

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON
OPINIONS

Raintree Town Center Associates, L.P.,

Plaintiff,

vs.

True North Franchise, LLC; Brian Gardner,
Seth Gelberg; David Margulies; Andrew
Banhidi; and Huy Le,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION:
MONMOUTH COUNTY

DOCKET NO.: MON-L-523-15

CIVIL ACTION

OPINION

Argued: December 18, 2015

Decided: May 10, 2016

Katie A. Gummer, J.S.C.

Matthew K. Blaine, Esq., appearing for plaintiff Raintree Towne Center Associates, L.P. (Davison, Eastman & Munoz, P.A.; Matthew K. Blaine, Esq. and Rebecca Carvalho, Esq., on the brief).

Marco Benucci, Esq., appearing for defendants True North Franchise, LLC, Brian Gardner, Seth Gelberg, David Margulies, Andrew Banhidi, and Huy Le (Marco M. Benucci, LLC; Marco Benucci, Esq., on the brief).

This matter comes before the Court pursuant to a motion for partial summary judgment brought by plaintiff Raintree Towne Center Associates, L.P. (“Raintree”). Plaintiff seeks judgment against defendants as to liability only on Count One and Count Two of plaintiff’s First Amended Complaint. In Count One, plaintiff asserts a claim for breach of the lease agreement (the “Lease”) between plaintiff and defendant True North Franchise, LLC (“TNF”). In Count Two, plaintiff asserts a breach of the guarantees between plaintiff and defendants Brian Gardner, Seth Gelberg, David Margulies, Andrew Banhidi, and Huy Le (collectively the “Guarantor defendants” or the “individual defendants”).

Plaintiff also moves for summary judgment against defendants on Counts One, Two, and Three of defendants' Counterclaim. In Count One of the Counterclaim, defendants assert that they were in "contractual privity" with plaintiff and that plaintiff breached the Lease "by failing to perform obligations under same and/or misrepresenting those obligations"¹ to defendants. Counterclaim, ¶ 8. In Count Two of the Counterclaim, defendants, asserting that they had acted in good faith, allege that plaintiff breached the implied covenant of good faith and fair dealing in that it did not perform under the provisions of the Lease "and/or failed to timely and reasonably act upon the requests made by the Tenant and/or unreasonably withheld their consent to the assignments which were procured by and through the efforts of Tenant." *Id.*, ¶ 14. In Count Three of the Counterclaim, which defendants entitle "Estoppel," defendants allege that they were damaged by their detrimental reliance on plaintiff's "actions, inactions, promises and/or representations." *Id.*, ¶ 18.

THE PARTIES' ARGUMENTS

I. Plaintiff's Argument in Support of Its Motion

Plaintiff argues that the absence of undisputed material facts warrants that summary judgment as to liability be granted in its favor. Plaintiff contends that (i) defendant TNF breached its contractual obligations under the Lease when it failed to pay rent and abandoned the premises at issue, and (ii) the Guarantor defendants breached their contractual obligations under their personal guarantees when they failed to assume responsibility for defendant TNF's performance. Plaintiff argues that defendants' assertion that their breaches were justified lacks any evidentiary support and is contrary to the plain terms of the Lease and its Addendum.

¹ Defendants allege a breach of contract, but do not identify any misrepresentation.

Plaintiff contends that defendant TNF failed to comply with the Addendum when it requested an assignment and that Raintree worked with defendants to assign the property to another tenant, fulfilling any of its contractual obligations. Plaintiff asserts that it had no obligation to consent to an assignment of the Lease because the Addendum permits assignment only if defendant TNF was in compliance with its obligations under the Lease and, according to plaintiff, TNF was not in compliance with its obligations under the Lease due to its failure to pay rent timely. Plaintiff argues that it nevertheless consented to the proposed assignment within the forty-five day notice period and, therefore, did not withhold unreasonably its consent to the assignment. Plaintiff argues that defendants' effort to recast their breach of contract claim as a claim for violation of the covenant of good faith and fair dealing fails because it is duplicative of and merely restates their meritless breach of contract claim. Plaintiff contends that defendants cannot establish a claim for estoppel because they have not proffered any evidence of any promise made by Raintree on which they detrimentally relied.

II. Defendants' Argument in Opposition to Plaintiff's Motion

Defendants argue that plaintiff's motion for partial summary judgment should be denied because genuine issues of material fact exist and discovery is needed to develop the facts in dispute. Defendants contend that the lack of discovery in this case precludes an adjudication by summary judgment because the parties have not taken any depositions and the factual record is not complete. Defendants assert that depositions need to be taken to determine whether plaintiff's conduct was contrary to the Lease or Addendum and whether either party breached the implied covenant of good faith and fair dealing.

III. Plaintiff's Argument in Reply to Defendants' Opposition

Plaintiff argues that defendants have failed to demonstrate any genuine issues of material fact. Plaintiff contends that additional discovery will not produce any additional facts necessary to resolve this motion. Plaintiff reiterates that the clear and unambiguous terms of the Lease and Addendum establish that defendant TNF breached the Lease and Addendum and that Raintree complied with the terms of the Addendum. Plaintiff argues that defendant TNF was not entitled to any notice or a cure period if it had defaulted due to the failure to pay timely rent. Plaintiff contends that it processed the assignment request within forty-five days in accordance with the Addendum, and defendants never provided any executed assignment paperwork. Plaintiff argues that the certifications of Mr. Gardner and Mr. Margulies submitted in opposition to the motion fail to set forth facts that establish why, how, or in what manner Raintree violated the terms of the Lease or the Addendum.

APPLICABLE LEGAL STANDARD

The Supreme Court of New Jersey revisited the standard to be applied by the trial judge when determining a motion for summary judgment in Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995). Specifically, the Court focused on whether an existing issue of fact is to be considered “genuine” under Rule 4:46-2 or, in the alternative, merely “of an insubstantial nature” thereby allowing the granting of summary judgment. Id. at 530. The Supreme Court stated that the essence of the inquiry by the trial judge should be the same as is applied in motions for directed verdicts: “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Id. at 536 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 251-52 (1986)).

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the

pleading, but must respond by affidavits meeting the requirements of Rule 1:6-6 or as otherwise provided in this rule and by Rule 4:46-2(b), setting forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered . . .

R. 4:46-5.

Thus, the standard for determining whether a “genuine issue” of material fact exists in a summary judgment motion requires the trial court to “consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party.” Brill, 142 N.J. at 540. However, where there “exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a genuine issue of material fact for the purposes of Rule 4:46-2.” Id. The Court concluded by stating, “[t]he thrust of today’s decision is to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves.” Id. at 541.²

² At the time this motion was filed and argued, the discovery period had not yet lapsed. The policy of the law of this State is that each litigant be afforded the opportunity to fully air his case. Robbins v. Jersey City, 23 N.J. 229, 240 (1957). Accordingly, courts are instructed to grant a motion for summary judgment only with extreme caution where discovery has not yet been completed. Ruvolo v. American Cas. Co., 39 N.J. 493, 499 (1963). Generally, summary judgment is premature where the opposing party has not yet had the opportunity to conduct discovery proceedings and develop facts on which he intends to base his claims. Empire Mutual Ins. Co. v. Melberg, 67 N.J. 139, 142 (1975). “When the incompleteness of discovery is raised as a defense to a motion for summary judgment, that party must establish that there is a likelihood that further discovery would supply the necessary information.” J. Josephson, Inc. v. Crum & Forster Ins. Co., 293 N.J. Super. 170, 204 (App. Div. 1996). Defendants failed to meet that standard. For example, during oral argument, defense counsel identified the deposition of John DeLorenzo as discovery that could impact the issues raised in this summary judgment motion. However, the deposition of Mr. DeLorenzo, see supra at 7-11, would shed no light on whether defendants breached their respective contracts, whether plaintiff failed to meet its contractual obligations, or whether plaintiff made a clear and definite promise to defendants on which they reasonably and detrimentally relied. See DepoLink Court v. Rochman, 430 N.J. Super. 325, 341 (App. Div. 2013) (“Although discovery frequently should be completed before the court entertains summary judgment . . . that general practice need not be observed in cases where it is readily apparent that continued discovery would not produce any additional facts necessary to a proper disposition of the motion”) (citation omitted).

FINDINGS OF FACT

Raintree and TNF entered into a ten-year Lease commencing on December 1, 2012, for Store #A-11 at Raintree Towne Center (the “Leased Premises”). See Certification of Matthew K. Blaine, Esq. (“Blaine Cert.”), Ex. A, at Raintree 3, at §§ 1 and 2. On behalf of TNF, the Lease was signed by defendants Gelberg, Margulies, and Le as managing members and by defendants Gardner and Banhidi as members. Id. at Raintree 31. TNF intended to operate a Jimmy John’s “gourmet sub (hero) sandwich restaurant” on the Leased Premises. See id. at Raintree 6, at § 4. The Lease required TNF to make monthly rental payments on the first day of each month. See id. at Raintree 3-4, at § 3(A). The term of the Lease was ten years, beginning on December 1, 2012. See id. at Raintree 3, at § 2.

Defendants Gelberg, Margulies, Le, Gardner, and Banhidi executed a “PERSONAL GUARANTEE,” which was attached to the Lease as Exhibit C. See id. at Raintree 34-35. In the Personal Guarantee, those defendants agreed to guarantee to Raintree “the performance by [TNF] of all terms, covenants and conditions on the part of [TNF] to be performed under” the Lease and the “payment of any and all Rent, Additional Rent and other charges, costs, fees and liabilities of [TNF] arising from or connected with the Lease” Id. at Raintree 34. If TNF failed to pay the monthly rent timely or failed to vacate the premises within the six-month notification period, “this guarantee will remain in effect for the entire Lease term.” Id. The individual defendants also executed a “GOOD GUY’ GUARANTEE OF LEASE,” which was made a part of the Lease as Exhibit E. Id. at Raintree 37-38. In that Good Guy Guarantee, the individual defendants guaranteed to Raintree that “they will advise Owner of [TNF’s] intention to vacate the Demised Premises a minimum of six (6) months in advance and that they will pay

to Owner all Minimum Rent, Additional Rent and any and all other charges that have accrued or may accrue under the terms of the Lease” Id. at Raintree 37.

Raintree and TNF entered into an Addendum to the Lease (the "Addendum") on November 28, 2012. See Blaine Cert., Ex. B. The Addendum provided for the assignment of the Lease. If TNF was “not one time in default of its obligations under this Lease,” Jimmy John’s Franchise LLC or a Jimmy John’s franchisee selected by Jimmy John’s Franchise LLC “shall have the right to receive an assignment of this Lease upon transfer, termination or expiration of the Franchise Agreement between TNF and Jimmy John’s Franchise LLC.” Id., ¶ 1. Jimmy John’s Franchise, LLC or the franchisee selected by Jimmy John’s Franchise, LLC had to agree to replace the Personal and Good Guy Guarantees under the Lease.

“Notwithstanding the foregoing,” TNF could assign or sublease the Lease “subject to Landlord’s review and approval of the financial standing of such Assignee or Sublessee, which shall not be unreasonably withheld.” Id. TNF had to give Raintree forty-five days written notice³ of its intention to assign or sublease the Lease and had to provide Raintree with certain specified information, including “such other information as [Raintree] requests, including financial statements in form acceptable to” Raintree. Id. Raintree agreed “to not unreasonably withhold its consent to such assignment or sublease.” Id. The successor tenant had to be “of equal or greater financial standing than” TNF. Id.

TNF did not pay timely its June 2014 or July 2014 rent. See Certification of Vijay Mehra (“Mehra Cert.”), at ¶ 5. It made those rent payments in late July 2014. Id. TNF has not made any payments to Raintree since then. See id. at ¶ 6. Failure to remit timely rent is a default of

³ During oral argument, defense counsel suggested that information regarding a second possible assignment could serve to defeat plaintiff’s motion. However, in their opposition to this motion, defendants did not support the existence of that purported second possible assignment with a copy of the contractually-required written notice of TNF’s intent to assign.

the Lease; there is no applicable cure period. See Blaine Cert., Ex. B., § 19(A), at Raintree 19.

In a July 21, 2014 letter executed by defendant Gardner on behalf of TNF, TNF notified Raintree of its intent to assign the Lease to John DeLorenzo (the “Assignee” or “Mr. DeLorenzo”). See Blaine Cert., Ex. C. According to TNF, Mr. DeLorenzo was a “Franchisee of the Jimmy John’s Franchise System selected by Jimmy John’s Franchise, LLC.” Id. Pursuant to Paragraph 1 of the Addendum, TNF asked Raintree to “execute an acknowledgment of and consent to the assignment of the Lease.” Id. It also asked Raintree to “let us know what, if any, other information you request so that this assignment can occur immediately or as soon as practicable.” Id.

In an email dated July 21, 2014, Vijay Mehra, a leasing representative of Raintree advised Mr. Gardner of Raintree’s position that TNF “cannot assign the lease when they owe the Landlord rent. Our system shows that [TNF] owes \$8,529.38.” See Blaine Cert., Ex. D at Raintree 44. Mr. Mehra also stated, “[a]fter receiving the arrears, submit the financials of the Assignee for the Landlord’s [sic] to review, have Assignee fill out the attached.” Id. In an email sent later that day, Mr. Gardner disagreed with Raintree’s interpretation of the Addendum, but agreed to ask defendant Gelberg or defendant Margulies to ask Mr. DeLorenzo to complete the document Mr. Mehra had provided. Id.

Mr. DeLorenzo sent a financial statement to Raintree on July 21, 2014. See id. at Raintree 50. On July 22, 2014, Mr. Mehra asked for written documentation that Mr. DeLorenzo had been approved by Jimmy John’s Franchise to take over the store. Id. at Raintree 49. Mr. DeLorenzo indicated that he was “already [an] approved franchisee” and agreed to forward the approval letter. Id. Later that day, Mr. DeLorenzo sent an image of the approval. Id. at Raintree 59-60. On July 23, 2014, Raintree requested a scan of the letter and “financial back up,”

specifically the first page of Mr. DeLorenzo's "investment statement page" and his personal tax return for 2013. See id. at Raintree 59. That day in response, Mr. DeLorenzo provided "the first page of the Morgan Stanley account" and his 2012 tax return "as I filed an extension for 2013." Id. He also provided a scan of the approval letter. Id. at Raintree 51. Mr. Mehra on behalf of Raintree again asked for the 2013 personal return, asked for some other information, and thanked Mr. DeLorenzo for providing information "as you are replacing the personal guarantee under the lease." Id. at Raintree 58. Mr. DeLorenzo did not respond to the comment about the personal guarantee, but noted again that he had filed an extension for 2013. Id. In a July 29, 2014 email to Mr. DeLorenzo with copies to defendants Gardner and Margulies, Mr. Mehra repeated the request for Mr. DeLorenzo's most recent tax return and stated "I have assignment paper work for your guys to review and fill out once we approve John's financials." See id. at Raintree 57. That day, Mr. DeLorenzo transmitted his personal tax return for 2012 and again noted that he did not have a personal tax return for 2013 because he had filed for an extension. See id. On July 31, 2014, Mr. DeLorenzo informed Raintree that all of his assets were held in a trust for which he and his wife were trustees and that he had no assets outside of that trust. See id. at Raintree 61.

TNF did not pay its August 2014 rent. See Mehra Cert., at ¶6.

On August 7, 2014, Raintree requested from Mr. DeLorenzo "the full Morgan Stanley Trust Statement so we can see the listed assets, and value." See Blaine Cert., Ex. D, at Raintree 70. Mr. DeLorenzo provided that full statement and asked to extend the expiration date of the Lease term. Id. Mr. Mehra advised defendants Gardner and Margulies that Mr. DeLorenzo had "suggested a few ideas to get you guys off the personal guarantee" and had requested new and additional signage. See id. at Raintree 79.

In an August 11, 2014 email to defendant Margulies, with copies to defendant Gardner and Mr. DeLorenzo, Mr. Mehra advised that “the owner is not in favor of releasing you from the guarantee” because “the business is struggling” and “the Assignee has all of his assets in trust.” Id. at Raintree 79. Defendant Margulies responded, stating that “it would not make sense for us to guarantee the lease as we would no longer have any involvement in the store” and asserting that Mr. DeLorenzo “would be the guarantor once the assignment has been completed.” Id. at Raintree 78. Mr. Mehra asked Mr. DeLorenzo to speak with Raintree’s attorney because “he has questions about the trust and its authority to take on liability.” Id. Mr. DeLorenzo left the attorney a message and sent him a copy of the trust. Id. at Raintree 82-83.

On August 15, 2014, Mr. Mehra on behalf of Raintree transmitted a “basic Assignment form” to TNF and Mr. DeLorenzo for completion, noting that “information regarding your assignment will need to be inserted, and the language will need to be amended by your attorney pursuant to your deal with each other, and then pursuant to Landlords consent” and noting that its attorney had spoken with Mr. DeLorenzo the previous evening about “what it will take for the LL to release the current guarantors, and consent to the assignment.” See id. at Raintree 81. Mr. DeLorenzo responded by asking for approval of “signage and seating” he had sent previously. See id. at Raintree 102.

On August 21, 2014, defendant Gardner forwarded to Raintree’s counsel, with copies to defendants Gelberg and Margulies, proposed language regarding the guarantee. Id. at Raintree 141-42.

In an email dated August 25, 2014, to Raintree’s counsel, defendant Gardner stated that he had “not heard back from you whatsoever” and “[b]ased on the landlord’s refusal to assign the lease our purchaser is walking away from the deal at the end of the day,” which, according to

defendant Gardner, “is entirely the landlord’s fault and is entirely due to the landlord’s improperly withholding the assignment.” Id. at Raintree 140-41. Raintree’s attorney responded later that day, confirming a telephone conversation in which he had advised defendant Gardner that “the form of assignment and consent you provided last Thursday was inadequate and unacceptable to Landlord.” Id. at Raintree 138-140. Raintree’s attorney noted that neither TNF nor the Assignee had responded to Mr. Mehra’s August 15, 2014 email regarding the assignment form. He also indicated on Raintree’s receipt, review, and approval of the assignment form, Raintree’s consent also was contingent on execution of the Good Guy Guarantee and Personal Guarantee by Mr. and Mrs. DeLorenzo and the DeLorenzo Family Trust and a modification of the existing Good Guy Guarantee and Personal Guarantee executed by the individual defendants. Id. at Raintree 139-40. Defendant Gardner responded, disagreeing with Raintree’s counsel’s characterizations, but stated that he would “go over the form from the 15th tonight, unless you are agreeing to send one that the landlord will accept.” Id. at Raintree 138.

On August 26, 2014, Raintree’s counsel forwarded to defendant Gardner and Mr. DeLorenzo a copy of the two guarantees required by Raintree from the Assignee. Id. at Raintree 117.

TNF did not pay its September 2014 rent. See Mehra Cert., at ¶6.

On September 2, 2014, defendant Gardner asked Raintree’s counsel to provide “a version of the agreement that you consider acceptable and final on your end.” See Blaine Cert., Ex. D, at Raintree 117. Later that day, counsel for Raintree transmitted revised copies of the three guarantees and the Assignment and Consent. See id. at Raintree 116 and Raintree 120-136. Counsel also requested a check for outstanding rent and the assignment fee prior to Raintree’s

execution of the Assignment and Consent. See id. at Raintree 116. Defendants did not respond to that email. See Mehra Cert., ¶2.

On September 3, 2014, Mr. DeLorenzo communicated with Raintree’s counsel regarding the signage and seating he had requested, indicating that he understood that both requests required town approval. See Blaine Cert., Ex. D, at Raintree 137.

On September 25, 2014, TNF received a letter of intent to purchase Jimmy John’s Freehold from Garrett Hogan. See id., Ex. E.

TNF did not pay its October 2014 rent. See Mehra Cert., at ¶6.

In an October 21, 2014 email from defendant Gardner to Raintree’s counsel and defendants Margulies and Gelberg and with a copy to Mr. Mehra, TNF informed Raintree that it had closed its store and had vacated the premises. See Blaine Cert., Ex. D, at Raintree 146. Vacating, abandoning, or deserting the premises is a default of the Lease. See id., Ex. A, § 19A, at Raintree 19.

On December 11, 2014, Raintree, through its counsel, sent defendants a notice confirming that “you voluntarily abandoned the Leased Premises and terminated your Lease.” See Blaine Cert., Ex. G.

CONCLUSIONS OF LAW

I. Breach of Contract

To establish a breach of contract claim, the party asserting the breach has the burden to show that: (i) the parties entered into a valid contract; (ii) the other party failed to perform its obligations under the contract; and (iii) the party asserting the breach sustained damages as a result of the other party’s breach of the contract. Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007). A party asserting breach of contract has the burden of establishing a prima

facie case with a reasonable degree of certainty that a breach occurred and that the breach resulted in damages. Tannok v. New Jersey Bell Tel. Co., 223 N.J. Super. 1, 9 (App. Div. 1988). “If the breach is material, i.e., goes to the essence of the contract, the non-breaching party may treat the contract as terminated and refuse to render continued performance.” Ross Sys. v. Linden Dari-Delite, Inc., 35 N.J. 329, 341 (1961) (citing 6 Corbin, Contracts, § 1253 (1951)).

A contract “arises from offer and acceptance, and must be sufficiently definite ‘that the performance to be rendered by each party can be ascertained with reasonable certainty.’” Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992) (quoting West Caldwell v. Caldwell, 26 N.J. 9, 24-25 (1958)). If the parties “agree on essential terms and manifest an intention to be bound by those terms, they have created an enforceable contract.” Id.

When the terms of a contract are clear and unambiguous, a court cannot rewrite the contract or alter its terms. See Dunkin Donuts of Am., Inc. v. Middletown Doughnut Corp., 100 N.J. 166, 173-174 (1985); see also Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 223 (2005) (“courts generally should not tinker with a finely drawn and precise contract entered into by experienced business people that regulates their financial affairs”); Rudbart v. North Dist. Water Supply, 127 N.J. 344, 353 (1992) (when parties have chosen freely to define their rights and duties by written contract, they are bound by the plain terms of their contract; the court cannot in the absence of fraud reconstruct the contract).

“The interpretation of a contract is ordinarily a legal question for the court and may be decided on summary judgment unless ‘there is uncertainty, ambiguity or the need for parol evidence in aid of interpretation . . .’” Celanese v. Essex County Improvement Auth., 404 N.J. Super. 514, 528 (App. Div. 2009) (quoting Great Atl. & Pac. Tea Co. v. Checchio, 335 N.J. Super. 495, 502 (App. Div. 2000). “The interpretation of the terms of a contract are decided by

the court as a matter of law unless the meaning is both unclear and dependent on conflicting testimony.” Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 92 (App. Div. 2001).

No one disputes that the parties entered into valid and binding contracts; none of the parties asserts that the contracts contain ambiguities that must be resolved by a jury.⁴ Thus, the interpretation of the contracts at issue is a question of law for this Court to decide. Plaintiff asserts that defendants breached contractual provisions; defendants assert that plaintiff breached contractual provision. If no genuine issue of material fact exists as to the alleged breaches, it is appropriate for this Court to decide this motion for partial summary judgment.

Having reviewed the Lease, the Addendum, and the guarantees, the Court concludes that the applicable contractual language is clear and unambiguous. Having reviewed the submissions of all parties, the Court finds that (i) defendant TNT breached the Lease; (ii) the Guarantor defendants breached the Personal Guarantee and Good Guy Guarantee; and (iii) no genuine issue of material fact exists as to those breaches.

Under the unambiguous terms of the Lease, TNF was required to pay Raintree “Fixed Rent,” specified in an annual amount, “payable in equal monthly installments . . . due and payable on the first day of each and every month of the Term.” See Blaine Cert., Ex. A (the Lease), at Raintree 4, at § 3(A). Plaintiff alleges, and defendants do not dispute, that defendant TNF did not pay timely its rent for June 2014 or July 2014 and did not pay any rent at any time for August 2014, September 2014, October 2014, or any months thereafter. Mehra Cert., at ¶¶ 5-6. The term of the Lease was ten years, beginning on December 1, 2012. See Blaine Cert., Ex. A (the Lease), at Raintree 3, at § 2. Defendants do not dispute that in an October 21, 2014 email,

⁴ Although not asserting any ambiguities, defendants appear to fault the Lease for not containing a definition of the word “default.” However, parties entering into a lease agreement, as reflected by the language of this Lease, intend that the tenant pay rent. The failure to pay that rent, under the common usage of the word default, clearly would be a default.

TNF's counsel advised Raintree that TNF "has vacated the property, and hereby returns the premises to you." See Blaine Cert., Ex. D (email communication sent by Mr. Gardner to Mr. Rohan, Mr. Margulies, and Mr. Gelberg), at Raintree 146. TNF's nonpayment of rent and abandonment of the premises are material breaches to the Lease.

The Individual defendants had a contractual obligation to assume responsibility of TNF's performance of the Lease when TNF breached the Lease. The Personal Guarantee provision clearly states: "[t]he undersigned . . . hereby guarantee to Landlord, on a primary, absolute and unconditional basis, the performance by Tenant of all terms, covenants and conditions on the part of Tenant to be performed under the within Lease . . . and the payment of any and all Rent . . ." See id. Ex. A at Raintree 34. The Good Guy Guarantee of Lease states: "[t]he undersigned guarantee to Landlord . . . that they will advise Owner of Tenant's intention to vacate the Demised Premises a minimum of six (6) months in advance and that they will pay to Owner all Minimum Rent, Additional Rent and any and all other charges that have accrued or may accrue under the terms of the Lease . . ." See id. at Raintree 37. Here, the Guarantor defendants do not dispute that they failed to give plaintiff notice of TNF's intention to vacate the premises and failed to pay the rent owed for the months of August, September, and October of 2014 and afterwards.

Defendants argue that their breaches of the Lease and guarantees should be excused because, accordingly to defendants, Raintree failed to meet its contractual obligations when it unreasonably withheld consent to the assignment of the Lease. The contractual provisions in the Addendum that discuss assignment of the Lease to a Jimmy John's franchisee state:

If Tenant is not one time in default of its obligations under this Lease . . . , Landlord agree that JIMMY JOHN'S FRANCHISE, LLC, . . . shall have the right to receive an assignment of this Lease upon transfer, termination, or expiration of the Franchise Agreement between JIMMY JOHN'S FRANCHISE, LLC and

Tenant . . . Upon such transfer, termination or expiration of said Franchise Agreement, Landlord shall promptly execute an acknowledgement of and consent to the assignment of the Lease. Notwithstanding the foregoing, if Tenant wishes to assign this Lease . . . such assignment or sublease shall be subject to Landlord's review and approval of the financial standing of such Assignee or Sublessee, which shall not be unreasonably withheld. Tenant shall give forty five (45) days' prior written notice of such intention to Landlord ("Tenant's Notice"), specifying the name of the proposed Assignee or Sublessee, the name of the character of its business and the term of the proposed assignment or sublease, and shall provide Landlord with such other information as Landlord requests, including financial statements in form acceptable to Landlord, and Landlord agrees to not unreasonably withhold its consent to such assignment or sublease. Tenant's Successor . . . must be of equal or greater financial standing than Tenant on the date thereof, and its use and occupancy shall not negatively impact the Shopping Center. JIMMY JOHN'S FRANCHISE, LLC or a Franchisee of the Jimmy John's Franchise System selected by JIMMY JOHN'S FRANCHISE, LLC, hereby agree to replace the Personal and Good Guy Guarantees under the Lease.

See id., Ex. B (the Addendum to Franchisee's Lease Agreement) at § 1.

The Lease addresses default in Section 19:

If Tenant defaults in the payment of Fixed Rent or any Additional Rent (no notice thereof being required to be given by Landlord), or if the premises shall be deserted, abandoned or vacated, or if Tenant defaults in compliance with any of the other covenants or conditions of this Lease and fails to cure the same within fifteen (15) days after the receipt of notice specifying default, then upon such default in payment of Rent, or at the expiration of said fifteen (15) days, as the case may be, or upon Tenant deserting, abandoning or vacating the Premises, Landlord may (a) cancel and terminate this Lease upon written notice to Tenant . . .

See Blaine Cert., Ex. A (the Lease), at Raintree 19, at § 19(A). It is undisputed that TNF was in default in the payment of rent when it submitted its July 21, 2014 letter of intent to assign the Lease to Mr. DeLorenzo.⁵ When TNF submitted its July 21, 2014 letter of intent to assign,

⁵ While not denying that TNF was in default of its rent obligations, defendants argue that Raintree had an obligation to provide written notice of that default and that TNF was entitled to a cure period following that written notice. See Dft. Br. at 1-2. Defendants misread the clear language of the Lease. The Rent section of the Lease does not provide for a cure period or written notice for failure to pay rent timely. See Blaine Cert., Ex. A at Raintree 3-4, at § 3 ("Fixed Rent shall be payable monthly in advance without previous notice or demand therefor . . . on the first day of each and every month . . ."). With respect to "defaults in compliance with any of the other covenants or conditions of this Lease," Section 19 of the Lease allows for a cure period of "fifteen (15) days after the receipt of notice specifying the default." Id. at Raintree 19, at § 19. However, that language does not apply to defaults in the payment of rent. Before that language regarding "defaults in compliance with any of the other covenants or conditions of this Lease," Section 19 expressly states that with respect to defaults in the payment of rent "no notice thereof being required to be given by Landlord." Id. Because the Lease did not require Raintree to provide written

Raintree's representative responded that day with an email advising TNF that it "cannot assign the lease when they owe the Landlord rent. Our system shows the [TNF] owes \$8,529.38." See id., Ex. C (July 21, 2014 letter) and Ex. D at Raintree 44 (July 21, 2014 email). In that email Raintree's representative advised TNF "[a]fter receiving the arrears, submit the financials of the Assignee for the Landlord's [sic] review, have Assignee fill out the attached." Id. TNF made the June 2014 and July 2014 rent payments in late July 2014. Mehra Cert., at ¶ 5. That belated payment does not change the fact that TNF had been in default of its rent obligations.

Accordingly, because TNF did not meet the requirement of being "not one time in default of its obligation under this Lease," the provision of the Addendum granting JIMMY JOHN'S FRANCHISE, LLC or a franchisee selected by JIMMY JOHN'S FRANCHISE LLC a right to receive an assignment was not applicable. Blaine Cert., Ex. B (the Addendum to Franchisee's Lease Agreement) at § 1.

Even if the Court were to ignore the fact that TNF was in default under its Lease obligations, the undisputed facts demonstrate that plaintiff did not "unreasonably withhold" its consent to the assignment. The Addendum clearly states that TNF was to provide forty-five days' prior written notice of its intent to assign the Lease. Id. TNF sent its letter indicating its intent to assign on July 21, 2014. Id., Ex. C. On September 2, 2014, two days before the expiration of the forty-five day period, Raintree's counsel sent to defendant Gardner the guarantee and assignment documents "in a form acceptable to the Landlord." Id., Ex. D, at Raintree 116. Defendants never responded to that email. See Mehra Cert., ¶ 2. Defendants have not asserted that they provided to plaintiff executed copies of those documents and they have not

notice of a default in the payment of rent, paragraph 3 of the Addendum, on which defendants rely, does not apply. See id., Ex. B, at 1.

provided the Court with any evidence that they provided plaintiff with executed copies of those documents.

Defendants do not fault plaintiff for the content of those documents and do not argue that any provision contained therein was unreasonable or unacceptable. Rather, defendants fault plaintiff for not acting in a “timely fashion.” Dft. Br. at 10. However, within the forty-five day notice period, plaintiff provided defendants with assignment and guarantee documents that were in a form acceptable to plaintiff – documents that defendants failed to have executed and returned to plaintiff. Blaine Cert., Ex. D, at Raintree 116. Between July 21, 2014, and September 2, 2014, Raintree exercised its contractual right to request from TNF information regarding the assignee, including “financial statements in form acceptable to” Raintree and to conduct a “review . . . of the financial standing” of the assignee. Id., Ex. B, at 1.⁶ In exercising those contractual rights, Raintree was not unreasonably withholding its consent to the assignment.

The Addendum also expressly states that the assignee “must be of equal or greater financial standing than” TNF and that the JIMMY JOHN’S FRANCHISE, LLC or its selected franchisee would agree “to replace the Personal and Good Guy Guarantees under the Lease.” Id. It is beyond dispute that TNF’s proposed assignee failed to meet those requirements. Mr. DeLorenzo did not hold any assets outside of a trust. Id., Ex. D, at Raintree 61. He never signed the Personal or Good Guy Guarantees submitted with Raintree’s representatives September 2, 2014 email.⁷

⁶ During that time period, Raintree also was addressing requests by Mr. DeLorenzo that went beyond the assignment, such as his request to modify the existing term of the Lease and his request for additional signage and seating. See supra at 9 and 10.

⁷ After the proposed assignment, the individual defendants understandably may not have wanted to continue the obligations they had accepted when they signed the Personal Guarantee and the Good Guy Guarantee. However, nothing in the Lease, Addendum, Personal Guarantee, or Good Guy Guarantee terminates their obligations under the Personal Guarantee or Good Guy Guarantee upon an assignment of the Lease. See id., Exs. A and B.

The Court finds that the contractual provisions at issue are clear and unambiguous and that no genuine issue of material fact exists as to TNF's breach of contract, the individual defendants' breach of the guarantees, and plaintiff's compliance with its contractual obligations. Applying the standard set forth in Brill, the Court concludes that the evidence "is so one-sided that one party must prevail as a matter of law." Brill, 142 N.J. at 536 (quoting Anderson, 477 U.S. at 251-52. Accordingly, the Court grants plaintiff's motion as to Counts One and Two of the First Amended Complaint and as to Count One of defendants' Counterclaim for breach of contract.

II. Implied Breach of the Covenant of Good Faith and Fair Dealing

"A breach of the implied covenant of good faith and fair dealing differs from a 'literal violation of a contract[.]'" Wade v. Kessler Inst., 172 N.J. 327, 341 (2002) (citing Bak- A-Lum Corp. of Am. V. Alcoa Bldg. Prods., Inc., 69 N.J. 123, 130 (1976)). "The covenant of good faith and fair dealing calls for parties to a contract to refrain from doing 'anything which will have the effect of destroying or injuring the right of the other party to receive' the benefits of the contract." Brunswick Hills Racquet Ball, Inc., 182 N.J. at 224-25 (citing Palisades Prods., Inc. v. Brunetti, 44 N.J. 117, 130 (1965)); see also Wade, 172 N.J. at 340. Unlike many other jurisdictions, New Jersey permits a party to recover for breach of the implied covenant of good faith and fair dealing even when the other party is not in breach of any express terms of the contract. See Sons of Thunder v. Borden, Inc., 148 N.J. 396, 423 (1997). "Although the implied covenant of good faith and fair dealing cannot override an express term in a contract, a party's performance under a contract may breach that implied covenant even though that performance does not violate a pertinent express term." Wilson v. Amerada Hess Corp., 168 N.J. 236, 244 (2001).

Where the contract permits one or both of the parties to a contract with latitude of discretion under the contract, that discretion is to be exercised reasonably and with proper motive. Id. at 251. However, “[t]he fact that a discretion-exercising party causes the dependent party to lose some or all of its anticipated benefit from the contract . . . is insufficient to establish a breach of contract by failing to perform in good faith.” Id. at 246. It remains the burden of the party asserting the breach to establish the other party’s “bad motive or intention” in frustrating the reasonable expectations of the party asserting the breach. Brunswick Hills Racquet Ball, Inc., 182 N.J. at 225; see also Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 110 (2007). Some basis for finding that the discretion was exercised unreasonably and in bad faith must exist. Wilson, 168 N.J. at 249. The implied covenant of good faith and fair dealing “does not require a party to a contract ‘to overlook its own rights under the agreement to protect its property interests because such action is detrimental to the other party’s interests.’” East Penn Sanitation, Inc. v. Grinnell Haulers, Inc., 294 N.J. Super. 158, 170-71 (App. Div. 1996) (quoting Liqui-Box Corp. v. Estate of Elkman, 238 N.J. Super. 588, 600 (App. Div.), certif. denied, 122 N.J. 142 (1990)). Ultimately, “whether a party acted in good faith is a question of fact to be determined on a case-by-case basis.” Wilson, 168 N.J. at 250.

Count Two of the Counterclaim, which defendants entitle “Violation of the Covenant of Good Faith and Fair Dealing,” is duplicative of their breach of contract claim. Defendants premise their breach of the covenant of good faith and fair dealing claim on the same assertions on which they base their breach of contract claim: that plaintiff breached the Lease and Addendum by unreasonably withholding consent to assign the Lease. See Counterclaim, ¶ 14. Defendants have not articulated or asserted any bad motive or intention on the part of the plaintiff in taking forty-three days to agree to assign the Lease.

For the reasons set forth above, the Court finds that no genuine issue of material fact exists as to plaintiff's compliance with its contractual obligations and that, even viewing the facts in a light most favorable to defendants, no reasonable factfinder could conclude that plaintiff failed to perform its contractual obligations, untimely acted on TNF's notice of intent to assign, or unreasonably withheld its consent to the assignment. Accordingly, the Court grants plaintiff's motion as to Count Two of defendants' Counterclaim.

III. Estoppel

To assert a claim of promissory estoppel, a plaintiff must plead and prove that “(1) there was ‘a clear and definite promise’; (2) the promise was ‘made with the expectation that the promisee will rely on it’; (3) ‘the promisee must reasonably rely on the promise’; and (4) ‘the promisee must incur a detriment in reliance thereon.’” Peck v. Imedia, Inc., 293 N.J. Super. 151, 165 (App. Div. 1996) (quoting Great Falls Bank v. Pardo, 263 N.J. Super. 388, 401 n.9 (Ch. Div. 1993), aff'd, 273 N.J. Super. 542 (App. Div. 1994)); see also Segal v. Lynch, 211 N.J. 230, 254 (2012); Kress v. La Villa, 335 N.J. Super. 400, 413 (App. Div. 2000); Pop's Cones, Inc. v. Resorts Int'l Hotel, Inc., 307 N.J. Super. 461, 469 (App. Div. 1998).

In Count Three of their Counterclaim, which defendants entitle “Estoppel,” defendants generically assert that they have been damaged as a result of their “detrimental reliance on Plaintiff's actions, inactions, promises and/or representations.” Counterclaim, ¶ 18. Defendants fail to identify anywhere in their Counterclaim a “clear and definite promise” made by plaintiff on which any of the defendants reasonably and detrimentally relied. Peck, 293 N.J. Super. at 165. They do not distinguish their promissory estoppel claim from their breach of contract claim. Cf. Pop's Cones, Inc., 307 N.J. Super. at 473 (plaintiff in its promissory estoppel claim was not seeking to enforce contract, but to recoup damages it had incurred in relying on

defendant's pre-contractual promise). To the extent defendants are relying on the contractual provisions at issue in support of their estoppel claim, that claim also fails for the reasons set forth above.⁸

Accordingly, the Court grants plaintiff's motion as to Count Three of the Counterclaim.

CONCLUSION

For the reasons set forth above, plaintiff's motion for partial summary judgment is GRANTED in its entirety. Accordingly, summary judgment as to liability under Counts One and Two of the First Amended Complaint is entered in favor of plaintiff and summary judgment as to the Counts One, Two, and Three of the Counterclaim is granted in favor of plaintiff and the Counterclaim is dismissed in its entirety.

⁸ During oral argument, defendants' counsel conceded that Raintree had made no promise that it would accept the assignment. Counsel argued that the estoppel claim was supported by the actions of Raintree in responding to the notice of intent to assign. However, Raintree's actions in responding to the notice of intent do not constitute a "clear and definite promise" to accept the assignment, but rather Raintree's exercise of its contractual rights.