IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

GK DEVELOPMENT, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**06 CH 3427**
	)	
IOWA MALLS FINANCIAL CORP., et al.	)	
	)	
Defendants.	)	
	)	**consolidated with**
	)	
COLLEGE SQUARE MALL ASSOCIATES LLC, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**06 CH 3586**
	)	
GK DEVELOPMENT, INC., et al.,	)	
	)	**Related to Case No. 26662**
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. INTRODUCTION

This cause came to be heard for trial between Plaintiffs/Counter-Defendants, GK Development, Inc., College Square Mall Development, LLC and College Square Mall Partners, LLC (collectively "Buyer") and Defendant Iowa Malls Financing Corp. and Defendant/Counter-Plaintiff, College Square Malls Associates, LLC (collectively "Seller"), in cases 06 CH 3427 and 06 CH 3586. Trial was also had on GK Development, Inc. v. Iowa Malls Financing Corp., 06 CH 26662.

In case number 06 CH 3427, Buyer filed suit against Seller seeking recovery of $4,300,000.00 held in escrow (the Hy Vee Holdback) by defendant Chicago Title and Trust (CT&T), as part of the December 17, 2004, sale of College Square Mall in Cedar

Falls, Iowa to Buyer by Seller pursuant to a purchase agreement. The $4,3000,000.00 in the Hy Vee Holdback represented the incremental value of a new lease with existing mall tenant Hy Vee, Inc. (Hy Vee). Buyer maintained that the Hy Vee Holdback constituted liquidated damages and that Seller forfeited the Hy Vee Holdback because Seller failed to comply with the terms of the Hy Vee Holdback as negotiated between Buyer and Seller in relevant contractual agreements. Buyer pleaded claims for declaratory judgment (Count I) and specific performance (Count II).

In response, Seller counter-sued Buyer (case number 06 CH 3586) for the entire amount of the Hy Vee Holdback. Seller posited that Hy Vee's failure to obtain building permits for construction at the College Square Mall by October 31, 2005, did not violate contract obligations, as that deadline had been modified by language of related contractual documents (the Deed and Money Escrow Agreement and the New Hy Vee Lease). Seller alleged that these agreements extended the deadline to February 12, 2006, from October 31, 2005. Seller asserted that because all conditions for payment of the Hy Vee Holdback to Seller were met by January 30, 2006, Seller is entitled to the complete Hy Vee Holdback. Further, Seller disputed that the Hy Vee Holdback constituted a liquidated damages provision of the contract. Seller alleged counts for declaratory judgment (Count I), breach of contract (Count II) and unjust enrichment (Count V).[1] Case number 06 CH 3586 was consolidated into case number 06 CH 3427, as a counterclaim.

In addition, Buyer sued Seller in case number 06 CH 26662, seeking recovery of $530,294.86 from the Hy Vee Holdback. Specifically, Buyer alleged that it was required to and did complete the construction work on that portion of the mall parking lot

[1] The Court entered summary judgment on Counts III and IV on February 26, 2010.

servicing Hy Vee. Buyer claimed that it is entitled to the $530,294.86 from the Hy Vee Holdback because that was the reasonable cost of the parking lot construction and because the work was pursuant to the required scope.

Seller responded that Buyer is not entitled to any payment because Seller did not have an opportunity to determine whether the Construction Agreement was reasonably acceptable before it was executed and Seller did not find the Construction Agreement to be reasonably acceptable. Further, the parking lot work was not competitively bid. Seller asserted as well that even if Buyer is entitled to some payment, Buyer is not entitled to the payment it seeks because the scope of the work performed on the parking lot exceeded the scope of the work for which Seller had any obligation to reimburse Buyer.

II. FINDINGS OF FACT

A. Statement of Agreed Facts

Prior to trial, the parties stipulated to certain facts. The stipulations relevant to the disposition of this case are repeated below:

1. This case arises from the sale of the College Square Mall (Mall) by Seller to Buyer. The sale of College Square Mall, and three other malls that are not at issue in this case, closed on December 17, 2004.

2. The process of selling the Mall began in June, 2004 with Seller's Offering Memorandum prepared by its broker, CB Richard Ellis. That Offering Memorandum predicted, based on ongoing negotiations, that Hy Vee, an existing grocery store tenant at the Mall, would relocate from its leased space to a new, larger space of 75,000 square feet that had become available when Wal Mart vacated the premises on March 31, 2004.

The Hy Vee relocation was predicted to result in an increase in Hy Vee's rented square footage by approximately 15,000 additional square feet at a rent of $6 per square foot. But in June 2004, there was no written commitment by Hy Vee to relocate its store to larger space at the Mall.

3. Buyer entered into a letter of intent to purchase the Mall in July 2004.

4. Buyer contracted to purchase the Mall from Seller on September 17, 2004. The specified outside date for the closing was December 17, 2004.

5. On October 12, 2004, Hy Vee executed a Letter of Intent (LOI) which committed Hy Vee to lease for 20 years 78,337 square feet of Wal Mart store space at a base rent of $7.00/sq. ft. The proposed Hy Vee lease would increase the fair market value of the Mall, but no lease would be executed prior to the closing on the sale of the Mall.

6. On November 10, 2004, Buyer and Seller entered into a Third Amendment To Real Estate Sale Contract (Third Amendment).

7. The Third Amendment provided for a holdback to be established at the closing of the sale of the Mall (Hy Vee Holdback). The Hy Vee Holdback would contain that portion of the Mall's purchase price which Buyer attributed to the additional rent to be paid by Hy Vee under a new lease.

8. After negotiations, the parties agreed that the amount of money for the Hy Vee Holdback would be $4,300,000.00.

9. The Third Amendment states in pertinent part that:

> With respect to College Square Mall, Purchaser and the Seller of said Property agree that at Closing they will enter into a Four Million Three Hundred Thousand and 00/100 Dollar ($4,300,000.00) holdback agreement from the

> purchase price of said Property . . . . The holdback amount shall not be released until all of the following are satisfied: (1) execution of a lease with Hy Vee, Inc. on terms in accordance with the Letter of Intent, dated October 12, 2004, attached hereto as Exhibit C, and in a form that is commercially reasonable; (2) delivery of the premises to the tenant in the condition required of Landlord as specified in the lease; and (3) acceptance by tenant of the premises and the obtaining by tenant of all permits and other governmental approvals necessary to complete the tenant's work. Should the lease not be executed by August 31, 2005, or all of the other conditions not be satisfied by October 31, 2005, the holdback amount shall not be released to Seller, but is and shall be forfeited and delivered to Purchaser....

10. Both parties understood at the time of the Third Amendment in November 2004 that the Wal Mart space required extensive remodeling to be suitable as a "21st Century prototype Hy Vee Food and Drug Store" (270 days was specified in the LOI).

11. Both Seller and Buyer also understood in November 2004 that the scope of the improvements, the likely cost of the improvements, and the allocation of that cost between landlord and tenant had yet to be agreed to by Hy Vee.

12. Immediately prior to the December 17, 2004 Closing, the Buyer and Seller entered into the Hy Vee Holdback agreement as specified in the Third Amendment. That agreement was the "Deed And Money Escrow" agreement (DME) dated December 15, 2004. The parcel at issue in this case is Parcel 2 which consists of the area of the Mall which included the former Wal Mart store, the existing Hy Vee store and related parking areas.

13. The Seller of Parcel 2 was College Square Mall Associates, LLC and the Buyer was GK College Square Mall Development, LLC. Iowa Malls Financing Corp. signed the DME on behalf of all the Sellers. GK signed the DME on behalf of all the Buyers. Chicago Title and Trust Company signed the DME as escrowee.

14. Section VII of the DME is captioned "The Hy Vee Holdback" and provides:

> At any time after the Closing Date that Seller of Parcel 2 shall advise [Chicago Title & Trust], in writing, and under oath, that (a) a lease in a commercially reasonable form has been signed by Hy Vee, Inc. ("Hy Vee") for the space previously occupied at College Square Mall by Wal Mart (the "Hy Vee Space") substantially in accordance with the Letter of Intent dated October 12, 2004, (b) that the Hy Vee Space has been delivered to Hy Vee in the condition required by the terms of such lease, (c) that the tenant thereunder has accepted the Hy Vee Space, and (d) that such tenant has obtained all government approvals and permits necessary to complete its work, then you shall advise the Parcel 2 Buyer in writing of such demand for payment and, unless you receive objection in writing of such demand for payment within five (5) days, the Hy Vee Holdback shall be made to the Parcel 2 Seller. If said objection is timely made, you are to continue to hold the Hy Vee Holdback subject to the joint direction of the parties or order of the court. In the event that the Seller of Parcel 2 is unable to make the representation contained in Subparagraph (b) above because all that is required of the landlord under the Hy Vee lease is work to be completed by the owner of Parcel 2 under the terms of the Contract (the "Owner's Work"), such Seller shall not be deemed to have failed to comply with such Subsection (b). In such event or in the event there is any other Owner's Work to be performed by the Buyer under the terms of the Hy Vee Lease for which Parcel 2 Seller is obligated to make payment to Parcel 2 Buyer under the terms of the Contract, then and in either such event 105% of the cost (determined by competitive bidding) of such Owner's Work shall be paid to the Owner of Parcel 2 [GK] and the balance of the Hy Vee Holdback shall be paid to the Parcel 2 Seller. In the event the Seller is unable to deliver such a lease signed by Hy Vee on or before August 31, 2005, or in the event the conditions of Subsections (b), (c) and (d) are not satisfied on or before October 31, 2005, without default of the owner or purchaser of Parcel 2, then, and only in such event, the Hy Vee Holdback shall be paid to the Parcel 2 Buyer; provided, however, if the plans have not been finalized by reason of any delay in producing, approving or revising such plans (such delay to be determined in accordance with the terms of the Hy Vee lease), then, and in all such events, the October 31, 2005 date shall be extended by one day for each day of delay in the

> delivery of plan approval. If Parcel 2 Seller shall notify Escrowee that it claims a delay and extension, Escrowee shall retain the Hy Vee Holdback subject to a joint direction of the parties or an order of court.

15. The closing of the sale of the Mall occurred on December 17, 2004. At the closing, affiliates of Buyer purchased and affiliates of Seller sold three other shopping centers in Iowa.

16. On June 16, 2005, Hy Vee, as tenant, signed the Substituted Lease Agreement (New Hy Vee Lease) for the space previously occupied by Wal Mart. The New Hy Vee Lease was for 79,750 square feet of the former Wal Mart space at $7.00 per square foot. The New Hy Vee Lease was negotiated by Seller and Hy Vee, not Buyer.

17. On July 15, 2005, GK, as landlord, signed the New Hy Vee Lease after Hy Vee refused to make two revisions requested by GK.

18. The New Hy Vee Lease included the following provisions:

> (1) Plans and Approvals. Landlord and Tenant have reviewed and approved Tenant's preliminary site plan for the Hy Vee Expansion . . . On or before the 75th day following the date of this lease [September 28, 2005], Tenant at its expense shall submit to Landlord detailed plans and specifications for the Hy Vee Expansion (the "Final Plans and Specifications"), prepared by Tenant for Landlord's approval ... Landlord shall within ten (10) business days after receipt of all of said Final Plans and Specifications notify Tenant in writing of its approval or disapproval thereof ... If Landlord does not approve the Final Plans and Specifications as initially submitted, Tenant shall within ten (10) business days thereafter submit for approval revised Final Plans and Specifications addressing any objections. Landlord shall then have seven (7) business days after receipt of said revised Final Plans and Specifications to approve or disapprove same....
>
> The construction of the Hy Vee Expansion shall be further subject to the satisfaction of the following conditions (the "Construction Conditions"): * * *

(a) The mutual agreement of Landlord and Tenant to the plans and specifications for the Hy Vee Expansion, as provided and within the time parameters set forth in Section 3(A)(1); * * *

(d) Tenant agrees to promptly submit an application for building permits and shall obtain all such permits and other governmental authorizations (the "Governmental Approvals") required for construction of the Hy Vee Expansion within thirty (30) days after the Landlord's approval of the Tenant's Final Plans and Specifications; provided, however, if Tenant timely submits such permit applications and diligently pursues obtaining a such permits, upon the written request of Tenant, Tenant may obtain a sixty (60) day extension of the Construction Condition set forth in this subsection 3(A)(1)(d).

19. Under the New Hy Vee Lease, Hy Vee had until 75 days after July 15, 2005 – i.e., September 28, 2005 – to submit construction drawings to Buyer for approval.

20. Under the New Hy Vee Lease, Hy Vee and Buyer had until 120 days after July 15, 2005 – i.e., November 13, 2005 – to reach agreement on construction drawings; if not, then Hy Vee, at its option, could declare the new lease null and void: "If Landlord and Tenant are unable to come to an agreement with respect to the Final Plans and Specifications for the Hy Vee Expansion prior to the 120th day following the date of this lease, then Tenant, at its option, may abandon further efforts to effect the Hy Vee Expansion in which event the Old Lease shall remain in full force and effect and this lease shall be null and void the same as if never executed."

21. Under the New Hy Vee Lease, within 30 days of Buyer's approval of Hy Vee's drawings, Hy Vee was required to make application for and obtain all building permits and other governmental authorizations, "provided, however, if Tenant timely submits such permit applications and diligently pursues obtaining such permits, upon the

written request of Tenant, Tenant may obtain a sixty (60) day extension." Hy Vee did not make a written request for an extension of time to GK. GK did not notify Hy Vee of any default under the New Hy Vee Lease.

22. Under the New Hy Vee Lease, all "communications which may or are required to be served or given under this lease" are "deemed given and received":

> (1) If hand delivered, when the delivery is made;
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> (2) If sent by first-class mail (registered or certified), return receipt requested, postage prepaid, two (2) business days after it is posted with U.S. Postal Service;
>
> (3) If sent by facsimile transmission, when transmitted to the party's facsimile number during normal business hours and confirmation of complete receipt is received by the transmitting party; or
>
> (4) If sent by a nationally recognized overnight delivery service, the day on which the Notice is actually received by the party.

23. On September 28, 2005, Hy Vee submitted its final plans for the Hy Vee Expansion.

24. On October 12, 2005, GK disapproved the plans and sent comments and requested revisions to Hy Vee.

25. On October 31, 2005, Hy Vee resubmitted revised plans to GK.

26. On October 31, 2005, Hy Vee applied to the Cedar Falls Building Department for its construction permit.

27. On November 8, 2005, GK approved Hy Vee's revised plans subject to certain conditions.

28. On January 6, 2006, Buyer sent a letter to Amanda Quas, the escrow agent at Chicago Title & Trust, directing Chicago Title & Trust to pay the Hy Vee Holdback to Buyer due to the alleged failure of Seller to meet the conditions of the DME.

29. On January 9, 2006, Seller sent a letter to Chicago Title & Trust objecting to the release of the Hy Vee Holdback to Buyer.

30. Hy Vee obtained a construction permit from the City of Cedar Falls on January 27, 2006.

31. The new space was delivered to Hy Vee and Hy Vee accepted it on January 30, 2006. The total square footage of the accepted new space was 80,189 square feet. The New Hy Vee Lease provides that "Should Landlord and Tenant mutually agree upon the plans and specifications for the Hy Vee Expansion and the Construction Conditions (which may be extended as provided in clause (iv) set forth above) be timely satisfied, then Tenant at its sole cost and expense shall commence construction of said Hy Vee Expansion within sixty (60) days after the satisfaction or waiver of the Construction Conditions and diligently pursue the same through completion on or before the date that is three hundred and thirty (330) days after the date that Landlord delivers possession of the Demised Premises to Tenant."

32. On February 9, 2006, Michael P. Fontana, who was an agent for Seller, sent a letter to Quas directing Chicago Title & Trust to pay the Hy Vee Holdback to [Seller] based on the fulfillment of all conditions for the release of the funds except for the completion of certain parking lot improvements required of Buyer under the Hy Vee Lease.

33. On February 10, 2006 and February 14, 2006, a lawyer for Buyer sent letters objecting to Fontana's direction to pay the Hy Vee Holdback to [Seller] and directing Chicago Title & Trust to continue to hold the Hy Vee Holdback until receiving a joint direction from the parties or a court order.

B. Additional Facts

34. The Court received testimony[2] from the following individuals:

A. Thomas Rogers (Rogers) was the primary negotiator of the Third Amendment on behalf of the Buyer. He testified by evidence deposition.

B. Garo Khalamian (Garo) is the President and owner of GK Development. He holds an undergraduate degree in architecture and a Master's Degree in Business Administration. He founded GK in 1995. The company has holdings -- retail shopping centers and malls -- valued in "many millions" of dollars. Garo signed the Third Amendment and DME.

C. David Sullivan (Sullivan) worked for Buyer from February 2005 to April 2009, as a senior VP of development. He reviewed drafts of the New Hy Vee Lease for Buyer.

D. Michael Fontana (Fontana) was formerly employed by Seller as a senior property accountant. He holds an MBA and attended law school. Fontana was directly involved in negotiating, for Seller, the Third Amendment, DME and the New Hy Vee Lease.

[2] The Court did not require that the parties submit transcription of witness testimony taken at trial. Accordingly, there are no page/line citations to witness testimony in this Order.

E. Gerry Curciarello (Curciarello) is a co-managing partner of Seller, along with Patrick O'Leary. Curciarello holds JD, MBA and CPA degrees. He was involved in acquisitions and contract review for Seller; Fontana reported to him in the negotiation process. He signed the Third Amendment and DME on behalf of Seller.

F. In addition to being a co-managing partner with Curciarello of Seller, Patrick O'Leary (O'Leary) is Seller's President. He has experience in real estate leasing, development, and management. O'Leary was a "decision maker" in the real estate transaction with Buyer and played a role in delivering the New Hy Vee Lease. Starting in approximately March 2005, O'Leary became directly involved in lease negotiations.

G. David Bailey (Bailey) is Assistant Vice President, Real Estate, for Hy Vee. He negotiates "deals" for location, expansion and relocation of Hy Vee stores. He was the point person for negotiation of the New Hy Vee Lease with Seller. Bailey testified by evidence deposition.

35. Seller negotiated the terms of the New Hy Vee Lease. Buyer was permitted to suggest Lease contents and did so, but Buyer had no right to dictate lease terms. None of the lease changes suggested by Buyer concerned deadlines for submission or approval of plans or permits.

36. If Buyer had refused to sign a lease that Seller deemed "commercially reasonable," Seller would have sued Buyer for breach of contract.

37. The New Hy Vee Lease contained time periods triggering obligations between landlord and tenant, but did not contain a terminal date for obtaining governmental permits.

38. Seller never told Hy Vee that the deadlines calculated in the New Hy Vee Lease needed to be shortened to comply with October 31, 2005 deadline.

39. Buyer never indicated it was concerned about the schedule set forth in the New Hy Vee Lease.

40. At the time the parties executed the Third Amendment and DME, Seller and Buyer believed that the New Hy Vee Lease would be executed prior to August 31, 2005, and that the tenant could obtain plan approval and necessary permits by October 31, 2005. Seller believed the lease would be negotiated no later than March, 2005. As late as March, 2005, Fontana believed a lease could be executed in April followed by approved and permitted plans by October 31, 2005. As of July 15, 2005, it was still possible that the October 31, 2005, deadline could be met.

41. When Buyer and Seller negotiated the Third Amendment and DME, they intended October 31, 2005, to be the deadline for Hy Vee to obtain plan approval and government permits.

42. The purpose of an October 27, 2005, telephone conference involving Garo, Fontana, Curciarello, Sullivan and Rogers was in part to negotiate an extension of the October 31, 2005, deadline set forth in the contract documents. At Buyer's

suggestion, Seller drafted a proposed extension of the October 31 deadline to January 31, 2006. Buyer did not accept this proposed amendment.

43. The difference between the existing Hy Vee lease and the New Hy Vee Lease was approximately $430,000.00 in additional annual income to the landlord (Buyer). The Hy Vee Holdback amount of $4,300,000.00 was a term negotiated by the parties and fairly represented the incremental value of the New Hy Vee Lease.

44. By the October 21, 2004, LOI, Hy Vee proposed opening a "first class high quality Hy Vee retail grocery store", a "21st century prototype" in the 78,000 square feet space previously occupied by Wal Mart.

45. Hy Vee was one of the anchor stores at College Square Mall. Its existing space could be modified to house two new, additional anchor stores. An expanded Hy Vee was marketed as a draw for other retailers to the mall. The mall housed multiple tenants and could accommodate eight "anchor spaces."

III. CONCLUSIONS OF LAW

A. The Contract

1. It is the role of the trier of fact to observe the conduct of the witnesses, determine their credibility, and weigh the evidence in making a determination. Joray Mason Contractors, Inc. v. Four J's Construction Corp., 61 Ill. App. 3d 410, 412 (2nd Dist. 1978).

2. "A contract is to be interpreted according to its plain and ordinary meaning in order to give effect to the parties' intent, and the construction of the contract is a question of law to be resolved by the court." West Suburban Mass Transit Dist. v. Consolidated Rail Corp., 210 Ill. App. 3d 484, 490 (1st Dist. 1991). "A contract must be read in its entirety and effect given to each of its provisions." American Apartment Management Co., Inc. v. Phillips, 274 Ill. App. 3d 556, 559 (1st Dist. 1995).

3. "Where the contract's meaning is clear and unambiguous on its face, resort to extrinsic evidence to interpret the contract is unnecessary." Id. Whether a contract is ambiguous is a question of law for the court. Mid-City Indus. Supply Co. v. Horwitz, 132 Ill. App. 3d 476, 481 (1st Dist. 1985). An ambiguity exists where a contract can be reasonably understood as having more than one meaning. Hobbs v. Hartford Ins. Co. of the Midwest, 214 Ill. 2d 11, 17 (2005). "Mere disagreement between the parties does not make a term ambiguous, which follows naturally from the principle that the subjective intentions of the parties are not relevant." Carey v. Richards Building Supply Co., 367 Ill. App. 3d 724, 727 (2d Dist. 2006). Where two or more contracts are executed in connection with the same transactions, the contracts are to be construed in reference to one another. Tepfer v. Deerfield Savings & Loan Ass'n, 118 Ill. App. 3d 77, 80 (1st Dist. 1983).

4. In the event of an ambiguity in the contract, a court may consider extrinsic evidence, including parol evidence, to ascertain the parties' intent. Gallagher v. Lenart, 226 Ill. 2d 208, 233 (2007); Quake Construction, Inc. v. American Airlines, Inc., 141 Ill. 2d 281, 288 (1990).

5. In an order entered April 9, 2009, this Court[3] denied Seller's motion for summary judgment, finding that the contract documents described *supra* created an ambiguity that necessitated resort to extrinsic evidence to determine the parties' intent as to the meaning of the contract's terms. The analysis set forth in the April 9, 2009, order is incorporated here in its entirety and adopted as a finding for purposes of this order.

> "The Third Amendment required the parties to enter a holdback agreement and provided that the holdback amount would be released upon: '(1) execution of a lease with Hy Vee, Inc. on terms in accordance with the Letter of Intent, dated October 12, 2004, attached hereto as Exhibit C, and in a form that is commercially reasonable; (2) delivery of the premises to the tenant in the condition required of Landlord as specified in the lease; and (3) acceptance by tenant of the premises and the obtaining by tenant of all permits and other governmental approvals necessary to complete the tenant's work.' The Third Amendment provided for an August 31, 2005 deadline for signing the Hy Vee Lease and an October 31, 2005 deadline for meeting conditions (2) and (3). The Third Amendment does not have a delay provision.
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> Section VII of the DME, the holdback agreement required by the Third Amendment, incorporated the requirements of the Third Amendment as to the Hy Vee Lease, delivery and acceptance of the premises and obtaining governmental permits and approvals. Section VII of the DME added a delay provision providing that if the "plans" for the Hy Vee Expansion were not finalized "by reason of any delay in producing, approving or revising *such plans*," then the October 31, 2005 deadline would be extended by "one day for each day of delay in the *delivery of plan approval*." Any such delay is to be determined in accordance with the Hy Vee Lease.
>
> Section VII states that any delay in producing, approving or revising the plans for the Hy Vee Expansion provides a basis for extending the October 31, 2005 deadline. [Buyer ignores] this language and contend[s] that

[3] Judge Mary K. Rochford entered the April 9, 2009, order prior to her elevation to the Illinois Appellate Court.

only a delay in delivering plan approval for the Hy Vee Expansion by [Buyer] could extend the October 31, 2005 based on the "delivery of plan approval" language. However, such a reading of Section VII of the DME cannot be accepted as a matter of law. The fact that [Buyer's] interpretation of Section VII of the DME is not firmly established, however, does not mean that [Seller] has shown that its interpretation is correct as a matter of law or that Section VII of the DME is unambiguous.

Construing the Third Amendment, the DME and the Hy Vee Lease as a whole, Section VII of the DME is not unambiguous as argued by both sides. The Third Amendment contemplated that all steps set forth would be accomplished by the deadline. Hy Vee would have a lease, accept the premises and have governmental approval by the deadline of October 31, 2005. [Seller's] position that under Section VII of the DME the October 31, 2005 deadline was extended to February 12, 2006 is based on an interpretation of the terms "such plans" and "delivery of plan approval" in Section VII as encompassing the final plans requiring approval by the Landlord under the Hy Vee Lease and the issuance of all governmental approvals and authorizations as required under the Hy Vee Lease. However, reading the Third Amendment, the DME and the Hy Vee Lease together, the agreements are ambiguous as to whether the governmental approvals and authorizations fall within the delay provision of Section VII of the DME.

The terms as to "plans" and "plan approval" are not consistent throughout the documents. The Third Amendment does not use the words "plans" or "plan approval" but does say that Hy Vee is to have "governmental approval" by October 31, 2005. The DME does not define the terms "plans" or "plan approval." The Hy Vee Lease uses the terms "Final Plans and Specifications" and delineates between the approval of the Final Plans and Specifications by the Landlord and the issuance of governmental authorizations and permits which the Hy Vee Lease designates as part of the "Construction Conditions". [Citation omitted.] However, the "Construction Conditions" provisions are under the section of the lease titled "Plans and Approvals." The "Construction Conditions" provisions also include "[t]he mutual agreement of Landlord and Tenant to the plans and specifications for the Hy Vee Expansion." When the Third

> Amendment, DME and the Hy Vee Lease are read together, it is not clear whether the October 31, 2005 deadline would be extended only for delays in approving the Plans and Specifications or for delays in approving the Plans and Specifications and obtaining the Governmental Approvals. . . ."

6. In light of the ambiguity identified above, the Court must rely on extrinsic evidence to glean the parties' intent at the time they executed the contract documents. The evidence adduced at trial proves that the parties intended October 31, 2005, to serve as the deadline for plan and permit approval. Therefore, because Hy Vee did not obtain the necessary permits by October 31, 2005, Buyer has proved a breach of the DME by Seller.

7. As this was a vigorously contested issue at trial, the Court's ruling merits further discussion. Seller contends, for example, that because the New Hy Vee Lease and LOI contemplated lengthy permitting and construction periods, the Buyer could not have reasonably intended rigid enforcement of the October 31, 2005 deadline in the Third Amendment and DME to obtain constructions permits. However, Seller alone had the right to negotiate the terms of the lease that would bind Buyer and Hy Vee as landlord and tenant, and Seller was no less aware than Buyer that Seller's own agreement with Buyer imposed penalties if certain events did not occur by October 31, 2005. Seller made no attempt to reconcile these terms. Instead, leading up to the October 31, 2005 date, Seller referred to the date as a "deadline" ((Plaintiff Exhibits 30, 155) and chided Buyer for placing compliance with that deadline in danger. Plaintiff Exhibit 155. Only on the eve of October 31, 2005, when it was apparent that Hy Vee could not obtain permits by the October 31, 2005, deadline, did Seller attempt to renegotiate that contract term

on an October 27, 2005, telephone conference call between Buyer and Seller representatives. Plaintiff Exhibits 86, 91. The attempted renegotiation was unsuccessful.

8. Exhibits admitted at trial undermined the testimony of Fontana, O'Leary and Curciarello that the deadlines of the Third Amendment and DME were merely "target" or "place holder" dates that the parties understood would be subject to event driven deadlines finally negotiated in the New Hy Vee Lease. See, e.g., Plaintiff Exhibits 23, 25, 30, 70, 155. Moreover, Mr. Curciarello was impeached by prior deposition testimony indicating that a purpose of the October 27, 2005, telephone call to Buyer was to negotiate an extension of the October 31 deadline. Further, had the purpose of the call been merely to cement the parties' existing understanding that October 31, 2005, was only a "target date" for obtaining construction permits (as Seller insists), one would expect Buyer's follow up email to confirm that understanding. It does not. Instead, it offers a "proposal" to delete the October 31, 2005 deadline in the Third Amendment in favor of a January 31, 2006, deadline. Plaintiff Exhibit 86.

9. Seller asserts that Buyer must have been aware of the discrepancy in permitting deadlines and thus, must have intended that this large commercial project would comply with the more generous timeframes set forth in the LOI and Lease. However, it is not ludicrous to suggest that in fact the parties, at the time the DME was executed, intended October 31, 2005 to be a drop-dead deadline. The DME was signed in December 2004: the deadline to obtain plan approval and permits (which did not entail actual completion of the build out) was more than ten

months in the future. Further, as stated above, evidence adduced at trial shows that Seller considered October 31, 2005 a deadline and fretted that the holdback might be lost if permits were not obtained by that date.

10. Although Seller contends Buyer insisted on changes to the New Hy Vee Lease, it is undisputed that Seller reserved the right to negotiate the Lease with Hy Vee to itself and that it did not have to incorporate any terms requested by Buyer. Thus it does not inevitably follow that because the New Hy Vee Lease established a schedule that might allow submission of permit applications beyond October 31, 2005, Buyer agreed to such an extension of the October 31 DME deadline. Buyer could not negotiate the lease terms and was obligated to accept any lease that was "commercially reasonable." Under these circumstances, it is reasonable to infer only that Buyer signed-off on this lease as Hy Vee's new landlord because to reject the lease could mean forfeiture of the Hy Vee Holdback. It is not reasonable to infer that, via a document it did not negotiate, Buyer also intended to release Seller of a separate contract term that was the product of bargaining directly between Buyer and Seller. Garo testified he signed the Lease to avoid any contention that he was rejecting an otherwise "commercially reasonable" lease and thereby lose the tenant.

B. Liquidated Damages

11. In Illinois, in the absence of an express provision to the contrary, a forfeiture provision in a contract will be construed as a liquidated damages clause. Berggren v. Hill, 401 Ill. App. 3d 475, 479 (1st Dist. 2010); Bamberg v. Griffin, 76 Ill.

App. 3d 138, 144 (1st Dist. 1979). "Liquidated damages clauses are often entered into to avoid the difficulty of ascertaining and proving damages by such methods as market value, resale value or otherwise." Siegel v. Levy Organization Development Co., Inc., 183 Ill. App. 3d 859, 861 (1st Dist.1989). Liquidated damages provisions are binding unless they are determined to be a penalty. Id.

12. The validity of a liquidated damages clause is determined by a three prong test as set forth in Jameson Realty Group v. Lewis Kostner, 351 Ill. App. 3d 416, 423 (1st Dist. 2004); citing Restatement (Second) of Contracts § 356, Comment (b) (1979): (1) the parties intended to include the provision, (2) the amount provided as liquidated damages was reasonable at the time of contracting and had some relation to the actual damages which might be sustained, and (3) and the actual damages would be difficult to prove and uncertain in amount. Id.

13. The liquidated damages clause in this case satisfies the three prong test of Jameson. First, the insertion and amount of the liquidated damages clause was intentional and negotiated through an arms-length transaction.

14. The second test cited by the Jameson court is also satisfied here. Rogers and Curciarello agreed that they attempted to capture the increased value added to the property by virtue of Hy Vee's intended occupancy of the Wal Mart space. Rogers testified that the difference between the existing Hy Vee lease and the New Hy Vee Lease was approximately $430,000.00 in additional annual income to the landlord. Rogers said that between the Buyer's position of not wanting to pay any compensation for an as yet non-existent lease, and the Seller's position of wanting the full value of the lease reflected in the purchase price, the parties agreed on a multiplier of 10 of the

incremental value annual of the lease as a valuation in-between the parties' respective positions. See also Dallas v. Chicago Teachers Union, 408 Ill. App. 3d 420, 425 (1st Dist. 2011).

15. The third Jameson factor applies as well. It is reasonable to conclude that a number of scenarios could have arisen if Hy Vee failed to execute the lease or proceed with steps necessary to occupy the new space. The space, intended for an anchor tenant, may or may not have been rented, eventually, to Hy Vee or another tenant. The presence of the anchor tenants was used as a marketing tool. Had the space vacated by Wal Mart not been rented, smaller tenants may or may not have abandoned the site or refused to occupy the site for a first time. Moreover, while Seller was negotiating the lease with Hy Vee, Buyer had no right to pursue other potential tenants to fill the vacant space. The liquidated damages provision in this case was related to Buyer's potential damages which were uncertain and difficult to prove.

16. The fact Hy Vee began paying rent in the new space in 2006 does not preclude award of the holdback to Buyer. In a case factually parallel to the instant case, Bethlehem Steel vs. the City of Chicago, 350 F. 2d 649 (7th Cir. 1965), Bethlehem Steel contracted to sell the City of Chicago steel for a road project (now called the Dan Ryan Expressway) that the City wanted to have opened by a certain date. Bethlehem Steel, 350 F. 2d at 650-51. The contract provided that Bethlehem would deliver the steel by a date certain or be liable for liquidated damages in the amount of $1,000 per day. Id. at 651. Bethlehem was 52 days late in delivering the steel to the City but the highway opened on its scheduled date. Id. The City was granted summary judgment on its claim for liquidated damages due under the contract. Bethlehem appealed on the basis that the

City had not incurred any harm or actual damages and therefore was not entitled to liquidated damages. Id. The U.S. Appellate Court for the 7th Circuit rejected Bethlehem's argument that the City had to prove its damages:

> "In other words, Bethlehem now seeks to re-write the contract and to relieve itself from the stipulated delivery dates for the purposes of liquidated damages, and to substitute therefore the City's target date for the scheduled opening of its super highway. This, the Plaintiff [Bethlehem] cannot do."

Id.

17. The Bethlehem Steel court relied on Wise v. United States, 249 U.S. 361 (1919) which refused to strike a liquidated damages clause because the benefiting party did not have actual damages, stating that the court is:

> " . . . to look with candor, if not with favor, upon such provision in contracts when deliberately entered into between parties who have equality of opportunity for understanding and insisting upon their rights, as promoting prompt performance of contracts and because adjusting in advance, and amicably, matters the settlement of which through courts would often involve difficulty, uncertainty, delay and expense."

Wise, at 366.

18. Further, the Court stated that:

> "The parties to the contract, with full understanding of the results of delay and before differences or interested views had arisen between them, were much more competent to justly determine what the amount of damage would be, an amount necessarily largely conjectural and resting in estimate, than a court or jury would be, directed to a conclusion, as either must be, after the event, by views and testimony derived from witnesses who would be unusual to a degree if their conclusion were not, in a measure, colored or partisan."

Id., at 366-367.

19. In Karimi v. 401 N. Wabash Venture, LLC, 2011 IL App (1st) 102670, ¶ 7, plaintiffs alleged that defendants improperly retained earnest money and earned interest following collapse of an agreement to sell a condominium to plaintiffs. Plaintiffs complained that the liquidated damages provision of the contract was an unenforceable penalty. Id. at ¶ 21. They argued as well that it was "obnoxious" to allow retention of liquidated damages where defendants suffered no damages as a consequence of the failed transaction. Id. at ¶ 25.

20. The appellate court found the liquidated damages provision enforceable and ruled:

> "The purpose of a liquidated damages provision is to provide parties with a reasonable predetermined damages amount where actual damages may be difficult to ascertain. [Citation omitted.] Courts generally give effect to such provisions 'if the parties have expressed their agreement in clear and explicit terms and there is no evidence of fraud or unconscionable oppression.' [Citation omitted.] As discussed above, plaintiffs here understood and agreed to the explicit terms of paragraph 12(a) when they entered into the purchase agreement, and they make no claim that fraud or unconscionable oppression played a role in inducing them to sign the contract. The nature of a liquidated damages provision is such that the set amount may at times exceed actual damages, and other times actual damages may exceed the set amount. In entering into the purchase agreement, both parties here agreed to accept this inherent risk. [Citation omitted.] Although defendants could have elected not to seek liquidated damages given the circumstances here, they have the right to pursue such damages under paragraph 12(a), and the provision is valid and enforceable. The trial court properly dismissed plaintiffs' complaint."

Id. at ¶ 27.

C. The Parking Lot Damages

Having found that Buyer is entitled to the Hy Vee Holdback in its entirety, it is unnecessary for the Court to determine whether Buyer may recover a portion of the holdback related to construction of the mall parking lot.

IT IS HEREBY ORDERED:

(1) Judgment is entered for Plaintiffs GK Development, Inc., College Square Mall Partners, LLC and College Square Mall Development, LLC on Counts I and II of the Complaint in case number 06 CH 3426, and against Defendants Iowa Malls Financing Corp., and College Square Mall Associates, LLC. Defendant Chicago Title and Trust Company is directed to disburse the Hy Vee Holdback ($4,300,000.00) to Plaintiffs within 14 days of entry of this Order. Judgment is entered for Plaintiffs/Counter-Defendants and against Defendant/Counter-Plaintiff on Counts I, II and V of the Counterclaim, formerly 06 CH 3586.

(2) Case number 06 CH 26662 is dismissed as moot.

(3) The cross motions for directed verdict, taken under advisement at the time of trial, are denied.

Enter: _____

Judge: _____

ENTERED
JUDGE CAROLYN QUINN-1880
AUG 24 2011
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK