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IN THE IOWA DISTRICT COURT FOR WOODBURY COUNTY

SOUTHERN ENTERPRISES, INC., Plaintiff, vs. GORDON PLAZA, LLC and the FRED AND MARTHA FAMILY TRUST DATED DECEMBER 31, 1987, Defendants.	LAW NO. LACV144669 FINDINGS, CONCLUSIONS, ORDER AND JUDGMENT

The above file came before the Court at the time and place set for trial. Plaintiff Southern Enterprises, Inc. (hereinafter "Southern Enterprises"), appeared by representative and with counsel, Joel Vos. Defendants Gordon Plaza, LLC, and the Fred and Martha Family Trust Dated December 31, 1987 (hereinafter collectively referred to as "Gordon Plaza"), appeared by representative and with counsel, Sabrina Sayler. The trial was stenographically reported.

FINDINGS

The within action is in relation to a written lease and addendum entered into and executed by the parties in October 1998. In particular, Southern Enterprises leased commercial building space from Gordon Plaza for the purpose of operating a Hallmark store located on Gordon Drive in Sioux City, Woodbury County, Iowa. The particular store or premises under the lease was located in an area that was being developed as the Gordon Plaza Addition, including a building structure consisting of a Hy-Vee Grocery Store connected to 16 in-line stores/spaces. One of those spaces was identified as Suite K that was the particular space or premises leased by Southern Enterprises.

The present dispute between the parties is in relation to rent previously paid or owed by Southern Enterprises pursuant to the terms of the lease. In particular, paragraph 10 of the lease addendum contains a provision which states as follows:

> SPECIALTY STORE CO-TENANCY: In the event that less than 70% of specialty shops are open for business by December 1, 1999, then tenant shall only be obligated to pay five percent (5%) of Gross Sales in lieu of all Minimum and Ancillary Rents. If this condition is not cured within (180) days, or if the anchor closes at any time during the lease term, tenant may terminate the lease. Thereafter, at any time following December 1, 1999, if less than 70% of the specialty shops are open for business, then tenant shall only be obligated to pay five percent (5%) of Gross Sales in lieu of all Minimum Rent and Ancillary Rents. If this condition is not cured within 180 days thereafter, tenant may terminate the lease.

The lease and addendum were negotiated between Alvin Kats, who is the sole officer and one of the shareholders of Southern Enterprises, and James Johnson, who was the co-manager and is now the sole manager of Gordon Plaza LLC. It is believed that the lease and lease addendum were prepared and/or provided by representatives of Hallmark Stores corporate office in Kansas City.

In regard to paragraph 10 of the lease addendum, James Johnson testified that it was his belief and interpretation that the parties understood that the Hallmark Store would not succeed if it essentially was on its own at the Gordon Plaza shopping development. James Johnson understood that if the Gordon Plaza Center was not 70 percent occupied, then Gordon Plaza LLC was not effectively "doing its job" and fulfilling its obligation to Southern Enterprises. The 70 percent occupancy insured sufficient foot and car traffic at the center, which naturally would generate more potential customers and business for the Hallmark store being operated by Southern Enterprises.

As noted in the parties' Stipulation of Facts, based on the Court's prior order granting partial summary judgment, less than 70 percent of the specialty shops were open for business during the months of December 1999 through January 2002, August 2002 through October 2003, and March 2008 through March 2009. During the months of February 2007 through February 2008, one of the spaces was leased to Morningside Lutheran Church. If such leased space is excluded, less than 70 percent occupancy also existed during those months.

Although the occupancy was less than 70 percent during those months, Southern Enterprises paid the full base rent and additional minimum and ancillary rents (referred to as "CAM" or Common Area Maintenance payments) until April 2009. Southern Enterprises also did not question or request any information from Gordon Plaza until

late 2008 or early 2009. During that time, the parties were negotiating an amended lease, and Alvin Kats re-reviewed the initial lease during that negotiation process. He then questioned the occupancy in prior years and requested occupancy information from Gordon Plaza. That information was eventually provided from approximately June 2009 through October 2009. Because Southern Enterprises questioned the occupancy and possible prior overpayments and was waiting for that occupancy information, it stopped paying any rent in April 2009.

The parties dispute the determination of occupancy under the lease and, thus, they dispute the number of months that less than 70 percent of specialty shops were open for business under the terms of the lease. The parties further dispute the calculation of rent for any such months and, in particular, the determination of gross sales. Gordon Plaza also claims Southern Enterprises is barred from recovering overpayments for months prior to May 31, 2001, based on the statute of limitations.

As part of the within litigation, Southern Enterprises previously filed a Motion for Partial Summary Judgment. On November 30, 2012, the Court filed an Order Re: Motion for Partial Summary Judgment, specifically granting the Motion in part and denying the Motion in part. The Court concluded that Southern Enterprises is entitled to partial summary judgment for any overpayment of rents in months that less than 70 percent of the specialty shops located in the main building only (as opposed to the entire Gordon Plaza addition as argued by Gordon Plaza) unless otherwise barred by the statute of limitations. The Court denied the request for partial summary judgment in regard to the statute of limitations and any overpayments made prior to May 31, 2001 (ten years before the filing of the within action). In its Order Re: Motion for Partial Summary Judgment, the Court also did not enter partial summary judgment as to the amount of any such overpayments. This case, therefore proceeded to trial on those issues remaining after the Court's Order on the Motion for Partial Summary Judgment, specifically in regard to the statute of limitations and calculation of gross sales for those months in which less than 70 percent of the specialty shops were open for business.

As noted above, the parties filed a Joint Stipulation of Facts at the time of trial, which the Court incorporates herein by reference. Additional and more specific Findings are included in the Court's Conclusions below. To the extent evidence

submitted at trial is not specifically referenced herein, the Court finds such evidence to be cumulative or probative of other evidence or otherwise not dispositive of the issues or the Court's Conclusions.

CONCLUSIONS

The lease and addendum form a contract between the parties, and neither party argues that the contract (lease and addendum) are invalid or unenforceable. They dispute the meaning and effect of certain provisions, specifically paragraph 10 of the addendum.

Although the terms are sometimes used interchangeably, construction of a written contract is distinguished from interpretation of that contract. Construction is the process of determining the legal effect of the terms of a written contract. Interpretation is the process of determining the meaning of such contract terms. E.g., Walsh v. Nelson, 622 N.W.2d 499, 503 (Iowa 2001) (citations omitted).

In construing a written contract, the Court must determine the intent of the parties and, except in cases of ambiguity, this intent is determined by what the contract itself says; and the Court looks only within the four corners of the written document. Iowa Rule of Appellate Procedure 6.14(6)(n); Clinton Physical Therapy Services, P.C. v. John Deere Health Care, Inc., 714 N.W.2d 603, 615 (Iowa 2006); Dickson v. Hubbell Realty Company, 567 N.W.2d 427, 430 (Iowa 1997).

When interpreting a written contract (finding the meaning of the terms), the Court can look to the circumstances surrounding the formation and execution of the contract. See Walsh, 622 N.W.2d at 503; Dickson, 567 N.W.2d at 430. Generally speaking, however, extrinsic evidence beyond the "four corners" may be used only when a term or terms of the written contract are ambiguous. Clinton Physical Therapy Services, 714 N.W.2d at 615 (extrinsic evidence may be considered when it sheds light on the circumstances, such as the situation of the parties, the prior negotiations, and the objects the parties were striving to attain) (citations omitted); Dickson, 567 N.W.2d at 430. Compare Walsh, 622 N.W.2d at 503 (noting that even though other evidence may aid the process of interpretation, the words of the contract remain the key in making the initial determination of whether the terms are ambiguous).

The above analysis is applied by the Court in its Conclusions below relating to

terms of the lease and addendum. Additionally, the Court makes references below to evidence that was or was not presented. In making such references, the Court is simply applying the law to the facts. Southern Enterprises has the burden of proof in regard to its claim of overpayment in this matter, and the Court does not shift or alter this burden in referring to evidence presented or not presented by the parties.

A. Statute of Limitations / Discovery Rule

As noted above, this is a breach of contract or breach of lease case. Pursuant to Iowa Code Section 614.1(5), actions on written contracts must be filed within 10 years after the cause of action accrues. A cause of action on a written contract accrues, and the statute of limitations begins to run when the contract is breached. E.g., Brown v. Ellison, 304 N.W.2d 197, 200 (Iowa 1981). Southern Enterprises filed its Petition in this matter on May 31, 2011. Under the applicable 10-year statute of limitations, therefore, Southern Enterprises' claim for overpayments made prior to May 31, 2001, would be barred.

Southern Enterprises argues that the "discovery rule" is applicable and would toll the accrual of its cause of action. Under the discovery rule, the statute of limitations begins to run when the injury (in this case the overpayment) is discovered or when, by the exercise of reasonable diligence, should have been discovered, whichever is the earlier of the two dates. Franzen v. Deere and Company, 334 N.W.2d 730, 732 (Iowa 1983). Although statute of limitations is an affirmative defense, Southern Enterprises has the burden of proving this exception to the normal statute of limitations. Franzen, 334 N.W.2d at 732. The Court concludes that this discovery rule is extended and applicable to breach of contract claims. See, e.g., Brown, 304 N.W.2d at 200-201 (outlining history of discovery rule and extending to breach of express and implied warranty actions); Franzen, 334 N.W.2d at 732. See also, John Q. Hammons Hotels, Inc. v. Acorn Window Systems, Inc., 394 F.3d 607, 610-611 (8th Circuit 2005) assuming without deciding that the discovery rule and statutes of limitations apply to cause of action alleging breach of contract, negligence, breach of express warranty, breach of implied warranty, strict liability, and negligent misrepresentation).

In determining when the cause of action was "discovered" for purpose of the discovery rule, actual notice or knowledge is not required. The statute of limitations

period begins when a party is on "inquiry notice," which imputes knowledge of all facts that a reasonable investigation would have disclosed. As applied to the within matter, Southern Enterprises must show that it could not have discovered the applicability of paragraph 10 of the lease and addendum through reasonable diligence; and knowledge of facts is imputed when Southern Enterprises gained information sufficient to alert a reasonable person of the need to investigate such claim. See, Hammonds Hotels, 394 F.3d at 610-611 (noting that knowledge of the exact nature of a problem is not required). See also, Hallett Construction Company v. Meister, 713 N.W.2d 225, 231 (Iowa 2006) (noting that a claimant can be on inquiry notice without knowing the details of the evidence by which to prove the cause of action) (citations omitted).

The Court finds and concludes in this matter that Southern Enterprises has failed to sustain its burden of proving the applicability of the discovery rule. Southern Enterprises has failed to prove that it was not on inquiry notice that less than 70 percent of the specialty shops were open for business as of May 31, 2001, when the ten-year statute of limitations would have started. Any claim for overpayments made prior to May 31, 2001, therefore, are barred by the statute of limitations.

In reaching this conclusion, the Court again notes that even under the discovery rule, the date of inquiry notice, as opposed to actual notice, controls. In this regard, the Court agrees with Southern Enterprises that it would not have been able to determine from visual observation only whether there was less than 70 percent occupancy. In order to make this determination, specific information as to the square footage of each suite or space and the existing leases/tenants was required. During the months before the ten-year statute of limitations (December 1999 through May 2001), the occupancy ranged from 51 percent to 63 percent. Although these specific percentages would have been unknown, Southern Enterprises would have been able to observe the number of suites/retail spaces that were vacant during those months. Southern Enterprises was aware of paragraph 10 of the addendum and of the percentage rent provisions. It knew or should have known at that time that the occupancy could have been less than 70 percent and, through reasonable diligence, the fact that such occupancy was less than 70 percent could have and would have been discovered.

The Court would note that in 2008 and early 2009, the occupancy was just under

60 percent, which is more than the occupancy that existed for a majority of the time prior to May 31, 2001. Based on visual observation only and no occupancy or lease records, Southern Enterprises in late 2008 and early 2009 raised this issue and requested specific occupancy information from Gordon Plaza. Even before this information was provided and, again, based solely upon visual observations, Southern Enterprises stopped paying rent in April 2009 because it believed paragraph 10 of the lease addendum was implicated. Similar facts and circumstances available to Southern Enterprises when it took these actions in late 2008/early 2009 would have existed from December 1999 through May 2001.

Southern Enterprises further argues that it even took Gordon Plaza several months in 2009 to acquire the information necessary to determine the occupancy percentages. Even if the Court were to consider this additional time in determining when the existence of the claim would have been discovered through reasonable diligence, Southern Enterprises should have known beginning in December 1999 that the occupancy may have been less than 70 percent. Through reasonable diligence, Southern Enterprises could have and should have requested occupancy information from Gordon Plaza at that time, and such information would have been provided and available to Southern Enterprises prior to May 31, 2001. In this regard, the delay and difficulties that Gordon Plaza had in providing the occupancy information in 2009 was due, in part, to the fact that it was being asked to go back and obtain such information for the 10 years prior to 2009. Such information would have been more immediately available if requested in December 1999 through May 2001 when Southern Enterprises would have been on inquiry notice.

B. Gross Sales

The parties also dispute how to determine the "gross sales" for purpose of calculating Southern Enterprises' rent obligation for those months in which the occupancy of specialty shops was less than 70 percent. The Court initially finds and concludes that gross sales under the lease is based upon the actual amount of money tendered or received by Southern Enterprises for the goods sold, not the price or value of such goods. The discounts and coupons used by customers in the within matter were not reimbursed to Southern Enterprises by a third party and, thus, are not included

in the determination of gross sales.

In reaching this conclusion, the Court concludes that the reference to and use of the term gross sales in the lease is similar to gross receipts and is intended to distinguish the basis of the percentage rent from net profit. The Court notes that "gross sales" is defined in Black's Law Dictionary as, "total sales (esp. in retail) before deductions for returns and allowances." Black's Law Dictionary, Eighth Edition. Black's Law further defines "gross receipts" for tax purposes as, "the total amount of money or other consideration received by a business taxpayer for goods sold or services performed in a year, before deductions." Black's Law Dictionary, Eighth Edition (referring to the tax code in Volume 26 of the United States Code). Although not directly on point, the Court further notes that for purpose of imposing a sales tax, the "sales price" is defined as the total consideration paid without deducting the seller's cost of the property sold and other charges for services necessary to complete the sale (distinguishing it from net profit). Iowa Code Section 423.1(51)(a). Sales price specifically does not include discounts or coupons that are not reimbursed by a third party. Iowa Code Section 423.1(51)(b)(1). It is reasonable to conclude that Southern Enterprise would pay rent based upon a percentage of money actually received. This was the intent of the parties.

Gordon Plaza makes two primary arguments in regard to this issue. First, Gordon Plaza argues that the lease addendum and the software used by Southern Enterprises were both prepared and provided by Hallmark Stores. Gordon Plaza then argues that the "gross sales" as used in the lease addendum is in reference to and has the same meaning as "gross sales" in the bookkeeping software and as referenced in the monthly sales reports (Exhibit K). The Court disagrees. Other than the evidence that both the lease addendum and the software were prepared by some agent or division of Hallmark, there is no other evidence that the terms "gross sales" in the lease addendum and software have the same meaning. It is unknown whether the software and lease addendum were even prepared and developed at the same time. Neither the software nor the lease addendum make any reference to each other. Although the Court understands the argument that the ordinary or plain meaning of the terms gross sales would be used by a business such as Hallmark, a lease agreement and software

for sales reports two different and unrelated records. This argument certainly is not unreasonable. For the reasons stated above, however, the Court believes the terms "gross sales" in paragraph 10 of the lease addendum means the actual money received by Southern Enterprises for the goods sold.

Gordon Plaza also argues that it would be unfair and an unreasonable interpretation of the terms "gross sales" to allow Southern Enterprises to manipulate and lower its rent obligation by unilaterally offering discounted sales. The Court again disagrees. Discounts, sales, and coupons are a reasonable and expected occurrence and practice for a business such as a Hallmark store. This would have been understood by both parties when the lease and lease addendum were executed. Additionally, the rent under paragraph 10 of the addendum was equal to five percent of the gross sales. This means Southern Enterprises would retain 95 percent of the gross sales for payment of other costs and expenses and in determining net profit. It would be unreasonable to believe Southern Enterprises would artificially offer sales and discounts to lower its rent when to do so would also reduce its profit, particularly considering this 95% - 5% ratio. It is quite possible, in fact, that the discounted goods would not have sold without the discount and, thus, Southern Enterprises' percentage rent obligation for those months would have been even lower.

The question of sales tax, however, is less clear. In contrast to the discounts or coupons, Southern Enterprises actually received from its customers money for the sales tax on the goods that were sold. The Court finds and concludes, however, that the intent of the parties and the percentage rent provision was for Southern Enterprises to pay rent based upon money it actually received for sales, again as distinguished from net profit. It is the money collected and retained by Southern Enterprises before deducting the cost of the goods and other expenses. Although its customers paid to Southern Enterprises the sales tax, the sales tax was never owned or retained by Southern Enterprises. It had no legal claim or interest in that sales tax. E.g., Iowa Code Section 423.2(12) (all sales taxes collected by a retailer are deemed to be held in trust for the state of Iowa).

Because the sales tax collected by Southern Enterprises is not a component of its profit, the Court concludes that a reasonable interpretation of the lease is that

Southern Enterprises was not required to pay five percent of the sales tax collected and held in trust for the state of Iowa as part of its rent. The term "gross sales" in paragraph 10 of the addendum does not include sales tax. Although the lease does not specifically exclude sales tax under paragraph 10 or elsewhere, a reasonable business tenant would not agree to pay rent based on sales tax belonging to the government. See, e.g., Hartig Drug Company v. Hartig, 602 N.W.2d 794, 798 (Iowa 1999) (concluding that a percentage rent provision in a lease based on gross sales did not include the total received for lottery tickets sold, which belonged to the state; but, rather, included only the five percent commission received by the business for selling the lottery tickets).

C. Lease to Morningside Lutheran Church

From February 2007 through February 2008, one of the spaces within the Gordon Plaza Addition was leased to Morningside Lutheran Church for youth programs. The parties disagree as to whether such lease should be included in determining whether "less than 70 percent of specialty shops [were] open for business" under the lease. The Court finds and concludes that the space leased to the church is not a "specialty shop" that was "open for business" and, thus, is not included in determining the months during which the percentage rent provision would apply.

In reaching this conclusion, the Court agrees with the argument of Southern Enterprises that the reasonable and ordinary meaning or definition of those terms under the lease connotes a business where goods or services are sold. The Court understands that one of the purpose and intent of this lease provision was to insure a certain amount of "foot traffic" at the Gordon Plaza. A lease of space to the church would arguably create such foot traffic and benefit Southern Enterprises.

In addition to the ordinary meaning of the terms "shops" and "business," however, the Court concludes that the intent and purpose of that lease provision was to insure a certain amount of shoppers or shopping traffic at the Gordon Plaza. A reasonable business tenant would not want to lease and pay rent for nonretail space. Paragraph 10 was intended to insure that Gordon Plaza would be a retail shopping center and, thus, Southern Enterprises would benefit from its lease. There is no evidence that the church sold goods or services at the Gordon Plaza during the term of

its lease. The evidence and the fact that the lease was for their youth programs suggests that the church did not sell goods or services at that location. The people using or going to that church space, therefore, were not at the Gordon Plaza to shop. Additionally, it is unknown whether the space was used by the church for its youth programs at times that would be considered normal business hours; and, thus, the more general intent of insuring foot traffic is not served by the church lease. Although this extrinsic evidence supports the Court's interpretation, the Court believes the terms of paragraph 10 in this regard are unambiguous (the Court again focuses on the terms "shops" and "business" used in the addendum).

D. Calculation of Damages

Based on the Court's Findings and Conclusions above, Southern Enterprises has sustained its burden of proving entitlement to a refund or reimbursement for overpayments made for the months of June 2001 through January 2002; August 2002 through October 2003; and February 2007 through March 2009. The total amount of overpayments is the difference between the base rent and CAM payments paid during those months and the percentage rent that was actually due for those months. The percentage rent due is five percent of the gross sales as defined and interpreted by the Court above for each of those months. These amounts are reflected in Exhibit 4, excluding the overpayment of the May 1, 2001, rent which was due prior to the ten-year statute of limitations. Based on the total overpayments as reflected in Exhibit 4, excluding the May 1, 2001, overpayment and giving a reduction or offset based upon the lack of any rent paid since April 2009, the total amount owed by Gordon Plaza to reimburse Southern Enterprises for overpayment of rent since June 1, 2001, is $178,407.78.

E. Interest

The law in regard to interest is clear. The general rule is that interest runs from the time money becomes due and payable. In the case of unliquidated claims, money becomes due and payable on the date the damages become liquidated, which is usually the date of judgment. One exception to this general rule recognized by the courts is when the damage is complete at a specific time, in which case interest runs from the time the damage is complete even though the damage has not been fixed in a specific

sum. See, e.g., Brenton National Bank of Des Moines v. Ross, 492 N.W.2d 441, 443 (Iowa App. 1992). See also, Schimmelpfennig v. Eagle National Assurance Corporation, 641 N.W.2d 814, 816 (Iowa 2002) (noting that neither Section 668.13 nor Section 535.3 govern the entitlement to interest from a point in time prior to the filing of a Petition). As is often the case, application of this law to the facts in this case is less clear.

Southern Enterprises argues that the damage (overpayment of rent) was complete at the time of the overpayment. Based on the exception to the general rule noted above, Southern Enterprises argues that it is entitled to statutory interest under Section 535.2 at the rate of five percent on the amount(s) of overpayments made commencing the date of each overpayment. Such argument is reasonable. Even though the overpayments were made by mistake and there is no evidence that Gordon Plaza acted fraudulently or in bad faith when it received and retained such payments, Gordon Plaza still received the benefit of such overpayments. It is reasonable to argue that Gordon Plaza should not receive a benefit or windfall of such overpayments by paying a judgment for the amount of overpayments only without also reimbursing Southern Enterprises through additional interest for the "time value" of those overpayments previously received.

Although such argument is reasonable, the Court finds and concludes that Southern Enterprises is not entitled to interest accruing from the date of overpayments. First, the Court would note that this case involves overpayments made by Southern Enterprises. Gordon Plaza did not affirmatively breach the lease when the rental payments were made. Southern Enterprises did not demand a return or refund of such overpayments when the payments were made, and Gordon Plaza did not refuse to refund such overpayments upon demand. At best, therefore, the Court believes Southern Enterprises would be entitled to interest only from the date when demand was made for repayment. E.g., Schwennen v. Abell, 471 N.W.2d 880, 884-885 (Iowa 1991).

More importantly, the Court agrees with Gordon Plaza that the analyses set forth in Brenton National Bank are applicable herein. In particular, although the Court in this proceeding has concluded that overpayments were made, the Court concludes that the damages sustained by Southern Enterprises were not complete for purpose of

calculating interest when the overpayments were made. The damages were not complete because there was a reasonable and genuine dispute as to whether Southern Enterprises had a right to recover or as to the amount of such recovery and, thus, the claim of Southern Enterprises remained unliquidated until this action. Brenton National Bank, 492 N.W.2d at 443.

In this regard, the within action involved more than simply a disagreement as to calculation or amount of damages with no reasonable or genuine dispute as to the fact that damage occurred. There was a reasonable and genuine dispute as to whether the 70 percent provisions would apply to the entire Gordon Plaza Addition development or just the main Hy-Vee store and contiguous in-line spaces addressed in the Court's Ruling on the Motion for Partial Summary Judgment. There was a reasonable and genuine dispute as to the meaning and amount of "gross sales." There was a reasonable and genuine dispute as to whether the space leased by the church would be included in determining whether occupancy was less than 70 percent. The claim for reimbursement of rental overpayments made by Southern Enterprises, therefore, was not known and complete, therefore, until this Court's Ruling and Judgment herein. It remained unliquidated.

Pursuant to Section 535.3(1), interest is allowed on all money due on judgments of courts at a rate calculated according to Section 668.13. Because this is not a case involving comparative fault, Chapter 668 does not apply and, by reference in Section 535.3(1), only the rate is determined by Section 668.13, not the date of accrual. See, Schimmelpfennig, 641 N.W.2d at 815 (Section 535.3 incorporates by reference the rate of interest in Section 668.13 but does not incorporate by reference the provision in 668.13 providing that interest shall accrue from the date of the commencement of the action). See also, Opperman v. Allied Mut. Ins. Co., 652 N.W.2d 139, 143 n. 1 (Iowa 2002); Frontier Leasing Corporation v. Ascevedo Grocery, Inc., an unpublished decision found at 713 N.W.2d 247, 2006 W.L. 229501, No. 05-0601 (Iowa App. February 1, 2006).

The date of accrual is therefore determined by Section 535.2(1)(b) as the date the money becomes due. Because the claim was genuinely and reasonably disputed and, thus, unliquidated, it becomes due on the date of this judgment.

F. Attorney Fees

Pursuant to Iowa Code Section 625.22, when judgment is obtained upon a written contract containing a provision for attorney fees, the court shall allow and tax as part of the costs a reasonable fee to be determined by the court. In determining what is reasonable, the court considers: the time necessarily spent; the nature and extent of the service; the amount involved; the difficulty of handling and importance of the issues (complexity of the litigation); the standing and experience of counsel; the customary charges for similar services; the responsibility assumed; and the results obtained. E.g., Great America Leasing Corp. v. Cool Comfort Air Conditioning and Refrigeration, Inc., 691 N.W.2d 730, 732-733 (Iowa 2005). The court is considered an expert as to reasonable attorney fees, and the issue of fees can be determined by the court based upon affidavit of counsel. E.g., Great Amercia Leasing Corp, 691 N.W.2d at 734; Nelson v. Iowa State Highway Commission, 253 Iowa 1248, 1256, 115 N.W.2d 695, 699-700 (1962).

Pursuant to Article 27 of the lease, if either party becomes a party in any litigation by or against the other party involving the enforcement of any of the rights and remedies or arising on account of the default of the other party in the performance of any obligations under the lease, then the prevailing party shall receive from the other all costs and reasonable attorney fees incurred in such litigation. The Court has reviewed the attorney fee affidavit filed by Southern Enterprises and has considered the arguments made by Gordon Plaza in its opposition on file.

It appears that the hourly rate charged for attorney time was $175, which the Court finds reasonable. It also appears that at times more than one attorney was involved in providing services (i.e., two separate itemizations for attendance at mediation for 8.5 hours on July 29, 2011; separate itemizations of time for both Attorney Vos and Attorney Wright for conferences they had with each other – i.e., 5-27-11 and 7-28-11). Although it is not unusual or unreasonable for an attorney to consult with or otherwise discuss a matter with a colleague, the question is whether the time incurred by both attorneys is recoverable from Gordon Plaza under the circumstances of this case. Again, this depends upon the nature and extent of the service, the difficulty or complexity of the issues, and the standing and experience of the attorney (a less

experienced attorney may reasonably incur more time but would also have a lower hourly rate).

The Court also considers the specific argument of Gordon Plaza as to the necessity of the hours spent by counsel preparing for the mediation and preparing for the partial summary judgment. Finally, although an attorney fee award is not based upon a percentage or proportion that the recovery bears to the total amount claimed or demanded, the Court does consider the results obtained in this matter, specifically including the fact that the Judgment awarded is less than the total damages requested.

The Court does not make a specific "audit" of each itemized time entry attached to the fee affidavit. The Court otherwise finds and concludes, however, that Gordon Plaza is obligated to pay pursuant to the terms of the lease reasonable attorney fees and costs incurred by Southern Enterprises in the amount of $22,274.24.

ORDER AND JUDGMENT

IT IS THEREFORE ORDERED that judgment be and is hereby entered in favor of Southern Enterprises and against Gordon Plaza in the amount of $200,682.02, plus statutory interest at the rate of 2.25% commencing the date of this judgment. The costs are taxed 75% to Gordon Plaza and 25% to Southern Enterprises pursuant to Section 625.3.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
LACV144669	SOUTHERN ENTERPRISES INC VS GORDON PLAZA LLC ET AL

So Ordered

Steven J. Andreasen, District Court Judge
Third Judicial District of Iowa

Filings
Title: SOUTHERN ENTERPRISES INC VS GORDON PLAZA LLC ET AL
Case: 03971 LACV144669 (WOODBURY)
Citation Number:

Event	Filed By	Filed	Create Date	Last Updated	Action Date
ORDER FOR JUDGMENT	ANDREASEN STEVEN J	04/15/2015	04/16/2015	04/16/2015	

Comments: COST TAXED 75% TO PLTF AND 25% TO GORDON PLAZA

Documents: ORDER FOR JUDGMENT

OTHER ORDER	ANDREASEN STEVEN J	01/13/2015	01/14/2015	01/14/2015	

Comments: TO REINSTATE CASE

Documents: OTHER ORDER

DISMISSED PER 1.944	CLERK AS JUDGE TO CLOSE CASE	01/13/2015	01/13/2015	01/13/2015	

Documents: DISMISSED PER 1.944

OTHER EVENT	SAYLER SABRINA LEE	12/16/2014	12/17/2014	12/17/2014	

Comments: DEFENDANTS' OPPOSITION TO PLAINTIFF'S ATTORNEY FEE AFFIDAVIT

Documents: OTHER EVENT

OTHER AFFIDAVIT	VOS JOEL DARREN	12/02/2014	12/03/2014	12/03/2014	

Comments: PLAINTIFF'S ATTORNEY FEE AFFIDAVIT

Documents: OTHER AFFIDAVIT

BRIEF	SAYLER SABRINA LEE	11/21/2014	11/21/2014	11/21/2014	

Comments: - DEFENDANTS POST HEARING

Documents: BRIEF

BRIEF	VOS JOEL DARREN	11/21/2014	11/21/2014	11/21/2014

Comments: PLAINTIFF'S POST-TRIAL BRIEF

Documents: BRIEF

COURT REPORTER MEMORANDUM AND CERTIFICATE	ANDREASEN STEVEN J	11/13/2014	11/13/2014	11/13/2014

Comments: 40.00 JAMIE JORGENSEN

Documents: COURT REPORTER MEMORANDUM AND CERTIFICATE

EXHIBIT	ANDREASEN STEVEN J	11/13/2014	11/13/2014	11/13/2014

Comments: EXHIBIT 7

Documents: EXHIBIT

EXHIBIT	ANDREASEN STEVEN J	11/13/2014	11/13/2014	11/13/2014

Comments: EXHIBIT 6

Documents: EXHIBIT

EXHIBIT	ANDREASEN STEVEN J	11/13/2014	11/13/2014	11/13/2014

Comments: EXHIBIT 5

Documents: EXHIBIT

EXHIBIT	ANDREASEN STEVEN J	11/13/2014	11/13/2014	11/13/2014

Comments: EXHIBIT 4

Documents: EXHIBIT

EXHIBIT	ANDREASEN STEVEN J	11/13/2014	11/13/2014	11/13/2014

Comments: EXHIBIT 3

Documents: EXHIBIT

EXHIBIT	ANDREASEN STEVEN J	11/13/2014	11/13/2014	11/13/2014
Comments: EXHIBIT 2				
Documents: EXHIBIT				
EXHIBIT	ANDREASEN STEVEN J	11/13/2014	11/13/2014	11/13/2014
Comments: EXHIBIT 1				
Documents: EXHIBIT				
EXHIBIT - PROPOSED	SAYLER SABRINA LEE	11/13/2014	11/13/2014	11/13/2014
Comments: K - PART 3				
EXHIBIT - PROPOSED	SAYLER SABRINA LEE	11/13/2014	11/13/2014	11/13/2014
Comments: K - PART 2				
EXHIBIT - PROPOSED	SAYLER SABRINA LEE	11/13/2014	11/13/2014	11/13/2014
Comments: K - PART 1				
EXHIBIT - PROPOSED	SAYLER SABRINA LEE	11/13/2014	11/13/2014	11/13/2014
EXHIBIT - PROPOSED	SAYLER SABRINA LEE	11/13/2014	11/13/2014	11/13/2014
EXHIBIT - PROPOSED	SAYLER SABRINA LEE	11/13/2014	11/13/2014	11/13/2014
EXHIBIT - PROPOSED	SAYLER SABRINA LEE	11/13/2014	11/13/2014	11/13/2014
EXHIBIT - PROPOSED	SAYLER SABRINA LEE	11/13/2014	11/13/2014	11/13/2014

EXHIBIT - PROPOSED	SAYLER SABRINA LEE	11/13/2014	11/13/2014	11/13/2014
EXHIBIT - PROPOSED	SAYLER SABRINA LEE	11/13/2014	11/13/2014	11/13/2014
EXHIBIT - PROPOSED	SAYLER SABRINA LEE	11/13/2014	11/13/2014	11/13/2014
EXHIBIT - PROPOSED	SAYLER SABRINA LEE	11/13/2014	11/13/2014	11/13/2014
EXHIBIT LIST	SAYLER SABRINA LEE	11/13/2014	11/13/2014	11/13/2014

Documents: EXHIBIT LIST

DEFENDANT/RESPONDENT WITNESS	SAYLER SABRINA LEE	11/13/2014	11/13/2014	11/13/2014

Comments: LIST

Documents: DEFENDANT'S WITNESS

STIPULATION FILING	SAYLER SABRINA LEE	11/12/2014	11/13/2014	11/13/2014

Comments: JOINT STIPULATION OF FACTS

Documents: STIPULATION FILING

EXHIBIT - PROPOSED	VOS JOEL DARREN	11/12/2014	11/12/2014	11/12/2014

Comments: EXHIBIT 7

EXHIBIT - PROPOSED	VOS JOEL DARREN	11/12/2014	11/12/2014	11/12/2014

Comments: EXHIBIT 6

EXHIBIT - PROPOSED	VOS JOEL DARREN	11/12/2014	11/12/2014	11/12/2014

Comments: EXHIBIT 5

EXHIBIT - PROPOSED	VOS JOEL DARREN	11/12/2014	11/12/2014	11/12/2014

Comments: EXHIBIT 4

EXHIBIT - PROPOSED	VOS JOEL DARREN	11/12/2014	11/12/2014	11/12/2014

Comments: EXHIBIT 3

EXHIBIT - PROPOSED	VOS JOEL DARREN	11/12/2014	11/12/2014	11/12/2014

Comments: EXHIBIT 2

EXHIBIT - PROPOSED	VOS JOEL DARREN	11/12/2014	11/12/2014	11/12/2014

Comments: EXHIBIT 1

EXHIBIT LIST	VOS JOEL DARREN	11/12/2014	11/12/2014	11/12/2014

Comments: PLAINTIFF'S EXHIBIT AND WITNESS LIST

Documents: EXHIBIT LIST

APPEARANCE	SAYLER SABRINA LEE	11/07/2014	11/07/2014	11/07/2014

Documents: APPEARANCE

ORDER SETTING TRIAL	ANDREASEN STEVEN J	11/06/2014	11/07/2014	11/07/2014

Comments: CONT TO 11/13/14 AT 9:00 AM

Documents: ORDER SETTING TRIAL

BRIEF	ISEMINGER MARCI LYNNE	11/05/2014	11/06/2014	11/06/2014

Comments: DEFENDANTS' TRIAL BRIEF

Documents: BRIEF

ORDER SETTING TRIAL	HOFFMEYER DUANE E	07/03/2014	07/03/2014	07/03/2014

Comments: NON JURY TRIAL 11/12/2014 09:00 AM WDCV.

Documents: ORDER SETTING TRIAL

COMPUTER GENERATED NOTICE		06/11/2014	06/11/2014	06/11/2014

Comments: NOTICE OF TRIAL SCHEDULING CONFERENCE 7/3/14 AT 11:45 AM

Documents: COMPUTER GENERATED NOTICE

OTHER ORDER	ANDREASEN STEVEN J	06/09/2014	06/09/2014	06/09/2014

Comments: CRT ADM TO SET TRIAL DATE

Documents: OTHER ORDER

ORDER SETTING HEARING	ANDREASEN STEVEN J	02/28/2014	02/28/2014	02/28/2014

Comments: HRG 3/14/14 AT 9:00 AM RE SCHEDULING CONF

Documents: ORDER FOR CONTINUANCE UNDER SECTION 1.944

ORDER FOR CONTINUANCE UNDER SECTION 1.944	ANDREASEN STEVEN J	02/28/2014	02/28/2014	02/28/2014

Comments: REINSTATE UNDER 1.944 UNTIL 1/1/15

Documents: ORDER FOR CONTINUANCE UNDER SECTION 1.944

MOTION	VOS JOEL DARREN	01/08/2014	01/08/2014	01/08/2014

Comments: REINSTATE CASE UNDER RULE 1.944 AND REQUEST FOR TRIAL SCHEDULING CONFERENCE

Documents: MOTION

DISMISSED PER 1.944	CLERK AS JUDGE TO CLOSE CASE	01/06/2014	01/06/2014	01/06/2014

Documents: DISMISSED PER 1.944

PROCEDENDO		03/13/2013	03/14/2013	03/14/2013

Comments: APPEAL DISMISSED; COPY EMAILED TO JUDGE ANDREASEN 3/14/13 KS

Documents: PROCEDENDO

SUPREME COURT ORDER		02/20/2013	02/20/2013	02/20/2013

Comments: REGARDING INTERLOCUTORY APPEAL

Documents: SUPREME COURT ORDER

OTHER EVENT	ISEMINGER MARCI LYNNE	12/31/2012	12/31/2012	12/31/2012

Comments: COMBINED CERTIFICATE

Documents: OTHER EVENT

ORDER FOR CONTINUANCE UNDER SECTION 1.944	ANDREASEN STEVEN J	12/28/2012	12/28/2012	12/28/2012

Comments: UNTIL 1/1/14

Documents: ORDER FOR CONTINUANCE UNDER SECTION 1.944

MOTION	VOS JOEL DARREN	12/28/2012	12/28/2012	12/28/2012

Comments: UNRESISTED MOTION TO CONTINUE CASE TO AVOID DISMISSAL UNDER

RULE 1.944

Documents: MOTION

NOTICE OF APPEAL	ISEMINGER MARCI LYNNE	12/28/2012	12/28/2012	12/28/2012

Comments: CERTIFIED COPIES OF NOTICE OF APPEAL AND DOCKET MAILED TO

MARCI ISEMINGER, JOEL VOS & CLERK OF SUPREME COURT 12/28/12

KS

Documents: NOTICE OF APPEAL

OTHER ORDER	ANDREASEN STEVEN J	11/30/2012	12/03/2012	12/03/2012

Comments: STATING PARTIAL SUMMARY JUDGMENT IS GRANTED REGARDING

OVERPAYMENT OF RENT

Documents: OTHER ORDER

ORDER FOR CONTINUANCE	ANDREASE N STEVEN J	11/21/2012	11/21/2012	11/21/2012

Comments: OF 11/29/12 TRIAL; CONTINUED TO A DATE TO BE SET BY THE COURT, TRIAL-SCHEDULING CONFERENCE WILL BE HELD 11/29/12 8:30 AM

Documents: ORDER FOR CONTINUANCE

MOTION FOR CONTINUANCE	ISEMINGER MARCI LYNNE	11/08/2012	11/08/2012	11/08/2012

Comments: UNRESISTED MOTION TO CONTINUE TRIAL DATE

Documents: MOTION FOR CONTINUANCE

COMPUTER GENERATED NOTICE		07/19/2012	07/19/2012	07/19/2012

Comments: 1.944 DISMISSAL NOTICE

Documents: COMPUTER GENERATED NOTICE

ORDER SETTING TRIAL	HOFFMEYER DUANE E	05/09/2012	05/09/2012	05/09/2012

Comments: NON JURY TRIAL 11/29/2012 09:00 AM WDCV.

Documents: ORDER SETTING TRIAL

COMPUTER GENERATED NOTICE		04/30/2012	04/30/2012	04/30/2012

Comments: TRIAL SCHEDULING CONFERENCE 5-9-2012 @ 10:30 AM

Documents: COMPUTER GENERATED NOTICE

ORDER FOR CONTINUANCE	ANDREASE N STEVEN J	04/18/2012	04/18/2012	04/18/2012

Comments: OF TRIAL CURRENTLY SET ON 4-25-2012

NOTE: SENT COPY TO COURT ADMINISTRATION ON 4-18-2012

Documents: ORDER FOR CONTINUANCE

MOTION FOR CONTINUANCE	ISEMINGER MARCI LYNNE	04/17/2012	04/17/2012	04/17/2012

Comments: OF TRIAL DATE, UNRESISTED

Documents: MOTION FOR CONTINUANCE

BRIEF	VOS JOEL DARREN	03/21/2012	03/21/2012	03/21/2012

Comments: PLAINTIFF'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR PARTIAL

SUMMARY JUDGMENT

Documents: BRIEF

OTHER AFFIDAVIT	ISEMINGER MARCI LYNNE	03/13/2012	03/14/2012	03/14/2012

Comments: IN SUPPORT OF DEFENDANT'S RESISTANCE

Documents: OTHER AFFIDAVIT

OTHER EVENT	ISEMINGER MARCI LYNNE	03/13/2012	03/14/2012	03/14/2012

Comments: STATEMENT OF DISPUTED FACTS AND MEMORANDUM OF LAW

Documents: OTHER EVENT

RESISTANCE	ISEMINGER MARCI LYNNE	03/13/2012	03/14/2012	03/14/2012

Comments: TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Documents: RESISTANCE

MOTION FOR SUMMARY JUDGMENT	VOS JOEL DARREN	02/24/2012	02/27/2012	02/27/2012

Comments: - PARTIAL

Documents: MOTION FOR SUMMARY JUDGMENT

ANSWER	VOS JOEL DARREN	02/22/2012	02/22/2012	02/22/2012

Comments: ANSWER TO COUNTERCLAIM

Documents: ANSWER

ANSWER	ISEMINGER MARCI LYNNE	02/01/2012	02/01/2012	02/01/2012

Comments: AMENDED ANSWER AND COUNTERCLAIM

Documents: ANSWER

OTHER ORDER	ANDREASEN STEVEN J	01/30/2012	01/31/2012	01/31/2012

Comments: GRANTING MOTION TO AMEND ANSWER

Documents: OTHER ORDER

MOTION	ISEMINGER MARCI LYNNE	01/26/2012	01/26/2012	01/26/2012

Comments: UNCONTESTED MOTION TO AMEND ANSWER TO ADD COUNTERCLAIM

Documents: MOTION ATTACHMENT

OTHER ORDER	ANDREASEN STEVEN J	01/24/2012	01/24/2012	01/24/2012

Comments: STIPULATED PROTECTIVE ORDER RE: CONFIDIDENTIAL INFORMATION

Documents: OTHER ORDER

STIPULATION FILING	ISEMINGER MARCI LYNNE	01/23/2012	01/23/2012	01/23/2012

Comments: STIPULATION FOR ENTRY OF PROTECTIVE ORDER

Documents: STIPULATION FILING

NOTICE		12/14/2011	12/14/2011	12/14/2011

Documents: NOTICE

CONVERSION ORDER	HOFFMEYER DUANE E	12/14/2011	12/14/2011	03/28/2012

Documents: CONVERSION ORDER

ORDER SETTING TRIAL	HOFFMEYER DUANE E	12/13/2011	12/14/2011	12/28/2012

Comments: NON-JURY TRIAL 04/25/12 @ 9:00 AM BY TRIAL SCHEDULING ORDER

Documents: ORDER SETTING TRIAL

ORDER SETTING TRIAL	HOFFMEYER DUANE E	10/12/2011	12/28/2012	12/28/2012

Comments: TRIAL 4/25/12 AT 9:00 AM

Documents: ORDER SETTING TRIAL

OTHER ORDER	HOFFMEYER DUANE E	10/12/2011	10/13/2011	12/28/2012

Comments: NOTIFICATION OF INDIVIDUAL ASSIGNMENT OF JUDGE

Documents: OTHER ORDER

COMPUTER GENERATED NOTICE		09/28/2011	09/28/2011	12/28/2012

Comments: NOTICE OF TRIAL SCHEDULING CONFERENCE

Documents: COMPUTER GENERATED NOTICE

ANSWER	ISEMINGER MARCI LYNNE	06/21/2011	06/22/2011	12/28/2012

Comments: OBO DEFTS GORDON PLAZA LLC AND THE FRED AND MARTHA FAMILY

TRUST DATED DECEMBER 31, 1987

Documents: ANSWER

RETURN OF ORIGINAL NOTICE		06/03/2011	06/03/2011	12/28/2012

Comments: 06/01/11 $35.00 CLERK'S NOTE: NO ORIGINAL NOTICE ATTACHED.

CLERK'S NOTE: SERVED ON JIM JOHNSON PERSONALLY

Documents: RETURN OF ORIGINAL NOTICE

RETURN OF ORIGINAL NOTICE		06/03/2011	06/03/2011	12/28/2012

Comments: 06/01/11 $35.00 CLERK'S NOTE: NO ORIGINAL NOTICE ATTACHED.

Documents: RETURN OF ORIGINAL NOTICE				
PETITION FILED	VOS JOEL DARREN	05/31/201 1	06/01/201 1	12/28/201 2
Documents: PETITION FILED				

CN=fnt,O=JUDICIAL

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Judgments/Liens
Title: SOUTHERN ENTERPRISES INC VS GORDON PLAZA LLC ET AL
Case: 03971 LACV144669 (WOODBURY)
Citation Number:

Judgment

Filed Date	Filed Time	Seq	Status	Status Date	Created	Updated
04/15/2015	05:51:00	1	NONE	04/16/2015	04/16/2015	04/16/2015

Judgment: COSTS

Satisfaction

Side	Name	Satisfaction Status	Status Date	Satisfaction	Sat. Date	Created	Updated
AGAINST	SOUTHERN ENTERPRISES INC,	NONE	04/16/2015	Unsatisfied	04/16/2015	04/16/2015	04/16/2015
FOR	GORDON PLAZA LLC,					04/16/2015	04/16/2015

Judgment

Filed Date	Filed Time	Seq	Status	Status Date	Created	Updated
04/15/2015	05:51:00	0	NONE	04/16/2015	04/16/2015	04/16/2015

Judgment: $200,682.02 WITH INTEREST AT 2.25% FROM 04/15/2015 AND COSTS

Satisfaction

Side	Name	Satisfaction Status	Status Date	Satisfaction	Sat. Date	Created	Updated
FOR	SOUTHERN ENTERPRISES INC,					04/16/2015	04/16/2015

AGAINST	GORDON PLAZA LLC,	NONE	04/16/2015	Unsatisfied	04/16/2015	04/16/2015	04/16/2015