

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

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|------------------------------|---|---------------------|
| CAREERS USA, INC.            | : | NOVEMBER TERM, 2001 |
|                              | : |                     |
| V.                           | : |                     |
|                              | : | NO. 0174            |
| KENNEDY BOULEVARD ASSOCIATES | : | (Commerce Program)  |

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OPINION

HERRON, J.

OCTOBER 30, 2002

Plaintiff, Careers USA, an employment agency, entered into a commercial lease with defendant, Kennedy Boulevard Associates, I.L.P. (hereinafter “Kennedy” or “defendant”) for use of a portion of the premises at 1819 John F. Kennedy Boulevard, Philadelphia, Pa. amounting to approximately 2,867 usable square feet of retail space. On November 6, 2001, plaintiff, Careers USA, filed a petition for preliminary injunction alleging that defendant failed to investigate and permanently repair water leaks and flooding emanating from a back wall in the premises as well as the common wall between the premises and another business. In addition, plaintiff, Careers USA, alleged that the defendant was also responsible for failing to correct a rodent infestation problem on the premises. Following several conferences and an agreed upon period of time whereby the parties monitored the complaints, and in consideration of a final hearing on June 27, 2002, oral argument and briefs, this Court finds that plaintiff has established a clear right to relief by presenting evidence that the utility of the premises has been substantially decreased as a result of the water intrusion and has suffered immediate and irreparable harm. This Court further finds that the evidence relating to rodent infestation is ambiguous at best and does not entitle the plaintiff to relief. As a result of these findings, the Court grants plaintiff, Careers USA, the relief requested, i.e., the right to escrow and apply all rent otherwise payable under the lease for application to remediation of the water intrusion problem if not permanently corrected within 120 days following issuance of this opinion and Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court adopts the findings of fact and conclusions of law set forth in plaintiff’s briefs and incorporates these as though set forth herein at length: Proposed findings of fact numbers 1

through 81, 91-92 and proposed conclusions of law numbers 1 through 8, 9 (except with respect to Article 9.C.G), 10 through 18; 20 through 35; 37 (except for the reference to rodent infestation); 38-39, 40 (except for references to rodent infestation); 41 through 43; and 46 through 48 (attached hereto and made a part hereof).

### DISCUSSION

In determining whether to grant a preliminary injunction, a Court may consider the averments of the pleadings and petition, affidavits of the parties or third parties, or any other proof. Pa. R. Civ. P. 1531. A preliminary injunction is “a most extraordinary form of relief which is to be granted only in the most compelling cases.” Goodies Olde Fashion Fudge Co. V. Kuroos, 408 Pa. Super. 495, 597 A.2d 141, 144 (1991). “The purpose of a preliminary injunction is to preserve the status quo as it exists or previously existed before the acts complained of, thereby preventing irreparable injury or gross injustice.” Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 602 A.2d 1277, 1286 (1992). A preliminary injunction should issue only where there is urgent necessity to avoid injury which cannot be compensated for by damages. Id.

The Court may grant the injunction only if the moving party has sufficiently established the following elements:

- (1) that relief is necessary to prevent immediate and irreparable harm that cannot be compensated by damages;
- (2) that greater injury will occur from refusing the injunction than by granting it;
- (3) that the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct;
- (4) that the wrong is actionable and an injunction is reasonably suited to abate that wrong; and
- (5) that the plaintiff’s right to relief is clear.

School District of Wilkinsburg v. Wilkinsburg Education Association, 542 Pa. 335, 338, 667 A.2d 5, 6 at n. 2 (1995); New Castle Orthopedic Associates v. Burns, 481 Pa. 460, 464, 392 A.2d 1383, 1385 (1978). These requisite elements “are cumulative, and if one element is lacking, relief may not be granted.” Norristown Mun. Waste Authority v. West Norriton Twp. Mun. Authority, 705 A.2d 509, 512 (Pa. Cmwlth. 1998).

Succinctly stated, Careers USA argues that Kennedy has breached the terms of the lease between the parties by failing to:

1. Provide to Careers USA 2,867 “usable square feet of retail space”;

2. Failing to use diligent efforts to locate and repair leaks within 210 days; and
3. Failing to insure that Careers USA's quiet enjoyment of the premises is not breached. See Lease at Article 1(a), 9B, 21 and 22.A.

While admitting that water leaks into the premises, Kennedy maintains that it has expended efforts, albeit unsuccessful, to remediate the water intrusion and, moreover, argues that there has been no decrease in the utility of the premises due to water leakage or, in the alternative, even if there has been a decrease in the utility of the premises that decrease has not been substantial enough to constitute a breach of the right to quiet enjoyment of the premises.

The record clearly establishes that the premises occupied by Careers USA has on repeated occasions suffered water intrusion and that any efforts to date expended to correct the problem have failed. At least to this extent, there is simply no factual controversy. The question is whether or not the amount and degree of water intrusion has substantially affected Careers USA's rights to quiet enjoyment of the space and, in this regard, this Court finds that the testimony clearly supports plaintiff's claims. Plaintiff's branch manager, Cynthia McPeak, testified that the operation of the business has been affected as a result of the water intrusion by necessitating the relocation of an employee as well as moving a filing cabinet from the area in question. In addition, whenever water intrusion occurs, it is necessary to address the damp carpet problem (i.e., seam separation, staining, discoloration and fraying) as well as tolerate the odor of mildew that inevitably results. Kennedy argues that the relocation of one employee did not result in a work stoppage but rather was a mere inconvenience in response to the water intrusion. Such an argument implicitly suggests that a tenant must endure repeated water intrusion and alter its use of the space. This fatuous argument ignores the practical reality that a tenant should not have to do so and accept rental space which is not entirely usable. The effects on Careers USA of the water intrusion have necessitated discouraging clients from visiting the premises because of its condition. There need not be, as Kennedy argues, evidence that there has been a decrease in Careers USA's ability to gain new clients or keep old clients due to the water leakage. The mere alteration of the fashion in which business is conducted on a regular and continuous basis constitutes a sufficient and significant disruption to plaintiff's quiet enjoyment of the premises and results in a breach of the lease by Kennedy which is ongoing today.

Kennedy unconvincingly argues that: "The water leakage at the rear of the premises has affected an area of the carpet which is approximately three to four feet wide and six to eight feet long. The water leakage on the Subway sandwich shop side of the premises extends approximately three to six feet along the carpet. Clearly, the affected portions of the carpet are a minimal amount of the entire leased premises. The majority of the leased premises is dry." (emphasis supplied) (Kennedy's brief at pages 3 and 4.) The argument that a tenant should accept space when a majority of it is dry shocks the conscience of this Court. Furthermore, this Court cannot agree with Kennedy's assertions that the continuous water intrusion to the premises of the above areas can be accepted as minimal, but on the contrary finds that it represents a significant portion of the premises resulting in repeated and continuous disruption to Careers

USA's use and enjoyment of the premises. The minimal square footage argument advanced by Kennedy is a shameful avoidance tactic to deflect attention from its contractual obligations to provide usable square footage to its commercial tenant.

Kennedy further seeks to excuse the water intrusion by pointing to its efforts to locate and repair the water leaks in the premises. Unfortunately, Kennedy's lip service efforts seem at best reactive rather than proactive and too little too late. Kennedy first offered as proof of remediation major renovations to the exterior of the premises in 1998, however, the evidence revealed that these had nothing to do with the water leakage issues and were simply part of a major rehabilitation of the building's facade. Only after the litigation was commenced by Careers USA did Kennedy retain the services of an engineer. This engineer, E. Fred Brecher, could not determine the source or cause of the water intrusion but rather engaged in unfounded speculation that the water intrusion occurred as a result of Careers USA employees leaving the rear exit door open while occupying the premises during periods of rain fall. All witnesses testified that this never occurred and there is not one single shred of testimony to support such rank speculation. The testimony of Kennedy's expert is simply not credible, whereas the testimony of Careers USA's expert, Randall Horne, P.E., was sound and convincing. This Court adopts Mr. Horne's expert opinion that the rear wall water intrusion was related to precipitation and that Kennedy's repairs were ineffective.

This Court declines to find that the evidence is sufficient to support Careers USA's assertion that Kennedy is responsible for the rodent infestation of the premises. There was uncontradicted evidence that Careers USA employees consumed food within the premises and, unlike the water intrusion problem, there was no expert testimony offered that Kennedy was at fault for the infestation problem or that its efforts to eliminate the problem were in violation of Article 9.C.G requiring "...reasonable efforts to keep the premises...pest and rodent free."

Accordingly, for all of the foregoing reasons, this Court grants Careers USA's petition for a preliminary injunction and enters a preliminary Order requiring that any further rents paid by plaintiff to defendant under the lease be placed into escrow. If the water intrusion problem is not permanently remediated within 120 days of the date of this Order, Careers shall thereafter be empowered to apply the past and future escrowed rents to investigate and permanently remedy the cause or causes of the water intrusion to its leased premises after which it shall resume making its rent payments directly to Kennedy.

BY THE COURT:

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JOHN W. HERRON, J.