

IN THE CIRCUIT COURT OF CLAY COUNTY, LIBERTY, MISSOURI

EASTBOURNE INVESTMENTS LTD., )

Plaintiff, )

) Case No. 08CY-CV03659

) Division 2

vs. )

CEC ENTERTAINMENT, INC. )

Defendant. )

**FILED**

TIME: MAY 31 2011

Clay County Circuit Court

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
AND JUDGMENT

NOW ON THIS 31<sup>st</sup> day of May, 2011, the Court takes up the above referenced matter. On May 12, 2011 the cause came on regularly for hearing. Plaintiff appeared by Counsel James Kessinger and Luke Demaree, and by corporate designee Lori Cogan. Defendant Chuck E. Cheese ("CEC") appeared by Counsel Miriam Bailey, and corporate representative Les Lehner. Evidence was heard, and the matter was taken under advisement. After considering the evidence presented, the pleadings, exhibits, and the testimony and credibility of the witnesses, and advising itself in the premises, the Court Finds and Concludes as Follows:

FINDINGS OF FACT

1. Between 1979 and 2005, Plaintiff and Defendant entered into a series of lease agreements concerning the commercial space located at 2726 N.E. Vivion Road, Kansas City, Missouri 64119 ("the Premises").

2. The lease agreements in effect prior to February 2005 were duly assigned to Plaintiff Eastbourne Investments, Ltd. ("Eastbourne") and Defendant CEC Entertainment, Inc. ("CEC") by their respective predecessors in interest.

3. On or about September 6, 1979, Plaintiff entered into a Lease Agreement ("the Lease"), identified as Exhibit 21, with Defendant concerning the Premises.

4. Thereafter, Plaintiff and Defendants entered into additional agreements extending or otherwise modifying the terms of the Lease, including a Letter Agreement dated February 4, 2005.

5. The February 4, 2005 Letter Agreement is identified as Exhibit 25 and contains the following provisions, in relevant part:

1. Primary Term: The Lease term shall be extended for an additional period of six (6) months months [sic], and shall continue on a month-to-month basis thereafter, such period commencing March 1, 2005 ("Extension Term"). Either Tenant or Landlord may terminate this Agreement any time after August 31, 2005 with thirty (30) days written notice to the other party.

2. Monthly Minimum Rent: Commencing on March 1, 2005, monthly minimum rent for the aforesaid Extension Term shall be Ten Thousand Two Hundred Eighty One and 25/100 (\$10,281.25) per month.

6. The parties dispute the legal effect of these two provisions.

7. From February 2005 to July 2005, CEC made monthly rental payments to Eastbourne, for March through August rent, in the amount of \$10,281.25.

8. On August 22, 2005, Eastbourne sent a letter to CEC, which is identified as Exhibit 2 and that stated, in relevant part:

Your lease extension agreement expires August 31, 2005. After that time period your lease shall continue on a month to month basis until either party gives a written notice (30 day minimum) to vacate.

Effective September 1, 2005, your base monthly rent will increase from \$10,281.25 to \$12,931.88 per month. Please adjust your payments accordingly.

9. The parties dispute the legal effect, if any, of the August 22, 2005 letter.

10. After Mr. Les Lehner, CEC's Director of Real Estate, received the August 22, 2005 letter, he called Eastbourne's then property manager, Sue Nolen, and expressed CEC's disagreement that Eastbourne could raise rent under the terms of the February 4, 2005 Letter Agreement.

11. At all relevant times thereafter, CEC disputed that it owed Eastbourne \$12,931.88 in rent per month.

12. At all relevant times, CEC remained in possession of the Premises and paid Eastbourne \$10,281.25 in rent per month.

13. Specifically, CEC sent to Eastbourne the following checks on the dates and in the amounts shown, which included the \$10,281.25 base rent per month:

- CEC Check No. 336187 – February 24, 2005 – \$13,623.96;
- CEC Check No. 342842 – March 24, 2005 – \$11,776.63;
- CEC Check No. 351262 – April 25, 2005 – \$11,776.63;
- CEC Check No. 358141 – May 23, 2005 – \$15,096.63;
- CEC Check No. 365852 – June 24, 2005 – \$13,436.63;
- CEC Check No. 372073 – July 25, 2005 – \$13,436.63;
- CEC Check No. 378734 – August 24, 2005 – \$13,436.63;
- CEC Check No. 386600 – September 26, 2005 – \$13,436.63;
- CEC Check No. 393416 – October 24, 2005 – \$13,436.63;
- CEC Check No. 402376 – November 28, 2005 – \$13,436.63;
- CEC Check No. 409142 – December 27, 2005 – \$13,436.63;
- CEC Check No. 415932 – January 23, 2006 – \$13,436.63;

- CEC Check No. 424833 – February 24, 2006 – \$13,436.63;
- CEC Check No. 431792 – March 24, 2006 – \$13,436.63;
- CEC Check No. 439654 – April 24, 2006 – \$13,436.63;
- CEC Check No. 447255 – May 24, 2006 – \$13,436.63;
- CEC Check No. 454907 – June 23, 2006 – \$13,436.63;
- CEC Check No. 462007 – July 25, 2006 – \$13,436.63;
- CEC Check No. 469907 – August 25, 2006 – \$13,436.63;
- CEC Check No. 477016 – September 25, 2006 – \$13,436.63;
- CEC Check No. 485691 – October 27, 2006 – \$13,436.63;
- CEC Check No. 493827 – November 29, 2006 – \$12,200.83;
- CEC Check No. 499054 – December 21, 2006 – \$12,543.13;
- CEC Check No. 508081 – January 26, 2007 – \$11,781.57;
- CEC Check No. 515643 – February 23, 2007 – \$12,162.35;
- CEC Check No. 523748 – March 27, 2007 – \$12,162.35;
- CEC Check No. 532063 – April 26, 2007 – \$12,162.35.

14. As evidenced by a stamp on the back of each check referenced in paragraph 13, above, each such check was deposited by Eastbourne's bank.

15. Each such check was also credited to CEC's tenant account by Eastbourne.

16. At all relevant times, CEC maintained that its monthly payments of \$10,281.25 completely fulfilled its base rent obligations under the February 4, 2005 Letter Agreement.

17. On October 5, 2005, Eastbourne sent CEC a letter, which is identified as Exhibit 3 and which stated, in relevant part:

Your account is past due. The over due [sic] amount is \$6,543.89.

Your rent increased on September 1, 2005 from \$10,281.25 to \$12,931.88 per month. You did not pay the increased amount for September and October.

18. On October 10, 2005, CEC's counsel sent Eastbourne a letter, which is identified as Exhibit 4 and which stated, in relevant part:

On February 4, 2005, Eastbourne Investments Ltd. ("Landlord") and CEC Entertainment, Inc. ("Tenant") entered into a letter agreement. Such agreement clearly sets forth the amount of monthly rental due during the extension term, which is \$10,281.25.

19. On October 23, 2005, Eastbourne's counsel sent CEC a letter, which is identified as Exhibit 5 and which stated, in relevant part:

As referenced in your correspondence, Eastbourne Investments Ltd. notified your company on August 22, 2005 that the monthly rental rates would increase effective September 1, 2005 to the sum of \$12,931.88 per month (a monthly increase of \$2,650.63).

Your responsive letter correctly recites that the "agreement clearly sets forth the amount of monthly rental due during the extension term." However, I am sure you know that the Term of the extension agreement ended on August 31, 2005. I have inferred from your response that you are arguing that Eastbourne can never increase the rental rate on CEC Entertainment. As you can read from the February 4, 2005 letter agreement enclosed with your response, the extended renewal period ended on August 31, 2005. During the term of the agreement, CEC Entertainment enjoyed the contractual benefit of a set rental rate. However, that contractual protection ended with the extension period. After August 31, 2005, CEC Entertainment possesses the above named premises on a month to month basis.

20. On November 16, 2006, CEC's counsel sent Eastbourne's counsel a letter, which is identified as Exhibit 6 and which stated, in relevant part:

Your insistence that the extension term ended on August 31, 2005 is incorrect. The letter agreement between the parties dated February 4, 2005 ("Letter Agreement") clearly states the following: "The Lease term shall be extended for an additional period of six (6) months, and shall continue on a month-to-month basis thereafter, such period commencing March 1, 2005 ("Extension Term"). Monthly minimum rent for the Extension Term is clearly set forth in the Letter Agreement in the second paragraph, as well.

CEC Entertainment, Inc. has fulfilled the terms and is in complete compliance with the Letter Agreement. If your client is interested in a longer extension than the current month-to-month, please contact Les Lehner at (972) 258-4240.

(emphasis in original).

21. On August 14, 2006, Eastbourne's counsel sent CEC a letter, which is identified as Exhibit 12 and which quoted the text of R.S. Mo. § 441.060 and further stated, in relevant part:

Just as our client had the authority to terminate your month-to-month tenancy with 30 days notice, our client also had the authority to increase your rent with 30 days written notice. Our client was simply giving your client notice that the month-to-month tenancy at the old rent would terminate in 30 days and a new month-to-month tenancy was offered to you at the increased rent. Your client's continued occupancy was an acceptance of our client's offer to rent on a month-to-month basis at the increased rent.

We concede that the rent increase did not take effect until October 2005 – not September 2005 as we alleged in our earlier correspondence. We did not give you 30 days notice before the September 2005 rent payment was due. The first rental payment due after the 30 days written notice was given was the October 2005 payment.

22. On May 1, 2007, Eastbourne's counsel sent CEC a letter, which is identified as Exhibit 15 and which demanded that CEC vacate the Premises:

23. On May 11, 2007, CEC's counsel sent Eastbourne's counsel a letter, which is identified as Exhibit 16 and which stated, in relevant part:

Tenant is in receipt of your letter dated May 1, 2007 regarding your notice to vacate the premises. Tenant will vacate the premises and return the keys to a representative of landlord by May 31, 2007.

Tenant maintains, as is has all along, that it has completely fulfilled all of its obligations under the lease. All amounts owed to landlord have been paid through May 31, 2007.

#### CONCLUSIONS OF LAW

1. "In interpreting leases, [the court's] primary concern is to give effect to the true intention of the parties by considering the language used in the lease. If the lease is

unambiguous, we may only consider the text of the lease agreement as evidence of the parties' intent." See *Washington Univ. v. Royal Crown Bottling Co. of St. Louis*, 801 S.W.2d 458, 464 (Mo. App. 1990).

2. The 1979 Lease, and each of the modifications, amendments, and extensions thereto, including the February 4, 2005 Letter Agreement, were negotiated in good faith and at arm's length between Plaintiff and Defendant.

3. The February 4, 2005 Letter Agreement is clear and unambiguous on its face concerning the length of the Extension Term and the amount of monthly minimum rent due for the duration of the Extension Term. Accordingly, the Letter Agreement's provisions must be given effect as written.

4. The "Extension Term" included not only an initial six-month period, but also a month-to-month period, as described in the Letter Agreement's paragraph 1. First, the location of the phrase "Extension Term," at the end of the single sentence that describes both the six-month and month-to-month clauses, indicates that the phrase "Extension Term" applies to the term described collectively by the two preceding clauses. Second, paragraph 1's second sentence explains that to terminate the Letter Agreement after the initial six-month period, the party desiring termination would have to give written notice; that is, the Letter Agreement's term did not automatically terminate at the end of the initial six-month period. Third, the "Extension Term" includes the month-to-month portion because the phrase "The Lease term," which is thereafter denominated the "Extension Term," is the subject of the verb phrase "shall be extended" as well as the verb phrase "shall continue," which apply to the six-month period and month-to-month period, respectively.

5. The "Monthly Minimum Rent," contractually set at \$10,281.25 for the whole of the Extension Term, expressly applied to CEC's tenancy at all relevant times after February 2005, unless Eastbourne at some point thereafter terminated the Lease but CEC remained in possession, or the parties agreed upon a different rental rate. The Court concludes that Eastbourne did not terminate the Lease until May 1, 2007, that CEC vacated within the appropriate time, and that the parties at no time after February 2005 agreed upon an increased rental rate.

6. Under the plain and unambiguous terms of the Letter Agreement, the Lease between the parties did not terminate automatically at the close of the Extension Term's initial six-month period.

7. Under the plain and unambiguous terms of the Letter Agreement, the Extension Term could be terminated by either Eastbourne or CEC "any time after August 31, 2005 with thirty (30) days written notice to the other party." Ex. 25.

8. The Letter Agreement's termination provision is in accord with Missouri law, which provides that a month-to-month tenancy "may be terminated by the person entitled to the possession by giving one month's notice, in writing, to the person in possession, requiring the person in possession to vacate the premises. R.S. Mo. § 441.060.

9. In a month-to-month tenancy, notice of termination "must be explicit and positive" and "must require a tenant to remove from the premises. It should not, therefore, in any case, give the tenant the mere option of leaving the premises, *or require him to enter into a new contract on certain conditions, or the like.*" *Flanagan v. Lazerine*, 157 S.W. 824, 825 (Mo. App. 1913) (emphasis added).



10. Eastbourne's letters to CEC dated August 22, 2005, October 5, 2005, October 23, 2005, and August 14, 2006 did not require CEC to remove from the premises, but only purported to require CEC to pay increased rent. Accordingly, those letters were ineffective to terminate CEC's tenancy under the Letter Agreement or Missouri law.

11. Further, Eastbourne's August 14, 2006 letter contains an admission that Eastbourne's August 22, 2005 letter to CEC was precisely the sort of alternative "notice" that the *Flanagan* court held was ineffective to either terminate a tenancy or increase rent. 157 S.W. at 825.

12. None of Eastbourne's communications to CEC during the relevant time period demanded or required that CEC remove from the Premises. Accordingly, those communications were ineffective to terminate CEC's tenancy under the Letter Agreement or Missouri law.

13. A tenant from month to month under a monthly rental, who receives 30 days' notice to quit or to continue in possession under an increased rental, and who on the 1st days after the expiration of the 30 days tenders the rental under the original tenancy, and dissents from the landlord's demand for additional rent, does not impliedly consent to a new lease at an increased rental. *See Flanagan*, 157 S.W. at 824.

14. In such circumstances, the tenancy continues on the same terms as it did before the landlord purported to raise rent. *See generally id.*

15. Because CEC dissented from Eastbourne's demands for additional rent at all relevant times, as evidenced by CEC's timely payment of rent at the Extension Term rate at all relevant times, and remained in possession at all relevant times, CEC did not impliedly consent to a new lease at the increased rate unilaterally declared by Eastbourne, and CEC's tenancy

continued on the same contractual terms as it had before Eastbourne attempted to raise the rental rate.

16. Because none of Eastbourne's communications prior to May 1, 2007 were effective to terminate the tenancy, and because the parties did not agree to a different rental rate, CEC's rental payment obligations were governed by the terms of the Letter Agreement and, by paying \$10,281.25 per month for rent from February 2005 to April 2007, CEC fulfilled its rental payment obligations under the Letter Agreement for the March 2005 to May 2007 lease term.

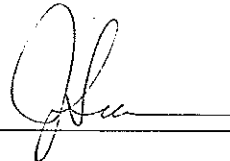
JUDGMENT

WHEREFORE, Judgment is entered in favor of Defendant. The costs of this action are assessed to Plaintiff.

IT IS SO ORDERED.

5/31/11  
\_\_\_\_\_

Date

  
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Judge Janet Sutton