**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI**
**AT KANSAS CITY**

| | | |
|---|---|---|
| **SURFACE COMPANIES, INC. d/b/a SURFACE REAL ESTATE HOLDINGS** | ) | |
| **Plaintiff,** | ) | **CaseNo.1816CV26361** |
| **v.** | ) | **Division 26** |
| **BAD AXE THROWING USA, INC.,** | ) | |
| **Defendants.** | ) | |

**JUDGMENT**

This case was called for trial on December 10, 2018. Plaintiff Surface Companies, Inc. d/b/a Surface Real Estate Holdings appeared through counsel and a corporate representative. Defendant Bad Axe Throwing USA, Inc. appeared through counsel and a corporate representative. Both parties requested findings of fact and conclusions of law and propounded proposed findings and conclusions prior to trial.

The trial and facts of this case were contested by the parties. As evidenced by the Court's findings of fact, the Court found some evidence credible and some evidence not credible.[1] Based upon the evidence and

[1] *E.g. White v. Dir. of Revenue,* 321 S.W.3d 298, 305 (Mo. banc 2010)("If the trier of fact does not believe the evidence of the party bearing the burden, it properly can find for the other party."). "[T]he trier of fact has the right to disbelieve evidence, even when it is not contradicted." *Id.* at 307.

issues raised at trial, applicable authorities, and arguments of counsel, this Court makes the following findings of fact and conclusions of law:

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiff Surface Companies, Inc., d/b/a Surface Real Estate Holdings Trust ("Surface") is a Trust and owner of the premises at issue in this lawsuit.

2. At trial, Michael Surface ("Mr. Surface") appeared as the corporate representative of Surface.

3. Plaintiff Surface owns commercial real estate located at 1727 and 1729 Oak Street, Kansas City, Jackson County, Missouri 64108 (hereinafter the "Premises").

4. Defendant Bad Axe Throwing USA, Inc. ("Bad Axe") is a Delaware corporation authorized to do business in the state of Missouri.

5. At trial, Mr. Mario Zelaya appeared as the corporate representative of Bad Axe.

6. This Court has jurisdiction over the parties and the subject matter of this action.

7. The parties stipulated that a judgment could be entered outside the thirty day requirement found in Section 517.111.2.

### THE LEASE AGREEMENT

8. The parties entered into a commercial lease agreement regarding the Premises on March 22, 2018.

9. The monthly rent due under the lease agreement was $7,184.50.

10. Thereafter, Bad Axe delivered a security deposit, which included the last month's rent, in the amount of $21,553.50.

11. At the time the parties entered into the lease, both parties recognized the building was not suitable for the tenant's use. In order to accommodate renovations by Surface, the lease contemplated terms that would permit completion of certain renovations before the Premises was "delivered" to Bad Axe.

12. The terms of the lease provided that rent was not due until "delivery" of the Premises.

13. Specifically, as set forth in Paragraph 3 of the lease, the term of the lease is for 37 months, set to begin based on a flexible "delivery" date:

> TERM. The term of this Lease (the "Term") is for 37 months, commencing on the 1 day of May 2018 and ending on 31st day of July, 2021. Lease payments begin June 1, 2018. It is agreed that the starting date may be moved due to Lessee confirming zoning compliance. This lease shall be executed allowing Lessee to confirm zoning compliance with Kansas City MO municipality. Once Zoning compliance is confirmed by Lessee (Estimate 4-6 weeks), Lessor shall start the work process allowing for its preparation time up to 30 days, and start up upon work to the premises, estimating 90 days for completion following confirmation of zoning compliance from Lessee. This flexible time frame is agreed and shall allow automatic modification in the final lease term beginning date and ending date. Paragraph 6 hereof shall be combined in this intent and shall be a part of the intent. Should zoning not be confirmed, this lease may be terminated or modified by written agreement by Lessor and Lessee. Lessee may begin its business specific improvements alongside Lessor in its improvements and is subject to agreed coordination.

14. Paragraph 6, dealing with "delivery" of the Premises at the beginning of the term, provided the premises ***shall*** be delivered in "White Box condition and warranted as A3 occupancy:"

> POSSESSION AT BEGINNING OF TERM. Lessor shall use due diligence to give possession as nearly as possible at the beginning of the Term. Rent shall abate pro rata for the period of any delay in giving Lessee possession. Lessee shall make no other claim against Lessor for delay in obtaining possession. Lessee shall be responsible for any occupancy, code or use license required by any government authority after possession is given by the Landlord. In the event that Lessee causes any such non-compliances after possession is given by Landlord, during the course of the term will hold Lessor harmless and shall remediate any such instance. It is further agreed, that any and all municipal, governmental, compliances be the responsibility of Lessor at the commencement of this lease/occupancy and any cost of such be made part of the gross rental as described in Paragraph 4 herein. **The premises shall be *delivered* by Lessor in White Box condition and *warranted* as A3 occupancy** with an occupant load of at least 125 people. **In the event the Lessee decides to alter the unit *after its initial delivery by Landlord as an A-3 occupancy*, Lessee shall be responsible for any occupancy, code or use license required by any government authority.** All other provisions of this covenant shall be in full force and effect. Lessee shall be responsible for any business licensing that is required in operating a business according to any governmental authority.

Emphasis added.

15. After execution of the lease, Bad Axe confirmed zoning as required by Paragraph 3 and Surface began performing substantial renovations to the Premises as contemplated by Paragraph 3, including demolition work, restoration of the concrete floor, installing new bathrooms, installing new HVAC, and other work.

## CONTINUED DISCUSSIONS OF THE PARTIES

16. The parties initially targeted July 1, 2018 for "delivery" of the Premises.

17. When the Premises were not delivered on July 1, 2018, Mr. Surface explained he was waiting to speak to an architect and that he anticipated the City of Kansas City would inspect the premises by the second week of July and at that the city would issue a certificate of occupancy at that point.

18. Throughout all relevant times, Surface never formally retained the professional services of an architect. Surface did consult with an architect on an informal ad hoc basis. Furthermore, no permits were obtained for any renovations of the Premises.

19. On July 11, 2018, Mr. Surface emailed Mr. Zelaya, telling Mr. Zelaya that he had spoken to his architect, and that the architect suggested that Surface should have the City of Kansas City inspect the property before Bad Axe took possession, in order to "keep it simple."

20. In that same email, Mr. Surface represented that he would handle the application for the certificate of occupancy:

> This means I will go to the City and request an application for a [certificate of occupancy]. City will give us an appointment. I requested the architect come in to look around just to make[] certain all is in good order from his perspective.

21. On July 17, 2018, Mr. Surface emailed Mr. Zelaya, telling him he would apply for the certificate of occupancy on July 19, noting that the building already possessed an A-3 status:

> . . . the [certificate of occupancy] will be applied for Thursday [July 19]. Then the city come [sic] out to do a final inspection. That is their schedule. I won't know it until Thursday. If we are not sited [sic] for anything then the [certificate of occupancy] will be issued. When I say sited [sic] they are generally small items that need modification or fixing. **The building is still an A3.**

Emphasis added.

22. On July 19, 2018, Mr. Surface emailed Mr. Zelaya and stated that he and the architect had gone to the City to request an inspection, but that no receipt [for the request] had been given. He went on to say that "we are on their inspection schedule and will get documentation at inspection." Regarding scheduling of the inspection, Mr. Surface said "They will call us in advance of the inspection. That [sic] most likely next week."

23. On July 30, 2018, Mr. Surface emailed Mr. Zelaya, telling him that he had delayed the inspection because he had to hire a new electrician.

24. On August 6, 2018, Mr. Surface emailed a Bad Axe employee regarding the progress of the electrical work and confirmed once again he intended to obtain the certificate of occupancy:

> . . . Electrical work ...Please ask Jesse for detail: to be done this week. Once Electrical for sign and Jesse, [certificate of occupancy] is the final inspection. That should go fast. I understand your build out to start on August 14. Please keep me informed. I want to get the [certificate of occupancy] inspection done before that you start.

25. On August 21, 2018, Mr. Surface informed Mr. Zelaya of Surface's intent to deliver the space once the front window was installed. Mr. Surface also stated that a certificate of occupancy was not required to perfect "delivery:"

> . . . once the glass is installed deliver the space to Bad Axe with the warrant per the lease that it is A3 occupancy. There is no other contingency to delivering the space. The electrical is not yet finished as we need the masonry people to come a core a how [sic] into the exterior to connect the sign. Once done we will have a final inspection and receive a CO. However, I repeat, our obligation is to warrant an A3 occupancy. A CO is not a contingency to deliver the space. Somehow that of recent time became an issue. We responded that is [sic] should not have been and to start you build out.

26. An employee of Bad Axe responded that a certificate of occupancy would provide a sufficient warrant of A-3 status:

> Your commitment is to warrant as A-3 and delivery in white box condition. You're not finished your improvements so it doesn't make sense for me to be there working yet. It takes 2 weeks for me to land, build, hire, train, and open. If electrical isn't finished then I have no business there yet, as it's not yet in white box condition. We thought the delivery of the CO would make this cleaner as it's the only for sure way to warrant that the premises are to code. If you could please revisit a timeline for delivery that'd be really helpful for us!

27. Mr. Surface responded and stated that "warrant" did not mean delivered as A-3, but instead that Surface had an obligation to fix any problems that precluded obtaining A-3 status after "delivery:"

> When the glass is installed the space will be delivered. The lease calls for a prorated rent due to any continuing circumstance we cause. That we will do.... The electrical for the building has always been operating. It is JUST the sign that was requested by Mario and you recently. But does not in any way affect the white box condition or A3 designation and warranting of a CO. However, that is the specific reason we held

up on final inspection for a CO. Further, the lease calls for us to warrant only that it is A3. That means that if anything is not to A3 standard that is our responsibility to make it that way. That does not mean that a CO issuance is the trigger for delivering the space. You should hold up on nothing on our account. Make you plan as you see fit. I think you are not taking advantage of time but that is not my decision. However, assertions have been made as though we are holding something up. That is not accurate. Once the glass is installed it will be delivered according to the lease.

28. The parties' email argument continued into the following day.

Mr. Zelaya wrote to Mr. Surface:

> You are to deliver the space as an A3 use. No questions there. If it's not to our use and there are shortfalls, we're not moving in. No questions asked there. I'm becoming increasingly p_____d off with the delays and now the change of direction when this is exactly what we discussed and agreed to. Sounds like you are not wanting to honour that. I will not stand for any more b_____t. If it's not to code for an A3 use, we will happily take our deposit back or go through legal means to do it. It's in the lease that the C of O is to be delivered for an A3 use. Let us know if you want us in there or if we should have our lawyers chat. In sick of waiting."

29. In response, Mr. Surface asserted, among other things that:

> Once the glass is in, it is delivered. A3 is warranted.... No you are not correct. Please see paragraph 3. It, and I summarize states that the use will be warranted to A3 and in white box condition. There is no delivery of a CO. We rescind our assistance in applying for a CO for you. We don't want to take any further risk that being helpful to you can result in. You may apply for you own. **Should the city find issues that prevent a CO as A3 we are obligated per the lease to make those correction.** That is the extent of your part in this.

Emphasis added.

**DISCOVERY THE PREMISES WERE NOT A-3 CONDITION**

30. On September 5, 2018, an employee of Bad Axe reached out to the City directly, contacting the Code Questions email address:

Hello Code Questions!

I have a code question. Well, more like a predicament...

My landlord has warranted his building (1729 Oak Street) as fit for an A-3 occupancy type. However, he has pulled no permits in the last few years nor does he have any CofO to present me with that suggests the building is, in fact, to code for A-3. The day I take possession of the unit the Landlord no longer has to warrant the building as A-3 compliant. It was a shady move on his part but I must move forward with possession soon because it's costing our company a lot to not be in there currently.

What sort of permitting or inspections must I schedule just to determine if the premises are A-3 compliant? The Landlord has no plans or anything to submit and I fear that drafting architectural plans will cost us a lot and delay our occupancy even further.

Can you please advise?

Thanks so much!

31. That email went to Mr. Carl Spahn, the Inspections Supervisor for the City of Kansas City, Missouri.

32. Mr. Spahn replied stating there were no bases for Surface to represent the Premises as A-3:

> . . . there are no recent permits of any kind for this address. How the landlord is telling you that the bldg. is a A-3 with an occupant load of 250, I have no idea. We have nothing on record showing this bldg. is a A-3 occupancy. What limited records we have show this bldg. as just an office/retail bldg, the old B-2 use group. This would not allow for your intended use, as cool as it sounds, unless you keep the occupant load to under 50 people. Under the old B-2 use group, assemblies were allowed up to 49 people.

33. Bad Axe then emailed Mr. Surface with this information, indicating that it knew the building was not A-3 compliant, despite Mr. Surface's previous representations.

34. Mr. Surface responded:

> The building delivery according to our agreement is based upon white box. As per the agreement we warrant the space to be A3. Bad Axe was to apply for a certificate of Occupancy. If found cleared for the new classification as it is then the new use group would be issued. **If work needs to be done to comply with A3, then we do that.**

Emphasis added.

35. Later that day, Mr Surface followed up to add, in part, that:

> **Also, I would like to emphasize at no time did I ever represent to you or Mario that the building is currently a A3 nor did we hint that it is currently A3.** That was left up to an application for a certificate of occupancy. Every bit of our conversations and written [c]ommunications will support that fact.

Emphasis added.

**PURPORTED DELIVERY OF THE PREMISES**

36. On September 10, 2018, Surface purported to "deliver" possession of the premises to Bad Axe and began charging Bad Axe for monthly rent.

37. Bad Axe sent a pro-rated check for September 2018.

38. On September 10, 2018, Bad Axe scheduled a general inspection of the Premises with the City of Kansas City, Missouri.

39. The Premises failed the general inspection.

40. On September 18, 2018, a city inspector identified the following deficiencies fatal to Bad Axe's application for A-3 occupancy status:

a. unpermitted work at the entrance;

b. unpermitted plumbing work/additions;

c. unpermitted electrical work; and

d. unpermitted mechanical/HVAC work.

41. On September 18, 2018, Surface pledged that it would remedy the deficiencies but nevertheless demanded Bad Axe continue to pay rent while the deficiencies were corrected.

42. In order to remedy the deficiencies, significant time and expense would be incurred: an architect would be required to submit plans consistent with the renovations and application fees would increase due to the previous unpermitted work; after that, the application process would take a minimum of two months to complete.

43. If the Premises had been "delivered" in A-3 condition, Bad Axe could have completed its own construction and opened for business in a little over two weeks.

44. On September 25, 2018, Bad Axe demanded the return of the deposit and informed Surface that it "will not be moving into the unit nor paying any sort of rent going forward."

45. Bad Axe also cancelled/stopped payment on its check for September rent.

46. Surface refused to return Bad Axe's deposit and continues to demand rent from Bad Axe. Likewise, Bad Axe continues to refuse to pay rent.

**LITIGATION**

47. Surface filed a petition for rent and possession in October 2018. Surface's petition demanded past rent due, interest on that rent, restitution of the premises, costs, and attorneys' fees as provided by the lease.

48. Bad Axe filed an answer and counterclaims alleging breach of contract and fraudulent misrepresentation in November 2019. More specifically, Bad Axe alleged breach of contract in that Surface purportedly breached the contract in failing to use due diligence to "deliver" the Premises and fraudulent misrepresentation[2] in that it relied on statements made by Surface in purchasing a custom sign. Bad Axe prayed for the return of its deposit and damages related to the acquisition, installation, and removal of a sign.

**CONCLUSIONS**

49. Surface's claim for breach of contract fails because the Premises were not in A-3 compliant condition when it attempted "delivery." No "delivery" occurred.

50. "The cardinal rule in the interpretation of a contract is to ascertain the intention of the parties and to give effect to that intention." *J.E.*

[2] Bad Axe abandoned its fraudulent misrepresentation claim at trial.

*Hathman, Inc. v. Sigma Alpha Epsilon Club*, 491 S.W.2d 261, 264 (Mo. banc 1973). "We use the plain, ordinary and usual meaning of the contract's words and consider the document as a whole." *State ex rel. Missouri Highway & Transp. Comm'n v. Maryville Land Partnership*, 62 S.W.3d 485, 491 (Mo. App. 2001). "Each term and clause is construed to avoid an effect that renders other terms and provisions meaningless." *Id.* at 492. "A construction attributing a reasonable meaning to each phrase and clause, and harmonizing all provisions of the agreement is preferred to one that leaves some of the provisions without function or sense." *Id.*

51. In a vacuum, the sentence "[t]he premises shall be delivered by Lessor in White Box condition and warranted as A3 occupancy with an occupant load of at least 125 people" could arguably support either Surface's or Bad Axe's interpretation. However, the following sentence "In the event the Lessee decides to alter the unit after its initial delivery by Landlord ***as an A-3 occupancy***, Lessee shall be responsible for any occupancy, code or use license required by any government authority" clearly presupposes that A-3 compliance is a condition that relates to the initial delivery of the premises, and not an ongoing obligation to fix problems after delivery. In fact, this second sentence provides that Surface has no obligation to remedy any "occupancy, code, or use license" issues after initial "delivery."

52. Paragraph 6 requires Surface to "deliver" the Premises in A-3 compliant condition in order to effectively "deliver" possession of the Premises to Bad Axe.

53. Surface breached the Lease by its failure to "deliver" the premises in A-3 compliant condition. Again, no such "delivery" occurred.

54. Bad Axe did not breach the Lease by nonpayment of rent because it had no duty to pay rent in that Surface failed to "deliver" possession of the Premises.

55. At trial, Surface suggested that even if Paragraph 6 required "delivery" in A-3 condition, Bad Axe waived its objection to delivery by sending September 2018 rent. The Court rejects this argument.

56. "To rise to the level of waiver, the conduct must be so manifestly consistent with and indicative of an intention to renounce a particular right or benefit that no other reasonable explanation of the conduct is possible." *Austin v. Pickett*, 87 S.W.3d 343, 348 (Mo. App. 2002). Bad Axe's conduct evidences an intent to continue to challenge "delivery," regardless of the payment of rent; there was no evidence to support any conclusion that Bad Axe waived its right to receive the Premises in A-3 condition.

57. Therefore, Surface materially breached its Lease obligations to Bad Axe. The Lease is terminated and Surface must return its deposit of $21,553.50.[3]

---

[3] Secondarily, the Court notes that even if Plaintiff's interpretation of the contract were correct, Plaintiff would have breached its duty of good faith and fair dealing in purporting to "deliver" the Premises in the conditions described by this Judgment.

"Missouri law implies a covenant of good faith and fair dealing in every contract." *Rock Port Mkt., Inc. v. Affiliated Foods Midwest Coop., Inc.*, 532 S.W.3d 180, 188 (Mo. App. 2017) (citing *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 412 (Mo. App. 2000)). "The implied duty of one party to cooperate with the other party to a contract ***to enable performance and achievement of the expected benefits is an enforceable contract right.***" *Id.* (emphasis added).

"A party breaches the covenant of good faith and fair dealing if it exercises a judgment conferred by the express terms of the agreement in a manner that evades the spirit of the agreement and denies the other party the expected benefit of the agreement." *Glenn v. HealthLink HMO, Inc.*, 360 S.W.3d 866, 877 (Mo. App. 2012); *see also Mo. Consol. Health Care Plan v. Cmty. Health Plan*, 81 S.W.3d 34, 46 (Mo. App. 2002).

Surface's conduct evaded the spirit of the agreement and denied Bad Axe the expected benefits of the agreement in that it demanded the payment of rent despite its full knowledge that its failure to obtain the proper permits created significant delay and additional costs to the severe detriment of Bad Axe. Surface also made numerous misrepresentations as to the underlying causes of the construction and permitting delays, all of which contributed to the issues which caused the failed inspection, delays, and costs to the severe detriment of Bad Axe.

Further, Surface's acts as described herein would constitute a material breach precluding its attempt to enforce the lease. *McKnight v. Midwest Eye Inst. of Kansas City, Inc.*, 799 S.W.2d 909, 915 (Mo. App. 1990) (citing RESTATEMENT (SECOND) OF CONTRACTS, § 241 (1981), the Court finds this breach as described in this Judgment is material and would extinguish Surface's claim for breach of contract. *See KC Excavating and Grading, Inc. v. Crane Const. Co.*, 141 S.W.3d 401, 405 (Mo. App. 2004)("A party cannot claim the benefit of a contract that it was the first to breach, but this rule applies only when the breach is material."), and *Classic Kitchens & Interiors v. Johnson*, 110 S.W.3d 412, 417 (Mo. App. 2003) ("Whether a breach is material or immaterial is a question of fact.").

## JUDGMENT

IT IS THEREFORE ORDERED that on Plaintiff Surface's claims against Defendant Bad Axe, judgment is entered in favor of the Defendant Bad Axe.

IT IS FURTHER ORDERED that on Defendant Bad Axe's claim against Plaintiff Surface, judgment is entered in favor of Defendant and damages in the amount of the deposit and rents paid are awarded in the amount of $21,553.50.

IT IS FURTHER ORDERED that all costs are assessed against Plaintiff Surface.

## APPEAL BOND

IT IS FURTHER ORDERED that should the Plaintiff appeal this judgment to the Missouri Court Of Appeals, the appeal bond is set in the amount of the court costs. The appeal bond authorized by this judgment is conditioned upon Plaintiff performing the following:

1. Plaintiff paying into Court the amount of the court costs incurred by Defendant(s); and
2. Execution of the required supersedeas bond documents.

Dated: March 4, 2019

Hon. Cory L. Atkins, Division 26

## CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was delivered to the parties via the eFiling system on March 4, 2019.

_____

Judicial Administrative Assistant/ Law Clerk