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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

401 FOOD, LLC,	)	
	)	
Plaintiff/Counter-Defendant,	)	
	)	
v.	)	**Case No. 24-0642-BC**
	)	
W 401 BROADWAY LLC,	)	
	)	
Defendant/Counter-Plaintiff.	)	

MEMORANDUM AND ORDER

Pursuant to this Court's February 12 and March 26, 2025 Orders, the trial in this matter on Phase 1 issues, those being questions of rightful possession and rights under the parties' lease, was held on September 8-11, 2025. All other matters are reserved, the case management of which are addressed below at the end of this Memorandum and Order.

The parties' relationship is one of landlord/tenant pursuant to a January 1, 2009 lease for a building with 17,713 rentable square feet at W 401 Broadway in Nashville, Tennessee. A January 2023 fire at the subject property triggered certain rights and obligations of the parties under their lease. Additionally, the tenant ownership was sold in April 2024 to a new principal who was interested in pursuing a new concept for the space. That new tenant owner had a past relationship with the landlord over which landlord sued to prevent the sale and transfer of ownership. That litigation, though still pending, did not stop the sale and the new tenant ownership took over the lease tenant rights. The landlord declared default within days, and then terminated the lease. The series of actions by the parties from the January 2023 fire through the June 2024 termination of the lease is the issue for the Court's resolution from this proceeding.

An additional party to this proceeding is the landlord's lender, which intervened in this case after insurance proceeds and their relationship to the mortgage became an issue. The

landlord's relationship with its lender is relevant to this proceeding, but the lender's rights were not at issue and the lender only limitedly participated by providing witnesses via deposition and a brief closing statement.

The trial, which lasted four and a half days, included nine live witnesses and deposition testimony from two of them, as well as two others through deposition testimony. There were 129 exhibits. The parties agreed that the following subjects would be tried during Phase 1:

Tenant's First Amended Complaint

Count 1: Declaratory Judgment – Operative Lease

- That Tenant has not breached the lease (¶ 78)
- That as a factual matter Tenant has not breached the Lease even as construed and interpreted by Landlord (¶ 80)
- That, pursuant to Tenn. Code Ann. ¶ 29-14-101 and Tenn. R. Civ. P. 57, Tenant is entitled to rent abatement until the remediation and repairs are complete (¶ 83)
- Construction of §§ 8 and 12 of the Lease Agreement and the obligations of the Parties to each other under these provisions (¶ 86(a))
- Whether, after determining the construction of the Lease Agreement, 401 Food is in default under the facts or is not in default (¶ 86(b))
- Whether Landlord has a right to evict 401 Food, despite all rent payments having been paid and accepted, based on construction of the Lease Agreement and the facts (¶ 86(e))

Count 2: Breach of Contract – Lease Agreement

- All allegations except ¶¶ 100-103 (damages)

Landlord's Second Amended Counterclaim

Count 1: Breach and/or Anticipatory Breach of Lease

- All allegations except ¶¶ 44 and 46 (damages)

Count 2: Unlawful Detainer

Count 3: Ejectment

Count 4: Declaratory Judgment

Count 5: Trespass

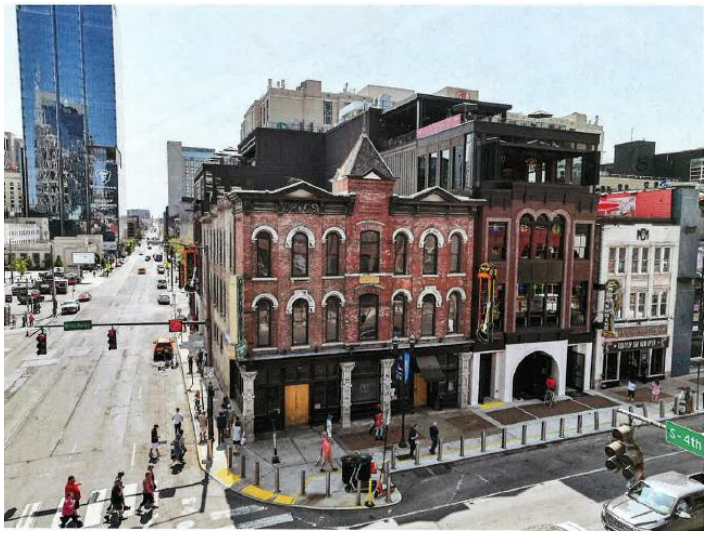
• All allegations except ¶ 63 (damages)

Having reviewed the pleadings, the evidence, the applicable law and the arguments and submissions of counsel, the Court finds as follows.

Findings of Fact

The Property, the Landlord and the Prior Tenant Operator

The property at issue is a three-story building, also with a basement, that has 17,713 rentable square feet, at W 401 Broadway in Nashville, Tennessee (the "Premises"). The Premises is a historic building that was built in the late 1800s. It is located on the corner of Fourth Avenue and Broadway with the front door facing Broadway, and a parking lot on the left that is the subject of an easement with the neighboring building that currently houses Jon Bon Jovi's Nashville, U.S.A. bar and music venue.



(Exh. 41).

Until a fire in January 2023, the Premises had operated as Merchants Restaurant for many years that pre-date the ownership of the landlord and the tenancy of the current tenant. Prior to that fire, Merchants included three floors of operations – an American Bistro on the first floor, a white tablecloth upscale steakhouse on the second floor, and an event space on the third floor. There is also a basement that was not a public space.

The lease at issue was entered by prior owners and a prior tenant owner effective January 1, 2009, and has been amended five times, the last amendment being executed on December 18, 2018 (the "Lease"). (Exh. 1). The term of the Lease was originally for ten (10) years with options to extend through the amendments. In the last extension, the tenant exercised the right to remain until December 31, 2028, but has the option to remain another twenty-five (25) years beyond that date. (*Id.*). The Lease is a "triple-net lease" which, in the real estate industry means the landlord is more of a passive than active investor as the responsibility for the leased property – including insurance, taxes and maintenance – is vested in the tenant. The benefit for the tenant is control, but with that control comes responsibility for essentially everything in the building. The benefit for the landlord is a lack of responsibility, but with that comes a lack of control.

The current owner of the Premises is Defendant, W 401 Broadway, LLC, the principals of which are three siblings in the Weintraub family, with primary operations handled by brothers Craig and Randy (referenced individually or collectively as the "Weintraubs" or "Landlord"). The Premises is the Weintraubs' first investment in Nashville real estate, which they bought in 2019[1] after deciding to shift their multi-generational real estate portfolio from New York multi-family residential properties to commercial properties in other parts of the United States with more stable

[1] Randy Weintraub believed the sale date to be in 2018, and Craig Weintraub testified 2017 or 2018. Neither was definitive. The relevant financing documents are dated May 13, 2019, thus the Court finds that must have been the date they purchased the Premises. (Exh. 53, 122).

triple-net leases and none of the headaches associated with rent-control laws and residential landlord/tenant issues.

Prior to buying the Premises, the Weintraubs visited Nashville and toured the site, which they immediately recognized as historic and beautiful. They also met with then-owner of the tenant Ben Goldberg, President of 401 Food, LLC (the "Tenant" and "B. Goldberg"). B. Goldberg and his brother Max are native Nashvillians who have been in the restaurant business for over twenty years (the "Goldbergs"). They operated Merchants under two different landlords, including the Weintraubs, beginning in February of 2010. The Weintraubs liked B. Goldberg and were immediately impressed with the Goldbergs as a secure, high credit tenant. They were interested in a long-term tenant and the security that offered because the Lease had a long term for extensions and the rent was below market for what other properties downtown were garnering. They believed the Goldbergs were such a tenant.

The Weintraubs also recognized that the Premises was a historic building with old building problems that would require constant upkeep. They walked the building, including the rooftop, to determine the property condition. They researched the zoning, survey and environmental study information, as well as the Nashville market. Based upon all they learned, they felt that the Premises would be a good investment and they purchased it. Part of the purchase was financed with a mortgage through their long-time bank, Wells Fargo Bank (the "Bank"). They executed a deed of trust and assignment of rents and leases on May 13, 2019, securing an obligation of $6,000,000, of record with the Davidson County Register of Deeds as document number 20190516-0046391 (the "Deed of Trust"). (Exh. 122). In the Deed of Trust, the Landlord obligates itself to carry insurance on the Property naming the Bank as the loss payee and is obligated to pay and assign insurance proceeds for losses to the Premises to the Bank. (*Id.* at ¶¶ 4.5, 4.7).

At or about closing, on May 13, 2019, Landlord and Bank also executed, along with Tenant, a three-party agreement titled Subordination, Non-Disturbance, Attornment and Estoppel Agreement (Deed of Trust) (the "SNDA"). (Exh. 53). The SNDA acknowledges the relationship between Tenant and Landlord, as well as the Lease and the Deed of Trust, in its Recitals. The first numbered paragraph states that the Deed of Trust is superior to the Lease and "Tenant acknowledges that Bank, in extending credit or continuing to extend credit to Landlord secured by the Property is doing so in material reliance on this Agreement." (*Id.* at ¶¶ 1(a) and (b)). Tenant acknowledges the Bank's right to an assignment of rents, although any paragraph regarding Bank's right to insurance proceeds or condemnation proceeds is intentionally omitted. (*Id.* at ¶2(d)). Tenant is required to recognize the Bank as standing in the shoes of the Landlord in the case of certain events, including an obligation to pay directly to the Bank rent and other performance items under the Lease. (*Id.* at ¶3). The SNDA protects Tenant's rights in the Property under the Lease in the event of a foreclosure under the Deed of Trust. (*Id.* at ¶4). Further, that "[a]t the request of any party hereto, each other party shall execute, acknowledge and deliver such other documents and/or instruments as may be reasonably required by the requesting party in order to carry out the purpose of this Agreement, provided that no such document or instrument shall modify the rights and obligations of the parties set forth herein." (*Id.* at ¶ 6(d)). Finally, the SNDA contains a merger clause and states that it is the "only agreement between the parties hereto with regard to the subordination of the Lease." Further, that it "shall supersede and cancel, but only insofar as would affect the priority between the Deed of Trust and the Lease, any prior agreements as to such subordination, including without limitation those provisions, if any, contained in the Lease that provide for the subordination thereof to the lien of a deed of trust or mortgage affecting all or any portion of the Property." (*Id.* at ¶ 1(d)).

The Lease

The terms of the Lease relevant to this proceeding are:

7. USE OF PREMISES.

7.1 (a) Use Allowed. The Premises shall be occupied and used by Lessee for the construction and operation of a restaurant or for such other business which, in Lessee's sole judgment, are compatible therewith, or for any other lawful purpose or purposes.

7.2 Other Use Restrictions.

(a) Nuisances. No use shall be made or permitted of the Premises or any part thereof, nor any acts done which shall constitute a nuisance.

(b) Compliance With Laws. Lessee shall use its best efforts to comply with all governmental rules, regulations, ordinances, statutes and laws now in force or which may hereafter be in force pertaining to the Premises and to Lessee's use thereof. Should Lessee inadvertently violate any of the same, Lessee shall, as soon as reasonably possible after discovery of any such violation, take all measurers reasonably necessary to comply with the law.

8. ALTERATIONS.

During the term hereof, Lessee shall have the right to make, at its sole cost and expense, such interior and nonstructural [sic] charges, alterations, improvements and additions to the Improvements and the Premises or any portion thereof as Lessee may desire (provided that exterior or structural alterations shall require Lessor's prior written consent, not to be unreasonably withheld), and shall also have the right to install therein and replace such trade fixtures and equipment as it may deem advisable for the conduct of its business, subject to the approval of all applicable governmental authorities, which approvals shall be obtained by Lessee at its sole cost and expense.

…

11. INSURANCE.

…

11.2 Fire Insurance on Improvements. During the period of any construction or renovation of the Improvements, Lessee shall maintain standard form builder's risk insurance with regard to the Improvements, and at all times therefore during the term hereof, Lessee shall maintain fire and extended coverage insurance covering the Improvements in an amount equal to not less than one

hundred percent (100%) of the replacement value of the improvements insured, with loss payable thereunder to Lessor and Lessee and to any authorized encumbrance of Lessor in accordance with their respective interests therein as provided in this Lease.

…

12. DESTRUCTION.

12.1 Partial (More than 50%) or Total Destruction Covered by Insurance. Except as otherwise provided in Section 12.2 below, in the event the Improvements are at least fifty (50%) percent damaged or destroyed by fire or other perils covered by the aforementioned fire and extended coverage insurance, Lessee at its option may promptly and diligently, to the extent of the insurance proceeds, restore the leased premises to the condition existing prior to the occurrence of the fire or other peril, or may release and turn over to Lessor insurance proceeds as a result thereof, if any, and Lessor shall promptly and diligently restore the leased premises to the condition existing prior to the occurrence of the fire or other peril (to the extent of insurance proceeds actually received by Lessor, and subject to the rights of Lessor's lender); provided, however, that if Lessor does not begin construction within thirty (30) days of receipt of such proceeds, or does not complete construction within one hundred twenty (120) days of receipt of the proceeds, Lessee may, at its option, and with no liability therefore, cancel and terminate this Lease.

12.2 Partial or Total Destruction From Any Cause Within the Last Five Years of the Term. In the event the Improvements are damaged or destroyed by any cause whatsoever during the last five (5) years of any extension of the primary term, and, if the time it would take to repair the Improvements and reopen the business conducted from the Premises would exceed six (6) months, as reasonably determined by Lessee, then Lessee, at its option, may promptly and diligently restore the leased premises to the condition existing prior to the occurrence of the fire or other casualty, or may release and tum over to Lessor insurance proceeds as a result thereof, if any, and cancel and terminate this Lease.[2]

12.3 Partial Destruction (Less than 50%). Except as otherwise provided in Section 12.2 above, in the event the Improvements are less than fifty (50%) damaged or partially destroyed by fire or other perils covered by the aforementioned fire and extended coverage insurance, Lessee shall, to the extent of the insurance proceeds, restore the leased premises to the condition existing prior to the occurrence of the fire or other peril.

12.4 Standard of Reconstruction. Any obligation of Lessor or Lessee to repair and/or restore the Improvements on the Premises pursuant to this Article shall be to repair or restore the same according to the plans and specifications

[2] This language was amended from the Original Lease and is in the Fifth Amendment to Lease.

therefor mutually approved by both parties or pursuant to revised plans reflecting Lessee's then current building specifications, subject to such modifications as may then be required by any governmental agency or authority then having jurisdiction to approve said plans.

12.5 Abatement of Rent. In the event of repair, reconstruction or restoration as herein provided, Monthly Rental shall be abated. However, Lessee may, at its option, continue to operate its business on the Premises during any such period to the extent reasonably practical from the standpoint of prudent business management. In such event, rent shall be abated in proportion to the percentage of the improvements actually being utilized during the abatement period.

…

17. DEFAULT.

…

17.2 Non-Monetary Default. In the event of a default by Lessee under any of the covenants or agreements of this lease set forth to be performed or observed by Lessee other than failure to pay said rents, taxes or assessments, and if Lessor shall execute and deliver to Lessee and any mortgagee entitled to notice, as hereinafter provided, written notice specifying such default in reasonable detail, then unless within thirty (30) days from and after the date that such notice is delivered to Lessee and each mortgagee, Lessee or any mortgagee shall have commenced to remove or cure such default and shall thereafter proceed with reasonable diligence to completely remove or cure such default, Lessor shall have the right at its election to exercise the right of entry and termination set forth in Section 17.1 above, provided, however, that if a mortgagee of Lessee's interest under this Lease shall in good faith and with the exercise of reasonable diligence be unable to obtain such possession of the premises by foreclosure or otherwise as will permit it to commence to cure any default covered by this section within the thirty (30) day notice period, and such mortgagee within the said thirty (30) day notice period shall notify Lessor of its inability to do so, then the time within which said mortgagee may commence to cure such default shall be extended until [sic] is the exercise of good faith and with reasonable diligence such mortgagee can obtain such possession, and provided further, that during such interim Lessee or any mortgagee shall pay or cause to be paid all rents, taxes, assessments, and other amounts payable by Lessee under the terms of this Lease.[3]

17.5 Defaults Requiring Longer Period to Cure. Notwithstanding any other provisions of this Section, Lessor agrees that if the default complained of, other than for the payment of monies, is of such a nature that the same cannot be

[3] This language was amended from the Original Lease and incorporates those amendments from the First Amendment to Lease.

cured within the periods specified above, then such default shall be deemed to be cured if Lessee within such period shall commence the curing thereof and shall continue thereafter with all [sic] one diligence to cause such curing and does complete the same with the use of such diligence.

…

22. QUIET POSSESSION

Lessor covenants that it owns the Premises in fee simple, that it has full right to make this Lease, and that if and so long as Lessee shall not be in default under the provisions of this Lease, Lessee shall quietly hold, occupy and enjoy the Premises, in accordance with the provisions hereof, throughout the term hereof, without hindrance, ejection, or molestation by Lessor or any party claiming under Lessor or otherwise.

23. SUBORDINATION BY LESSOR AND LESSEE; ESTOPPELS.

Lessor hereby expressly reserves the right, at its option, to place encumbrances on and against the Premises superior in lien and effect to this Lease and the state created hereby, without affecting in any way Lessee's obligations under this Lease, and Lessee agrees to execute such separate subordination agreements with respect to such lie4ns and encumbrances as the lender or its title insurer shall reasonably require; provided, however, that any such encumbrances shall first covenant with Lessee in writing that in the event of foreclosure or sale under power of sale or other acquisition of title by or trough the encumbrances, this Lease and Lessee's quiet possession of the Premises ill not be disturbed or affected and this Lease shall remain in full force and effect so long as Lessee is not in default hereunder.

Lessee shall have the right from time to time to subordinate this Lease to the terms and conditions of any encumbrance on or against Lessee's equipment which may be placed in and used in relation with the Premises, and Lessor agrees to execute such documents as may reasonably be required to accomplish this subordination.

Lessor and Lessee shall, within ten (10) days following written request form the other party, issue an estoppel certificate to the requesting party (and any prospective buyer, assignee, and/or lender, as the case may be) certifying (to the extent actually true), in addition to any other items reasonably requested, that (1) this Lease is in full force and effect and has not been amended or modified; and (b) the requesting party is not in default, nor dos the certifying party have knowledge of any circumstance4 which, but for the giving of notice and passage of time, would constitute a default under this Lease.

(Exh. 1).

The Weintraubs and the Goldbergs worked well together as landlord/tenant from 2019 until January 21, 2023, when a fire broke out in the first-floor kitchen at Merchants, late at night, causing significant damage to the Premises resulting in a series of events that led to this litigation. The Weinbraubs visited Nashville a few times a year, always going to Merchants on those visits and generally seeing B. Goldberg.

The Fire and the Activities of Landlord and Tenant in 2023

The fire at Merchants occurred after the restaurant had closed and went up through all three floors behind the kitchen hoods on each floor. B. Goldberg described it as a "small" fire but that it caused a lot of damage because of the origin in the kitchen, that it traveled up the floors through the kitchens, and the age of the building. He was on the scene in the early hours of January 21, 2023, working with the Metro Nashville Fire Department to understand what happened, and coordinating with the remediation company ServePro to dry out the Premises post-fire and address smoke damage, as well as to address immediate safety concerns, temporary lighting, and protection from the elements. B. Goldberg also immediately notified the Weintraubs via email, and they stayed in close touch over the next few days. (Exh. 54-55). Tenant had insurance through Society Insurance and Landlord had insurance through AIG. Both parties immediately notified their carriers and opened claims. (Exh. 55-56). The Weintraubs visited the Premises February 12, 2023 and had no concerns about how Tenant was handling the post-fire remediation.

As of March 7, 2023, the insurance companies had completed their cause investigations and cleared Tenant to begin demolition work at the Premises pursuant to the demolition permit they received. (Exh. 57). At that time Tenant's goal was to reopen as soon as possible and to use as much of the Merchants' fixtures and features as were usable. Tenant was working to determine what was usable but demolition had to occur first. (Exh. 58). On May 8, 2023, Tenant obtained a

quote from Shaub Construction Company, Inc. ("Shaub") to do preliminary demolition and rebuild for $5,261,983. (Exh. 59). B. Goldberg considered this a "starting point" to take to the insurance companies for review and approval. Tenant also obtained a "Selective Interior Demolition" plan from Manuel Zeitlin Architects on June 29, 2023, which was modified on September 7, 2023 by Powell, LLC, another architecture and design firm Tenant was working with for concept plans for the new Merchants. (Exh. 60, 99).

On June 6, 2023, Powell provided an interior design proposal. (Exh. 94). On August 7, 2023, Powell presented "updated layouts, mood board, and ceiling plans" as part of their design services. (Exh. 95). Additional updates were provided on October 11, 2023. (Exh. 96). At the same time Tenant was working with Powell for architecture, engineering, and kitchen equipment coordination services. (Exh. 97-98).

One significant item for replacement – the elevator – was approved by insurance in June of 2023, and AIG issued payment so that it could be ordered, in July of 2023. (Exh. 63-64). The elevator control room in the basement had been damaged by water and the components could not be replaced given their age.

On August 23, 2023, Tenant reached back out to Shaub to meet about commencing work on planning the rebuild. (Exh. 61). However, the demolition plans apparently evolved, and Shaub did not commence demolition at the time, or at least it was not done, because it continued at least until November 6, 2023, when B. Goldberg notified the Weintraubs that, "We have officially started demo and the space is getting cleaned up and cleaned out." (Exh. 62. 99). At that time, Tenant hoped to reopen in 2024, however additional problems were identified that required Shaub to expand its demolition scope of work into January of 2024. (Exh. 49-50). Each new discovery required insurance approval before it could be addressed, with associated delays caused by the

internal insurance expert consultations – every party was working with multiple experts on this complex process. (Exh. 48). The demolition process was, according to the industry witnesses, a work in progress, much of which could not be known until walls and floors were removed. Additionally, B. Goldberg testified that there were problems with insurance approval on the new HVAC system which caused an unanticipated delay soon thereafter.

Specifically, B. Goldberg testified that the HVAC in a commercial building the age of the Premises was complex and tied to a lot of other building systems. Over time, while he was the operator of Merchants, they had replaced different units and elements of the system, tying them into the existing system. After the fire, given the age of the HVAC system and building code changes, Tenant was required to replace the entire system, including the building of a vault under the sidewalk per Nashville Electric Service. The original estimate, which Goldberg obtained from a preferred vendor (Merryman-Farr), was approximately $1,000,000. The two insurance companies disputed which of them was responsible and what needed to be done. This dispute came to an impasse. (Exh. 45-46).[4] The carriers elected an insurance appraisal process in which a third party determined what would need to be done and the cost. That appraisal, which was not issued until April 9, 2024, approved Merryman-Farr's replacement cost of $1,063,740, minus depreciation of $212,748. (Exh. 37). The Goldbergs were unwilling to front the expense of the HVAC replacement without insurance approval given the amount involved and the uncertainty of what would be covered. This slowed down the project despite B. Goldberg's hope to reopen in early 2024.

On November 29, 2023, Powell completed plans to rebuild Merchants to substantially the same – albeit updated – condition it was in pre-fire, which plans were provided to B. Goldberg

[4] The fact that there were two carriers with two different clients and scopes of coverage were issues that plagued the project throughout for other items of coverage as well. (Exh. 48).

soon thereafter (the "2023 Plans"). (Exh. 9, 66). At Landlord's request, after Metro Nashville's December 12, 2023 approval of the 2023 Plans, on December 18, 2023, Tenant provided them to Landlord with the qualifier:

> This is not 100% final, but should be pretty close to our thought process at this point. Budgets will need to be dialed in, should be EOW and I can send along then, but a major sticking point has been HVAC work and what is needed for codes to pass us. I will have a budget soon, but will need to finalize once we see that decision from insurance and City.

(Exh. 8). Despite this qualifier regarding finality, Metro Nashville Codes had approved the plans as final as they were approved and stamped as such and the building permit was available on January 4, 2024. (Exh. 68). The 2023 Plans were resent on January 10, 2024. (Exh. 11). Regardless, neither of the Weintraubs reviewed the 2023 Plans, or had any experts working on their behalf do so. They did forward the 2023 Plans to the Bank. Up through that date, although it had been almost eleven (11) months since the fire, the Landlord had no concerns about how Tenant was handling the remediation, demolition and planning for rebuilding. The parties kept in close contact regarding those plans, as well as insurance requirements and payments. Behind the scenes, however, as of October 2023, Landlord was under significant pressure from the Bank, as discussed in more detail below. Landlord and Tenant were also exploring potential opportunities to change their relationship.

Landlord Interactions with Mike Kelly

B. Goldberg told Landlord in August of 2023 that he was considering selling Merchants. The Weintraubs therefore contacted a business broker about finding a third party to purchase Merchants or potentially partner with them on it. The broker connected them with Mike Kelly, the principal in a development company that had two honky-tonk businesses in Nashville. Kelly has had about 150 bars and restaurants in the country and was a very experienced operator. The

Weintraubs' broker connected them with Kelly in October 2023, who was familiar with Merchants from doing business in downtown Nashville. Before speaking with him, the Weintraubs asked him to sign a Confidentiality and Non-Circumvention Agreement, which he did on October 30, 2023 on behalf of his company, Kelly Investment Group, LLC (the "CNCA"). (Exh. 20).

The next day, during an introductory call, Kelly got the impression they were looking for a new tenant because the current lease was expiring. They spoke about the fire, the insurance proceeds, and that the Lease had under-market rent obligations. Kelly expressed significant interest in the Premises and mentioned the possibility of a honky-tonk with a rooftop bar. He provided a lot of information regarding how his other Nashville businesses were performing. The Weintraubs did not object or express any concerns about a change of concept during their introductory call. They did tell Kelly that B. Goldberg was unaware of the conversation and asked him not to contact B. Goldberg. (Exh. 126).

Kelly attempted to continue conversations with the Weintraubs at a real estate convention in Las Vegas they all planned to attend in November of 2023. (Exh. 127). They were unable to connect in person but set a follow up call for December 6, 2023. (Exh. 13).

During that second call, Kelly again expressed interest in connecting with B. Goldberg, which the Weintraubs did not want him to do. They felt the conversations were very pre-mature, their relationship with the Tenant was very important to them and it was not appropriate. Kelly expressed urgency about moving forward with a deal. They discussed different possible structures for a deal without coming to any specific conclusions. One month later, on January 5, 2024, Kelly texted Craig Weintraub about an upcoming trip to Nashville and his desire to speak with B. Goldberg and ensure that B. Goldberg did not proceed with renovations if they were going to be able to make a deal. Craig Weintraub did not respond. (Exh. 13). Kelly therefore contacted B.

Goldberg, who immediately made himself available to meet. They commenced an information exchange and negotiations, made a deal and executed a Membership Interest Purchase Agreement by January 22, 2024 for Kelly, through an entity called Nashville Honky-Tonk Holdings, LLC, to purchase the Tenant for $12,000,000 (the "MIPA"). (Exh. 16-18). Kelly wanted to contact the Weintraubs after their first meeting, in early January, but B. Goldberg requested that he wait until they had a deal, which he did. (Exh. 16).

On January 24, 2024, Goldberg texted the Weintraubs to set up a call. Craig Weintraub was not available,[5] but Randy Weintraub was, and they spoke briefly. (Exh. 73). B. Goldberg told Randy Weintraub about a potential buyer and set up a call for the three of them the next day because B. Goldberg was anxious for the call. During that second call, Kelly was introduced as the potential buyer – Randy Weintraub did not put together that he was the same person his brother and he spoke to in October and December of 2023. Randy Weintraub congratulated B. Goldberg on the sale and asked Kelly for financials. Kelly explained his honky-tonk concept which again was not met with objection.

Randy Weintraub went back to his brother, who followed up with B. Goldberg to get the identity of the potential buyer. When they found out it was Kelly, both Weintraubs were furious and felt Kelly had violated the CNCA. They were not upset the Goldbergs found a buyer, or even that the buyer wanted to have a different concept – Craig Weintraub specifically testified they had no reservations about Tenant changing concepts. They were upset that the buyer was Kelly and that, they believed, he had violated the CNCA. They sued Kelly and two of his entities on February 5, 2024 alleging, among other claims, breach of the CNCA and seeking a variety of remedies

[5] His wife was in labor delivering their child.

including an injunction to prevent the sale of Tenant pursuant to the MIPA (the "Part III Case").[6] After initially obtaining a temporary restraining order, on February 24, 2024, the request for a temporary injunction was denied. The Part III Case remains pending and no further relief has been ordered by the Court other than entry of a stipulated protective order.

Landlord's Issues with the Bank

In this context, mounting pressure from the Bank also affected the Weintraubs' actions. The Weintraubs have a long-standing business relationship with the Bank, and their primary contact had been Larry Hammrick, a wealth manager there. Craig Weintraub texted Hammrick within 24-48 hours of learning about the fire and assumed that was sufficient to put the Bank on notice of the situation. (Exh. 123). For whatever reason, the information about the fire was not communicated within the Bank because, in October of 2023, the Bank notified the Landlord it was previously unaware of the fire until it learned of it through a recent routine inspection. This caused significant discomfort within the Bank and the file was reassigned to a casualty department at the Bank with whom the Landlord had no prior relationship. The Bank immediately began putting pressure on Landlord for information about the reconstruction process, demanding direct payment and control of insurance proceeds, and assurance that rent payments would continue. For instance, initially Tenant was paying rent through insurance proceeds. Once those were exhausted, Tenant was paying rent. The Bank insisted upon written assurance from Tenant that it would continue to pay rent, which B. Goldberg obliged on January 10, 2024. (Exh. 11, 51). The Bank also began holding the Landlord's insurance proceeds in late 2023 and pushing for a timetable for repairs, budget, plans, proof of Tenant funds for repairs and the like. (*Id.*). The Bank's tone toward the

[6] This case was assigned to Chancery Court Part III and is styled *W 401 Broadway LLC v. Kelly Investment Group, LLC, Nashville Honky-Tonk Holdings, LLC, and Michael Kelly*, case number 24-127-III (the "Part III Case").

Landlord had changed and the only concern seemed to be results with the Premises rebuild. This pressure continued to mount into 2024.

On February 14, 2024, after the Weintraubs had learned of Kelly and initiated suit to stop the sale, the Weintraubs had a call with B. Goldberg regarding the Bank's concerns about the Premises, and whether the Tenant would continue rent as B. Goldberg promised. The Weintraubs provided the information to the Bank, but the Bank was upset, and the Landlord was upset as demonstrated by the litigation with Kelly. B. Goldberg was working with the insurance companies on the HVAC and proceeding with the project as it was unclear whether the sale to Kelly would go through.

On April 8, 2024, the Bank wrote the Weintraubs and their father reiterating a request for personal financial statements and other asset information. (Exh. 113). On May 30, 2024, the Bank issued a Notice of Default on the Deed of Trust based upon its perception the Weintraubs did not timely notify it of the fire and a failure to provide information. (Exh. 114). Landlord has denied being in default under the Deed of Trust. (Exh. 115).

A Bank representative from its workout department, Gordon Elderdice, testified through his deposition that his department was handling the mortgage to the Premises as of March 2024. The Bank continues to hold $1,800,000 in insurance proceeds paid by Landlord's insurer intended for work on the Premises. The Bank is concerned about the condition of the Premises and the pending litigation that has prevented any reconstruction or use. Edlerdice, speaking on behalf of the Bank, opined that "The ultimate dispute revolves around the well-below rental rate in the lease . . . and the approximate 30 years of remaining lease term including options." Further, that Landlord has a "monetary incentive" to "have the Lessee evicted" because of the Lease rental terms. It is apparent that the Landlord's relationship with the Bank deteriorated because of the fire,

regardless of whether it was reasonable, creating pressure on the Landlord that in turn impacted the Weintraubs' actions.

Events Post-MIPA Prior to Tenant Sale Closing

Both Weintraubs testified they had no problem with how Tenant was handling the post-fire work until the MIPA. They felt B. Goldberg kept them informed and was working diligently toward reopening Merchants.

After learning of the MIPA, these parties engaged in heated litigation in the Part III Case. Kelly continued his due diligence with the Goldbergs hoping to close on the MIPA. B. Goldberg testified he continued to work toward reopening Merchants and that he was not sure the closing would occur. He communicated with the Weintraubs about budgets, insurance reimbursements and provided a requested letter confirming Tenant's intention to continue paying rent and make repairs to the Premises as required by the Lease. (Exh. 52, 71-72). The Weintraubs did not express frustration with B. Goldberg over the budget issue, for instance, and in response to his promise to provide a budget, Craig Weintraub emailed on February 6, 2024, "Sounds good, I figured it's still being worked on. I told the bank if the budget was complete I would have had it already. Appreciate all you're doing – I know its's a lot." (Exh. 52).

Landlord had no communications with Kelly other than through lawyers and litigation. At B. Goldberg's request, and pursuant to Paragraph 23 of the Lease, on April 5, 2024, Landlord issued an Estoppel Certificate which provided, in relevant part, that "All conditions of the Lease to be performed by Lessee and necessary to the enforceability of the Lease, as of the date hereof, have been satisfied, except as provided below." (Exh. 14, ¶ 1(f)). It further provided that "All rent obligation of Lessee under the Lease have been paid current, and no amounts of rent of Lessee are currently past due." (*Id.*, at ¶ 1(g)). However, Landlord included the following:

> To Lessor's knowledge, except as provided below, there are no defaults by the Lessee under the Lease. A casualty event (fire) occurred in the Premises on or about January 21, 2023, resulting in material damage to the Premises. Despite the passage of more than fourteen (14) months, and numerous insurance claims and payments, the Lessee has not commenced restoration construction and has not provided the Lessor with either a budget or timing for reconstruction. The Lessee's delay in commencing reconstruction and completing reconstruction constitutes a situation that, with the passage of time, or giving of notice (or both), would constitute a Lessee default under Lease.

(*Id.*, ¶ 1(h)). Thus, as of April 5, 2024, Landlord had not declared default based upon Tenant's actions in relation to the post-fire work but was "reserving its rights" to do so.

During this due diligence period, as soon as the MIPA was executed, B. Goldberg introduced Kelly to the team at Powell, and Kelly opened a dialogue about hiring Powell to work on a plan for his honky-tonk concept. (Exh. 21-26, 32-36). Kelly and his team had extensive conversations with Powell about design and a shift to a honky-tonk business. That plan originally included a rooftop, but was abandoned after Kelly got on the roof and decided it was too small and not safe for that use. Powell sent proposed design, architectural and mechanical, electrical and plumbing coordination contracts. (Exh. 104-105). They were not finalized and executed at the time because of the Part III Case and the potential that the sale pursuant to the MIPA would be enjoined even though Powell was ready to pull the permit on the previously approved plans. (Exh. 29, 83). Kelly's plan was to finance the buildout himself and increase the budget for the additional changes required by the changed concept. He did not intend to be deterred by the insurance problems associated with the HVAC dispute or money being held by the Bank or the Landlord and, in fact, the MIPA provided that the seller would keep all pending insurance proceeds from the Tenant policy. (Exh. 18, 3-34). In the meantime, on April 9, 2024, the appraisal approved the HVAC replacement cost freeing up the funds for that work as bid by Merryman-Farr. (Exh. 37).

Kelly and B. Goldberg worked toward a closing which occurred on April 19, 2024. (Exh. 75). Kelly called Craig Weintraub after the closing to inform him of the sale and attempted to discuss the situation with him. Craig Weintraub testified he was not responsive to Kelly and told Kelly to go through the lawyers.

B. Goldberg also spoke with the Weintraubs and told Kelly, via text on April 23, 2024, "It was VERY short. Just let them know, they said they appreciated it and that was all. They said they had your info, and left it at that." (Exh. 35). It is undisputed that the Goldbergs had the right to sell Tenant, but Landlord is challenging the right for Kelly to purchase Tenant through the Part III Case.

Post-Tenant Closing Actions by Tenant

As soon as he closed on the MIPA, Kelly took action to move forward with preparing the Premises to reopen, preferably as a honky-tonk. Nothing he did, however, prevented him from restoring the premises to a restaurant. He did so both through design work with Powell and construction work with his own staff.

Powell's Director of Architecture, Manley Seale, testified that Kelly contacted the company to move forward with the project right after the MIPA closing. On April 24, 2024, Powell re-sent contracts in response to Kelly's request, stating that Powell's "design team is excited and ready to get started." (Exh. 106). After a meeting and some tweaking, revised contracts were sent and executed by May 20, 2024, with Kelly wiring a $150,000 deposit against a $300,000 design fee four days later. (Exh. 107-111). On May 30, 2024, Powell provided Kelly a concept drawing for the Premises to be converted to a honky-tonk, with the building occupancy going from 350 to 1000 or more (the "2024 Plans"). (Exh. 27-28, 102). Kelly's instructions to Powell were to prepare the honky-tonk plans, but that the 2023 Plans to restore Merchants was the fallback plan. Kelly

also had the building permit, based upon the 2023 Plans, pulled on May 14, 2024. (Exh. 10). No work was ever done to finalize the 2024 Plans, or to implement them, or to build pursuant to the 2023 Plans, because of Landlord's termination of the Lease on June 6, 2024. (Exh. 7). Kelly also did not share the 2024 Plans with the Landlord because they were not final as he was still working through the best use of the space, he was in litigation with the Landlord in the Part III Case, and the Landlord was refusing to communicate directly with him. They are undisputably different plans from the 2023 Plans.

David Smith, Director of Facilities for Kelly Operations Group, was responsible for the work Tenant did on the Premises after the MIPA closing, which was done pursuant to a demolition permit obtained by the previous owner of Tenant. Smith's work for Tenant generally was building upkeep, construction contracts and contractor work and, to the extent necessary, management of licensed contractors. Smith had these responsibilities for Kelly's other two Nashville properties and thus had developed a familiarity with the Nashville permitting processes and Codes Department personnel. Prior to closing, but soon after execution of the MIPA, Smith visited the Premises on January 26, 2024, to inspect it and give Kelly his thoughts. He documented the property condition extensively. (Exh. 44, 84).

As soon as the Tenant sale closed, Smith went to work at the Premises doing extensive demolition at a rapid pace. The demolition was a much larger scope than prior demolition. (Exh. 36). He documented the work in frequent texts and pictures to Kelly. Some of that work included:

- April 24-26, 2024: Obtained dumpster permits, cleared out most of the first floor including dining booths and curved bar, filling all available dumpsters;
- May 10, 2024: First two floors were 80% completed for demolition;

- May 13, 2024: Demolition commencing in basement, construction permit being pulled for non-demolition work, staircase work;
- May 28, 2024: Still doing demolition work;
- June 5, 2024: Still doing demolition work and cleaning out;
- June 14, 2024: Building demolition complete, interior down to shell, ready for rebuild.

(Exh. 43, 86, 88).

Smith had workers scheduled to work through June 14, 2024 to wrap up the work and ensure the Premises was safe. (Exh. 87). In addition to what Smith knew before starting, he discovered the following:

- First-floor had multiple levels of flooring that needed to be removed because of the cumulative weight;
- The first-floor men's bathroom piping was heavily congested from years of usage and needed to be replaced, in addition to the planned replacement of fixtures;
- Interior and exterior stairs were unsafe, rotted in places, and not ADA[7] compliant;
- The first-floor bar had extensive water damage and the dining booths smelled and potentially were moldy from being wet.

In addition to this work, the elevators that had been paid for by insurance and ordered in 2023 were delivered the week of May 13, 2024. Per an email dated May 17, 2024, Tenant was ordering windows for the entire building and hoped to complete the project in 12 months but was going to attempt to finish by the end of 2024. (Exh. 39).

Seale, Powell's representative who testified at trial, supported Tenant's position that the demolition work on the Premises was not complete prior to this work by Kelly's team. He said

[7] The Court assumes this is a reference to the Americans With Disabilities Act, 42 U.S.C § 12101, *et seq.*

the Premises needed extensive mechanical, electrical and plumbing work because of upgrades that would be required by Metro Codes and insurance. Further, Seale testified, the stairs, kitchens and bathrooms needed to be redone for the old building to be safer. Finally, that doing demolition work to take the Premises to a shell allowed for *either* Kelly's honky-tonk concept or a rebuilding of Merchants and that 95% of the time additional demolition is needed in a building like the Premises because of what is found in the process.

Additionally, Craig Weintraub acknowledged that Landlord's insurer, on January 24, 2024, emailed him that additional non-fire damage portions of the Premises needed attention during reconstruction because of the age of the building, including structural items.

Landlord's Notice of Default and Declaration of Default

On April 23, 2024, B. Goldberg confirmed with Kelly that he informed Landlord of the sale. (Exh. 35). Regardless, on April 24, 2024, Landlord sent to B. Goldberg's attention a Notice of Default under the Lease (the "Default Letter"). (Exh. 2). The Default Letter provided, in pertinent part:

> This letter (the "**Notice of Default**") constitutes Lessor's notice to Lessee of Lessee's default under the Lease. Specifically, Lessee has not, since the January 2023 casualty event: (i) submitted plans and specifications to Lessor for the repair and restoration of the Leased Premises ("**Restoration Plans**"); (ii) provided Lessor with an overall Restoration budget ("**Restoration Budget**"); (iii) restored (or even commenced restoration of) the Leased Premises to the condition existing prior to the casualty event (the "**Restoration**"); or (iv) turned over Lessee's casualty insurance proceeds to Lessor.
>
> Section 12 of the Lease governs Lessee's obligations to restore the Leased Premises after a casualty event. Lessor (and its lender) have shown Lessee much patience in respect to Lessee's Restoration obligations. However, due to the extended delay in Restoration commencement, and especially since no Restoration Plans yet exist, Lessor (and its Lender) now insists on Lessee's full compliance within Section 12 of the Lease.
>
> Pursuant to Section 17.2 of the Lease, as amended by the First Amendment to Lease effective February 22, 2010, Lessee now has thirty (30) days from the date of this

> Notice of Default to cure the non-monetary defaults described herein by: (i) submitting Restoration Plans to Lessor pursuant to Section 12.3 of the Lease, (ii) after receipt of Lessor's approval of the Restoration Plans, commencing and completing the Restoration work pursuant to the Restoration Plans as soon as feasibly possible, and (iii) immediately turning over any casualty insurance proceeds in Lessee's possession to Lender.

(Exh. 2).

In response to the Default Letter, Kelly asked B. Goldberg about the first allegation, that no plans for restoration had been provided. B. Goldberg confirmed he had provided plans in December of 2023. (Exh. 8-9). Craig Weintraub testified the Landlord did not consider the 2023 Plans as satisfying their request because Kelly was going to rebuild a different concept. However, the change of concept was not mentioned in the Default Letter, and Craig Weintraub also testified that the Default Letter was sent to B. Goldberg because the Landlord did not know about the Tenant sale. The Court does not credit this testimony that Landlord did not know of the sale given Craig Weinbraub's inconsistency, and B. Goldberg's text with Kelly that **he** told the Landlord of the closing. Kelly also testified that he called the Weintraubs to discuss the Premises with them and they would not speak with him, which is consistent with the position they took in later email correspondence. The Court finds that the Landlord had been notified of the sale and made a judgment call that the 2023 Plans were not satisfactory despite the fact they did not object to another concept, but rather only Kelly's ownership of Tenant. This finding demonstrates a lack of good faith on behalf of Landlord in sending the Default Letter.

Kelly testified he was also willing to provide a budget if the Bank was requesting one, and he did not understand that the Landlord had rights in the Tenant insurance proceeds. As for the restoration work, Kelly obtained the building permit based upon the 2023 Plans to prepare for restoration. (Exh. 10).

Kelly asked B. Goldberg to set up a call with the Landlord upon receipt of the Default Letter, which call was scheduled for the next day, April 25, 2024. (Exh. 35). Craig Weintraub testified that his brother and he were not interested in speaking with Kelly about anything related to the Premises and that he told Kelly to go through the lawyers.

Kelly again reached out to the Landlord, on May 22, 2024, regarding their continued requests for information from B. Goldberg, ignoring the fact he was now the principal with the Tenant. In an e-mail he reminded them of his ownership and that landlord requests should be directed to him. Craig Weintraub responded, "You have failed to abide by any written or other agreements between us to date and we have no reason to believe that will change, particularly given the current state of the property." (Exh. 15). He directed that all communications go through the Landlord's attorney.

In the meantime, Tenant's counsel responded to the Default Letter on May 2, 2024, well before the cure period expired, reiterating the new ownership. Tenant disputed the default claims or the Lease requirements for the requested information, but regardless, that plans had been provided and restoration commenced including the ordering of elevators. (Exh. 39). Further, "that Tenant has kept the Lessor fully apprised of all this activity and until receipt of your letter no issues had been raised about plans, timing, budgets or anything else." (Exh. 3). Regarding status of work, the letter stated:

> With respect to a timeline for completion and a final budget for the renovation, as Lessor has been made fully aware by Tenant, finalizing both a timeline and a budget has been hampered by the lengthy insurance claims process and disagreements between the Lessor's and Tenant's insurance carriers, which is still ongoing. Tenant has a working budget for renovation of the property, which we understand was provided to the Lessor. Tenant has kept the Lessor fully apprised of the claims process, including the resulting delays, and until receipt of your letter no issues had ever been raised by the Lessor with respect to either the process, the budget or the timing for completion. Notwithstanding the foregoing, Tenant has moved forward with the work that could be completed to date.

(*Id.*). As for the subject of the insurance proceeds Tenant offered, through counsel:

> Notwithstanding the various issues between the parties, including the pending lawsuit brought by W 401 Broadway LLC, our client looks forward to restoring the premises and opening the business as soon as possible. We are available to discuss the Restoration Plans, Restoration Budget, a timeline and/or use of insurance proceeds, or anything else related to the ongoing renovation in particular and the Leased Premises in general. Please let us know when you would like to discuss. In addition, if your client is unable to locate the information outlined in this letter which Tenant has previously provided please let us know and we can arrange to provide it again.
>
> It is our hope that we can have a constructive dialogue regarding the relationship between the Tenant and the Lessor. Continuing to communicate primarily through litigation, a notice of default, and letters between the lawyers does not seem to be a constructive or efficient way to forge a workable business relationship for our clients going forward. Please let me know if you or your client are willing and available to discuss. We are prepared to do so at your convenience.

(*Id.*).

Despite this offer to discuss the items in the Default Letter, rather than set a meeting the Landlord had its counsel respond formally on May 14, 2024. (Exh. 4). In that letter Landlord, for the first time, referenced the possibility that the Tenant would build a honky-tonk rather than Merchants Restaurant, and that if so anything provided in the past did not satisfy its requirements. Additional points were raised regarding insurance and its use on the Premises and a claim that "nothing has been done" since December of 2023. The letter concluded "[b]ased on the facts, Lessee is in default under the Lease. Lessor has not demonstrated any material efforts to cure its default. Subject only to the thirty (30) day notice in the April 14th Notice of Default letter, Lessor intends to evict Lessee from the Leased Premises." (*Id.*).

After additional letters between lawyers, and Kelly's May 21, 2024 attempt to communicate with the Weintraubs, on May 24, 2024, Tenant's counsel wrote Landlord's counsel and included several attachments to address the Notice of Default. The attachments included a

budget Shaub prepared December 19, 2023 based upon the 2023 Plans, a Dropbox link for the 2023 Plans (which had already been provided), the building permit based on those plans, and before and after photos showing the work in the prior month post-MIPA closing. (Exh. 6). Tenant reiterated it was not planning a rooftop bar or structural changes to the exterior of the building. Tenant's counsel letter summarized its position by stating "This whole default process seems to be solely a pretextual attempt by Lessor to manufacture a non-monetary default when none exists, in a misguided effort to terminate the Lease or increase the rent." (*Id.*). The pictures, showing the work Tenant performed since the closing on the MIPA, were as follows:

1st Floor Bar

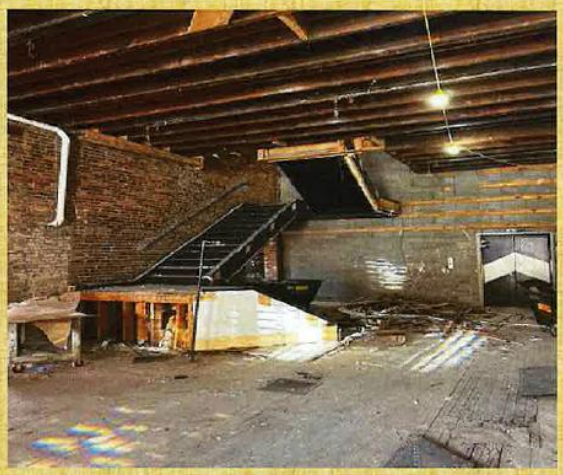
Before

After

1st Floor Staircase

Before

After



2nd Floor Dining

Before

After

2nd Floor Staircase

Before

After

(Exh. 6).

Also on May 24, 2024, Tenant filed this declaratory judgment action seeking the Court's determination of "whether [Tenant] has breached its non-monetary provisions [of the Lease], whether [Tenant] is entitled to rent abatement and credit for rent paid, and whether Landlord has a right to evict [Tenant]." (Compl., ¶ 5). In its Counter-Complaint, filed July 1, 2024, Landlord sought a declaration of "whether Tenant has materially breached the Lease Agreement and whether Owner is entitled to terminate the Lease Agreement for Tenant's material, uncured breaches, along with possession of the Property and eviction of Tenant." (Ans. and Counter-Cl., ¶ 49). Additionally, the Landlord brought claims for breach, detainer, ejectment and trespass.

On June 6, 2024, Landlord terminated the Lease pursuant to a written notice based upon its position that Tenant failed to cure the default ("Notice of Termination"). Tenant was ordered to vacate the Premises immediately. The proof demonstrates that Tenant did not vacate the Premises until June 14, 2024. Since then, the building has sat empty, unused, unaltered and

unimproved. Tenant has continued to pay rent during this entire period. The parties are at a stalemate regarding their Lease rights. The Part III Case remains pending without activity.

Expert Testimony

Both parties had experts testify regarding the percentage of damage to the Premises, made relevant by Paragraphs 12.1 and 12.3 of the Lease. Tenant's expert on this topic, Kurt Bergman, with Rikus, found the damage under 50%. (Exh.78-79). Landlord's expert on this topic, Roger Nelson with Spire Consulting, found the damage over 50%. (Exh. 116-117). For the purposes of this proceeding, the Court does not find it necessary to credit one expert finding over the other.

Both parties also had experts testify regarding the appropriateness of Tenant's work post-MIPA, how it would impact the restoration to Merchants versus a honky-tonk, and time associated with either project. Tenant relied on Bergman and Jeff Alexander, also with Rimkus, for these items. Nelson was Landlord's expert for these subjects as well.

None of the experts visited the Premises prior to their retention post-Lease termination, but rather relied, in part, on pictures and timelines associated with when and how work was being performed. Tenant acknowledges that new interior structural supports proposed by Tenant to increase capacity and for a honky-tonk was work not necessary for restoration to Merchants. Further, that it could take additional time for those new elements, including the new design work from Powell. However, Landlord's position that demolition was complete prior to April of 2024 and that everything Tenant did from that point forward was unnecessary is unsustainable. As Alexander, who is an expert in building remediation and has deep expertise in that area testified, there was serious damage from water including to the building's electrical systems. Moreover, that the scope of work for prior demolition would be controlled by who was paying and what the contractor was hired to do. That does not necessarily include everything needed, but just what was

requested. The Court finds this supported by Smith's testimony. Although Smith is employed by Kelly and thus aligned with the Tenant, he also has the most intimate knowledge of the Premises as he was there almost daily for six weeks doing work, and the Court credits Smith's testimony on this point.

Landlord's expert Nelson testified that the Premises was ready for restoration to Merchants in January of 2024 and that the proposed work, based on the 2023 Plans, should have been complete by July 31, 2024. Further, that the new plans Tenant was working on that became the 2024 Plans increased the scope of the project and would not have resulted in a prompt restoration of the property. This was based upon his assumption that all necessary demolition was complete by January of 2024.

Nelson acknowledged that additional repairs/demolition might have been discovered in the process given the age of the building, and that he could not identify such items through photographs. He also opined that the HVAC insurance dispute should not have impacted the Tenant's work because the Tenant should have paid for the work and worried about reimbursement after the fact. On this point, the Court does not find that a reasonable position given B. Goldberg's testimony of the enormous cost and inability to front those funds when he owned Tenant and was handling the project. Nelson also opined that no work was done to restore the property after January of 2024, however, he acknowledged that the elevator was delivered in May and installed in June. Finally, he opined that Tenant was acting diligently through January of 2024, but not after, thus justifying the Default Letter.

The Court also notes that Nelson bases his timeline for reconstruction upon an assumption that the 2023 Plans were final. This is contrasted with the Weintraubs' testimony that they did not consider the plans final, and thus did not have them reviewed or provide what they believe to be

their necessary approval for Tenant to proceed. Seale with Powell testified they were final as he stamped them and Metro approved them. This inconsistency is important and supports the Court's finding that Landlord was taking inconsistent positions regarding default to justify their refusal to work with Kelly and further demonstrates a lack of good faith in sending the Default Letter and subsequently terminating the Lease.

Conclusions of Law

Tenant seeks declaratory judgment that it has not breached the lease and that it is entitled to rent abatement from the date of entry of this Order until the remediation and repairs are completed. Further, that landlord has breached Sections 7, 17.5, and 22 of the Lease, reserving damages for Phase 2. In contrast, Landlord seeks a finding that Tenant breached the Lease or that Tenant anticipatorily breached entitling Landlord to terminate and reserving damages for Phase 2. Further, that Landlord is entitled to detainer, ejectment, and trespass. Tenant contends it complied with its obligations under the Lease, while Landlord contends that Tenant breached by failing to promptly and diligently restore the Premises to its pre-fire condition and by refusing to provide the requested restoration plans and budget. Further, that Tenant's intent to install a concept materially different from Merchant's Restaurant was an anticipatory breach of the Lease.

The parties rely on differing interpretations of the Lease to support their positions. Tenant contends it has significant flexibility in how it uses the Premises pursuant to Sections 7 and 8. Landlord contends that Section 12.2 does not allow flexibility to change the business, as it provides that Tenant restore "to the condition existing prior to the occurrence of the fire or other peril" which requires Tenant to restore to the same concept.[8]

[8] During Tenant's Motion for Judgment on the Pleadings, the parties disputed whether the destruction of the Premises was under or over 50%, which would impact whether Section 12.1 or 12.3 applied. At trial, this argument was largely abandoned, and the parties focused on the interpretation of Section 12.2 of the Lease since the casualty occurred during the last five years of an extension, and all of the provisions include the relevant phrase "to the condition existing prior

A party alleging breach of contract must prove "the existence of a valid and enforceable contract, a deficiency in the performance amounting to a breach, and damages caused by the breach." *Fed. Ins. Co. v. Winters*, 354 S.W.3d 287, 291 (Tenn. 2011) (citing *ARC LifeMed, Inc. v. AMC–Tenn., Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005)). Courts must interpret contracts to ascertain and give effect to the intent of the contracting parties consistent with legal principles. *Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tennessee, Inc*., 566 S.W.3d 671, 688 (Tenn. 2019). Each provision must be construed in light of the entire agreement, and the language in each provision must be given its natural and ordinary meaning. *Mark VII Transp. Co.*, 339 S.W.3d at 647–48; *see also Buettner v. Buettner*, 183 S.W.3d 354, 359 (Tenn. Ct. App. 2005)). Moreover, Tennessee courts "give primacy to the contract terms, because the words are the most reliable indicator—and the best evidence—of the parties' agreement when relations were harmonious, and where the parties were not jockeying for advantage in a contract dispute." *Individual Healthcare Specialists, Inc*., 566 S.W.3d at 694 (quoting Feldman, 21 Tenn. Practice § 8:14).

If the written instrument is unambiguous, the Court must interpret it as written rather than according to the unexpressed intention of one of the parties. *Sutton v. First Nat'l Bank*, 620 S.W.2d 526 (Tenn. Ct. App. 1981). A contract is not ambiguous merely because the parties have different interpretations of the contract's various provisions, *Cookeville Gynecology & Obstetrics, P.C. v. Southeastern Data Sys., Inc*., 884 S.W.2d 458, 462 (Tenn. Ct. App. 1994) *(*citing *Oman Constr. Co. v. Tennessee Valley Authority*, 486 F.Supp. 375, 382 (M.D. Tenn. 1979)), nor can this Court create an ambiguity where none exists in the contract. *Strategic Acquisitions Grp., LLC v. Premier Parking of Tennessee, LLC,* No. E2019-01631-COA-R3-CV, 2020 WL 2595869, at *4 (Tenn. Ct.

to the occurrence of the fire." The Court does not find it necessary to make a determination whether the fire caused more or less than 50% damage.

App. May 22, 2020) *(*citing *Cookeville P.C.*, 884 S.W.2d at 462) (citing *Edwards v. Travelers Indem. Co.*, 300 S.W.2d 615, 617–18 (Tenn. 1957).

In contrast, if the words in a contract are susceptible to more than one reasonable interpretation, the parties' intent cannot be determined by a literal interpretation of the language and the court must apply established rules of construction to determine the intent of the parties. *Allstate Ins. Co.*, 195 S.W.3d at 611 (citing *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885, 890 (Tenn.2002)). Contract language "is ambiguous only when it is of uncertain meaning and may fairly be understood in more ways than one." *Id.* (quoting *Farmers–Peoples Bank v. Clemmer*, 519 S.W.2d 801, 805 (Tenn. 1975)). When a contractual provision is ambiguous, a court has the ability to use parol evidence, including the contracting parties' conduct and statements regarding the disputed provision, to guide the court in construing and enforcing the contract. *Memphis Housing Auth. v. Thompson*, 38 S.W.3d 504, 512 (Tenn. 2001) (citations omitted).

Lease Interpretation

The Lease provides in relevant part:

> 7. USE OF PREMISES
>
> 7.1 (a) Use Allowed. The Premises shall be occupied and used by Lessee for the construction and operation of a restaurant or for such other business which, in Lessee's sole judgment, are compatible therewith, or for any other lawful purpose of purposes.
>
> …
>
> 8. ALTERATIONS
>
> During the term hereof, Lessee shall have the right to make, at its sole cost and expense, such interior and nonstructural charges [sic], alterations, improvements and additions to the Improvements and the Premises or any portion thereof as Lessee may desire (provided that exterior or structural alterations shall require Lessor's prior written consent, not to be unreasonably withheld), and shall also have the right to install therein and replace such trade fixtures and equipment

as it may deem advisable for the conduct of its business, subject to the approval of all applicable governmental authorities, which approvals shall be obtained by Lessee at its sole cost and expense.

In the case of fire or other casualty, the Lease provides in relevant part:

12. DESTRUCTION

12.2 Partial or Total Destruction From Any Cause Within the Last Five Years of the Term. In the event the Improvements are damaged or destroyed by any cause whatsoever during the last five (5) years of any extension of the primary term, and, if the time it would take to repair the Improvements and reopen the business conducted from the Premises would exceed six (6) months, as reasonably determined by Lessee, then Lessee, at its option, may promptly and diligently restore the leased premises to the condition existing prior to the occurrence of the fire or other casualty, or may release and turn over to Lessor insurance proceeds as a result thereof, if any, and cancel and terminate this Lease.[9]

12.4 Standard of Reconstruction. Any obligation of Lessor or Lessee to repair and/or restore the Improvements on the Premises pursuant to this Article shall be to repair or restore the same according to the plans and specifications therefor mutually approved by both parties or pursuant to revised plans reflecting Lessee's then current building specifications, subject to such modifications as may then be required by any governmental agency or authority then having jurisdiction to approve said plans.

(Exh. 1).

The parties do not contend that the Lease is ambiguous but offer different interpretations of its terms. The Court does not find the Lease to be ambiguous. Sections 7 and 8 of the Lease provide Tenant with wide discretion to run any lawful business and make nonstructural alterations and improvements as "Lessee may desire." Further, that any exterior or structural alterations require Landlord approval which should not be "unreasonably withheld." These provisions are supported by the fact that the Lease is a triple-net lease, placing additional responsibilities on the Tenant in exchange for more control over the building. Each provision must be construed in light of the entire agreement, and the language in each provision must be given its natural and ordinary

[9] The original language of Section 12.2 was replaced in the Fifth Amendment to Lease.

meaning. *Mark VII Transp. Co.,* 339 S.W.3d at 647–48. It is with this context in mind that the Court reviews Section 12 of the Lease.

Landlord contends that Section 12.2 of the Lease required Tenant to "restore the leased premises to the condition existing prior to the occurrence of the fire," and that by changing the design without Landlord's consent from Merchant's Restaurant to a different concept—a honky-tonk—was an anticipatory breach of the Lease. Further, that Tenant's additional demolition and gutting of the Premises for purposes of making unapproved design changes and its refusal to provide its true plans and specifications warranted termination. In support, Landlord asserts that the more specific terms of Section 12 curtail the wide discretion provided for in Sections 7 and 8.

Reviewing each provision in light of the entire agreement, the Court does not find that Tenant was obligated to restore the Premises to a "Merchants Restaurant" exactly as it was before. Section 12.2 provides Tenant the option to restore the Premises or turn over insurance proceeds to Landlord and terminate the Lease. While this section does provide for restoration "to the condition existing prior to the occurrence of the fire," the Court cannot find this prevents Tenant from changing the concept to a honky-tonk, which the Court acknowledges is a different concept from Merchants Restaurant but still a bar/restaurant business. The Court cannot ignore the fact that Landlord had no objection or problem with changing the design concept to a honky-tonk until it found out the new tenant was Kelly. An interpretation otherwise under the facts of this case would be unreasonable and inconsistent with Sections 7 and 8 and the spirit of the Lease as a whole.

While changes affecting the exterior or structure require Landlord's written consent, the Lease expressly requires Landlord to act reasonably. In fact, the Lease also separately provides in Section 29 that whenever Lessor's approval is required, "Lessor shall not unreasonably withhold such permission, consent or approval." The testimony at trial demonstrated that Landlord has no

problem with the honky-tonk concept, indicating that Landlord likely would have provided approval for the structural changes but for Kelly's ownership. Testimony demonstrated that it would benefit the building and that Kelly was willing to pay for these changes.

With this finding in mind, the Court turns to Landlord's grounds for termination as set forth in the Notice of Default.

Landlord's Grounds for Termination

Pursuant to the Default Letter dated April 24, 2024, the Landlord claimed that Lessee was in default of the Lease because it had not 1) submitted "Restoration Plans"; 2) provided a "Restoration Budget"; 3) restored or commended restoration of the Premises; or 4) turned over Lessee's casualty insurance proceeds to Lessor. (Exh. 2). Landlord provided Tenant with thirty days to cure by providing Restoration Plans, commencing restoration work after obtaining Landlord's approval, and turning over insurance proceeds.

i) Restoration Plans

In the Default Letter, Landlord asserted that "since the January 2023 casualty event," Tenant had not "submitted plans and specifications to Lessor for the repair and restoration of the Leased Premises." (Exh. 2). Landlord provided that Tenant could cure the defect by "submitting Restoration Plans to Lessor pursuant to Section 12.3 of the Lease." (*Id*.). At trial, Landlord relies on Section 12.4 of the Lease, arguing that Tenant is obligated to restore the Premises either according to plans and specifications that are approved by Landlord or according to revised plans reflecting Tenant's then current building specifications, which it argues are plans reflecting Premise's specifications at the time of the fire. Tenant argues that restoration plans are not required by the Lease; in any event, that plans were submitted on December 18, 2023; January 10, 2024; and May 24, 2024. Landlord does not dispute that restoration plans were sent, but instead argues

that the plans were not final when submitted, and B. Goldberg did not ask for Landlord's approval. Further, that when Tenant responded to the Default Letter, Tenant re-submitted moot plans despite having plans to build a honky-tonk.

The Court interprets Section 12.4 as requiring the parties' mutual approval when making changes that are not then-current building specifications as the Premises existed prior to the casualty. This is a logical interpretation considering that if Tenant was simply restoring the Premises as it was before, Landlord approval would be unnecessary. Although this appears inconsistent with Sections 7 and 8 of the Lease, the fact that a casualty has occurred and insurance proceeds are involved cannot be ignored, entitling the Landlord to some discretion as the owner of the Premises when a different design is proposed. Despite this, Landlord is required to act reasonably in providing approval, and Landlord has admitted that they have no problem with the concept of a honky-tonk.

Even though the Lease requires mutual approval pursuant to Section 12.4 due to the different design, the Court finds that the assertion Tenant failed to submit restoration plans for approval is not a proper ground for default. The 2023 Plans had been submitted to Landlord, and the Default Letter did not raise the issue of any new design changes. To acknowledge that plans were submitted but not reviewed for lack of finality and then claiming default for lack of plans appears disingenuous to the Court, especially combined with the fact that the Default Letter was sent five days after the transfer of ownership and after Landlord attempted to prevent the sale in the Part III Case and Tenant tried to communicate with Landlord and Landlord refused. Moreover, the plans were sufficient for Landlord's expert to create a timeline for construction , and Landlord had not raised any issues prior to the transfer of ownership. B. Goldberg testified that he continued to make efforts towards restoring the Premises and resolving the HVAC and insurance issues, of

which Landlord was kept apprised. The Court does not find this to be a proper ground for default and, moreover, that Landlord likely did not act in good faith as required in every contract.[10] Landlord had no objections to the Premises changing to a honky-tonk and, as such, Landlord likely would have approved plans with the new concept but for Kelly's ownership.

Further, while Tenant responded to the Default Letter with the 2023 Plans that did not include his design changes, Landlord and Kelly were engaged in separate litigation in the Part III Case, and Kelly testified that he was willing to restore the Premises either to a Merchants Restaurant or a honky-tonk, but that it was his preference to change the concept to a honky-tonk. The Court does not find it unreasonable that Tenant re-submitted the 2023 Plans considering the circumstances.

ii) Restoration Budget

In the Default Letter, Landlord next asserted that "since the January 2023 casualty event," Tenant had not "provided Lessor with an overall Restoration budget." (Exh. 2). Landlord contends that its Lender required these items, and that Tenant was obligated under Section 23 of the Lease and the SNDA to provide them.[11] Further, that when Tenant responded to the Default Letter, Tenant re-submitted a moot construction bid.

Tenant contends that a budget is not required by the Lease. Further, that emails from B. Goldberg dated February 6, 2024 demonstrate that he was keeping Landlord apprised that he was

[10] Tenant has brought a claim for breach of the covenant of good faith and fair dealing contending that Landlord intended to wrongfully evict Tenant, which has been reserved for Phase 2. A duty of good faith and fair dealing is implied in the performance and enforcement of every contract. *Kinard v. Nationstar Mortg. LLC*, 572 S.W.3d 197, 208 (Tenn. Ct. App. 2018) (citing *Lamar Adver. Co. v. By-Pass Partners*, 313 S.W.3d 779, 791 (Tenn. Ct. App. 2009)). The purpose honors the reasonable expectations of the contracting parties and protects the rights of the parties to receive the benefits of the agreement into which they entered. *Id.* (citing *Lamar Adver. Co.*, 313 S.W.3d at 791). Based on the evidence presented during Phase 1, it is likely that the Landlord did not act in good faith in attempting to terminate the Lease.

[11] Landlord has a separate breach of contract claim pursuant to the SNDA, but that claim is reserved for Phase 2 of this case.

working on resolving the HVAC issues and would finalize the budget, to which Craig Weintraub responded, "Sounds good, I figured it's still being worked on." (Exh. 52). Regardless, Tenant contends that a budget was provided via the response letter dated May 24, 2024.

The Court does not find that the Lease required Tenant to provide a budget. Although Section 23 allows Lessor to place encumbrances on and against the Premises, such action cannot affect Lessee's obligations under the Lease. Such a requirement is in contravention of the Lease terms. Accordingly, the Court does not find this was an appropriate basis for default.

iii) Restoration or Commencement of Restoration

In the Default Letter, Landlord next asserted that "since the January 2023 casualty event," Tenant had not "restored (or even commenced restoration of) the Leased Premises to the condition existing prior to the casualty event." (Exh. 2). Landlord contends that Tenant did not promptly and diligently restore the Premises to the condition existing prior to the fire as Section 12 of the Lease required; specifically, 12.2 provides that Lessee "may promptly and diligently restore the leased premises to the condition existing prior to the occurrence of the fire" or release and turn over to Landlord insurance proceeds and terminate the Lease. (*Id.*). Landlord acknowledges that remediation and preparation work progressed at a reasonable pace from the immediate aftermath of the fire through early December 2023. However, through its expert, Nelson, Landlord argues that restoration of Merchants Restaurant would have been substantially complete by July 2024 if Tenant had not changed design concepts, which increased the project's scope and further caused delays. Moreover, that from the end of April through termination, Tenant underwent additional demolition and gutted the building to install a new concept instead of restoring Merchant's Restaurant.

The Court notes that Nelson's testimony that the new plans would not have resulted in a prompt restoration are based on the December 2023 plans and the assumption that all demolition had been done as of January 2024. While some of the demolition performed by Kelly was not necessary to return the Premises to a Merchant's Restaurant, the Court credits Smith's testimony in finding that demolition was not complete as of January 2024. As soon as Kelly closed, he quickly moved forward with commencing restoration of the Premises, albeit his plans were to change it to a honky-tonk. Notably, Kelly was ready to move forward and self-finance the construction, while B. Goldberg was waiting for the insurance proceeds for the HVAC and not willing to pay out of pocket.

Although the timeline for restoring the Premises to a honky-tonk is unclear, the Court cannot find that this is a ground for default. Tenant was promptly and diligently working on restoring the Premises both immediately after the fire as well as in January 2024 and thereafter. Although ownership changed and new design plans were in the works, Kelly continued to move forward with restoring the Premises, either as a honky-tonk or Merchants Restaurant, and was not hindered by receiving insurance proceeds. Further, the HVAC issue continued to be a problem and the appraisal was not finalized until April 9, 2024. To say that restoration had stopped or was not commenced likewise appears disingenuous with the Court considering the timing of the Default Letter. Again, Landlord, through Craig Weintraub, testified that he had no reservations or objections to Merchant's changing concepts, or, more specifically, a honky-tonk. One of the primary motivating factors appeared to be the Weintraubs' issue with the transference of ownership to Kelly, which is supported by the fact that Landlord attempted to stop the sale in the

separate chancery proceeding but was unsuccessful.[12] The Court does not find this to be a proper ground for default, and, moreover, that Landlord likely did not act in good faith.

iv) Insurance Proceeds

Finally, in the Default Letter, Landlord asserted that "since the January 2023 casualty event," Tenant had not "turned over Lessee's casualty insurance proceeds to Lessor." (Exh. 2). Landlord had never requested the insurance proceeds until the Default Letter, and the Court does not find this to be a basis for default. Tenant had the option to move forward with restoration or turn over the insurance proceeds for Landlord to move forward with restoration. Clearly, Tenant opted to restore the Premises on its own.

First Material Breach

Both parties bring breach of contract claims against the other. Ordinarily, a party who first materially breaches may not recover under the contract. *Madden Phillips Const., Inc. v. GGAT Dev. Corp.*, 315 S.W.3d 800, 813 (Tenn. Ct. App. 2009) (citing *United Brake Sys., Inc. v. Am. Envtl. Prot., Inc.*, 963 S.W.2d 749, 756 (Tenn. Ct. App. 1997); *McClain v. Kimbrough Constr. Co.*, 806 S.W.2d 194, 199 (Tenn. Ct. App. 1990)).

Landlord's claimed bases for default are not supported by the Lease and cannot form the basis for breach or eviction. Even if Landlord had a basis for default as alleged in the Default Letter, Tenant cured within thirty days by providing the requested information. Accordingly, the termination on June 6, 2024 was improper, and Landlord committed the first material breach of the Lease. Furthermore, by attempting to terminate the Lease and evict Tenant, Landlord breached Section 22 of the Lease. Landlord interfered with Tenant's quiet possession and enjoyment of the Premises pursuant to Section 22. While Landlord argues that notice and an opportunity to cure was

[12] The Order denying a temporary injunction was entered on February 24, 2024.

required, the Court finds that Tenant was excused from providing such notice as Landlord was attempting to terminate the Lease and remove Tenant from the Premises.[13] Any notice and opportunity to cure would have been futile and not reasonable under the circumstances. *Forrest Const. Co., LLC v. Laughlin,* 337 S.W.3d 211, 230 (Tenn. Ct. App. 2009) (citing *Salley v. Pickney Co.*, 852 S.W.2d 240 (Tenn. Ct. App. 1992)).

Rent Abatement

The Lease provides in Section 12.5 that "In the event of repair, reconstruction or restoration as herein provided, Monthly Rental shall be abated . . . ." The Court finds that Tenant is entitled to rent abatement from the date of entry of this Order until restoration is complete.

Conclusion

The Court notes that Merchant's is an iconic building and business in Nashville with significant history. Despite this, the Court cannot ignore the rights and obligations of the parties under the Lease, which provides significant flexibility to Tenant to pursue a lawful restaurant or business and make desired changes and alterations. The Court believes that the parties can work together to resolve their issues and restore the property to an appropriate and useful purpose.

Landlord's claimed bases for default are not supported by the Lease and cannot form the basis for breach or eviction. It is therefore, ORDERED, ADJUDGED, and DECREED, that pursuant to Count 1 for Declaratory Judgment in Tenant's First Amended Complaint, the Court finds as follows:

- Tenant did not breach the Lease and is not in default.
- Landlord has no basis for eviction and was not entitled to terminate the Lease on June 6, 2024.

[13] Section 17.2 of the Lease requires notice and opportunity to cure in the event of Lessee's default, and there is no similar provision applicable to Landlord's default.

- Tenant is entitled to rent abatement from the date of entry of this Order through completion of remediation and repairs.

It is further, ORDERED, ADJUDGED, and DECREED, that Tenant is entitled to an award of damages pursuant to Count 2 for breach of contract, to be determined at Phase 2.

It is further, ORDERED, ADJUDGED, and DECREED, that Count 1 for breach and/or anticipatory breach, Count 2 for unlawful detainer, Count 3 for ejectment, Count 4 for declaratory judgment that Tenant materially breached and that the Lease is terminated, and Count 5 for trespass are hereby DISMISSED.

Case Management

The parties are ORDERED to contact the Calendar Clerk, within fifteen (15) days, to schedule a Rule 16 Conference.

It is so ORDERED.

s/Anne C. Martin
ANNE C. MARTIN
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

cc by U.S. Mail, email or efiling as applicable to:

L. Webb Campbell II, Esq.
John L. Farringer IV, Esq.
Brettson J. Bauer, Esq.
Sherrard Roe Voigt & Harbison, PLC
1600 West End Ave., Ste.1750
Nashville, TN 37203
wcampbell@srvhlaw.com
jfarringer@srvhlaw.com
bbauer@srvhlaw.com

Kate Skagerberg, Esq.
Laurence M. Papel, Esq.
Carson W. King, Esq.
Nelson Mullins Riley & Scarborough LLP
1222 Demonbreun St., Ste. 1700
Nashville, TN 37203
kate.skagerberg@nelsonmullins.com
larry.papel@nelsonmullins.com
carson.king@nelsonmullins.com

David W. Houston, IV, Esq.
Andy O. Wilson, Esq.
Charles E. Nugent, Esq.
BURR & FORMAN, LLP
222 Second Avenue South, Ste. 2000
Nashville, TN 37201
dhouston@burr.com
aowilson@burr.com
cnugent@burr.com