

12-019-18
25

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2015-982-A

SPINEFRONTIER, INC.

v.

CUMMINGS PROPERTIES, LLC

FINDINGS OF FACT, RULINGS OF LAW
AND ORDER FOR ENTRY OF FINAL JUDGMENT

This action arises from a commercial lease dispute. SpineFrontier, Inc. ("SpineFrontier") sought a declaratory judgment that it had timely terminated its commercial lease with its landlord, Cummings Properties, LLC ("Cummings"). Cummings filed a counterclaim against SpineFrontier, asserting that SpineFrontier had breached the parties' lease by defaulting on its lease obligations, and that SpineFrontier owed Cummings rent for the four year, eleven month balance of the automatically renewed five year lease term.

On August 12, 2016, the court (Drechsler, J.) denied Cummings' summary judgment motion, concluding that there existed "a material issue of fact as to the parties' intent concerning the automatic renewal provision" of their lease.

Memorandum of Decision and Order on Defendant's Motion for Summary Judgment, at p. 9 (Drechsler, J.). The court (Lauriat, J.) thereafter held a jury-waived trial on February 1, 2 and 6, 2018. It heard testimony from Stephen Drohosky, Justin D'Aveta and William Grant, all employees of Cummings, and from Kingsley R.

12

Chin, Aditya Humad and Christopher Chang, all current or former employees of SpineFrontier. The court also received 70 agreed-upon exhibits in evidence.

Upon consideration of the credible testimony of the witnesses, the exhibits, and the memoranda and arguments of counsel, the court makes the following findings of fact, rulings of law, and order for entry of judgment in this action.

FINDINGS OF FACT¹

SpineFrontier is a Delaware corporation with a principal place of business in Malden, Massachusetts. Cummings is a Massachusetts limited liability company with a principal place of business in Woburn, Massachusetts. Cummings manages more than 10 million square feet of commercial real estate in more than 70 buildings located in ten Greater Boston communities, including Andover, Beverly, Burlington, Marlborough, Medford/Somerville, Stoneham, Sudbury, Wakefield, Wilmington, and Woburn.

Cummings and SpineFrontier were parties to a commercial lease (as amended and extended, the "Lease"), which was comprised of six documents: an original lease, four written lease extensions, and one amendment to lease.

Kingsley R. Chin ("Chin") and Christopher Chang ("Chang") co-founded SpineFrontier in or about 2005. At all relevant times Chin has been SpineFrontier's

¹ The parties have stipulated to many, but not all of these facts. Where the parties do not agree, the court's findings are based upon such testimony and evidence as it has found credible.

chief executive officer. In or about early 2006, Chin and Chang decided to rent office space in Massachusetts for SpineFrontier. Chang lived in or near Beverly, Massachusetts. He chose SpineFrontier's office space in the Cummings Center in Beverly.

On or about May 3, 2006, SpineFrontier, LLS, a Delaware entity, as lessee, and Cummings, as lessor, executed a written agreement captioned "Cummings Properties, LLC Standard Form Commercial Lease" (the "Original Lease") for space 321-D at 100 Cummings Center in Beverly, Massachusetts. (Exhibit 1). The original leased premises contained approximately 331 square feet of leasable space. Chang signed the Lease on behalf of SpineFrontier, LLS.

The Original Lease's initial term was for one year, commencing on May 1, 2006 and "ending at noon on April 30, 2007." Paragraph 31 of the Original Lease states as follows:

AUTOMATIC FIVE-YEAR EXTENSIONS. This lease, including all terms, conditions, escalations, etc. shall be automatically extended for additional successive periods of five years each unless LESSOR or LESSEE serves written notice, either party to the other, of either party's option not to so extend the lease. The time for serving such written notice shall be not more than 12 months or less than six months prior to the expiration of the then current lease term. Time is of the essence.

The premises was almost immediately too small for SpineFrontier's needs. SpineFrontier informed Cummings that it needed a larger office. Cummings prepared

and presented to SpineFrontier the lease documentation that would accompany SpineFrontier's move to larger space.

On June 26, 2006, Chang wrote to Cummings' account manager for the SpineFrontier account, Justin D'Aveta ("D'Aveta"):

I am writing you in regards to my lease at 100 Cummings Center . . . In specific reference to section 31 that states, an automatic five-year extension. This letter serves as written notice to inform you that SpineFrontier will effectively end our one year lease agreement on April 30, 2007. I will contact you if SpineFrontier needs to lease additional office spaces after the April 30, 2007 date.

On June 30, 2006, Stephen Drohosky ("Drohosky"), Cummings' vice president and general manager for Cummings Center, replied to Chang in writing as follows:

We have received your June 26, 2006 letter precluding the automatic extension of your lease at 100 Cummings Center, Suite 321-D. Accordingly, your lease will expire on April 30, 2007. We appreciate your business and understand that canceling the extension was a formality. Justin D'Aveta will stay in touch with you regarding SpineFrontier's future facility requirements and we hope we will be able to agree on a new lease to continue your tenancy. In the meantime, please call either of us at any time if we can be of immediate assistance.

The court finds, based on the credible testimony, that Cummings' custom, practice and course of conduct was aimed at securing an extension to its existing lease *prior to* the expiration of the notice of termination period in the tenant's then existing lease, so long as the tenant was in good standing and was current on its rental payments to Cummings.

At Cummings' urging, in the Fall of 2006, prior to the termination of the notice of lease period in the Original Lease, SpineFrontier and Cummings entered into a written agreement captioned "Cummings Properties, LLC Standard Form Lease Extension #1" ("Lease Extension No. 1"), which was signed by Kingsley Chin, on behalf of SpineFrontier, on or about October 27, 2006 and by Cummings on or about November 9, 2006. While the original lessee was SpineFrontier, LLS, that corporate entity's liability was terminated by Lease Extension No. 1; SpineFrontier, Inc. became a (co)lessee in Lease Extension No. 1 and is the only proper lessee party to this action.

Paragraph 1 of Lease Extension No. 1 states: "The lease is hereby extended for an additional term of three years ending at noon on April 30, 2010." Paragraph 5 of Lease Extension No. 1 states:

The lease, including all terms, conditions, escalations, etc. shall be automatically extended for additional successive periods of five years each unless LESSOR or LESSEE shall serve written notice, either party to the other, of either party's desire not to so extend the lease. The time for serving such written notice shall be not more than 12 months or less than six months prior to the expiration of the then current lease period. Time is of the essence.

In July 2007, again at Cummings' urging and prior to the notice of termination period of Lease Extension No. 1, SpineFrontier and Cummings executed a written agreement captioned "Cummings Properties, LLC Standard Form Lease Extension #2" ("Lease Extension No. 2"), which was signed by SpineFrontier on or about July

2, 2007 and by Cummings on or about July 11, 2007.

Paragraph 1 of Lease Extension No. 2 states: "The lease is hereby extended for an additional term of six months ending at noon on October 30, 2010." At SpineFrontier's request and direction, Cummings stamped the words "THIS PARAGRAPH DOES NOT APPLY" over Paragraph 5 of the lease document – the notice of termination provision – and sent that document to SpineFrontier.

In June 2008, again well in advance of the notice of lease termination window, SpineFrontier and Cummings executed a written agreement captioned "Cummings Properties, LLC Standard Form Lease Extension #3" ("Lease Extension No. 3"). At the time Lease Extension No. 3 was signed, SpineFrontier's Peter Forte ("Forte") had replaced Chang as the point-person on the lease extension.

SpineFrontier had an ink-stamp of Chin's signature. At the time Lease Extension No. 3 was signed, Forte was authorized to use Chin's signature stamp on behalf of SpineFrontier. On or about June 2, 2008, he applied the stamp to Lease Extension No. 3 in the space provided for SpineFrontier's signature as lessee, and in the space provided for Chin's signature as guarantor. Forte returned the document so stamped to Cummings.

Cummings sent a letter to Chin dated June 3, 2008 enclosing a signature-stamped version of Lease Extension No. 3 and asked for his original signature on behalf of both SpineFrontier and as guarantor. Chin complied.

Paragraph 1 of Lease Extension No. 3 states:

The lease is hereby extended for an additional term of three years and nine months ending at noon on July 30, 2014.

Paragraph 5 of Lease Extension No. 3 states:

The lease, including all terms, conditions, escalations, etc. shall be automatically extended for additional successive periods of five year(s) each unless LESSOR or LESSEE serves written notice, either party to the other, of either party's option not to so extend the lease. The time for serving such written notice shall be not more than 12 months or less than six months prior to the expiration of the then-current lease period. Time is of the essence.

Aditya Humad ("Humad") joined SpineFrontier in 2009 as a financial analyst.

Between 2009 and 2014, he was promoted to director of business development & finance, vice president, chief financial officer, and president.

In the Spring of 2010, again well in advance of the notice of lease termination deadline, SpineFrontier and Cummings executed a written agreement captioned "Cummings Properties, LLC Standard Form Lease Extension #4" ("Lease Extension No. 4"), which was signed by SpineFrontier on April 23, 2010 and by Cummings on May 10, 2010.

The parties executed Lease Extension No. 4 in part to accommodate SpineFrontier's written request that its monthly financial obligations be discounted for an additional year. Paragraph 1 of Lease Extension No. 4 states that "The lease is hereby extended for an additional term of one year ending at noon on July 30, 2015."

Lease Extension No. 4 also stated, in an unnumbered concluding paragraph, that

All other terms of the lease shall continue to apply, and to the extent any inconsistency exists between this extension and the lease, including any prior amendments, the terms herein shall control and supersede any earlier provisions.

Lease Extension No. 4 did not expressly restate the notice of lease termination provision that appeared in Lease Extension No. 3. Kingsley Chin signed Lease Extension No. 4 on or about April 23, 2010.

On or about August 15, 2012, SpineFrontier and Cummings entered into a separate lease for approximately 1,467 square feet of office space at 500 Cummings Center, Suite 3450, in Beverly (the "3450 Lease"). Humad signed the 3450 Lease in his then-capacity as SpineFrontier's chief financial officer. Paragraph 30 of the 3450 Lease set forth a notice of lease termination provision. Before signing the lease, Humad crossed out that provision and initialed the document in the margin.

On or about August 26, 2013, Cummings and SpineFrontier entered into Amendment to Lease No. 1. Humad signed Amendment to Lease No. 1 in his then-capacity as chief financial officer. Amendment to Lease No. 1 states: "In connection with a lease in effect between the parties at 500 Cummings Center, Suite 3500, Beverly, Massachusetts ('premises' or 'leased premises'), fully executed on May 3, 2006 and currently terminating on July 30, 2015, . . . [the parties] hereby agree to amend said lease, including its terms . . . as follows"

One reason that the parties executed Amendment to Lease No. 1 was because

SpineFrontier wanted the premises it continued to lease from Cummings to be substantially modified with new construction to be performed by Cummings.

Amendment to Lease No. 1's purpose, among others, was to finance modifications to SpineFrontier's office costing approximately \$37,293. SpineFrontier paid the amortized costs for such modifications, including interest at a rate of eight percent annually through July 30, 2015, by increasing its monthly rent payment to Cummings by \$1,754.31, to \$30,466 per month for the balance of the lease term.

In Amendment to Lease No. 1, the parties set forth, *inter alia*, that the appended and mutually agreed-upon design plan and construction modifications to the premises were to be completed by Cummings (at Cummings' expense), and SpineFrontier's base rent would be increased accordingly. Amendment to Lease No. 1, in an unnumbered concluding paragraph, states:

All other terms of the lease shall continue to apply, and to the extent any inconsistency exists between this amendment and the lease, including any prior amendments, the terms herein shall control and supersede any earlier provisions.

On October 22, 2014, and well within the time allowed under the Lease for notice of termination of the Lease, Humad – by then SpineFrontier's president and CFO – emailed Justin D'Aveta as follows:

We have been looking at properties to buy/lease for SpineFrontier for 2015. The below are of interest if we stay within Cummings. Looking for modern feel for 15000 sq. ft., at \$10-16 rate with plenty parking, housing exec offices

and admin for 100-150 people over 3-5 years. We want to be closer to Boston but could consider Woburn, Lynn, Medford, Malden, Wakefield, or Peabody/Danvers area that are closer than Beverly.

In his October 22, 2014 email, Humad pasted two links that profiled properties managed by Cummings in Woburn. Humad concluded his email: "Available to discuss tomorrow or look at options you can offer on Friday. Thx." D'Aveta replied to Humad's e-mail on the same day. Drohosky's custom and practice, was to require that he be sent copies of all e-mails to or from D'Aveta's "jdd@cummings.com" email address, including the emails described above. As a result, in October of 2014, Drohosky was fully aware of SpineFrontier's intent not to remain in the Beverly space after July 30, 2015.

Although Cummings maintains form letters for communications to tenants, including those in response to communications from tenants purporting to provide notice to Cummings of the termination of the tenant's lease, Cummings neither acknowledged nor rejected SpineFrontier's email of October 22, 2014 as a statement that was or was not in compliance with the requirement for notice of termination of SpineFrontier's lease.

D'Aveta and Humad met in person on or about October 24, 2014. Humad stated to D'Aveta that while "that their plans continue to evolve, . . . the one thing he is positive about is that SpineFrontier cannot continue operating in Beverly, [and that] [h]e has told his employees that the company will not be in Beverly any later

than July 2015." Humad told D'Aveta that Spine Frontier was looking at spaces elsewhere, and he indicated its interest in looking at Cummings spaces in Woburn. D'Aveta memorialized these statements in his written notes of their meeting. After the meeting of October 24, 2014, Cummings did not notify SpineFrontier that its verbal notice of lease termination was insufficient, improper or inconsistent with the requirements of the Lease, as extended and amended.

During the six-month "notice of termination of lease" period from August 1, 2014 through January 30, 2015, as well as in the months that followed, SpineFrontier and Cummings discussed on several other occasions the possibility of SpineFrontier extending the Lease and changing the location of its leased premises from Cummings Center in Beverly to Cummings' offices at TradeCenter 128 in Woburn, Massachusetts, as well as to other non-Beverly properties managed by Cummings.

In July of 2015, SpineFrontier began moving its furniture, fixtures and equipment from the leased premises in Beverly. It did not fully vacate that space until sometime in the first several days of August of 2015. SpineFrontier retained the keys to the leased premises beyond noon on July 30, 2015. It returned the keys to Cummings sometime in August 2015. SpineFrontier fully paid its rent through July of 2015, but it did not pay Cummings rent for any month after July of 2015.

On August 5, 2015, Cummings sent SpineFrontier a notice (the "Notice of

Rent Due") for what it deemed to be SpineFrontier's financial default. The Notice of Rent Due was served upon SpineFrontier by certified mail at the leased premises. Courtesy copies of the Notice were also sent to SpineFrontier by first-class mail to its office in Malden, Massachusetts, as well as to its counsel.

In the Notice of Rent Due, Cummings informed SpineFrontier that if payment of rent on the Lease in Beverly was not received within ten days, the result would be (i) the automatic termination of the Lease without further notice; (ii) Cummings taking appropriate legal action to recover possession of the Premises; and (iii) Cummings accelerating the rent for 59 months through the end of the five year automatic extension of the lease term (until July 30, 2020), and seeking to collect "the entire balance of unpaid rent as liquidated damages discounted to its net present value using the published prime rate currently in effect, in an amount of \$1,732,377.52," in accordance with Section 20 of the Lease.

While SpineFrontier did not cure the default alleged in the Notice of Rent Due, it agreed that Cummings could apply \$38,763.97 of its \$184,400 security deposit being held in connection with the Lease to settle Count III (breach of contract for damage to leased premises) and Count IV (breach of contract for miscellaneous damages) of Cummings' Amended Verified Counterclaim.² Cummings

² On July 6, 2017, the parties filed a Stipulation of Dismissal as to Counts III and IV of Cummings' Amended Verified Counterclaim (paper no. 12).

continues to hold the remaining balance of the security deposit (i.e., \$145,636.03) pursuant to the Lease.

Paragraph 22 of the Original Lease provided as follows:

If LESSEE continues to occupy, control or encumber all or any part of the leased premises after the termination of this lease without the written permission of LESSOR, LESSEE shall be liable to LESSOR for any and all loss, damages or expenses incurred by LESSOR . . . except that use and occupancy payments shall be due in full monthly installments at a rate which shall be two times . . . the monthly rent due under this lease immediately prior to termination . . . it being understood that such extended occupancy is a tenancy at sufferance . . . LESSEE's control, occupancy or encumbrance of all or any part of the leased premises beyond noon on the last day of any monthly rental period shall constitute LESSEE's occupancy for an entire additional month, and increased payment as provided in this section shall be due and payable immediately in advance.

RULINGS OF LAW

I.

Upon consideration of the findings of fact set forth above, the court first concludes and determines that the lease agreements between SpineFrontier and Cummings each contained or continued in effect a provision that required SpineFrontier to notify Cummings – within not less than six nor more than twelve months prior to the end of the then existing lease term – that SpineFrontier was terminating its lease. While this provision was excised from Lease Extension No. 2, it was reinstated in Lease Extension No. 3 and, by clear implication, continued in effect

in Lease Extension No. 4 and Amendment to Lease No 1. Accordingly, by the terms of the agreements between the parties, SpineFrontier was required to notify Cummings not sooner than July 30, 2014 and not later than January 30, 2015 if it was terminating the parties' lease on July 30, 2015. If SpineFrontier failed to do so, then by the terms of the lease agreements, SpineFrontier's lease would automatically extend for an additional five years, or 60 months, until noon on July 30, 2020.

The Court further concludes that SpineFrontier gave Cummings contractually sufficient notice that it would not automatically extend the Lease when Humad sent his October 22, 2014 email to D'Aveta. The email made clear that SpineFrontier was not interested in remaining in its then-present Beverly location (and therefore subject to its current lease). To the extent Cummings was confused about the thrust of the email, any such confusion was remedied during the subsequent conversation between Humad and D'Aveta a mere two days later. By October 24, 2014, therefore, Cummings was on actual notice that SpineFrontier did not intend to extend its current lease for another term.

SpineFrontier's failure to comply with Section 21 of the Original Lease, which required that "any notice" be served by constable or delivered by registered mail, certified mail, or recognized courier service, did not render the notice ineffective because it was otherwise sent, received, and acknowledged well within the time allowed under the Lease for notice of termination. Timely, written notices are valid

even if sent in a manner that is not in strict compliance with the contract where, as here, the purposes of the notice provision have been fulfilled. See *Gerson Realty, Inc. v. Casaly*, 2 Mass. App. Ct. 875, 875 (1974) (tenant had validly exercised its option to renew when it sent the renewal notice by certified mail rather than registered mail as required by the lease); *Computune, Inc. v. Tocio*, 44 Mass. App. Ct. 489, 493 (1998); *Servigny v. Dowd*, 343 Mass. 160, 162 (1961). Cf. *Loitherstein v. Int'l Business Machines*, 11 Mass. App. Ct. 91, 93-96 (1980) (option to terminate lease was not properly exercised where the lessor did not receive payment of the termination charge until six days after the termination date); *Stapleton v. Macchi*, 401 Mass. 725, 729 (1988) (tenant failed to exercise option to purchase because it only provided oral notice).

It was likewise immaterial that the email did not explicitly refer to the notice of lease termination provision because the email (as further clarified by the October 24 meeting) plainly conveyed that SpineFrontier did not intend to extend its current lease. See *Seaboard Sur. Ins. Co. v. Town of Greenfield*, 370 F.3d 215, 223 (1st Cir. 2004), citing *Carey v. Planning Bd. of Revere*, 335 Mass. 746, 748 (1957) (indicating that while the form of notice is not important, it must nevertheless convey with reasonable certainty the information reasonably needed to serve the purpose of the

notice requirement).³ The email, therefore, provided sufficient notice under the Lease.

In any event, assuming *arguendo* that the email did not constitute adequate notice, Cummings waived its right to insist on strict compliance with the Lease's notice requirements. Waiver can be inferred where a party engages in "clear, decisive and unequivocal conduct" indicating such waiver. *KACT, Inc. v. Rubin*, 62 Mass. App. Ct. 689, 695 (1989). See also *Dynamic Mach. Works, Inc. v. Machine & Elec. Consultants, Inc.*, 444 Mass. 768, 774 (2005). While an anti-waiver provision may serve as evidence that waiver did not occur, its presence is not dispositive. See *M.J.G. Props., Inc. v. Hurley*, 27 Mass. App. Ct. 250, 250-253 (1989).

At no point following the October 22, 2014 email or the October 24, 2014 meeting did Cummings notify SpineFrontier that its notice failed to comply with the requirements of SpineFrontier's lease. Moreover, in the several *months* that followed, Cummings acted as if proper notice had been provided, repeatedly attempting to strike a deal with SpineFrontier on different terms for office space in one of its

³ Section 21, in addition to providing the means through which notice should be delivered, also stated that: "No oral notice or representation shall have any force or effect." To the extent Cummings contends that this provision precludes the Court from taking into account, Humad's statements during the October 24, 2014 meeting, this argument is without merit. Because the statements merely clarified what was already evident from the email – namely, that SpineFrontier did not intend to stay in Cummings' Beverly property under its then current lease, – they did not constitute the type of separate oral notice/representation prohibited by the provision.

non-Beverly properties.⁴ The court further notes that in the past, Cummings failed to strictly enforce the Lease's notice requirements. Chang's June 26, 2006 letter informing Cummings that it did not wish an automatic extension to take effect under the Original Lease was explicitly accepted by Cummings as sufficient notice even though it was not delivered by any of the methods detailed in Section 21. This conduct, in combination with Cummings' 2014 conduct, is clear, decisive and unequivocal evidence of waiver.

Based on the above, the court concludes that SpineFrontier gave Cummings contractually sufficient notice of termination, that the Lease did not automatically extend, and that therefore SpineFrontier did not breach the Lease by failing to pay rent for the August 2015 through July 2020 lease term.

II.

SpineFrontier, however, did breach the Lease when it continued to maintain possession of the premises beyond the lease termination date of noon on July 30, 2015.

The evidence demonstrates that SpineFrontier remained on the property until sometime in the first several days of August of 2015 without Cummings' written

⁴ Following October 2014, Cummings also made no effort to extend the Lease, even though its custom and practice was to lock down lease extensions prior to the expiration of the notice of termination period. This is yet another way in which Cummings operated as if notice had been properly provided.

permission. Such extended occupancy constituted a tenancy at sufferance governed by Section 22 of the Original Lease and so SpineFrontier was required to make a use and occupancy payment equal to twice its monthly rent at the time. SpineFrontier, however, did not do so. Accordingly, Cummings is entitled to holdover damages in the amount of twice the lease payment due for the month of July, 2015. However, unless Cummings is holding the balance of SpineFrontier's security deposit for some reason or purpose independent of the present action, SpineFrontier is entitled to the return of that security deposit balance.

III.

In the event that the above rulings are determined to be incorrect, and an appellate court concludes that SpineFrontier did not provide adequate notice of its intention not to extend the parties' lease, the court will address whether Cummings may recover, as liquidated damages, future lease payments totaling \$1,732,377.52 as calculated in accordance with the rent acceleration clause in Paragraph 20 of the Original Lease.⁵ As discussed below, the court concludes that Cummings is not entitled to such damages.

A liquidated damages provision is unenforceable if it is "grossly

⁵ In anticipation of an appeal of the court's rulings in this action, and if that appeal should be successful, the court addresses the matter of liquidated damages in order to avoid the need for, and the time and expense of, a second or further trial to determine those damages.

disproportionate to a reasonable estimate of actual damages made at the time of contract formation," and so functions as a penalty. *TAL Fin. Corp. v. CSC Consulting, Inc.*, 446 Mass. 422, 432 (2006) (internal quotes omitted). Put differently, such a provision is only valid if the sum agreed on as liquidated damages represents a "reasonable forecast of damages expected to occur in the event of a breach." *Cummings Props., LLC v. National Commc'ns Corp.*, 449 Mass. 490, 494 (2007). Whether the measure of anticipated damages is reasonable depends on the circumstances of each case. *NPS, LLC v. Minihane*, 451 Mass. 417, 420 (2008). In determining whether a liquidated damages provision is enforceable, the Court examines only the circumstances at the time of contract formation and does not take a "second look" at the actual damages after the contract has been breached. *Kelly v. Marx*, 428 Mass. 877, 878 (1999). The party challenging the application of the provision bears the burden of showing that it is unenforceable. *TAL Fin. Corp.*, 446 Mass. at 430. Reasonable doubt as to whether the provision is a valid liquidated damages clause is resolved in favor of the aggrieved party. *Id.*

Applying this standard, it is evident that the rent acceleration provision is unenforceable because Cummings was well aware at the time it entered the Lease that it was *highly* unlikely that any vacancy would last longer than 6-12 months. Cummings has acknowledged that it generally took the company 6-12 months to lease a vacated premises. Moreover, the Lease's notice of lease termination provision

(drafted by Cummings) only required that a notice of termination be provided 6-12 months prior to the end of the lease term, consistent with the typical vacancy period. However, the rent acceleration clause at issue here permits Cummings to recover up to *five years'* worth of rent. It, therefore, represents a gross overestimation of Cummings' potential damages and so must be considered punitive. Cf. *NPS, LLC*, 451 Mass. at 422 (although liquidated damages provision represented "worst case-scenario," it was enforceable because "the defendant ha[d] not shown that this outcome [was] sufficiently unlikely that it render[ed] the amount grossly disproportionate to a reasonable estimate of actual damages.").


Having found that Cummings cannot seek liquidated damages, the Court concludes that the more appropriate measure of damages for SpineFrontier's breach of its lease agreement with Cummings is the equivalent of nine months' rent.

ORDER FOR ENTRY OF JUDGMENT

Upon consideration of the foregoing findings of fact and rulings of law, judgment shall enter in favor of SpineFrontier, Inc. on Cummings Properties, LLC's breach of contract claim for default under the parties' lease agreement (Count 2 of Amended Verified Counterclaim), but in favor of Cummings on its breach of contract claim against SpineFrontier seeking holdover damages under their lease agreement equivalent to two months' rent (Count 5 of Amended Verified Counterclaim).

With respect to Count 1 of SpineFrontier, Inc.'s Complaint and Count 1 of

Cummings Properties, LLC's Amended Verified Counterclaim, it is further DECLARED, ADJUDGED and DECREED that in the circumstances of this case, SpineFrontier, Inc. properly terminated its lease agreement with Cummings Properties, LLC as of July 30, 2015, and therefore SpineFrontier does not owe Cummings damages, liquidated or actual, as a result of its termination of that lease agreement. Unless Cummings is holding the balance of SpineFrontier's security deposit for some reason or purpose independent of the present action, SpineFrontier is entitled to the return of that security deposit balance.


Peter M. Lauriat
Justice of the Superior Court

Date: March 27, 2018

