STATE OF VERMONT
ORANGE COUNTY, SS.

Progressive Plastics, Inc.,	)	**Orange Superior Court**
Plaintiffs	)	**Docket No. 42-2-02 Oecv**
	)	
v.	)	
	)	
New England Properties, Inc.,	)	
Clifford of Vermont, Inc.,	)	
Quickpull, Inc.,	)	
Clifford Properties, Inc., and	)	
CV Industrial Park of Randolph, Vermont,	)	
Defendants	)	

DECISION REGARDING:
CROSS MOTIONS FOR SUMMARY JUDGMENT

Introduction

Plaintiff Progressive Plastics, Inc. and Defendant Clifford Properties, Inc. disagree about the proper interpretation of a commercial lease. Specifically, former tenant Progressive Plastics seeks reimbursement from its landlord for improvements made during a ten-year period covered by two successive five-year leases, whereas its former landlord Clifford Properties seeks to limit the reimbursement to cover only improvements made during the second five-year lease. The parties have filed cross motions for summary judgment on this issue. Attorney P. Scott McGee represents Progressive Plastics. Attorney John C. Candon represents Clifford Properties.

Summary Judgment

Summary judgment is appropriate if the documents in the record, "referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3).

Undisputed Facts

The court derives the undisputed facts from the parties' statements filed under V.R.C.P. 56(c)(2). Plaintiff filed its statement of undisputed facts in connection with an earlier motion for summary judgment, on November 12, 2002. Defendant replied on November 27, 2002. In addition, defendant has filed its own statement of undisputed facts in connection with its current motion for summary judgment, on February 1, 2006. Based on the parties' statements and the supporting documents, the following facts are undisputed:

From sometime in 1990 to June 6, 2001, Plaintiff Progressive Plastics, Inc. was a tenant at the Clifford Industrial Park in Randolph, Vermont. The first lease was signed by C.V. Industrial Park as landlord, and Progressive Plastics, Inc. as tenant, on August 1, 1990. An addendum was signed on July 3, 1991. The first lease was for a term of five years. The first lease was silent as to reimbursement for improvements.

In 1996, Progressive Plastics and C.V. Industrial Park negotiated a new written lease, which they signed on June 10, 1996. The second lease was for a term of five years. The second lease contained the following provision:

> TENANT and LANDLORD will mutually assess their interests at the end of a three year period to determine whether an option to renew at the end of the five year term will be offered. In the event that the option to renew is not offered, LANDLORD will reimburse TENANT for improvements made to the property in the amount carried on TENANTS [sic] books for leasehold improvements at the end of the five year term. If TENANT chooses to vacate at any time, LANDLORD will not be held responsible to purchase the leasehold improvements made during TENANT'S tenure.

The above language in the second lease, specifying reimbursement by the landlord for plaintiff's leasehold improvements, was an inducement and protection to plaintiff in connection with plaintiff's decision to renew its leasehold interest for an additional five-year term.

The landlord did not provide plaintiff with an option to renew its second lease. The second lease expired on June 6, 2001, at the end of the five-year term.

When the second lease expired and was not renewed, plaintiff submitted a request to defendants for $27,200 in improvements according to the listing in its books, for improvements made over the course of the first and second lease terms.

The amount carried on the plaintiff's books for leasehold improvements made during the term of the second lease is $1,134.00.

At all times material hereto, defendant Clifford Properties, Inc. was the beneficial owner of the leasehold property.

Procedural Background

The parties seek a ruling interpreting a reimbursement term found within the second lease. Plaintiff Progressive Plastics first filed a motion for summary judgment concerning this issue on November 12, 2002. On February 6, 2003, the court issued an entry order, indicating that more discovery was necessary prior to ruling on the motion. Plaintiff renewed its motion on July 16, 2003, and defendant replied on July 28, 2003. On August 9, 2004, Judge Brian Burgess

issued an eight-page Decision and Order, granting plaintiff's motion in part and denying it in part. Judge Burgess specifically addressed the proper interpretation of the reimbursement term, denying plaintiff's motion for summary judgment on that issue. He explained his decision as follows:

> The second lease covered a five-year period, and this provision refers unambiguously to improvements made within "the" five-year term. Read as a whole, the contract contains no retroactive provisions, and the court cannot insinuate such a revision. It may well be that is what plaintiff intended when the parties renegotiated the lease for a second term, but that is not the agreement signed by defendant.

Decision and Order (Burgess, J., August 9, 2004), at 5. In his Order, Judge Burgess expressly stated that "defendant is not liable, under the lease, to pay plaintiff for any improvements made to the property during the first lease term, and plaintiff's Motion for Summary Judgment on that point is DENIED." *Id.* at 8. Presumably he did not grant summary judgment to Clifford Properties, Inc., because Clifford Properties had not filed its own motion for summary judgment.

Plaintiff then filed a motion to reconsider. Judge Burgess denied that motion, explaining that "the second lease is an independent and wholly sufficient document of mutual obligation as landlord-tenant and, on its face, incorporates nothing of the first lease." *Entry Regarding Motion* (Burgess, J., February 2, 2005).

More recently, the parties have filed cross motions for summary judgment on the same issue. Even though this case is long past the original date for pre-trial motions, the court recently granted permission to file additional motions for summary judgment. The court retains authority to revisit earlier summary judgment rulings, under *Morrisseau v. Fayette*, 164 Vt. 358 (1995).

The Pending Motions

In addressing the pending cross motions, the court is called upon to interpret the reimbursement clause of the contract, and perhaps to reconsider the logic of Judge Burgess's earlier decision. First, the court agrees with Judge Burgess's statement of background legal principles, and the plaintiff has not questioned those principles in its current motion. The background legal principles are as follows:

- Under common law, the tenant must demonstrate a distinct agreement to recover for costs of repairs, alterations and improvements. 49 Am. Jur. 2d, *Landlord and Tenant*, § 860.

- Courts must look to the objective intent of the parties, as that intent is indicated by the writing signed by each party. *Downtown Barre Development v. C & S Wholesale Grocers, Inc.*, 2004 VT 47, ¶ 8, 177 Vt. 70, 74-75.

- The parol evidence rule bars admission of evidence of a prior or contemporaneous oral agreement that varies from or contradicts the terms of the written agreement. *Housing Vermont v. Goldsmith & Morris*, 165 Vt. 428, 431 (1996).

Judge Burgess applied the above principles to the reimbursement clause of the June 10, 1996 contract, and concluded that it unambiguously refers to improvements made within "the" five-year term. *Decision and Order* (August 9, 2004), at 5. For the convenience of the reader, the court will again quote the contract language, as follows:

> TENANT and LANDLORD will mutually assess their interests at the end of a three year period to determine whether an option to renew at the end of the five year term will be offered. In the event that the option to renew is not offered, LANDLORD will reimburse TENANT for improvements made to the property in the amount carried on TENANTS [sic] books for leasehold improvements at the end of the five year term. If TENANT chooses to vacate at any time, LANDLORD will not be held responsible to purchase the leasehold improvements made during TENANT'S tenure.

Plaintiff objects to Judge Burgess's decision on the grounds that (1) it incorrectly suggests that the contract explicitly limits the reimbursement to improvements "within the five-year term," (2) it incorrectly assumes that the references to the five-year term directly modify the provision for reimbursement within the second sentence, and (3) it overlooks the reference, in the third sentence, to "improvements made during TENANT'S tenure."

However, plaintiff's argument overlooks the main point of Judge Burgess's decision, which is that: "The second lease covered a five-year period." Judge Burgess elaborated on that point when he responded to plaintiff's motion for reconsideration, by emphasizing that "the second lease is an independent and wholly sufficient document of mutual obligation as landlord-tenant." In other words, the entire second contract was designed to cover a five year period. Even though Progressive Plastics was a tenant for a period of at least ten years, the "tenure" under the second lease was for a period of five years. Defendant's obligation to reimburse plaintiff for leasehold improvements appears within the context of a five-year lease.

Plaintiff suggests that the second lease was simply a renewal of the first lease, and that the back-to-back five-year leases were the same as one ten-year lease for all purposes. However, the second lease was not a simple renewal of the first lease; clearly the two contracts contained different terms.

The court concludes that the second lease was an independent contract, for a term of five years, beginning in June of 1996. Given this conclusion, plaintiff is entitled to reimbursement for improvements made to the property during that second lease. Plaintiff is not entitled to reimbursement for improvements made prior to June of 1996, because those improvements did not occur during the tenure of the applicable lease agreement.

ORDER

Progressive Plastics, Inc.'s Motion for Summary Judgment is DENIED. Clifford Properties, Inc.'s Motion for Summary Judgment is GRANTED. Defendant Clifford Properties Inc.'s liability to Plaintiff is limited to $1134.00 plus interest.

Case to be set for status conference on remaining issues consistent with this order.

Dated this 23 day of March, 2006.

Hon. Harold E. Eaton, Jr.,
Presiding Judge