

**COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO**

<b>THE SHOPPES AT KENNEDY'S LANDING</b>	:	
Plaintiff	:	<b>CASE NO. 2011 CVH 01679</b>
vs.	:	<b>Judge McBride</b>
<b>JU JUS BOUTIQUE, INC. , et al.</b>	:	<b>DECISION/ENTRY</b>
Defendants	:	

Richard G. McCue Co., LPA, Richard G. McCue, attorney for the plaintiff The Shoppes at Kennedy's Landing, 948 Old St. Rt. 74, Suite 6, Cincinnati, Ohio 45245.

Patrick Gregory, attorney for the defendants Ju Jus Boutique, Inc. and Judy Cone, 717 W. Plane, P.O. Box 378, Bethel, Ohio 45106.

This cause is before the court for consideration of the motion for summary judgment filed by the plaintiff The Shoppes at Kennedy's Landing.

The court scheduled and held a hearing on the motion for summary judgment on November 14, 2011. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

## FACTS OF THE CASE

The Shoppes at Kennedy's Landing filed the present action on September 20, 2011, alleging that the defendants Ju Jus Boutique and Judy Cone entered into a lease agreement and that they are currently in breach of the lease. The plaintiff now seeks summary judgment on its claim. The affidavit of Drena Francis and attached documents filed in support of the summary judgment motion establish that Ju Jus Boutique has made no payments on its lease obligation since February 1, 2010 and that defendant Judith Cone signed a personal guaranty as to Ju Jus Boutique's lease obligation.<sup>1</sup>

While the defendants filed no memorandum in opposition to summary judgment, Judith Cone filed an affidavit in opposition of the motion. This affidavit states that the plaintiff has failed to re-lease the premises and, consequently, has failed to mitigate its damages.<sup>2</sup> The affidavit further states that the plaintiff rented space next door to Ju Jus Boutique that was used as a barbeque pit restaurant.<sup>3</sup> Judith Cone avers that fumes and odors from the barbeque restaurant "permeated into the leased area and affected the clothing that was for sale on the leased premises."<sup>4</sup> The defendant argues that this violated her right to quiet enjoyment of the leased premises.

The plaintiff filed an affidavit in response to Judith Cone's affidavit which mainly addressed the issue of mitigation of damages. However, at the hearing on this matter, defense counsel objected to the court's consideration of this affidavit and the evidence attached thereto. As this court ruled at the hearing on this matter, a party moving for

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<sup>1</sup> Affidavit of Drena Francis.

<sup>2</sup> Affidavit in Opposition of Motion for Summary Judgment at ¶ 2.

<sup>3</sup> Id. at ¶ 3.

<sup>4</sup> Id.

summary judgment must present all evidence in support of its motion contemporaneously with the motion so that the non-moving party has a full and fair opportunity to respond. While a court may consider untimely-filed evidence in support of summary judgment if the non-moving party does not move to strike or raise an objection to the evidence's consideration<sup>5</sup>, the non-moving party in the case at bar did object to the consideration of the plaintiff's affidavit and evidence filed out of time. Therefore, the court will not consider that affidavit and evidence for the purposes of the present motion.

#### **WHAT IS THE STANDARD FOR REVIEW ON A MOTION FOR SUMMARY JUDGMENT?**

The court must grant summary judgment, as requested by a moving party, if "(1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion."<sup>6</sup>

The court must view all of the evidence, and the reasonable inferences to be drawn therefrom, in a light most favorable to the non-moving party.<sup>7</sup> Furthermore, the

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<sup>5</sup> *Foster v. Cleveland Clinic Foundation* (Dec. 16, 2004), 8<sup>th</sup> Dist. Nos. 84156 and 84169, 2004-Ohio-6863, at ¶ 8, citing, *Stegawski v. Cleveland Anesthesia Group*, 37 Ohio App.3d 78, 83, 523 N.E.2d 902 (Ohio App. 8<sup>th</sup> Dist., 1987).

<sup>6</sup> Civ. R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Davis v. Loopco Indus., Inc.* (1993), 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144.

<sup>7</sup> *Engel v. Corrigan* (1983), 12 Ohio App.3d 34, 35, 465 N.E.2d 932; *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12-13, 467 N.E.2d 1378; *Welco Indus. Inc. v.*

court must not lose sight of the fact that all evidence must be construed in favor of the nonmoving party, including all inferences which can be drawn from the underlying facts contained in affidavits, depositions, etc.<sup>8</sup>

Determination of the materiality of facts is discussed in *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211:

“As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.”<sup>9</sup>

Whether a genuine issue exists meanwhile is answered by the following inquiry: Does the evidence present “a sufficient disagreement to require submission to a jury” or is it “so one-sided that the party must prevail as a matter of law[?]”<sup>10</sup> “The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.”<sup>11</sup>

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*Applied Cas.* (1993), 67 Ohio St.3d 344, 356, 617 N.E.2d 1129; *Willis v. Frank Hoover Supply* (1986), 26 Ohio St.3d 186, 188, 497 N.E.2d 1118; *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152, 309 N.E.2d 924.

<sup>8</sup> *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485, 696 N.E.2d 1044, citing *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341, 617 N.E.2d 1123.

<sup>9</sup> *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.

<sup>10</sup> *Id.* at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.

<sup>11</sup> *Id.* at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.

The burden is on the moving party to show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law.<sup>12</sup> This burden requires the moving party to “specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond.”<sup>13</sup>

A party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party’s claims.<sup>14</sup> The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case.<sup>15</sup> Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party’s claims.<sup>16</sup>

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.<sup>17</sup> However, if the moving party satisfies this burden, then the nonmoving party has a “reciprocal burden” to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a “triable issue of fact”

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<sup>12</sup> *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.

<sup>13</sup> *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus.

<sup>14</sup> *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

remains in the case.<sup>18</sup> The duty of a party resisting a motion for summary judgment is more than that of resisting the allegations in the motion.<sup>19</sup> Instead, this burden requires the nonmoving party to “produce evidence on any issue for which that (the nonmoving) party bears the burden of production at trial.”<sup>20</sup>

The nonmovant must present documentary evidence of specific facts showing that there is a genuine issue for trial and may not rely on the pleadings or unsupported allegations.<sup>21</sup> Opposing affidavits, as well as supporting affidavits, must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must show affirmatively that the affiant is competent to testify on the matters stated therein.<sup>22</sup>

“Personal knowledge” is defined as “knowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay.”<sup>23</sup>

Accordingly, affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civ.R.56(E),

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<sup>18</sup> *Id.*

<sup>19</sup> *Baughn v. Reynoldsburg* (1992), 78 Ohio App.3d 561, 563, 605 N.E.2d 478.

<sup>20</sup> *Wing v. Anchor Media Ltd. Of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus; *Welco Indus., Inc. v. Applied Companies* (1993), 67 Ohio St.3d 344, 346, 617 N.E.2d 1129; *Gockel v. Ebel* (1994), 98 Ohio App.3d 281, 292, 648 N.E.2d 539.

<sup>21</sup> *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 659, 612 N.E.2d 1295.

<sup>22</sup> Civ.R.56(E); *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 646, 662 N.E.2d 1112; *Smith v. A-Best Products Co.* (Feb. 20, 1996), 4<sup>th</sup> Dist. No 94 CA 2309, unreported.

<sup>23</sup> *Carlton v. Davisson*, 104 Ohio App.3d at 646, 662 N.E.2d at 1119; *Brannon v. Rinzler* (1991), 77 Ohio App.3d 749, 756, 603 N.E.2d 1049.

which sets forth the types of evidence which may be considered in support of or in opposition to a summary judgment motion.<sup>24</sup>

Under Civ.R.56(C), the only evidence which may be considered when ruling on a motion for summary judgment are “pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action.” These evidentiary restrictions exist with respect to materials which are submitted both in support of and in opposition to a motion for summary judgment.

Where the copy of a document falls outside the rule, the correct method for introducing such items is to incorporate them by reference into a properly framed affidavit.<sup>25</sup> Thus, Civil Rule 56(E) also states that “[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.”

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.<sup>26</sup> Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.<sup>27</sup>

However, the summary judgment procedure is appropriate where a nonmoving party fails to respond with evidence supporting his claim(s). While a summary judgment

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<sup>24</sup> *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 69, 582 N.E.2d 1040.

<sup>25</sup> *Martin v. Central Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 89, 590 N.E.2d 411; *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220, 222, 515 N.E.2d 632.

<sup>26</sup> *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.

<sup>27</sup> *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150.

must be awarded with caution, and while a court in reviewing a summary judgment motion may not substitute its own judgment for the trier of fact in weighing the value of evidence, a claim to survive a summary judgment motion must be more than merely colorable.<sup>28</sup>

In deciding a summary judgment motion, the court may, even if summary judgment is not appropriate upon the whole case, or for all the relief demanded, and a trial is necessary, grant a partial summary judgment, such that a trial will remain necessary as to the remaining controverted facts.<sup>29</sup>

## **LEGAL ANALYSIS**

### **(A) JUDITH CONE'S AFFIDAVIT IN OPPOSITION**

Before moving to the merits of the present motion, the court must first address a deficiency in Judith Cone's affidavit.

Pursuant to Civ.R. 56(E), "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall affirmatively show that the affiant is competent to testify to the matters stated in the

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<sup>28</sup> *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d at 111, 570 N.E.2d at 1099.

<sup>29</sup> Civ.R.56(D); *Holeski v. Lawrence* (1993), 85 Ohio App.3d 824, 834, 621 N.E.2d 802.

affidavit.”<sup>30</sup> “ ‘Personal Knowledge’ is ‘knowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said.’”<sup>31</sup>

In her affidavit, Judith Cone does not explicitly state that her averments were made on personal knowledge. However, this omission is not automatically fatal to the affidavit’s admissibility and consideration.<sup>32</sup> “[P]ersonal knowledge may be inferred from the contents of an affidavit \* \* \* .”<sup>33</sup> The lease at issue identifies the tenant as “Ju Jus Boutique Inc., DBA Bridal Formal, Judy Cone \* \* \* .”<sup>34</sup> As the tenant of the premises at issue, the court can reasonably infer that Judy Cone has personal knowledge as to the ways her store was affected by the barbeque restaurant next door and, consequently, the court finds the affidavit admissible as to this issue. As will be discussed below, it is this portion of Cone’s affidavit that is dispositive to the motion currently before the court.

## **(B) THE RIGHT TO QUIET ENJOYMENT OF THE LEASED PREMISES**

Paragraph 22 of the lease between the parties reads as follows:

“22. Quiet Enjoyment. If Tenant performs its obligations under this Lease, Tenant will have the quiet enjoyment of the Shop so long as this Lease remains in force, without hindrance or disturbance from Landlord, subject to the specific provisions of this Lease and to easements and restrictions of record.”<sup>35</sup>

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<sup>30</sup> *Chase Bank, USA v. Curren*, 191 Ohio App.3d 507, 946 N.E.2d 810, 2010-Ohio-6596, ¶ 17, quoting *Bonacorsi v. Wheeling & Lake Erie Ry. Co.* (2002), 95 Ohio St.3d 314, 767 N.E.2d 707, at ¶ 26.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at ¶ 27.

<sup>33</sup> *Id.*, quoting *Carter v. U-Haul Internatl.* (Oct. 8, 2009), 10<sup>th</sup> Dist. No. 09AP-310, 2009-Ohio-5358, at ¶ 10.

<sup>34</sup> Francis Aff. at Exhibit A.

<sup>35</sup> *Id.*

Furthermore, even if there were no written provision included in the subject lease, “ ‘[i]n Ohio, a covenant of quiet enjoyment is implied into every lease contract for realty.’”<sup>36</sup> This covenant “protects the tenant's right to a peaceful and undisturbed enjoyment of [her] leasehold.”<sup>37</sup> “The covenant is breached when the landlord obstructs, interferes with, or takes away from the tenant in a substantial degree the beneficial use of the leasehold.”<sup>38</sup> “The degree of the impairment required is a question for the finder of fact.”<sup>39</sup> “When the landlord breaches the covenant of quiet enjoyment, the tenant is relieved of its obligation to pay rent for the premises.”<sup>40</sup>

Breach of the covenant of quiet enjoyment may be raised as a defense to an action seeking damages for unpaid rent, and it is not an affirmative defense that is required to be pled in the defendant's answer under Civ.R. 8(C).<sup>41</sup>

As noted above, the degree of impairment required to find a breach of the covenant of quiet enjoyment is a question of fact. While the court is mindful of the fact that, in order to constitute a breach of the covenant, “ ‘the interference with the tenant's quiet enjoyment must be so substantial as to be tantamount to an eviction, actual or constructive[,]”<sup>42</sup> the court finds that Cone's affidavit is sufficient to create a factual question as to this issue. Judith Cone stated in her affidavit that the plaintiff rented the

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<sup>36</sup> *Hamilton Brownfields Redevelopment, LLC v. Duro Tire & Wheel*, 156 Ohio App.3d 525, 806 N.E.2d 1039, 2004-Ohio-1365, ¶ 23 (Ohio App. 12<sup>th</sup> Dist., 2004).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*, citing *GMS Mgt. Co., Inc. v. Datillo* (June 15, 2000), 8<sup>th</sup> Dist. No. 75838, 2000 WL 776982.

<sup>41</sup> *Davis v. Sean M. Holley Agency, Inc.* (Oct. 29, 2010), 2<sup>nd</sup> Dist. No. 23891, 2010-Ohio-5278, ¶ 14.

<sup>42</sup> *Presser v. RCP Mayfield, LLC* (July 9, 2009), 8<sup>th</sup> Dist. No. 92073, 2009-Ohio-3380, ¶ 23, quoting *GMS Mgmt. Co. v. Datillo* (June 15, 2000), 8<sup>th</sup> Dist. No. 75838.

space next door to her clothing store to a tenant which used the space for a barbeque pit restaurant.<sup>43</sup> Cone avers that the fumes and odors emanating from that restaurant “permeated” her store and “affected the clothing that was for sale on the leased premises” and “negatively affected the condition of the property for its intended use” as a clothing store.<sup>44</sup> These allegations are sufficient to raise genuine issues of material fact which cannot be resolved by the court in a motion for summary judgment.

### **CONCLUSION**

Based on the above analysis, genuine issues of material facts remain in the case at bar, and the plaintiff is not entitled to judgment as a matter of law. As a result, the plaintiff’s motion for summary judgment is not well-taken and is hereby denied.

Counsel shall conference and call the Assignment Commissioner within seven calendar days in order to schedule a trial setting conference which shall be scheduled within 14-28 days after the date of this decision.

**IT IS SO ORDERED.**

DATED: \_\_\_\_\_

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Judge Jerry R. McBride

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<sup>43</sup> Aff. in Opp. at ¶ 3.

<sup>44</sup> Id.

**CERTIFICATE OF SERVICE**

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-mail/Regular U.S. Mail this 5<sup>th</sup> day of December 2011 to all counsel of record and unrepresented parties.

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Secretary to Judge McBride