IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR MIAMI-DADE COUNTY, FLORIDA

Case No. 2022-002245-CA-01

MICHAEL KADOSH, as Trustee under the Michael Kadosh Intervivos Revocable Trust Agreement Dated November 28, 2001,

Plaintiff/Counter-Defendant,

v.

SYLVANO INC., and ALL OTHERS IN POSSESSION,

Defendant/Counter-Plaintiff.
_____/

DEFENDANT/COUNTER-PLAINTIFF'S RESPONSE TO PLAINTIFF/COUNTER DEFENDANT'S MOTION TO DETERMINE RENTS

Defendant/Counter-Plaintiff Sylvano Inc. requests that the Court deny Plaintiff/Counter Defendant's Motion To Determine Rents.

On a landlord's motion to determine rents owed, a court must determine what constitutes rent under a written lease and it must apply the lease's plain terms. Here, the written lease expressly abated rate—that is, reduced rent to zero—if a fire rendered the premises untenantable. The premises in this lawsuit caught fire, and the tenant has not returned to the premises because of that fire. Hence, under the lease's plain terms, the rent has been reduced to zero dollars. This conclusion, moreover, is supported by the landlord's own actions. Several times after the fire, the tenant informed the landlord that the lease wholly abated any rent until the landlord fixed the premises. Not once in over fifteen months did the landlord contest this or demand rent. Only after the tenant notified the landlord that its failure to fix the premises breached the lease did the landlord demand rent. For this reason and others, the motion must be denied.

I. FACTUAL BACKGROUND

Plaintiff, Michael Kadosh as Trustee under the Michael Kadosh Intervivos Revocable Trust Agreement dated November 28, 2001 ("Landlord") leased 1925 Liberty Avenue on Miami Beach ("Premises") to Defendant Sylvano Inc. ("Tenant"). In August of 2020, a fire struck the Premises, and the Tenant was unable to return to the Premises. The lease between Landlord and Tenant provided that if there was a fire, it was Landlord's obligation to fix the Premises and that *the Tenant would not have to pay rent until that happened*:

> 11. FIRE OR CASUALTY. If the Building shall be rendered untenantable by fire or other casualty during the Term, Tenant shall have the right to terminate this Lease upon providing Landlord with written notice within 90 days after the occurrence of such fire or other casualty. In the event of termination, Base Rent and Additional Rent shall be paid only to the date of the fire or casualty. During any time that the Premises are untenantable due to causes set forth in this Paragraph, Base Rent and Additional Rent shall be abated. Upon any such termination, Landlord and Tenant shall each be released from all further liability under this Lease accruing after the effective termination date. If Tenant does not elect to terminate this Lease, then Landlord shall promptly restore the Building.

[Lease Agreement, Ex. 1 § 11][1]

From August of 2020 till November 31, 2021, the Tenant and the Landlord operated under Section 11 of the Lease and the Landlord never requested that the Tenant pay rent. In January of 2021, the Tenant, in a letter from its counsel, demanded that the Landlord repair the Premises and noted that, under the lease, rent was totally abated. [Jan. 11, 2021 Letter from Bilzin Sumberg, Ex. 4 at 1–2] The Landlord never responded to the Tenant's letter—as discovery taken in this action has confirmed. [Ans. to Defendant/Counter-Plaintiff's First Set of Inter., Ex. 5 at 3] Nor did the Landlord fix the Premises, as was its obligation. Instead, on July

[1] Though the Landlord insinuates, without evidence, that the Tenant never renewed the lease, that is incorrect. [Mot. at 3 n.2] On September 24, 2019, the Tenant's counsel sent a proper renewal notice. [Sept. 24, 2019 Letter from Bilzin Sumberg, Ex. 2] That notice was sent through FedEx, and it was received at the Landlord's address on September 25, 2019. [Federal Express Confirmation, Ex. 3]

26, 2021, the Tenant sent the Landlord another formal notice, noting that an engineering report uncovered structural damage to the Premises and that the "Tenant has been unable to operate its business in the Premises since the fire that occurred . . . on August 28, 2020." [July 26, 2021 Letter from Bilzin Sumberg, Ex. 6 at 1–2] Once again, the Landlord neither responded nor fixed the Premises. [Ex. 5 at 3] And so, on November 8, 2021, the Tenant informed the Landlord that it was in default, and that the Tenant "will continue to abate" rent "in accordance with Section 11 of the Lease, so long as the Premises remain untenantable." [Nov. 8, 2021 Letter from Bilzin Sumberg, Ex. 7 at 2]

Nineteen days later, the Landlord, for the first time, responded, in a letter from its attorney, that the Tenant had breached the lease—not by refusing to pay rent but by altering the Premises without approval. [Mot. Ex. 1 at 15–16] On December 16, 2021, the Tenant responded, again reiterating that rent was abated, addressing the Landlord's claims of alleged breach, and requesting a call to amicably address the situation. [Dec. 16, 2021 Letter from Bilzin Sumberg, Ex. 8]

On February 7, 2022, the Landlord filed two actions—one for eviction and the other for breach of contract. The Landlord's complaint does not specifically allege what amount of rent the Tenant allegedly owes. [Mot. Ex. 1 at 1–3]

II. LEGAL ARGUMENT

Section 83.232 of the Florida Statutes requires that, in an eviction action, any tenant pay rent in "the amount alleged in the complaint as unpaid" into the court registry or otherwise lose any defense to the eviction action. *See* FLA. STAT. § 83.232(1). Nonetheless, the statute is not without defenses. In particular, a tenant may "contest the amount of money to be placed into the court registry" by contending that it has made payments or arguing about what "properly

constitutes rent under the provisions of the lease." *Id.* § 83.232(2). Likewise, a court has discretion to "extend" the time to make any payment into the registry "to allow for later payment, upon good cause shown." *Id.* § 83.232(1).

Here, the Tenant should not be required to put any money into the registry, since under the governing lease, the appropriate rent due is $0. In any event, this Court should use its discretion to require any payment into the registry for past rent not be due until after trial.

A. Under the Lease, No Rent Whatsoever Is Due.

In its motion to determine rents, the Landlord contends that the Tenant must deposit back rent in the court registry because it "did not allege defenses of payment or satisfaction." [Mot. at 2] But that is not the only defense to a landlord's request for rent. Indeed, by the statute's plain language, a court must also determine "[w]hat properly constitutes rent under the provisions of the lease." FLA. STAT. § 83.232(2)(b). And, as caselaw from the Fourth District Court of Appeal highlights, to make that determination, this Court must look to and interpret the parties' lease.

Indeed, in *Custom Marine Sales, Inc. v. Boywic Farms, Ltd.*, 245 So. 3d 791 (Fla. 4th DCA 2018), and in *Rowe v. Macaw Holdings I, LLC*, 248 So. 3d 1178 (Fla. 4th DCA 2018), the Fourth DCA made clear that courts err when they do not look at the lease to determine what rent—or if any rent—is owed. In *Custom Marine*, a commercial lease contained a clause "waiving rent payments until the completion of certain improvements," and though those improvements were never made, the trial court nevertheless required the tenant to "deposit rent pursuant to section 83.232." 245 So. 3d at 792. The Fourth DCA reversed, noting that the "language of the lease agreement" was clear and that "[w]hen the language of a contract is unambiguous, it must be enforced based on its plain language." *Id.*

Similarly, in *Rowe*, a commercial lease had a provision that "provided for a reduction in fixed rent proportionately to the extent to which repair operations interfered with the operation" of the tenant's business. 248 So. 3d at 1179. Instead of applying this contractual language, the trial court in *Rowe* required that the tenant pay the rent in its entirety minus "amounts paid by the tenant and other credits to which the parties agreed." *Id.* The Fourth DCA again reversed, concluding that the issue required an evidentiary hearing to determine what the rent was, exactly, given the provision reducing rent. *Id.* at 1180. Importantly, the Fourth DCA noted that the trial court needed an evidentiary hearing because in *Rowe*, unlike the "more common situation in which a tenant . . . claims as a defense to the non-payment of rent that the landlord breached some other lease provision not expressly tied to the amount of rent set forth in the lease," the "lease provision describ[ed] an event which expressly alter[ed] the amount of rent set forth in the lease." *Id.*

As in *Custom Marine* and *Rowe*, the Court must look at the language of the lease in deciding this motion. The lease here contains a clause that expressly and explicitly alters the rent due and owing if the Premises becomes untenantable because of a fire. That provision is clear: No rent is owed until the Landlord fixes the Premises. And the facts are undisputed: a fire rendered the Premises untenantable, and the Premises are not fixed. Accordingly, the Tenant owes no rent, and it should not be required to place any money in the court registry.

B. Alternatively, the Court Should Not Require Payment Until After Trial.

Alternatively, even if the Tenant were required to pay all back rent into the court registry, the Court should use its discretion to require that the Tenant make that payment only after the trial because the Landlord waited a fifteen months before first requesting back rent, waited even longer before bringing this eviction action, and waited yet another two months before filing this

motion. "[E]quity aids the vigilant and not the indolent." *Lanigan v. Lanigan*, 78 So. 2d 92, 96 (Fla. 1955).

To begin with, this Court need not force a tenant to place money into the court registry right away. Under the plain language of the statute, "[t]he court may . . . extend" the time for a tenant to make a payment "to allow for a later payment, upon good cause shown." FLA. STAT. § 82.232(1). When a statute uses the word "may," it grants discretion. *See State v. Werner*, 402 So. 2d 386, 387 (Fla. 1981); *Snyder v. Douglas*, 647 So. 2d 275, 279 (Fla. 2d DCA 1994). This Court thus retains discretion to move the date any payment into the court registry is required.

And this Court should use that discretion here. The Landlord has been, at best, indolent. For nearly fifteen months after the Premises caught fire, the Landlord not once asserted that the Tenant owed a nickel of rent. Only after the Tenant informed the Landlord of its breach of the lease did the Landlord claim that the Tenant owed rent stretching back fifteen months. And the Landlord did not sue for eviction until nearly eighteen months had passed. Incredibly, the Landlord asserts that the Tenant must pay back the rent for that entire time frame—a whopping $180,415.66—or lose possession of the Premises. The law does not favor such delay. Moreover, requiring such a large payment—nearly impossible for a restaurant that hasn't operated in almost two years—would effectively eliminate the bargained-for protections of Section 11 of the lease. Good cause thus exists to require any payment to be made only after a trial.[2]

[2] The most the Court should order would be payment of rent into registry during the pendency of this action *starting from the date of any such order*. Initially, the statute states that "the tenant shall pay into the court registry the amount alleged in the complaint as unpaid, or if such amount is contested, such amount as is determined by the court." FLA. STAT. § 82.232(1). Because the Landlord's complaint does not allege any definitive amount as unpaid, the Landlord has not complied with this section and thus the Tenant need not put any money in the court registry at all. At any rate, section 82.232 "is designed to remedy the problem of commercial tenants remaining on the premises for the duration of litigation without paying the landlord rent." *Premici v. United Growth Props., LP*, 648 So. 2d 1241, 1243 (Fla. 5th DCA 1995). Any such order would protect the Landlord from any delays in this lawsuit while refusing to award the Landlord for sitting on its hands for over eighteen months.

III. CONCLUSION

For all these reasons, the Tenant requests this Court (1) deny the Landlord's Motion To Determine Rents or, (2) alternatively, order that any future rent be deposited into the court registry but extend the time to deposit back payments until after a trial on the eviction action.

Dated: May 16, 2022

Respectfully Submitted,

TOTH FUNES PA

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CERTIFICATE OF SERVICE

I certify that on May 16, 2022, I electronically filed this document with the Florida Courts e-Filing Portal, which will serve it by e-mail on all counsel on the Service List below.

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