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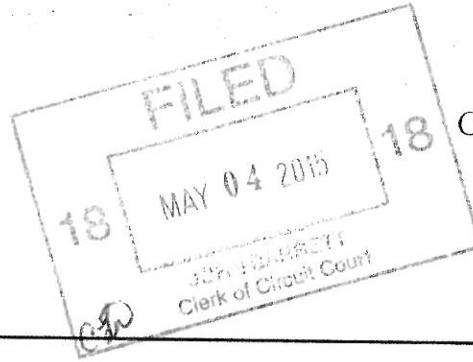
MIDWEST DEVELOPMENT  
CORPORATION,

Plaintiff,

v.

MILWAUKEE COUNTY,

Defendant



Case No. 12-CV-11071

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**DECISION AND ORDER**

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This matter came before the Court on February 3, 2014 for a hearing on Milwaukee County's ("County") Motion to Amend its Answer, Midwest Development Corporation's ("Midwest") Motion to Dismiss the Counterclaim, and the parties' Motions for Summary Judgment. Paul Piaskoski appeared on behalf of Midwest, Michele Ford and Kathryn West appeared on behalf of County. The Court has considered the arguments and filings of the parties and now makes the findings of fact and conclusions of law:

**County's Notice of Claim Argument**

1. The County argues that Midwest's claims should be dismissed for failure to comply with Wisconsin's Notice of Claim statute.
2. The Notice of Claim statute, WIS. STAT. § 893.80(1d), prevents any claimant from maintaining an action against a government entity unless the claimant gave notice of the claim, which can be satisfied by:
  - a. Providing actual notice to the government entity without causing prejudice, and

- b. Providing the address of the claimant and an itemized statement of relief to an appropriate official and waiting until the claim is disallowed before filing suit.
3. Determining if a government entity had actual notice is a mixed question of fact and law for which the plaintiff bears the burden of proof. *E-Z Roll Off, LLC v. Cnty of Oneida*, 335 Wis.2d 720, 732, 800 N.W.2d 421 (2011).
4. Prejudice occurs when the government entity is delayed in its ability to adequately defend its case, because this hinders the statutory purpose to allow government entities to promptly investigate claims. *Id.* at 746.
5. The Court finds that Midwest substantially complied with the notice of claim statute and the County has not shown a material dispute of fact on this issue.
  - a. Correspondence between the parties indicates that the County had actual notice of Midwest's claim no later than August 17, 2012.
  - b. The County was not prejudiced by lack of formal notice, because it had enough time to investigate and evaluate Midwest's claim.
  - c. Midwest's "Notice of Landlord's Default" dated September 4, 2012 was submitted to James Keegan, the Director of the Department of Parks, Recreation and Culture. This document provided to the County Midwest's counsel's address and requested that the County buy back improvements valued at \$7.4 million,
  - d. The County disallowed Midwest's claim in a September 7, 2012 letter, stating that it carefully reviewed the facts of the case before asserting its position.
  - e. Midwest filed its lawsuit on October 9, 2012.
6. Based on the above undisputed facts, the Court finds that the County received actual notice of Midwest's injury, evaluated the claim, and did not suffer prejudice because of the form of notice provided. Therefore, the County's affirmative defense based on the notice of claim statute fails as a matter of law.

### **Midwest's Constructive Eviction Claim**

7. The core of Midwest's constructive eviction claim is that the County allowed a new tenant Rock Sports Complex ("Rock") to enter the Crystal Ridge property ("the property") before terminating Midwest's tenancy.

8. The elements of constructive eviction are: (1) disturbance of the tenant's possession by the landlord or someone acting under the landlord's authority, (2) which makes the premises unfit for the tenant's use, (3) if the tenant abandons the property in a reasonable amount of time. *Schaaf v. Nortman*, 19 Wis.2d 540, 543, 120 N.W.2d 654 (1963).
  - a. The breach must be substantial and for long enough that the breach deprives the tenant of full use and enjoyment of the property for a material period of time. *Id.* at 544.
  - b. The landlord must be given notice and has a reasonable amount of time to remedy the breach and only after a reasonable amount of time passed with no cure can the tenant quit the premises due to the alleged breach. *Id.*
9. Midwest alleges:
  - a. Rock entered the property to begin landscaping work without Midwest's permission on or before September 4, 2012, disturbing Midwest's quiet possession of the property and disrupting its operations.
  - b. Midwest gave notice of Rock's disturbance to the County by September 4, 2012.
  - c. The County did not remedy the breach, so Midwest was left with no choice but to sign the Mitigation Agreement with Rock on September 18, 2012, which constitutes abandonment.
10. In 2008, the Lease term expired and Midwest became a holdover tenant on a year-to-year basis, under which only 90 days notice was needed for County to terminate the Lease.
11. The County contracted for the option to take full ownership of all improvements permanently affixed to the Leased Premises except the chair lift upon the abandonment of the premises by Midwest or termination of the lease. (Lease ¶ 21).
12. Midwest entered into the Mitigation Agreement with Rock and received the County's Notice of Termination before it abandoned the premises.
  - a. Midwest and its owner John Kaishian received \$400,000 under the Mitigation Agreement for consulting services, purchase of the chair lift, a covenant not to compete, and use of the Crystal Hill name and logo.
  - b. Midwest agreed that Rock "will be permitted to access the Property prior to the termination of your lease and to begin immediately to make improvements and begin construction at the Property." (Mitigation Agreement, ¶ 3).

- c. Rock allowed Midwest to fulfill its commitments renting the Property as a venue for weddings. (*Id.* at ¶ 11).
  - d. Midwest received the 90-Day Termination Notice from the County on September 26, 2012.
13. When the inferences are viewed in Midwest's favor, Rock disturbed Midwest's possession in a way that made the property unfit for Midwest's use and Midwest gave the County notice and two weeks to remedy the breach. However, the Court does not agree that the Mitigation Agreement constitutes abandonment, because Midwest maintained its right to use the property for its wedding business. Rather than quitting the premises, Midwest negotiated a solution with Rock and received ample consideration in exchange for ceding control of the property. Based on these undisputed facts, Midwest did not quit the property until well after the Mitigation Agreement was signed and the Termination Notice was received. Therefore, the Court finds that Midwest's constructive eviction claim fails as a matter of law.

#### **Midwest's Buyback Provision Claim**

14. Midwest argues that County's lease agreement with Rock triggered the buyback provision (Lease ¶ 28), because the County allowed Rock to develop the property for other uses than Midwest was allowed under the uses provision (Lease ¶ 4). Specifically, Midwest argues that the County allowed Rock to transform a mom and pop skill hill into a state of the art multi-sports and entertainment complex.
15. The Court finds that the terms of the Lease are unambiguous, so the only question is if the County Board's Resolution to lease the property to Rock triggered the buyback clause.
- a. Whether a contract is ambiguous is a matter of law. *Wisconsin Label Corp. v. Northbrook Property & Cas. Ins. Co.*, 2000 WI 26, ¶ 24, 233 Wis.2d 314, 607 N.W.2d 276. Courts apply the literal meaning of unambiguous contracts. *Id.* at ¶ 23.
  - b. Contracts are interpreted to avoid unreasonable and absurd results. *Chapman v. B.C. Ziegler and Co.*, 2013 WI App 127, ¶ 11, 351 Wis.2d 123, 839 N.W.2d 425.

16. The Lease allowed Midwest to use the property for “the operation of a year-round sports center” and prohibited the use of “motorized recreational vehicles.” (Lease ¶ 4).
17. The July 11, 2012 County Board Resolution allows Rock to construct and operate “athletic fields and related amenities” and requires written approval from the County and Wisconsin Department of Natural Resources for any construction activities. It does not allow Rock to operate a business using motorized recreational vehicles.
18. Midwest argues that the Resolution’s inclusion of the term “related amenities” is the County’s attempt to backdoor uses into its agreement with Rock that would trigger the buyback clause.
  - a. Merriam-Webster defines an amenity as “something that conduces to comfort, convenience, or enjoyment.”
  - b. The Court finds that the Resolution’s use of the word “amenities” is consistent with the operation of a year-round sports center.
19. Midwest emphasizes that it primarily operated a ski hill while Rock has concentrated its operations on mountain biking, athletic fields, and merchandise. However, Midwest’s Lease leaves open the possibility of “other sports activities for all seasons as agreed upon in writing.” (Lease ¶ 4). Therefore, the Court finds that Rock’s focus on mountain biking and other business pursuits is not dispositive.
20. Midwest argues that the buyback clause was triggered because the County approved uses of the property for Rock, which were not agreed to in writing for Midwest. Rock changed the scale and focus of operations, but Midwest and Rock each used the Property for a recreation-focused year-round sports center. The Court finds that enforcing Midwest’s interpretation of the contract would produce unreasonable results, because it deviates from the literal meaning of the Lease’s terms and would prevent any subsequent tenant from developing or improving the property without triggering the buyback clause.
21. Based on the undisputed facts, the uses defined by the County Board Resolution and the uses defined by the Lease are not dissimilar in a way that triggers the buyback clause. Therefore, the Court finds that this claim fails as a matter of law.

### County's Erosion Claim

22. The County argues that Midwest breached its contractual obligations under the Maintenance and Repairs clause (Lease ¶ 12), because Midwest did not remedy damage to the Property resulting from "slope failure and erosion."
23. The County also argues that the affidavit and report from Midwest's expert, Timothy Lynch, should be struck from the record.
24. Lease ¶ 12 is a repair and replacement clause and as such will be construed to impose only minimal duty on the tenant to undertake repairs and only to the extent that the premises can be used for the purposes for which they are leased, *Lindsay Bros., Inc. v. Milw. Cold Storage Co.*, 58 Wis.2d 658, 666, 207 N.W.2d 639 (1973).
  - a. The County bases its duty to remediate erosion claim on a landslide that was caused by an unusually strong rain storm in 2008 that caused erosion throughout the County.
  - b. Midwest continued to use the property for the operation of a year-round sports center from 2008 until 2012.
  - c. Rock is currently using the property for the operation of a year-round sports center.
25. Construing all inferences in County's favor and ignoring the evidence submitted by Mr. Lynch, Midwest did not damage the property such that it could not be used as a year-round sports center. This is shown by the fact that Midwest and Rock have continued to use the Property for this purpose. Based on the undisputed facts, the County's claim fails because Midwest met its repair and maintenance obligations under ¶ 12.

### ORDER


#### THEREFORE,


1. County's Motion to Amend its Answer in order to raise an affirmative defense that Midwest failed to meet statutory notice of claim requirements is denied for the reasons stated on the record;

2. The Court DENIES the County's motion for summary judgment on its notice of claim argument;
3. The Court GRANTS the County's motion for summary judgment on Midwest's constructive eviction claim, because when construing all facts in Midwest's favor there is no legal basis for its claim;
4. The Court ORDERS the County to refund the pro rata share of Midwest's rent based on a termination date of December 26, 2012;
5. The Court GRANTS the County's motion for summary judgment on Midwest's buyback provision claim, because when construing all facts in Midwest's favor there is no legal basis for its claim;
6. The Court GRANTS Midwest's motion for summary judgment on County's erosion mediation claim, because when construing all facts in County's favor there is no legal basis for its claim.

**SO ORDERED.**

Dated this 4 day of May, 2015 at Milwaukee, Wisconsin.

BY THE COURT:  
  
The Honorable Pedro Colón  
Circuit Court Judge, Branch 18



**This is a final order for the purposes of appeal.**