

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WESTON AND CO., INC. :
t/a BRYCE'S CATERING, : CIVIL ACTION
 : NO. 06-4900
Plaintiff, :
 :
v. :
 :
BALA GOLF CLUB, :
 :
Defendant. :

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

NOVEMBER 15, 2007

Before the Court is a contract dispute between Weston and Co. and Bala Golf Club. A bench trial was held on Thursday, September 6, 2007. This memorandum contains the Court's findings of fact and conclusions of law.

I. FINDINGS OF FACT

On October 24, 2002, Weston and Co. ("Weston"), a catering company operated by Alan Brody, and Bala Golf Club ("Bala" or "the Club"), a private golf club in Bala Cynwyd, entered into a Lease Agreement¹ (Def.'s Ex. 1) and a Food Service Operating Agreement ("FSOA") (Def.'s Ex. 2).

The Lease provided that Weston would lease facilities

¹ The Lease Agreement was amended on January 1, 2004 and at some point during October 2004. The original agreement together with the amendments will be referred to as "the Lease."

at Bala consisting of the Dining Room, Banquet Room, Bistro Room, President's Room, Kitchen and Men's Grill (collectively, the "Premises") for the purpose of providing food and beverage service to Bala's members. In addition to operating the Club's regular restaurants, Weston was authorized to book private events at the Club for both members and non-members. The Lease prohibited Weston from booking events more than one year in advance without Bala's permission.

Weston billed its customers directly for private events. Club members who used the restaurants or bar during regular club hours were billed by Bala on a monthly basis, based on receipts submitted by Weston. Each month, Bala turned over to Weston the money collected from members, less any amounts owed by Weston to Bala. For example, Weston was responsible for a portion of the Club's monthly utility bills; this amount was deducted each month from the amount paid to Weston. See Def.'s Ex. 2, § 9 (providing that Bala shall pay to Weston "all funds received for standard food and beverage purchases on a monthly basis, with monthly adjustments for items permitted to be offset under the terms of this Agreement").

In October 2004, the Lease was amended to provide that Weston would vacate the Men's Grill on January 1, 2005. Def.'s Ex. 1. Bala operated the Men's Grill itself after Weston vacated.

The FSOA required Bala to maintain a "food minimum" policy, under which Bala's members were required to spend \$1,000 per year in food and beverage purchases at the Club.² If a member hosted a "large event," defined as an event with 16 or more guests, the deduction from the member's food minimum requirement was capped at \$250. Members who did not meet their minimum purchase requirements were billed the unspent amount of their minimum at the end of each fiscal year.³ Each year until 2006, Bala collected the unused food minimums and then remitted the money to Weston.⁴

The members' spending was tracked by Bala's bookkeeper. Based on receipts submitted by Weston and obtained from the Men's Grill, she entered each member's spending into a computer database on a weekly basis. The database was used to record all of the Club's information about its members and a variety of reports could be generated using the database, to show everything from number of children in a family to spending-to-date in a fiscal year. Ordinarily, all of the Club's food minimum reports

² This minimum applied only to full members of the Club. Members meeting certain criteria qualified as junior or senior members and were subject to a lesser minimum spending requirement. Moreover, the spending requirement would be prorated for a member who joined or left the Club mid-year.

³ Bala's fiscal year ran from October 1 to September 30.

⁴ The October 2004 Amendment provided that amounts spent by members at the Men's Grill would be deducted from the members' annual food minimums.

were generated using the bookkeeper's computer, which had certain parameters saved that governed how the report would be generated.⁵ The amount of the unused food minimums in fiscal year 2006, as reflected by the Club's year-end report, is \$17,329.93.⁶

⁵ The food minimum report was provided regularly to Weston by the Club to enable Weston to estimate future demand at the Club. Alan Brody could view the food minimum report from his own computer at the Club, but he could not input data.

⁶ Weston contends that Bala's report is erroneous and that the correct amount is actually \$36,539.05. To support this claim, Weston offered the following evidence: Brody testified that, in August 2006, he generated food minimum reports from his own computer. He compared reports from August 14, 2006 and August 21, 2006. The amount of unused food minimums decreased by around \$40,000 between August 14 and August 21. This decrease was caused by changes in a category entitled "prior spent," which showed how much members had spent in prior weeks. Many of the changes in members' "prior spent" amounts were whole numbers, for example, \$200 rather than \$197.67. Whole number charges are unusual in the restaurant business. Brody further testified that, although erroneous entries totaled about \$40,000 in August 2006, the members continued purchasing food through September. The correct entries made after August 21 offset the erroneous entries to some extent so that the remaining erroneous entries equal only \$19,209.12. Weston argues that it is entitled to the minimums reflected in Bala's year-end report plus the amount of remaining erroneous entries, or \$36,539.05.

The Court rejects this argument. At trial, Bala offered four plausible explanations for the phenomenon observed by Brody. First, Brody's report may have appeared aberrant because it was printed from his own computer, rather than the bookkeeper's computer, which has the proper parameters saved. Second, unused food minimums may change abruptly if a member changes status during the year. Third, some of the whole-number changes may reflect large events that were held, since deductions are capped at \$250 for large events. Finally, the Club's computers were damaged by lightning in August 2006, leading to a sudden influx of entries once the computers were fixed. Brody himself admits that the October report does not reflect all the same "erroneous entries" as the August report. The Court

After Weston and Bala signed the Lease, Weston carried out construction work to modernize the kitchen at Bala. Weston made at least \$50,000 worth of improvements to the Premises.⁷ In return, Bala deferred Weston's rent obligation for 2005. This arrangement was pursuant to Section 4(a) of the Lease, which provided that, if Weston made "not less than Fifty Thousand Dollars (\$50,000) of improvements to the kitchen prior to October 31, 2003 (and g[ave] Landlord evidence of same)," Weston's 2005 rent payments would be deferred. Rather than paying \$50,000 rent in 2005, Weston would pay its 2005 rent in ten payments of \$2,500 during 2006 and ten during 2007.

The Lease further provided that "[u]pon termination, any unpaid and deferred rent shall be credited against any sums due Tenant by Landlord." Def.'s Ex. 1, § 4(a). Furthermore, if Weston was dispossessed of the Premises, "the payment of rent [would] cease from and after the date of dispossession." Id. § 11. When the Lease terminated on September 30, 2006, Weston had

concludes that Brody has failed to prove that erroneous entries were made in August of 2006 and remained in the October 2006 food minimum report.

⁷ Weston claims to have spent \$75,201.17 making permanent improvements to the Premises. Pl.'s Ex. 3. Weston includes in this amount not only the cost of the equipment that was installed, but also the expenses incidental to the installation of equipment, such as labor and construction costs. The Court need not determine the exact amount of improvements made because Weston has failed to prove that it is entitled to damages for any of the improvements, see infra Section II.F.

paid \$17,500 of the \$50,000 deferred rent.

During the lease term, Weston operated under a liquor license obtained in the name of Bryce's Catering, Weston's trade name. It operated under a health license obtained in the name of Bala Golf Club.

The Lease provided that Weston was responsible for repairing and maintaining the HVAC system on the Premises. Weston was also required to pay for a preventative maintenance contract during Weston's tenure. Such a contract was obtained in January 2006; Weston did not maintain such a contract in 2005. At some point prior to the termination of the Lease, the Club received complaints from members about the air conditioning system on the Premises. These complaints were relayed to Weston in memoranda from Bill Horn.

On June 19, 2006, Bala notified Weston by letter that it was exercising its right to terminate Weston's tenancy pursuant to Section 3(c) of the Lease. Section 3 allowed Bala to terminate the Lease at any time upon three months' written notice to Weston. If Bala exercised this right, Weston was to receive a termination fee. The termination fee was to be "equal to the sum of":

(i) Twenty-five Percent (25%) of the gross contracted-for receipts for any Party, (which for purposes of this Agreement shall be defined as an event, attended by 16 or more guests, other than an event sponsored by Bala Golf Club) as to which Tenant has, prior to receipt of notice of

termination (A) entered into a signed and written binding contract (a copy of which shall be provided to Landlord not later than thirty (30) days after Landlord's notice of termination, (B) received a deposit, and (C) which is scheduled to take place during the three-year period following the date of such notice, but without deduction if the Party does not take place, plus

(ii) the unamortized cost of any permanent improvements ("Improvements") made by Tenant during the term of the Food Service Operating Agreement or this Lease Tenant will be reimbursed for the portion of the Improvements represented by the months of useful life not used by Tenant. Such amount shall be determined by multiplying the cost of an Improvement, divided by the useful life in months of such Improvement as determined by GAAP, amortized on a straight line basis, by the number of months which the Tenant will be unable to use such improvement, e.g.

\$12,000 (cost of improvement)
120 (number of months of useful life)
Number of months improvement used by Tenant: 20
Number of months remaining in useful life: 100

$$\frac{\$12,000}{120} \times (120-20)=100) = \$10,000 \text{ to be reimbursed}$$

Def.'s Ex. 1, § 3(c).

After the June 19 letter was sent, preparations began for the termination of the Lease. In mid-September, Brody and the assistant manager of Bala conducted an inventory of the personal property and equipment on the Premises. The then-current inventory was compared to a list of the property onsite at the commencement of Weston's tenancy. Nothing was found to be missing; in fact, the inventory had increased during Weston's tenancy. Pl.'s Ex. 18. Of importance to this dispute, 11 steel

tables were present even though only 7 had been onsite at the start of Weston's tenancy.

To ensure a smooth transition from Weston to Iovine Brothers, the new caterer hired by Bala, Brody provided to Bill Horn and to Michael Iovine, principal of Iovine Bros., information regarding upcoming events at Bala. Bill Horn was notified of most of the upcoming events. Plaintiff's Exhibit 7 shows a list of parties that Horn compiled for Iovine Bros. based on the information given him by Weston.

Iovine Bros. was provided with a "Client Contract Transfer Confirmation" for each party that was scheduled at Bala. The Confirmation listed basic details about the event such as the date and number of guests. In some cases, Brody also provided Iovine with a copy of the contract and photocopy of the deposit check. Before Weston vacated, personnel from Iovine Bros. walked through the Premises several times and were also in the kitchen for "tastings" in preparation for upcoming events.

In September 2006, Bala had a Funk Water Purifier installed on the Premises. Def.'s Ex. 4. Before the Funk Purifier was installed, a leased water softener had been used. Trial Tr. 74:24-75:8, Sept. 6, 2007. Weston paid about \$80 per month for the lease. Id. The Funk Water Purifier cost \$1,950. Def.'s Ex. 4.

Alan Brody and Gary Ueltzen, House Chairman of Bala,

conducted a walk-through inspection of the premises on October 1, 2006. The two examined the condition of the Premises, including the structure, fixtures and permanent equipment. Tr. 126-27. The inspection was memorialized in a signed document stating that "the building was found to be left in satisfactory condition." Pl.'s Ex. 14.

After Weston vacated, Bala conducted another inventory and found that several items were missing that had been present during the first inventory.⁸ Bala also had a health inspection and determined that some improvements would be needed at the Club. In the fall and winter of 2006-07, Bala carried out a variety of projects at the Club, installing and/or repairing kitchen equipment, repairing the HVAC system, and making various changes to the electrical system.

II. DEFENDANT'S MOTION TO STRIKE

Defendant moved to strike the testimony of Alan Brody, principal of Weston, insofar as Mr. Brody testified as to the "useful life" of various items for purposes of interpreting Section 3(c) of the Lease. This motion was renewed in Bala's

⁸ One deli refrigerator, one hand slicer and eleven steel tables that had been present during the first inventory were no longer present. The missing items have a replacement value of \$4,379.99. Def.'s Ex. 12. The missing tables were valued at \$2200 for the group of eleven. Therefore, the Court estimates a replacement value of \$200 per table.

post-trial submissions (doc. no. 41). Section 3 provides that, when determining the termination fee due Weston for improvements made to the Premises, "the useful life in months of such Improvement as determined by GAAP, amortized on a straight line basis" will be used. Def.'s Ex. 1, § 3(c)(ii).

At trial, Mr. Brody gave two types of testimony regarding this section of the Lease. First, he testified that the intent of the parties at the time of drafting was that 120 months, or 10 years, would be the useful life for any and all Improvements covered by Section 3(c)(ii). See Tr. 79:6-9 (describing 10 years as "the formula"); 80:14-17 (testifying that he and Bala agreed that a ten-year schedule would be used for the calculation). Second, he testified that, based on his own experience in the catering business, most kitchen equipment lasts longer than 20 years. Tr. 80: 8-13. He further provided his own estimates of the life span of various pieces of equipment. Defendant objects to the second type of testimony, arguing that expert testimony is required to interpret Generally Accepted Accounting Principles ("GAAP").

The Lease refers to the "useful life in months of such Improvement as determined by GAAP." "[A]s determined by GAAP" modifies "useful life" and indicates that the useful life of the Improvement should be determined with reference to GAAP standards, rather than determined by the parties with reference

to their own experience or any other factors. Thus, an assessment of "useful life . . . as determined by GAAP" requires knowledge of GAAP.

Mr. Brody is not qualified to testify as to the "useful life" of the claimed improvements "as determined by GAAP." It is undisputed that he was not qualified as an expert witness with specialized knowledge of accounting and GAAP.⁹ Moreover, Federal Rule of Evidence 701 prevents Mr. Brody, a lay witness, from providing his opinion as to useful life.¹⁰ Lay opinion testimony must be "rationally based on the perception of the witness . . . [and] not based on scientific, technical or other specialized knowledge." The meaning of "useful life" under GAAP standards cannot be described as "rationally based on the perception" of Mr. Brody since the record does not disclose that he has any

⁹ "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto" Fed. R. Evid. 702. Plaintiff does not argue that Mr. Brody is an accounting expert; it argues rather that such an expert is unnecessary. See Pl. Weston's Mem. of Law in Opp./Reply to Def.'s Request to Strike Opinion Testimony of Weston's Witness, Alan Brody (doc. no. 45).

¹⁰ "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701.

knowledge of GAAP standards. Furthermore, interpretation of GAAP requires "specialized knowledge" of accounting which falls within the scope of Rule 702. See, e.g., In re Campbell Soup Co. Sec. Litig., 145 F. Supp. 2d 574, 593 (D.N.J. 2001) (holding that questions about the interpretation of GAAP are best left to expert testimony at trial).

Because Mr. Brody's opinion of useful life under GAAP is neither admissible lay opinion under Rule 701 nor the opinion of a qualified expert under Rule 702, Defendant's motion will be granted and Mr. Brody's testimony as to the useful life of any claimed improvements will be struck.

II. CONCLUSIONS OF LAW¹¹

A. Legal Standard

"[T]he burden of proof in a contract action is upon the party alleging breach." E. Tex. Motor Freight, Diamond Div. v.

¹¹ Pennsylvania law applies to this dispute. "In a diversity action, the court 'must apply the choice of law rules of the forum state to determine what substantive law will govern.'" Huber v. Taylor, 469 F.3d 67, 73 (3d Cir. 2006) (quoting Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941)). Choice-of-law provisions "will generally be given effect" in Pennsylvania. In re Allegheny Int'l, Inc., 954 F.2d 167, 178 (3d Cir. 1992) (citing Smith v. Commonwealth Nat'l Bank, 557 A.2d 775, 777 (Pa. Super. 1989)). The Lease and the FSOA each provide that they shall be construed under Pennsylvania law; these choice-of-law provisions will be given effect.

Lloyd, 484 A.2d 797, 801 (Pa. Super. 1984). "The party having the burden of proof in a contract matter must sustain it by a 'preponderance of the evidence.'" Snyder v. Gravell, 666 A.2d 341, 343 (Pa. Super. 1995). The preponderance of the evidence standard requires the party bearing the burden of proof to convince the finder of fact that "the facts asserted by the [party] are more probably true than false." Burch v. Reading Co., 240 F.2d 574, 579 (3d Cir. 1957); United States v. Payment Processing Ctr., LLC, 461 F. Supp. 2d 319, 322 (E.D. Pa. 2006).

"[T]he plaintiff in an action for breach of contract has the burden of proving damages resulting from the breach." Spanq & Co. v. U.S. Steel Corp., 519 Pa. 14, 25 (1988).

"[D]amages cannot be based on a mere guess or speculation." Id. at 26. Instead, the evidence must "with a fair degree of probability establish a basis for the assessment of damages." Id. at 27.

"A fundamental rule in construing a contract is to ascertain and give effect to the intent of the contracting parties. It is firmly settled that the intent of the parties to a written contract is contained in the writing itself. When the words of a contract are clear and unambiguous, the meaning of the contract is ascertained from the contents alone." Chen v. Chen, 893 A.2d 87, 93 (Pa. 2006) (quoting Mace v. Atl. Refining Mktg. Corp., 785 A.2d 491, 496 (Pa. 2006)). "A contract is not

ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends."

Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc., 247 F.3d 79, 92 (3d Cir. 2001) (applying Pennsylvania law). "To determine whether ambiguity exists in a contract, the court may consider "the words of the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning." Id. (quotation omitted).

"It is axiomatic in contract law that two provisions of a contract should be read so as not to be in conflict with each other if it is reasonably possible." Keystone Fabric Laminates, Inc. v. Fed. Ins. Co., 407 F.2d 1353, 1356 (3d Cir. 1969) (applying Pennsylvania law). Moreover, if an inconsistency between two provisions is unavoidable, the more specific of the two provisions will trump the more general of the provisions. Capitol Bus Co. v. Blue Bird Coach Lines, Inc., 478 F.2d 556, 560 (3d Cir. 1973); Harrity v. Cont'l-Equity Title & Tr. Co., 280 Pa. 237, 242 (1924). "'Wherever reasonable," the provisions of a contract are "interpreted as consistent with each other and with any relevant course of performance.'" Sunbeam Corp. v. Liberty Mut. Ins. Co., 781 A.2d 1189, 1193 (Pa. 2001).

B. Weston's Claims

Weston asserted a breach of contract claim against Bala based on six alleged breaches; two parts of the claim were settled by the parties before trial.¹² The remaining four parts are: first, Weston is entitled to be paid for food and beverage sales it made during September 2006; second, Weston is entitled to the unused food minimums collected by Bala for 2006; third, Weston should be paid a termination fee for party contracts it booked; and fourth, Weston should be paid a termination fee for improvements it made to the Premises.

1. September 2006 Food & Beverage Sales

The parties agree that Weston is entitled to be paid for food and beverage sales made in September 2006, less certain deductions for monthly expenses. Gross dining room sales in September were \$54,542.03. The parties agree that Bala is entitled to deduct at least \$19,497 in expenses from this amount. Bala further argues that it may deduct the cost of a Funk Water Purifier (\$1,912.09), which was installed during September 2006. Weston argues that Bala is not entitled to reimbursement for the cost of the Funk Purifier and that Bala may deduct only \$19,497.

Because the court holds that Bala is not entitled to be reimbursed by Weston for the cost of the Funk Water Purifier, see

¹² The parties agree that Weston is entitled to \$666.22 for dinnerware purchased from Weston and to \$12,333 for catering provided during certain golf outings.

infra § II.C.1, Bala may deduct only \$19,497. Weston is entitled to \$35,044.13 for dining room sales in September 2006.

2. Unused Food Minimums

The parties contest whether or not Weston is entitled to the amounts collected by Bala for unused food minimums.¹³

The Lease does not specifically address the issue of unused food minimums, aside from providing that Bala will require its members to purchase from Weston a minimum of \$1,000 per year in food and beverage. Section 9 of the Lease provides that Bala "will turn over to Tenant all funds received for standard food and beverage purchases on a monthly basis," but it does not make clear whether "funds received for standard food and beverage purchases" includes money collected for purchases that members were required, but failed, to make.

It is undisputed that, despite the contract's lack of express direction regarding the food minimums, Weston received the unused food minimums collected by Bala every year until 2006. "Wherever reasonable," the provisions of a contract are "interpreted as consistent with each other and with any relevant course of performance.'" Sunbeam Corp. v. Liberty Mut. Ins. Co., 781 A.2d 1189, 1193 (Pa. 2001). Although the contract does not

¹³ The parties also dispute the amount of the 2006 unused food minimums; the Court resolved this dispute in its findings of fact.

expressly state that Weston will receive the unused food minimums each year, it is clear that the requirement that \$1,000 be purchased "from Tenant" was intended to guarantee Weston a certain amount of business each year. This interpretation is consistent with the parties' practice of paying unused minimums to Weston each year. Therefore, the Court concludes that the parties intended Weston to receive the unused food minimums. Weston is entitled to \$17,329.93 for unused food minimums.

3. Party Contracts

The parties disagree as to the amount of the termination fee owed to Weston under Section 3(c)(i) for parties scheduled to take place following termination. Section 3(c)(i) provides that, in order to receive the termination fee, Weston must have provided Bala with copies of party contracts within 30 days of receiving the termination notice (i.e., within 30 days of June 19). The contracts must be signed, written and binding, and a deposit must have been collected. Finally, only events for 16 or more persons constitute parties within the meaning of Section 3.

The only evidence provided by Weston to show that it notified Bala of upcoming events within the time limit prescribed by Section 3 is a list of events compiled by Bill Horn based on

information supplied to him by Weston.¹⁴ The list notes the name and date of each event, whether a contract had been submitted, and whether a deposit had been paid, along with additional information irrelevant to Section 3. The Court credits Mr. Horn's testimony that the list he prepared for Iovine Bros. contains a complete summary of the materials supplied to Bala by Weston.

The events that meet the Section 3(c) criteria are: the Rosenbaum, Scheinfeld, Gross, Levin, Paul, Pierce and Overbrook H.S. Reunion Brunch events.¹⁵ These are the only events listed

¹⁴ Weston argues that any contracts provided to Iovine Bros. should be treated as having been provided to Bala. Putting aside the issue of whether notification of Iovine constitutes notification of Bala, party contracts were transmitted to Iovine on September 30, 2006. Thus, any contracts supplied to Iovine that had not already been given to Bill Horn were not timely for the purposes of the termination fee.

¹⁵ Bala contends that events scheduled to take place more than one year after the contract date should not be included because Section 6 of the Lease prohibited Weston from booking banquets more than one year in advance without Bala's approval. Bill Horn testified that Weston had never sought Bala's approval before booking an event more than one year in advance. Weston offered no evidence that the events in question, the Scheinfeld and Overbrook events, were approved by Bala. However, even if Weston breached Section 6(c)(iv) of the Lease by booking events more than one year in advance, this breach does not excuse Bala's performance under Section 3(c).

The non-breaching party to a contract is only excused from performance under a contract if the breaching party's breach was material. Oak Ridge Const. Co. V. Tolley, 504 A.2d 1343, 1348 (Pa. Super. 1985). Materiality is determined based on factors that include the extent of the non-breaching party's injury and the adequacy of compensation available for that injury, the extent to which the breaching party can cure its breach, and whether the breaching party's behavior comports with

for which there was a signed contract and also a deposit.

Section 3 provides that Weston's termination fee is to be based on the contract price, not the actual amount spent on the event. Because the lists prepared by Horn either do not mention the price or list the actual price, the Court relies on the prices shown in Plaintiff's Exhibit 8 to determine the contract prices.¹⁶ The contract prices for the relevant events are as follows: Rosenbaum, \$11,700; Scheinfeld, \$8,367; Gross, \$6,300; Levin, \$2,400; Paul, \$7,400; and Overbrook, \$1,500.¹⁷

standards of good faith and fair dealing. Id. Weston's failure to seek Bala's permission before booking the Scheinfeld and Overbrook events is not material. It does not appear that Bala has been injured by Weston's breach, therefore, the breach can be compensated with nominal damages. Moreover, there was no evidence that Weston acted in bad faith; it appears instead that the parties simply developed the practice of Weston booking events without Bala's input. Because Weston's breach of Section 6 is not material, Bala's performance under Section 3 is not excused as to the termination fee for the Scheinfeld and Overbrook events.

¹⁶ The parties agree that Weston's practice was to record the contract price in handwriting in the lower right-hand corner of the contract.

¹⁷ No award will be made for the Pierce event. According to Bala's list, a signed contract and deposit were received for the event. However, the contract price is not listed in Bala's materials, nor is it recorded on the contract supplied by Weston. Without any information as to the Pierce contract price, the Court is unable to fashion an award.

The contract price is not listed in Exhibit 8 for the Scheinfeld event. Therefore, the Court relies on the event price listed in Bala's materials. A comparison of the contract prices recorded on the contracts themselves with the amounts on Bala's list shows that the prices listed by Bala were usually within a few hundred dollars of the contract price. Therefore, the Court concludes that Bala's amount is a sufficiently close

Weston is entitled to twenty-five percent of each contract price, or \$9,416.75.

4. Permanent Improvements

Weston's final claim is that Bala breached the Lease by failing to pay Weston a termination fee for permanent improvements made by Weston to the Premises during the lease term. Section 3(c)(ii) entitles Weston to a termination fee based on

the unamortized cost of any permanent improvements ("Improvements") made by Tenant during the term of the Food Service Operating Agreement or this Lease Tenant will be reimbursed for the portion of the Improvements represented by the months of useful life not used by Tenant. Such amount shall be determined by multiplying the cost of an Improvement, divided by the useful life in months of such Improvement as determined by GAAP, amortized on a straight line basis, by the number of months which the Tenant will be unable to use such improvement. . . .

Lease Agreement at 3(c)(ii).

Weston made at least \$50,000 worth of improvements to the Premises, however, Weston has not proven that it is entitled to damages for Bala's failure to pay a termination fee for these improvements. To prove its claim for a termination fee, Weston needed to show the useful life as determined by GAAP of each improvement, the cost of the improvement and the time when the

approximation of the contract price to allow a reasonably accurate assessment of damages.

improvement was made (in order to calculate the useful life remaining at the time of termination).

Weston argues that 10 years should be used as the useful life for each improvement, relying on Brody's testimony that the intent of the parties in drafting the contract was that 10 years would be used regardless of the actual expected lifespan of an improvement and without resort GAAP. However, this testimony will not be considered. The contract is clear and there is no need for extrinsic evidence.

Section 3(c)(ii) states the formula for calculating the termination fee, followed by "e.g.," and a calculation showing how the termination fee would be determined for an improvement costing \$12,000 with a useful life of 10 years. The "e.g." following the termination fee formula clearly indicates that the calculation that follows is simply an example of how the formula should be applied. Not even Brody himself claimed that the parties intended that the other portions of the example be used for each improvement (for example, that each improvement be valued at \$12,000 regardless of its actual cost). It would be contrary to the language of the contract to adopt ten years as the useful life of each improvement.

Weston has not proved the useful life of any of the improvements. No expert testimony was offered as to the GAAP method of determining useful life. Even if lay opinion testimony

were accepted to determine useful life, there is insufficient credible testimony upon which to base the determination. Brody testified that, in his experience, kitchen equipment lasts "well over 20 years." However, he also testified that the Funk Water Softener could be expected to last approximately five years, undermining his claim that most equipment lasts 20 years. No testimony was offered as to which pieces of equipment listed in Exhibit 3 should be considered kitchen equipment; thus, even if the Court did credit the assertion that kitchen equipment lasts 20 years, it would be unable to apply this information in a useful way.

Because there is insufficient evidence from which to determine the useful life of any of the claimed improvements, the termination fee described in Section 3(c)(ii) cannot be calculated. Weston has failed to meet its burden of establishing damages within a "fair degree of probability." Weston will not be awarded a termination fee under Section 3(c)(ii).

C. Bala's Counterclaims

Bala asserts a four-part counterclaim against Weston for breach of contract.

1. Funk Water Purifier

Bala claims that it is entitled to deduct the cost of a Funk Water Purifier from the amount paid to Weston for September

2006 food and beverage sales. The Lease entitles Bala to deduct monthly expenses from the amount paid to Weston; however, Bala has failed to prove that the purchase of the Water Purifier constitutes a monthly expense. Weston paid a monthly fee to lease a water softener during its tenancy. The purchase of the Funk Softener appears to obviate the need for that lease. Rather than being a monthly expense, the Softener is a permanent improvement for which, under Section 3(c), Weston would be entitled a termination fee if Weston had purchased the Softener. Bala has not proven that the Softener constitutes a monthly expense; therefore, the cost of the Softener will not be deducted from the amount awarded to Weston for September 2006 dining room sales.

2. Liquor License

The parties agree that Weston owes Bala \$25,000 because Bala advanced Weston funds for the purchase of a liquor license.

3. Deferred Rent

Bala claims that Weston owes \$32,500 in deferred rental payments. The parties agree that Weston's rent obligation of \$50,000 for 2005 was deferred for one year. Rather than paying rent in 2005, Weston was to pay its 2005 rent in monthly installments of \$2,500 over ten-month periods in 2006 and 2007.

The parties also agree that, when the lease was terminated, Weston had paid \$17,500 of the \$50,000 owed for 2005. They dispute whether Bala is entitled to offset the remaining \$32,500 from sums owed to Weston.

Bala argues that it is entitled to deferred rent under Section 4(a), which provides that "[u]pon termination, all unpaid deferred rents shall be credited against any sums due Tenant by Landlord." Weston argues that Section 11 conflicts with Section 4, creating ambiguity and thereby requiring extrinsic evidence to interpret the lease.¹⁸

The Lease is not ambiguous. Section 4(a) clearly states that unpaid deferred rent will be credited against any sums owed by Bala to Weston at the termination of the Lease. Section 11 makes no mention of deferred rent, but only states that payment of rent shall cease from the date of dispossession. Sections 4 and 11 are consistent. Section 11 speaks only of rent, not deferred rent; it refers to rent obligations that had not accrued at the time of dispossession. Thus, there is conflict with Section 4's provisions for deferred rent.

Moreover, even if Section 11 were read to apply to

¹⁸ The only extrinsic evidence offered by Weston is Brody's testimony that it was his understanding that he would not be obligated to make additional payments of either rent or deferred rent if the Lease was terminated.

deferred rent, the two sections do not conflict.¹⁹ Section 4 requires only that deferred rent be applied to reduce amounts owed by Bala to Weston. It does not require Weston to pay deferred rent out of pocket. This requirement is consistent with Section 11's provision that no rental payments will be made after dispossession.

Because Section 4(a) requires that unpaid deferred rent be credited against any sums owed by Bala to Weston, any award in favor of Weston will be reduced by \$32,500, the amount of unpaid deferred rent.

4. Repairs & Replacements

Bala asserts that Weston is obligated to pay for a variety of repairs and replacements that were carried out after Weston vacated the Premises. The Lease provided that Weston would "keep the non-structural and interior portions of the Premises and the Personal Property in good order and repair and [would] surrender the Leased Property in as good condition as when received, excepting depreciation caused by ordinary wear and tear." Weston was "solely responsible for any and all maintenance, repairs or replacements." However, Weston was not "required to make any capital improvements to the Premises unless

¹⁹ If the sections did conflict, Section 4(a), as the section that deals most specifically with deferred rent, would trump Section 11, a more general section.

such work is required in connection with the specific activities to be performed by Tenant." Def.'s Ex. 1, § 14(a).

a. Repairs required to comply with the City of Philadelphia Health Code

Bala argues that Weston is obligated to pay for repairs that were carried out after Weston vacated in order to bring the Club into compliance with the City of Philadelphia's Health Code. Invoices for these repairs form Defendant's Exhibit 13. Bala's counterclaim for these repairs will be denied for the following reasons.

First, Bala failed to prove that the violations of health code developed during Weston's tenancy. Bala had a valid health license when Weston arrived; no evidence was offered that the license was revoked during Weston's tenure. Second, Ueltzen found the building to be in good condition during his walk-through. Third, Iovine visited the kitchen several times, sometimes with Bill Horn. There is no evidence that the two men observed problems during their visits. Fourth, although Horn testified that the equipment had to be shut down for safety reasons the morning after Weston vacated, no explanation was offered of how Iovine Bros. operated in the months between the start of its lease and the time of repairs. Thus, Horn's testimony as to the disastrous condition of the kitchen immediately following Weston's departure is unconvincing.

Finally, two of the invoices include expenses that were

incurred to renovate the Men's Grill, a portion of the Premises that Plaintiff vacated in 2004. Bill Horn testified that Bala was able to operate the Men's Grill successfully after 2004. Bala offered no evidence that the problems with the Men's Grill actually developed while Weston was still in possession of the Grill. Nor did Bala show that Weston somehow caused a latent defect to develop in the Men's Grill that only manifested itself in 2007. One of the problems addressed in 2007 was a collapsed floor, which presumably would have impeded Bala's operation of the Grill during the years between 2004 and 2007. Therefore, the Court concludes that the problems with the Men's Grill developed after Bala took over operation of the Grill. Because Bala did not prove that Weston breached its duty to maintain the premises, Bala is not entitled to damages for this part of its counterclaim.

b. HVAC expenses

Bala claims that Weston must pay for repairs made to the HVAC system after the termination of Weston's tenancy. Section 13(c) of the Lease provides that Weston was responsible for "maintain[ing], repair[ing] and if necessary replac[ing] . . . any HVAC unit solely serving the Premises." Weston was also required to "maintain at all times a preventive maintenance contract for such unit at Tenant's sole expense."

Weston breached the Lease by allowing the HVAC system on the Premises to fall into a state of disrepair. Before Weston vacated the Premises, Bala notified it that club members were complaining about the air conditioning. Weston did nothing to address these complaints, despite its obligations under the lease. In October 2006, Bala spent \$2,067.76 repairing the system.

Bala also had work performed on the HVAC system in December 2006 and January 2007. The Court concludes that Bala has not proven that these problems were present when Weston vacated. Testimony as well as the invoices themselves show that the work done after October 2006 was simply to replace items that wear out as part of ordinary usage. No evidence was offered that additional work was needed at the time of the October repair but that the work was deferred. Bala has not proven that the December and January repairs were caused by Weston's breach of contract.

Bala is entitled to \$2,067.76 for repairs to the HVAC necessitated by Weston's breach of contract.

c. Kitchen repairs

Bala claims that Weston should be responsible for the costs of various repairs Bala made to kitchen equipment after Weston vacated the premises.

The parties agree that Bala is entitled to \$540.46 for the repair of a Vulcan oven on November 20, 2006. Judgment will be entered against Bala on the remainder of the kitchen repairs because Bala has not proven that the need for the repairs arose before Weston vacated. The majority of the kitchen repairs were made in March and April 2007; all of the repairs were made over one month after Weston vacated. The kitchen was in working order when Bill Horn and the Iovines walked through during the weeks prior to September 30, 2006. Horn testified that everything appeared to be working well the night before Weston vacated. Moreover, Iovine Bros. began operating out of the club's kitchen immediately after Weston vacated, suggesting that the kitchen was functional and that the need for repairs arose after Weston's departure.

Bala is entitled to \$540.46 for this part of its counterclaim.

d. Missing kitchen equipment

Bala asserts a counterclaim against Weston for certain equipment belonging to Bala that Weston took when it vacated the Premises.

Bala is entitled to reimbursement for the "Bain Marie" Deli Refrigerator and the hand slicer, both of which were on the Premises at the start of Weston's tenancy. Bala is also entitled

to reimbursement for 7 of the 11 missing stainless steel tables. Seven tables were present at the start of Weston's tenancy, but four were purchased by Weston. These four remain Weston's property.

Bala provided a list of estimated replacement costs prepared by Bill Horn, who researched the amount Bala will spend to replace each missing item. Bala is entitled to \$4,379.99 for the missing equipment.²⁰

IV. CONCLUSION

For the reasons stated above, Weston and Bala are entitled to the following amounts:

Weston:	\$35,044.13	(September dining room sales)
	\$17,329.97	(Unused food minimums)
	\$ 9,416.75	(Party contracts)
	\$ 0.00	(Permanent improvements)
Total:	\$61,790.81	

Bala:	\$ 0.00	(Funk Water Purifier)
	\$25,000.00	(Liquor license)
	\$32,500.00	(Deferred rent)
	\$ 2,067.76	(Repairs to the HVAC system)
	\$ 540.46	(Repairs to kitchen equipment)
	\$ 4,379.99	(Missing kitchen equipment)
Total:	\$64,488.21	

The amount owed to Bala by Weston will be offset by the amount Bala owes to Weston. Therefore, judgment will be entered

²⁰ The estimated cost to replace 11 steel tables was \$2,200, which equals \$200 per table. Because Bala is entitled to reimbursement for only 7 of the tables, only \$1,400 will be awarded for the cost of the tables.

for Bala on the claim and counterclaim in the amount of
\$2,697.40.