

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

HIBBETT SPORTING GOODS, INC.,)
)
 Plaintiff,)
)
 v.)
)
 WEATHERFORD DUNHILL LLC)
 c/o DUNHILL PROPERTY)
 MANAGEMENT SERVICES, INC.,)
)
 Defendant.)

Civil Action No. _____

PLAINTIFF’S ORIGINAL COMPLAINT

Plaintiff, Hibbett Sporting Goods, Inc. (“Hibbett”), by and through its attorneys, hereby files its Petition for Declaratory Judgment and in support thereof alleges as follows:

1. This is an action for Declaratory Judgment pursuant to Rule 57 of the Federal Rules of Civil Procedure, wherein Hibbett seeks a declaration establishing its rights and obligations under a certain Agreement of Lease, dated November 5, 2009, between Hibbett and Defendant Weatherford Dunhill LLC c/o Dunhill Property Management Services, Inc., successor-in-interest to Weatherford I-20/Main St, Ltd. (the “Lease”).

I. PARTIES

2. Hibbett is a corporation formed under the laws of Delaware, with its principal place of business in Alabama. Hibbett has in excess of 1,000 retail locations, selling sporting goods equipment, athletic apparel, athletic shoes and sports fan-licensed products. Hibbett operates a

store in Weatherford Ridge Shopping Center (the “Center”) in Weatherford, Texas pursuant to the Lease.

3. Weatherford Dunhill LLC c/o Dunhill Property Management Services, Inc. (“Dunhill”) is a limited liability company formed under the laws of the State of Texas. Its manager is William Hutchison, who is a citizen of Texas. On information and belief, all members of Dunhill are also citizens of Texas.

II. JURISDICTION

4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 because there is complete diversity of citizenship between the parties and the amount in controversy exceeds the sum of \$75,000, exclusive of interest and costs.

5. This Court has personal jurisdiction over Defendant because (1) its principal place of business is in Texas; (2) it transacts business within the State of Texas; (3) it has continuous and systematic contacts with the State of Texas; (4) it has purposefully availed itself of the privileges and benefits of conducting business in the State of Texas; and (5) a substantial part of the events or omissions giving rise to Plaintiff’s claims occurred in Texas and involved Defendant.

6. Venue is proper pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions given prior to the claims herein occurred in this district.

III. FACTUAL BACKGROUND

7. On or about November 5, 2009, Hibbett and Dunhill entered into an Agreement of Lease (the “Lease”), which is attached hereto as Exhibit “A.” Under the terms of the Lease, Hibbett (referred to as “Tenant” in the Lease) leased approximately 6,068 gross leasable square feet of space in the Center from Dunhill (referred to as “Landlord” in the Lease).

8. The Lease includes a Main Term of five (5) years and two (2) option terms of five (5) years each. Accordingly, if all three (3) option terms are exercised, the Lease runs from 2009 to 2024. Exhibit "A" at ¶ 5, Lease. On February 21st of this year Hibbett exercised the second of these two option terms and extended its lease for another five (5) years.

9. On December 5, 2011, the parties entered a Second Amendment to Lease Agreement, which amended Paragraph 27 of the Lease, among other things. Paragraph 27 of the Lease includes a Co-Tenancy provision that specifies that Hibbett has certain remedies if Belk, JCPenney, TJ Maxx and at least 55,000 square feet of the remaining gross leasable area of the Center is not open and operating:

Continuing Co-Tenancy.

Landlord agrees that (1) Belk or its Comparable Replacement (as hereinafter defined), in its current location shown on the Site Plan, (2) JCPenney or its Comparable Replacement, in its current location shown on the Site Plan, (3) TJ Maxx or its Comparable Replacement and (4) at least fifty five thousand (55,000) square feet of the remaining gross leasable area of the Center (excluding the Leased Premises) shall be open and operating in a manner consistent with such tenants' other locations (each the "Continuing Co-Tenancy Requirement"); provided, however, in no event shall the square footage occupied by a Temporary Tenant be used to calculate the square footage of the Center which is open and operating. For purposes of this Paragraph 27.2 only, a Comparable Replacement shall be defined as a regional or national tenant with similar customer demographics, customer profiles, price points and merchandise of the same or better quality than the tenant being replaced and which occupies at least ninety percent (90%) of the space previously occupied by the tenant being replaced. In the event one of requirements (1), (2) and (3) of the Continuing Co-Tenancy Requirement is not satisfied, then Tenant may elect to reduce the then-current Minimum Rent by Two and 00/100 Dollars (\$2.00) per square foot in the Leased Premises per annum until the condition giving rise to such reduction is satisfied. There is no termination right applicable to the immediately preceding provision. However, in the event two of requirements (1), (2) and (3) of the Continuing Co-Tenancy Requirement are not satisfied, then Tenant may elect to pay the Alternative Rent in lieu of all Minimum Rent, Percentage Rent and all other charges due hereunder. In the event requirement (4) of the Continuing Co-Tenancy Requirement is not satisfied, then Tenant may elect to pay the Alternative Rent in lieu of all Minimum Rent, Percentage Rent and all other charges due hereunder. In the event Tenant has been

paying Alternative Rent for a period of six (6) months due to a Continuing Co-Tenancy Requirement violation, Tenant may, at any time thereafter until five (5) business days following its receipt of notice from Landlord that the condition resulting in the violated Continuing Co-Tenancy Requirement has been satisfied, elect to (i) terminate this Lease upon thirty (30) days written notice to Landlord or (ii) continue to pay Alternative Rent. Tenant's termination right for failure of any Continuing Co-Tenancy Requirement is ongoing. In the event that Tenant has been paying Alternative Rent for a period of twenty four (24) months due to a Continuing Co-Tenancy Requirement violation ("Alternative Rent Period"), Tenant, upon thirty (30) days notice from Landlord, must elect to: (a) pay Rent as provided in this Lease or (b) terminate this Lease, pursuant to Tenant's ongoing termination right stated above, upon thirty (30) days written notice to Landlord. Notwithstanding the foregoing, in the event of a subsequent failure of any of the Continuing Co-Tenancy Requirements, Tenant's remedies as set forth in this paragraph shall be reinstated, with the Alternative Rent Period restarted, and shall apply to each and every subsequent failure of any of the Continuing Co-Tenancy Requirements."

Exhibit "B" at ¶ 1, Second Amendment to Lease Agreement.

10. In March 2020, the President of the United States of America declared a national emergency due to the coronavirus pandemic. Shortly thereafter, the State of Texas and Parker County, Texas declared a local disaster and public health emergency and ordered that individuals could not occupy nor could individuals be permitted to occupy various establishment, including, but not limited to, malls and retail stores that do not sell essential household goods. As such, Hibbett was unable to access the premises or conduct business. *See* <https://www.parkercountytexas.com/CivicAlerts.aspx?AID=416>.

11. On March 24, 2020, Hibbett sent correspondence to Dunhill via electronic mail, stating that Hibbett's closure was due to one or more of the following (as addressed in the Lease): "an event of force majeure, a casualty, the discovery of hazardous substances within the Center and/or the Premises, loss of the right of quiet enjoyment and/or access and visibility to the Premises being materially and adversely affected." Hibbett went on to note that its rental and payment obligations, as well as any obligation to continuously operate from within the Premises, were

abated during the closure of its business. Exhibit “C,” Letter from Hibbett to Dunhill, dated March 24, 2020.¹

12. More than a month later, on May 7, 2020, Hibbett received correspondence from Dunhill, stating that Hibbett’s failure to immediately remit rent for April 2020 would constitute a default under the Lease. Dunhill did not acknowledge receipt of Hibbett’s correspondence or dispute that Hibbett had the right to abate its rental and payment obligations under the Lease. Exhibit “D,” Letter from Dunhill to Hibbett, dated April 30, 2020.

13. Immediately, on May 8, 2020, Hibbett sent correspondence to Dunhill via electronic mail, advising that Hibbett had become aware that, as of March 16, 2020, the Continuing Co-Tenancy Requirement in the Lease was not satisfied. The local disaster and public health emergency declared by Parker County prohibited Hibbett and its co-tenants, including Belk, JCPenney, and TJ Maxx, from operating their businesses. As such, under the “Continuing Co-Tenancy” provision, Hibbett was entitled to pay Alternative Rent (in lieu of Minimum Rent) starting in April of 2020. Hibbett reminded Dunhill that Hibbett retained all rights and remedies under the Lease. Exhibit “E,” Letter from Hibbett to Dunhill, dated May 8, 2020.

14. On June 1, 2020, after not receiving any response to its most recent correspondence, Hibbett fully paid its rent and other charges for the months of April, May, and June 2020 to Dunhill.

15. On June 5, 2020, Hibbett received correspondence from Dunhill, stating that it was terminating the Lease and seeking to retake possession of the premises. Dunhill further acknowledged receipt of Hibbett’s payments but stated that it was rejecting the payments. Exhibit

¹ On April 1, 2020, Hibbett paid common area maintenance costs and insurance charges to Dunhill.

“F,” Letter from Dunhill to Hibbett, dated June 2, 2020. This, despite Hibbett’s notice to Dunhill that it intended to pay “Alternative Rent” under the “Continuing Co-Tenancy” provision and ultimate payment in full. On June 10, 2020, Hibbett received the returned rent check. Exhibit “G,” Hibbett Returned Rent Check.

16. Dunhill’s correspondence to Hibbett relating to its payment obligations was not in compliance with the notice requirements of the Lease because the correspondence was sent to the wrong address. *See* Exhibit “D,” Letter from Dunhill to Hibbett, dated April 30, 2020; Exhibit “F,” Letter from Dunhill to Hibbett, dated June 2, 2020.

17. In or about 2014, pursuant to the Lease, Hibbett sent notice to Dunhill, updating its notice addresses to its current mailing address, 2700 Milan Court, Birmingham, Alabama 35211. Exhibit “A” at ¶ 32, Lease. Dunhill is aware of this change of address, as Dunhill has corresponded with Hibbett at its current mailing address for years. Dunhill intentionally forwarded notices related to Hibbett’s payment obligations and potential default to an address at which it knew Hibbett no longer occupied.

18. As Dunhill has not complied with the notice provisions of the Lease, the time in which Hibbett can cure any purported default has not yet began to run. As such, Hibbett’s payment in full cured any alleged default.

19. Even if the purported notice of default is valid and complies with the terms of the Lease, Hibbett still cured the alleged default when it tendered its full rent and other charges to Dunhill.

IV. COUNT ONE – DECLARATORY JUDGMENT

20. Hibbett hereby incorporates by reference and restates as if more fully stated herein paragraphs 1 through 19 of this Complaint.

21. Hibbett requests declaratory judgment, pursuant to 28 U.S.C. § 2201 et seq., stating that Hibbett is not in default of its obligations under the Lease because neither it nor its co-tenants were able to conduct business, pursuant to government order.

22. Hibbett requests declaratory judgment, pursuant to 28 U.S.C. § 2201 et seq., stating that Hibbett is not in default of its obligations under the Lease because its rental and payment obligations were abated due to the government closure of its business and/or due to Dunhill's failure to satisfy the co-tenancy requirements of the Lease.

23. Hibbett requests declaratory judgment, pursuant to 28 U.S.C. § 2201 et seq., stating that Dunhill has not complied with the notice requirements of the Lease. In the alternative, Hibbett requests declaratory judgment stating that even if Dunhill has complied with the notice requirements of the Lease, Hibbett has timely cured any purported default by fully paying its rent and other charges for the months of April, May and June 2020.

24. Hibbett requests declaratory judgment, pursuant to 28 U.S.C. § 2201 et seq., stating that Dunhill is not entitled to terminate the Lease .

V. PRAYER

25. WHEREFORE, Hibbett prays that declaratory judgment be entered in its favor and against Dunhill providing that (i) Dunhill is not entitled to terminate the Lease; and (ii) Hibbett is not in default of its obligations under the Lease because its rental and payment obligations were abated due to the government closure of its business and/or due to Dunhill's failure to satisfy the co-tenancy requirements of the Lease.

26. In the alternative, Hibbett prays that declaratory judgment be entered in its favor and against Dunhill providing that (i) Dunhill is not entitled to terminate the Lease; and (ii) Hibbett

is not in default of its obligations under the Lease because Dunhill's default notice is invalid under the Lease.

27. In the alternative, Hibbett prays that declaratory judgment be entered in its favor and against Dunhill providing that (i) Dunhill is not entitled to terminate the Lease; and (ii) Hibbett is not in default of its obligations under the Lease because Hibbett paid the disputed rent and other charges.

28. Hibbett also seeks an award of its attorneys' fees and costs, pursuant to the Lease.² Hibbett seeks such other further and different relief that the Court deems appropriate, premises considered.

Date: June 10, 2020

Respectfully submitted,

By: /s/ William S. Snyder

WILLIAM S. SNYDER

Texas State Bar No. 00786250

wsnyder@bradley.com

BETHANIE LIVERNOIS

Texas State Bar No. 24093787

blivernois@bradley.com

BRADLEY ARANT BOULT CUMMINGS LLP

4400 Renaissance Tower

1201 Elm Street

Dallas, Texas 75270

(214) 939-8700 (Telephone)

(214) 939-8787 (Facsimile)

ATTORNEYS FOR PLAINTIFF

² Paragraph 42 of the Lease specifies that the prevailing party in any action or proceeding is entitled to recover its attorneys' fees:

In the event of any action or proceeding brought by either party hereto against the other based upon or arising out of any breach of the terms and conditions hereof, the prevailing party shall be entitled to recover all costs, including reasonable attorneys' fees, from the other. To the extent any attorneys' fees or other legal fees, costs or expenses are incurred by either party for which the other party shall be liable under the terms of the Lease, any such fees, costs or expenses shall be limited to reasonable amounts under the circumstances.

Exhibit "A" at ¶ 42, Lease.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June 2020, I electronically filed the foregoing document with the Clerk of the Court for the U.S. District Court, Northern District of Texas, using the electronic case filing system for the Court, which will send a “Notice of Electronic Filing” to the attorneys who have consented in writing to accept this notice as service of this document by electronic means.

/s/ William S. Snyder

William S. Snyder