Term

NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

FRESH POND MALL LIMITED PARTNERSHIP *vs.* **PAYLESS** SHOESOURCE, INC.

11-P-483

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This case is on appeal from a summary judgment entered by the Superior Court in favor of the defendant, Payless Shoesource, Inc. (Payless). The plaintiff, Fresh Pond Mall Limited Partnership (Fresh Pond), brought suit, alleging a material breach of the parties' commercial lease by improperly terminating the lease and failing to pay rent. Fresh Pond also sought damages under G. L. c. 93A.

Background. On September 12, 1990, the predecessor to Fresh Pond and the predecessor to Payless entered into a ten-year lease for commercial space. The signing of the lease was contingent upon the remaining presence of so-called key tenants, who at that time were Ames and T.J. Maxx. A 'key tenant' provision in the lease provided Payless with an early unilateral cancellation option in the event of cancellation, expiration, or termination of the lease of either key tenant. However, before Payless could exercise that right, Fresh Pond would be given the opportunity to lease the space to a comparable key tenant within six months.

In 1992, Ames filed for bankruptcy. A majority of the commercial space was then leased to Toys 'R' Us. [FN1] In the fourteen years following, while Toys 'R' Us maintained its occupancy, Payless paid its monthly rent and never objected to the presence of Toys 'R' Us. Within those years, Payless extended its lease agreement and executed three estoppel certificates. [FN2] In 2006, Toys 'R' Us vacated the premises. Subsequently, Payless requested rent modification. After the request was denied, Payless invoked Section 1.08 of the lease and cancelled its agreement with Fresh Pond.

Discussion. Upon review of the briefs and record appendix, we conclude that the entry of summary judgment was appropriate. At the appellate level, the court examines a grant of summary judgment de novo, viewing the evidence contained in the summary judgment record in the light most favorable to the nonmoving party, in this case, Payless. See *Miller v. Cotter,* 448 Mass. 671, 676 (2007). The moving party has the burden of demonstrating the absence of any genuine issue of material fact, *Arcidi v. National Assn. of Govt. Employees, Inc.,* 447 Mass. 616, 619 (2006), and an entitlement to judgment as matter of law. See Mass.R.Civ.P. 56(c), as amended, 436 Mass. 1404 (2002); *Gray v. Giroux,* 49 Mass. App. Ct. 436, 438 (2000).

1. *Comparable key tenant.* Fresh Pond failed to provide ample controverting evidence to survive summary judgment. See *Kourouvacilis v. General Motors Corp.,* 410 Mass. 706, 711 (1991). This case presents two separate questions. The first relates to an issue of contract interpretation. Generally, summary judgment is encouraged when '[a] dispute over a writing clearly stat[es] the rights and duties of the parties.' *Targus Group Intl., Inc.* v. *Sherman,* 76 Mass. App. Ct. 421, 428 (2010). 'The construction of a written contract which is plain in its terms and free from ambiguity presents a question of law for the court.' *Hiller v. Submarine Signal Co.,* 325 Mass. 546, 549-550 (1950). '[P]arties are bound by the plain terms of their contract.' *Id.* at 550. However, where a contract's terms are ambiguous, 'the intent of the parties is a question of fact to be determined at trial.' *Seaco Ins. Co.* v. *Barbosa,* 435 Mass. 772, 779 (2002). *Browning-Ferris Indus., Inc.* v. *Casella Waste Mgmt. of Mass., Inc.,* 79 Mass. App. Ct. 300, 307 (2011).

The summary judgment record discloses that neither party defined the term 'comparable key tenant' set out in the lease agreement. [FN3] An ambiguity arises from language 'susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one.' *Citation Ins. Co.* v. *Gomez,* 426 Mass. 379, 381 (1998). Fresh Pond does not challenge the meaning of the word 'comparable' on appeal. Instead, Fresh Pond offers a letter written by Payless as proof that Toys 'R' Us was comparable. Similar to the motion judge, we are not convinced. The letter only demonstrates that Payless enjoyed the benefits of having Toys 'R' Us nearby. Payless did not concede that Toys 'R' Us was comparable. Consequently, Payless lawfully invoked Section 1.08 of the commercial lease.

2. *Waiver clause.* The second question is whether Payless waived its right to terminate the lease by its failure to trigger Section 1.08 for fourteen years. An issue of waiver is ordinarily one for the fact finder, but if the facts are undisputed, the waiver is a question of law. See *McCarthy v. Tobin,* 429 Mass. 84, 88-89 (1999); *Comins v. Sharkansky,* 38 Mass. App. Ct. 37, 42 (1995). See also *Dynamic Mach. Works, Inc.* v. *Machine & Elec. Consultants, Inc.,* 444 Mass. 768, 773 (2005) (a waiver can be decided at summary judgment where the material facts are undisputed).

Within the lease, Section 20.11 specifically states that '[n]o waiver of any default hereunder shall be implied from any omission by either party to take any action . . . . No delay or omission by either party hereto to exercise any right or power . . . shall impair any such right or power or be construed to be a waiver thereof.' Each lease extension agreement explicitly stated that Payless's option to renew or extend the term of the lease shall not be deemed a waiver of its cancellation rights. Furthermore, the estoppel certificates contained statements that continued to preserve Payless's rights. [FN4] It is undisputed that the nonwaiver language was memorialized in each document and both parties knew of its existence.

Consequently, there is no evidence in the record to show that Payless waived its cancellation right. See *Sheehan v. Commercial Travelers Mut. Acc. Assn. of Am.,* 283 Mass. 543, 552 (1933) ('There can be no waiver of a right unless the right is known and it was intended to surrender it'); *KACT, Inc.* v. *Rubin,* 62 Mass. App. Ct. 689, 695 (2004), quoting from *Glynn v. Gloucester,* 9 Mass. App. Ct. 454, 462 (1980) ('[W]here waiver is not explicit, it must be premised on 'clear, decisive and unequivocal conduct''). Absent a comparable key tenant, Payless reserved the right to cancel its lease agreement with Fresh Pond. The lease did not require Payless to exercise that right within a specific time frame.

Ultimately, this case can be characterized as a demonstration of the need to draft clear and concise contract language. Payless continuously preserved its waiver. The delay of fourteen years before triggering the comparable key tenant clause cannot legally be construed as a waiver of Payless's right to terminate the lease.

Accordingly, we affirm. [FN5] Pursuant to § 20.05 of the lease, Payless is entitled to reasonable appellate attorney's fees. Payless may submit a petition for fees and costs, together with supporting materials, within fourteen days of the date of the rescript of this decision. Fresh Pond shall have fourteen days thereafter to respond. See *Fabre v. Walton,* 441 Mass. 9, 10-11 (2004).

Judgment affirmed.

Order dated January 14,

2011, affirmed.

By the Court (Berry, Brown & Grainger, JJ.),

Entered: March 8, 2012.

FN1. It is undisputed that a remaining portion of the Ames space was left unoccupied, one of the three requirements needed to invoke the key tenant provision.

FN2. Each of these renewals and extensions explicitly reaffirmed the 'key tenant' and 'no waiver' clauses.

FN3. The motion judge applied a literal translation of the word 'comparable' and held that Ames and Toys 'R' Us are wholly different. See *Holyoke Water Power Co.* v. *Whiting & Co.,* 276 Mass. 528, 539 (1931); *Hiller v. Submarine Signal Co.,* 325 Mass. at 550.

FN4. Specifically, Payless's estoppel certificates stated that they were not 'affirmative representations, warranties, covenants or waivers . . . .'

FN5. Deciding as we do, we have no need to address Fresh Pond's additional arguments.

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