

1 Prepared by the Court

**F I L E D**

Superior Court of California  
County of San Francisco

MAY 31 2022

CLERK OF THE COURT

BY: *Rosalie H. Humpal*  
Deputy Clerk

8 **SUPERIOR COURT OF CALIFORNIA**

9 **County Of San Francisco**

10 Department No. 505

12 152 GEARY ST. LLC ,

Plaintiff,

Case No.: CGC-20-587001

DECISION AFTER BENCH TRIAL

13 vs.

14 VIJAYA PROPERTIES, LLC, et al,

15 Defendants.

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18 This case was assigned to me for a nonjury trial on February 14, 2022. By prior order, I  
19 granted motions in limine 1 and 2 filed by plaintiff 152 Geary St. LLC precluding defendants  
20 Vijaya Properties, LLC and Interurban Capital Group, Inc. from excusing their non-payment of  
21 fixed rent due to COVID-19 and contending that plaintiff had a duty to mitigate their failure to  
22 pay fixed rent. The practical result of my prior order was that defendants have no defenses to  
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1 plaintiff's claims for past due fixed rent and real estate taxes as well as late charges on those  
2 amounts.

3 A one-day fully remote bench trial was held on April 6, 2022. Roey Rahmil and Joseph  
4 Matalon appeared on behalf of plaintiff. Theodore Spanos appeared on behalf of defendants. The  
5 sole witness was George Stanchfield, vice-president of leasing for Thor Equities, which  
6 apparently is the parent company of the plaintiff. Several exhibits were admitted into evidence.  
7 The parties agreed to waive oral closing arguments, opting instead for closing argument briefing  
8 per an agreed schedule. At the conclusion of the trial I stated that I would take the trial issues  
9 under submission as of May 4, 2022, the expected day of my receipt of the last closing argument  
10 brief.

11 At the trial plaintiff proved, and defendants did not dispute, that as of the trial, defendants  
12 owed plaintiff \$4,726,467.20 in unpaid fixed rent, \$626,256.94 for late charges on that unpaid  
13 fixed rent, \$564,235.92 in unpaid real estate taxes, and \$74,761.38 for late charges on those  
14 unpaid real estate taxes for a total of \$5,991,721.44.

15 As revealed by the parties' closing briefs, there were only two contested issues in the  
16 trial. Those issues are whether: 1) section 1.3(B) of the parties' lease requiring the payment by  
17 Vijaya of "additional rent" in an amount equal to fixed rent for the period that Vijaya failed to  
18 open the premises as provided in that section is enforceable and 2) the amount owing to plaintiff  
19 should be reduced by the \$1,050,000 letter of credit funds drawn down and retained by plaintiff.  
20 As briefly discussed below, based on the evidence at trial and the parties' lease, the answer to the  
21 first issue is no and the answer to the second question is yes.

22 The trial testimony established that the additional rent requirement for failure to open the  
23 premises as required by section 1.3(B) was not discussed by the parties prior to execution of the  
24 lease nor was any effort made by either party to estimate the amount of reasonable compensation  
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1 for any loss suffered by plaintiff if Vijaya breached the premises opening requirement. This fact  
2 alone is fatal to plaintiff's effort to enforce the additional rent requirement of section 1.3(B).

3 In 1977 Civil Code 1671, the liquidated damages statute, was amended to distinguish  
4 between the standards for enforceability of liquidated damages provisions in consumer contracts  
5 and residential leases (Civil Code 1671 (c) and (d)) from such provisions in all other contracts  
6 (Civil Code 1671(b)). Twenty-one years after that amendment, the California Supreme Court  
7 held that, per Civil Code 1671(b), in evaluating the legality of liquidated damages provisions in  
8 contracts other than consumer contracts and residential leases, such as the parties' commercial  
9 lease in this case, "The amount set as liquidated damages 'must represent the result of a  
10 reasonable endeavor by the parties to estimate a fair average compensation for any loss that may  
11 be sustained'" and, if it did not, the liquidated damages provision is an unenforceable "penalty."  
12 (*Ridgley v. Topa Thrift and Loan Association* (1998) 17 Cal. 4<sup>th</sup> 970, 977, quoting *Garrett v.*  
13 *Coast & Southern Federal Savings & Loan Association* (1973) 9 Cal. 3d 731, 739 (emphasis  
14 added)).

15 By quoting from a pre-amendment case in a case governed by Civil Code 1671(b), the  
16 California Supreme Court made clear that the pre-amendment requirement that the parties must  
17 "reasonably endeavor" to estimate fair compensation for a possible future breach continued to  
18 apply post-amendment to all contracts containing liquidated damages provisions, including those  
19 governed by 1671(b). Decisions of the courts of appeal confirm this key point. (*See, e.g.,*  
20 *Graylee v. Castro* (2020) 52 Cal. App. 5<sup>th</sup> 1107, 1114-1115; *Purcell v. Schweitzer* (2014) 224  
21 Cal. App. 4<sup>th</sup> 969, 974). Plaintiff's argument that the reasonable estimate requirement is confined  
22 only to cases governed by 1671(c) and (d) is contrary to *Ridgley*, *Graylee*, and *Purcell*.

23 Even if *Constellation-F, LLC v. World Trading 23, Inc.* (2020) 45 Cal. App. 5<sup>th</sup> 22 can be  
24 fairly read as abandoning the reasonable estimate requirement in some 1671(b) cases, I choose  
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1 not to follow that decision for two reasons. First and foremost, where there is a conflict between  
2 a California Supreme Court decision (*Ridgley*) and a court of appeal decision (*Constellation*), I  
3 must follow the California Supreme Court decision. Second, regardless of its vitality as  
4 California law, by its express terms *Constellation* is limited to the narrow factual situation where  
5 a tenant chooses to remain in possession of rental property as a holdover tenant after the  
6 expiration of a lease. This is a very different factual situation from that faced by Vijaya who  
7 remains in possession of the leased property under the terms of the parties' lease because  
8 plaintiff has chosen not to recover possession. Unlike the holdover tenant in *Constellation* who  
9 could avoid the liquidated damages provision "merely" by leaving the property (48 Cal. App. 5<sup>th</sup>  
10 at 29), defendants have no ability to avoid the additional rent for Vijaya's failure to open the  
11 premises by leaving the premises.

12 A separate reason why the additional rent requirement of section 1.3(B) is an  
13 unenforceable penalty is that the amount of 1.3(B) additional rent that defendants are subject to  
14 is far out of proportion to any reasonably anticipated damages that plaintiff could suffer as a  
15 result of Vijaya's failure to open the premises. As stated in *Ridgley*, "A liquidated damages  
16 clause will generally be considered unreasonable, and hence unenforceable under section  
17 1671(b), if it bears no reasonable relationship to the range of actual damages that the parties  
18 could have anticipated would flow from a breach." Plaintiff argues that the section 1.3(B)  
19 additional rent is now approximately 30% of the \$20 million purchase price of the building and  
20 thus "within the range of the decline in property value" testified by Mr. Stanchfield. However,  
21 plaintiff ignores that, per the terms of the parties' lease, the total section 1.3(b) damages for the  
22 life of the lease far exceeds the purchase price of the building. (Compare the rent schedule in  
23 section 2.1(A) of approximately \$28 million with the \$20 million purchase price). Under these  
24 circumstances, the liquidated damages provision of section 1.3(B) "bears no reasonable  
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1 relationship” to the presumed but unproven and unquantified loss of property value due to  
2 Vijaya’s failure to open the premises.

3 As to the letter of credit issue, it is undisputed that plaintiff drew down the entirety of the  
4 letter of credit and thus received and retained the entirety of the \$1,050,000. Per the explicit  
5 terms of section 28.1 of the parties’ lease, by receiving the entirety of the \$1,050,000, plaintiff is  
6 able to use that money “for the payment of any Fixed Rent” not paid by defendants. That  
7 plaintiff unilaterally elected to retain the money in a bank account that only it can access and not  
8 apply the money to past due fixed rent does not negate the fact that the money is held by plaintiff  
9 who could use it to cover some of the past due unpaid fixed rent. Effectively plaintiff seeks to  
10 hold the letter of credit money as a “security deposit,” yet section 28.1 makes clear that only the  
11 portion of a letter of credit not drawn down and not “applied or retained shall continue to be  
12 treated as Tenant’s Security Deposit.” In short, per the plain language of the parties’ lease as well  
13 as common sense and basic fairness, plaintiff’s decision to draw down the entirety of the letter of  
14 credit and retain those funds to use as it wishes results in a credit to defendants of \$1,050,000  
15 against the \$5,991,721.44 they owe. \$5,991,721.44 less \$1,050,000 is \$4,941,721.44, the amount  
16 that plaintiff is entitled to recover from defendants.

17 Accordingly, for the reasons stated above, plaintiff is entitled to judgment in its favor and  
18 against both defendants in the amount of \$4,941,721.44. Per law and custom, a separate  
19 document entitled JUDGMENT AFTER BENCH TRIAL will be filed so stating.

20 IT IS SO ORDERED.

21 Dated: May 31, 2022



22  
23 Harold E. Kahn  
24 Judge of the Superior Court  
25

**SUPERIOR COURT OF CALIFORNIA  
County of San Francisco**

152 GEARY ST. LLC.

Plaintiff(s)

Case Number: CGC-20-587001

vs.

VIJAYA PROPERTIES, LLC. Et al

Defendant(s)

**CERTIFICATE OF MAILING**  
(CCP 1013a (4))

I, Rosallie Gumpal, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On May 31, 2022, I served the attached DECISION AFTER BENCH TRIAL by placing a copy thereof in a sealed envelope, addressed as follows:

Joseph Lee Matalon, Esq.  
WACHTEL MISSRY LLP  
1602 Lawrence Avenue, Suite 110  
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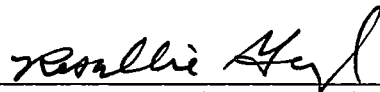
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Dated: May 31, 2022

T. Michael Yuen, Clerk

By:



Rosallie Gumpal, Deputy Clerk