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COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT DEPARTMENT

BERKSHIRE

SUPERIOR COURT

Civil Action No. 2076CV00102

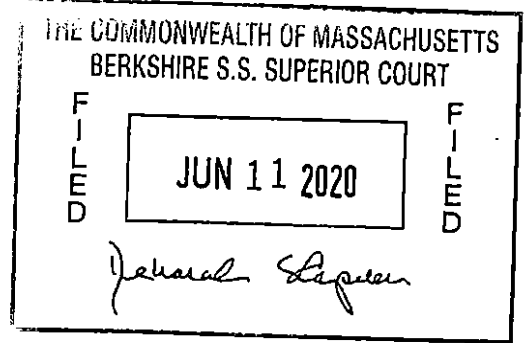
BERKSHIRE COOPERATIVE
ASSOCIATION, INC.,

Plaintiff,

v.

POWERHOUSE SQUARE I, LLC and
BENCHMARK DEVELOPMENT, LLC,

Defendants.



COMPLAINT

Plaintiff, Berkshire Cooperative Association, Inc. (“The Berkshire Food Co-op” or the “Co-op”), sets forth its Complaint against Defendants Powerhouse Square I, LLC and Benchmark Development, LLC, as follows:

Introduction

1. The Berkshire Food Co-op is the anchor tenant in the new mixed-use development located at 34-42 Bridge Street, Great Barrington, Massachusetts (the “Development”). This lawsuit is the Co-op’s last resort in a years-long effort to compel its landlord, Defendant Powerhouse Square I, LLC and its affiliate and predecessor in interest Defendant Benchmark Development, LLC (collectively, “Landlord”), to live up to the promises they made in the Co-op’s Lease (as defined herein).

2. The construction of the Development has been a disaster, and continues to be a disaster even a full year after the Co-op partially opened for business there. It has been beset by long delays, construction defects, mechanical issues, and parking problems, most within the

control of – and some intentionally caused by – the Landlord and its principals. The Landlord sold the Co-op and the Great Barrington community a “bill of goods,” representing that the Landlord and its principals are experts in mixed-use development and have been successful in every project they have developed. The problems with the Development have exposed the Landlord and its principals as incompetent project managers, undercapitalized developers, and liars.

3. For many businesses, but particularly for a grocery store, the Landlord’s failure to deliver a space with functional parking, mechanical systems and other building elements has deprived the Co-op of a substantial benefit under the Lease. The Co-op’s volunteer Board of Directors, having made exhaustive attempts to have the Landlord resolve the ongoing issues, is filing this action in order to recoup the community’s historic investment of \$2.7 million in the Co-op’s new space, including \$1.6 million in loans from the Co-op’s owners. The hard work of the Co-op’s Board and staff, and the extraordinary support of the people of Southern Berkshire County, are at risk because of the Landlord’s violations of the parties’ agreements, misrepresentations, unfair and deceptive businesses practices, and other significant acts, errors, and omissions.

Parties

4. The Berkshire Food Co-op is a Massachusetts mercantile cooperative with a usual place of business at 34 Bridge Street, Great Barrington, Massachusetts.

5. Each of Defendants Powerhouse Square I, LLC and Benchmark Development, LLC is a Massachusetts limited liability company with a usual place of business at 92 Caulkins Road, New Marlborough, Massachusetts.

6. On information and belief, the Landlord's members are Brian Cohan and Michael Charles Carotenuto, both of whom are Massachusetts residents.

Factual Allegations

7. The Berkshire Food Co-op runs a food cooperative, which was founded in 1981 by local families who wanted to provide the community with a food market filled with high quality food and sustainable products at reasonable prices, with local ownership and responsible business practices.

8. The Co-op has been in operation for almost forty years and has expanded significantly over time to meet the needs of its growing local customer base, who rely on the Co-op's quality and sustainable food offerings, along with its firm commitment to local agriculture, support of the local economy, dedication to environmental stewardship and educational outreach.

9. On or about October 20, 2016, The Berkshire Food Co-op and Defendant Benchmark Development, LLC entered into a lease agreement (the "Original Lease") for a term of years concerning a retail space located at 34 Bridge Street in Great Barrington, Massachusetts (the "Premises").

10. At the time, the Premises was part of a planned development to be constructed, consisting of a 52,000 square foot mixed-use commercial and residential project known as the 34 and 42 Bridge Street Development, located at 34 and 42 Bridge Street, Great Barrington, Massachusetts.

11. The Co-op planned to relocate its existing business to the Premises once it was constructed. The Co-op's previous location was at 42 Bridge Street which is adjacent to the Premises.

12. The first significant issue in the project was that construction of the Development was significantly delayed by Landlord.

13. The Landlord was initially required to commence construction by no later than June 1, 2017, which it failed to do.

14. On or about December 11, 2017, the Co-op and Defendant Benchmark Development, LLC entered into a first amendment to the Original Lease (the "First Amendment").

15. Pursuant to the First Amendment and the Landlord's representations, the Landlord was required to deliver the Premises so that the Co-op could commence business operations by no later than October 31, 2018.

16. On or about March 21, 2018, the two Landlord entities entered into an Assignment and Assumption of Lease Agreement dated as of March 21, 2018 (the "Assignment"), pursuant to which Defendant Benchmark Development, LLC sold, transferred, assigned and delegated to Defendant Powerhouse Square I, LLC all right, title, interest, duties and obligations in, to and under the Original Lease, as amended.

17. Defendant Powerhouse Square I, LLC accepted such Assignment and assumed all of the Landlord's obligations under the Original Lease, as amended.

18. Before and around the time of the Assignment, the Landlord had become aware that material costs for steel, aluminum, and other building materials had risen.

19. During the summer and into the fall of 2018, Landlord and the Co-op, and their representatives, were in regular communication regarding the construction schedule and delivery date.

20. At that time, Landlord, in bad faith, repeatedly assured timely delivery of the Premises while secretly knowing it had made a tactical decision to default on its obligations to deliver the Premises on time because the delay would likely save the Landlord money on material procurement.

21. The Berkshire Food Co-op relied on these representations in planning its opening and conveying that information to its customer base.

22. Contrary to its representations and obligations under the Lease, Landlord failed to deliver the Premises by October 31, 2018.

23. Thereafter, in or about late 2018 or early 2019, knowing that it was liable for delay damages, Landlord embarked on a bad faith scheme to avoid those damages.

24. As part of this scheme, Landlord told the Co-op it had two choices if it did not want the construction schedule to fall further behind: remove the Co-op's contractor from the site and cease construction of the interior of the Premises while the Landlord continued with its portion of the work, or waive the Co-op's delay damages claim.

25. The Co-op had no contractual obligation, and the Landlord had no contractual right, to remove the Co-op's contractor from the site.

26. Landlord knew at the time that the Co-op relied on a firm opening date in order to meet the financial projections that justified the Co-op's investment in the new Premises.

27. Landlord used the wrongful threat of further breaching its own contractual obligations in an effort to force the Co-op to release its delay damages claim under the Lease.

28. The Co-op refused to waive its damages claims and instead removed its construction crew from the site.

29. After the Co-op removed the crew, the Landlord quickly changed course and requested that the Co-op's crew return, which it did.

30. The Landlord's speedy change of course demonstrated that the request to remove the Co-op's crew was nothing but a ploy to try to get a release of the damages claim.

31. The Landlord's failed maneuver cost the Co-op in additional construction costs for the demobilization, remobilization and loss of efficiency.

32. On or about January 25, 2019, Co-op and Defendant Powerhouse Square I, LLC entered into a second amendment to the Original Lease (the "Second Amendment" and, together with the Original Lease and the First Amendment, the "Lease").

33. After numerous delays and as the schedule repeatedly changed, the Landlord next represented to the Co-op in the Lease and orally that it would deliver the Premises so that the Co-op could commence business operations by April 17, 2019.

34. By April 17, 2019, Landlord failed to complete its obligations under the Lease to deliver the Premises to the Co-op.

35. Through June 2019, Landlord continued to fail to deliver the Premises as required under the Lease and despite Landlord's repeated assurances that it would do so.

36. Among other things at that time:

- a. Landlord's contractor was still performing construction on the south and east sides of the building, creating a hazardous condition for employees and potential customers of the Co-op;
- b. The Great Barrington Building Commissioner could not issue a temporary certificate of occupancy because the entrance to the Co-op remained a construction area;

- c. Landlord failed to deliver a Premises with emergency egress from the building onto Bridge Street;
- d. Landlord failed to deliver ADA compliant bathrooms at the Premises;
- e. Landlord failed to deliver adequate roof covering for a portion of the Premises; and
- f. Landlord failed to deliver parking for the Premises required under the Lease.

37. The Co-op took possession of the Premises in June 2019; however, the Premises was never properly delivered under the Lease.

38. At that time and consistent with its prior bad faith tactics, Landlord threatened not to obtain a certificate of occupancy for the Premises unless the Co-op commenced paying rent, even though the Co-op was not required to do so under the Lease.

39. On or about June 19, 2019, Landlord assured the Co-op that construction and any remaining issues would be completed in short order, and gave Co-op a timeline of six weeks (July 31, 2019) to demolish an old building and finish the parking lot.

40. By July 31, 2019, Landlord still had not delivered the Premises as required under the Lease. At that time and despite Landlord's repeated assurances, no work had begun with respect to the demolition of the former Co-op building and construction of the parking lot, and Landlord remained in default on several obligations with respect to the Lease.

41. Landlord's defaults deprived the Co-op of the bargained for value of the Premises under the Lease and further caused the Co-op to suffer serious material adverse effect on its operations, including lack of customer parking, unsafe parking, an unsightly Premises, the inability for delivery trucks to access the loading dock located at the Premises, and lack of signage.

42. On July 31, 2019, the Co-op provided a notice of default and continued to comply with its obligations under the Lease despite the Landlord's failure to deliver Lease requirements and serious disruption to its business caused by Landlord.

43. On August 31, 2019, the Co-op provided a second notice of default as Landlord continued to fail to properly deliver the Premises including adequate parking and signage permitting as required under the Lease.

44. By September 19, 2019, Landlord had still failed to demolish the old building and finish the parking lot as it promised on June 19, 2019, and as required under the Lease.

45. Due to Landlord's failures, the Co-op, among other things, had been left during the initial months of the opening of its new location with inadequate temporary parking, an active constructive site and block-out construction fencing around the front of its new space, faulty mechanical systems, along with other visual and physical obstructions for its customers. This was a violation of the Lease requirements and severely impacted the Co-op's ability to conduct its business.

46. The Co-op received consistent complaints from customers about the inadequate parking, lighting, and the related poor condition of the Premises, and its business suffered dramatically.

47. The Co-op's repeated complaints to the Landlord were met at various times with silence, at times with continued promises that work would be completed, and at other times with bad faith denial of responsibility by the Landlord.

48. As a result of the Landlord's repeated failures, in October 2019, Landlord and the Co-op entered into an agreement whereby the Co-op was permitted to withhold rent while

Landlord completed its obligations with respect to parking and signage, two of the most important (but not only) breaches by the Landlord (the “Rent Withholding Agreement”).

49. Under the Rent Withholding Agreement, the Co-op was permitted to withhold rent until the Landlord provided 50 exclusive, paved, striped, lit and fully accessible parking spaces.

50. The Landlord represented that the parking requirements (which were already months overdue) would be complete no later than November 10, 2019.

51. Landlord failed to complete its obligations under the Rent Withholding Agreement.

52. To date, although **eight months** have elapsed since the Rent Withholding Agreement, Landlord remains in default under both the Lease and Rent Withholding Agreement, including with regard to parking, signage and general customer safety.

53. To date, the Landlord has still not provided the parking required by the Lease, the Rent Withholding Agreement and its promises.

54. Parking is one of the most integral and essential features of a grocery business. At no time has the Landlord provided the parking required by the Lease. Instead, Landlord has provided a patchwork of less spaces than required, unfinished and poorly lit temporary space and regular changes to parking configuration.

55. The parking situation was so bad that the Co-op leased additional space across the street so its customers could park, at additional cost to the Co-op. A food market without adequate parking so that its customers, who are hauling groceries and pushing shopping carts, have to cross a street to get to their cars is a disaster.

56. To make matters worse, the Landlord failed to properly mark and paint crosswalks for those customers crossing the street, which (a) was a breach of the Lease, and (b) upon information and belief, was noted by the Town of Great Barrington to be in violation of law.

57. Since the Co-op's occupancy of the Premises began, various other issues attributable to Landlord have arisen or exist, which are seriously affecting the Co-op's use and enjoyment of the Premises.

58. The Co-op has the right under the Lease to install a sign facing Main Street to identify the location of its new store to the public. Given the location of the Co-op on Bridge Street, a sign that can be seen from Main Street is very important.

59. The Landlord was responsible for the structural requirements of the building to support the sign. When the Co-op tried to install the sign, there was a lack of adequate structural support.

60. Subsequently, including on October 11, 2019, Landlord represented that its general contractor would install the structural elements necessary to carry the sign and that such work would be complete by October 18, 2019. This representation was false and misleading.

61. After the date promised by the Landlord, the Co-op again, at its expense, had a crew on site to install the sign, only to discover that the structural requirements had again not been fulfilled.

62. The result of Landlord's failures has caused, among other things, unsafe pedestrian crossing, consistent lack of parking for customers, customers waiting for spots, leaks and water accumulation in the Premises including in shopping areas, failure of other mechanical systems, customer complaints, customers parking across the street, lack of proper signage, and a

poor shopping experience for The Berkshire Food Co-op's customers and potential customers. The lack of adequate facilities was even more noticeable and detrimental as the demand for food increased in early 2020.

63. These failures have resulted in an overall disastrous blow to Co-op's relocation and opening in its new location and its customer goodwill, which it has carefully developed and cultivated for nearly 40 years.

64. The damage that the Co-op has suffered and continues to suffer due to the Landlord's failures is irreparable.

65. The lack of parking at the Premises has continued, even though the Co-op has been at its new Premises for a year. This continues to make the Premises untenable for the Co-op's operations.

66. Upon information and belief, the Co-op also occupies less space than indicated by the Lease and as a result the Landlord has overcharged the Co-op for rent and related payments. The Co-op has repeatedly requested that the Landlord correct the calculation of the square footage, but the Landlord has failed and refused to do so.

67. The Landlord has also overcharged the Co-op for certain work.

68. To date, Landlord has not delivered the Premises in compliance with the Lease and local and state law.

69. As a result of Landlord's failures, the Co-op has been unable to adequately conduct its business operations at the Premises.

70. During the period of its tenancy, Co-op complied with all express and implied terms of the Lease as modified by the Rent Withholding Agreement.

Causes of Action

COUNT I
BREACH OF CONTRACT - LEASE

71. Plaintiff realleges and incorporates by reference the allegations set forth above and below as though each were fully set forth herein.

72. The Landlord's actions, omissions, and misrepresentations constitute breach of the Lease.

73. As a direct and proximate result of the Landlord's breaches of contract, The Berkshire Food Co-op has suffered damages in an amount to be proven at trial.

COUNT II
BREACH OF CONTRACT - RENT WITHHOLDING AGREEMENT

74. Plaintiff realleges and incorporates by reference the allegations set forth above and below as though each were fully set forth herein.

75. The Landlord's actions, omissions, and misrepresentations constitute breach of the Rent Withholding Agreement.

76. As a direct and proximate result of the Landlord's breach of contract, The Berkshire Food Co-op has suffered damages in an amount to be proven at trial.

COUNT III
BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

77. The Berkshire Food Co-op realleges and incorporates by reference the allegations set forth above and below as though each were fully set forth herein.

78. The Landlord owed The Berkshire Food Co-op a duty to act in good faith and deal fairly under the Lease and Rent Withholding Agreement.

79. The Landlord violated its obligation of good faith and fair dealing as set forth above, causing The Berkshire Food Co-op to suffer damages in an amount to be proven at trial.

COUNT IV
BREACH OF THE COVENANT OF QUIET ENJOYMENT

80. The Berkshire Food Co-op realleges and incorporates by reference the allegations set forth above and below as though each were fully set forth herein.

81. The Berkshire Food Co-op has an express and implied right of quiet enjoyment under Lease and Rent Withholding Agreement.

82. The Landlord, by its actions as detailed herein, has breached both the express and implied covenants of quiet enjoyment.

83. As a direct and approximate result of the Landlord's breaches, The Berkshire Food Co-op has suffered damages in an amount to be proven at trial.

COUNT V
CONSTRUCTIVE EVICTION

84. The Berkshire Food Co-op realleges and incorporates by reference the allegations set forth above and below as though each were fully set forth herein.

85. The conduct of the Landlord described herein constitutes a constructive eviction.

86. The Berkshire Food Co-op has suffered damages in an amount to be proven at trial.

COUNT VI
MISREPRESENTATION

87. The Berkshire Food Co-op realleges and incorporates by reference the allegations set forth above and below as though each were fully set forth herein.

88. In connection with the Lease and in the course of its business as landlord, the Landlord supplied false information as set forth in this complaint by:

- a. repeatedly representing to the Co-op that the Landlord would deliver the Premises as required by the Lease so that the Co-op could commence business operations;
- b. representing to the Co-op that it would have reasonable access to and the use of parking and repeated representations regarding the date of completion;
- c. representing that the Landlord was progressing with procuring materials when the Landlord knew it was not and was instead intentionally delaying purchases;
- d. representing that the building was structurally sufficient to carry the blade sign for the Co-op and causing the Co-op to incur to costs to install the sign when Landlord knew or had reason to know that the building was not properly constructed;
- e. falsely assuring the Co-op that would honor certain obligations under the Lease when the Landlord intended not to; and
- f. other misrepresentations and omissions throughout the development process.

89. The Landlord failed to exercise reasonable care and competence in obtaining and supplying and/or omitting such information.

90. The false information was for the guidance of the Co-op in its business transactions.

91. The Landlord supplied the false information or omissions for the Co-op's benefit and knew that the Co-op would rely on the information it supplied.

92. The Co-op justifiably relied on the false information.

93. The Landlord's actions caused and resulted in pecuniary loss to the Co-op.

94. As a result of its justifiable reliance on the Landlord's misrepresentations, The Berkshire Food Co-op has suffered damages in an amount to be proven at trial.

COUNT VII
VIOLATION OF G. L. c. 93A

95. The Berkshire Food Co-op realleges and incorporates by reference the allegations set forth above and below as though each were fully set forth herein.

96. At all times material to this Complaint, the Co-op and Landlord were engaged in trade and commerce within the meaning of G.L. c. 93A § 11.

97. The conduct of Landlord as alleged herein constitutes unfair and deceptive acts and practices declared unlawful under G.L. c. 93A § 2 or by the rules and regulations promulgated by the Attorney General of the Commonwealth of Massachusetts pursuant to G.L. c. 93A § 2(C).

98. As a direct and proximate result of the Landlord's use or employment of these unfair or deceptive acts or practices, the Co-op has suffered loss, injury and damage plus reasonable costs and attorney's fees.

99. The Landlord's use or employment of these unfair or deceptive acts or practices was a willful or knowing violation of G.L. c. 93A § 2, entitling the Co-op to recover, in addition to any other relief, its actual damages, doubled or trebled, plus interest, costs and attorney's fees.

Prayer for Relief

WHEREFORE, Plaintiff Berkshire Cooperative Association, Inc., requests that this Court:

- a) Enter judgment against Landlord on all counts in the Complaint in an amount to be proven at trial;
- b) Determine Landlord liable for violations of M.G.L. c. 93A, and award The Berkshire Food Co-op double or treble damages pursuant to Count VII due to

the Landlord's knowing and willful violations of G.L. c. 93A;

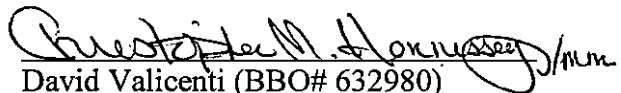
- c) Award The Berkshire Food Co-op interest, costs and reasonable attorney's fees; and
- d) Award such other relief the Court deems necessary and proper.

JURY DEMAND

Berkshire Cooperative Association, Inc. demands a trial by jury on all claims and issues so triable.

Respectfully submitted,
Berkshire Cooperative Association, Inc.

By its attorneys,

/mm

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