

IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL CIRCUIT IN AND
FOR WALTON COUNTY, FLORIDA
CIRCUIT DIVISION

CASE NO.: 2009 CA 2380

J. BRUCE FORBES, as successor in
interest to EIG DFS, LLC,

Plaintiff,

vs.

MARVIN'S INC.,
a Delaware Corporation,

Defendant.

INSTR # 1186698
OR BK 2884 Pages 4535 - 4539
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FINAL JUDGMENT

This cause came before the court for final hearing on a complaint filed by J. Bruce Forbes, as successor in interest to EIG DFS, LLC, seeking damages for breach of a lease agreement and for conversion, and on a counterclaim filed by Marvin's, Inc., seeking damages for breach of the covenant of quiet enjoyment contained in the lease and for breach of the lease agreement. The court, having considered the evidence and testimony presented, finds that:

A) The plaintiff's predecessor in interest, EIG DFS, LLC, and the defendant entered into a lease agreement with a term of seven years. The lease began in 2005, but the defendant in September of 2009 sent the plaintiff a letter terminating the lease, vacated the premises, and ceased making rental payments.

B) The plaintiff claims that the defendant breached the lease agreement by failing to pay rent. The defendant claims the plaintiff violated the lease agreement through a breach of the covenant of quiet enjoyment based upon: a) claims to ownership of a portion of the lumber shed

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area made by a third party; b) problems with the heating, ventilation, and air conditioning system, and; c) drainage problems in the outdoor garden area of the store.

C) The evidence presented established that the defendant did not pay rent in the amount of \$247,697.68, CAM fees in the amount of \$16,398.61, real estate taxes in the amount of \$32,011.22, insurance in the amount of \$38,149.64, sales tax due on rental payments in the amount of \$27,707.51, interest in the amount of \$34,486.64, and late fees in the amount of \$32,889.93, all of which would be due under the lease if not properly terminated.

D) The defendant presented financial statements in summary form to establish the profits or losses for its business located on the leased premises. It also produced a list of moving expenses to indicate that it incurred \$332,025.19 in expenses related to closing the business when it terminated the lease.

E) The financial statements presented by the defendant failed to sufficiently separate the profits for the period of time before the Lowe's store opened nearby, even though this was known to be of importance in determining the defendant's actual reason for terminating the lease. The defendant's chief executive officer testified that more detailed financial statements were not available, despite repeated discovery demands made by plaintiff's counsel, yet he was able to produce a detailed list of each and every expense he asserted was incurred as a result of the closure of the store. There was no testimony or evidence presented, however, to establish a predicate for introduction of the figures contained on the list of moving expenses, and it could not be received into evidence.

F) The evidence concerning the breach of quiet enjoyment caused by the assertion of a claim of ownership by another person showed that the person claiming to own a portion of the shed area appeared twice on the premises, left after being ordered to do so on each occasion, and

then filed a suit to enforce her claim. That action was later dismissed for want of prosecution and did not result in any interference with the defendant's use of the property, except during the two visits to the property. Such evidence was insufficient to establish an actionable breach of the covenant of quiet enjoyment.

G) The evidence concerning the difficulties with the heating, ventilation, and air conditioning system established that several instances occurred where the system was not properly working and the plaintiff was notified of the problem. On each of those occasions the plaintiff sent a qualified repairman to correct the problem and that after the repairs were completed, no more complaints were communicated to the plaintiff. The court has considered the deposition testimony of the store's former manager about continual problems with the cooling system, but can find no evidence to establish that the defendant communicated such unsolved problems to the plaintiff.

H) The evidence concerning the drainage in the garden area was insufficient to establish any continuing unresolved problem which would justify the unilateral termination of the lease by the defendant.

I) The defendant failed to provide the plaintiff with written notice of its failure to perform its obligations and allowing a reasonable time for cure, as provided by section 24.4 of the lease agreement. Without such notice, the defendant has no authority to terminate the lease for plaintiff's non-performance of its obligations.

J) The defendant failed to establish any of the affirmative defenses asserted in its answer.

K) Based upon the foregoing, the court finds that the defendant breached the lease agreement by failing to pay the rent due thereunder, and that the defendant failed to establish any

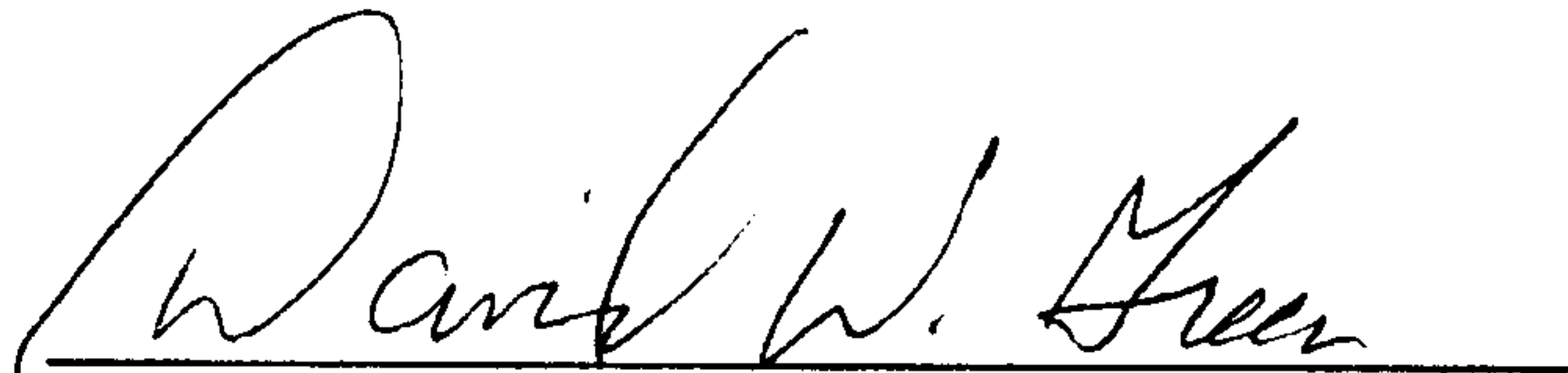
breach of lease by the plaintiff or to establish any of the damages claimed by it even had it been able to prove a breach by plaintiff. It is therefore

ORDERED AND ADJUDGED that:

1) The plaintiff, J. Bruce Forbes, whose address is 70 Southwest Century Drive, Suite 100445, Bend, Oregon 97702, recover from the defendant, Marvin's, Inc., unpaid rent in the amount of \$247,697.68, unpaid CAM fees in the amount of \$16,398.61, real estate taxes in the amount of \$32,011.22, insurance in the amount of \$38,149.64, sales tax due on rental payments in the amount of \$27,707.51, interest in the amount of \$34,486.64, and late fees in the amount of \$32,889.83, for a total amount of \$429,341.13, which shall bear interest at the rate of 4.75 percent per year, for all of which let execution issue.

2) The plaintiff is also entitled to recover his court costs and attorney's fees incurred in the prosecution of this action and the court reserves jurisdiction to enter a separate judgment for such fees and costs.

DONE AND ORDERED in chambers at DeFuniak Springs, Walton County, Florida this the 1st day of March, A.D., 2012.


DAVID W. GREEN
CIRCUIT JUDGE

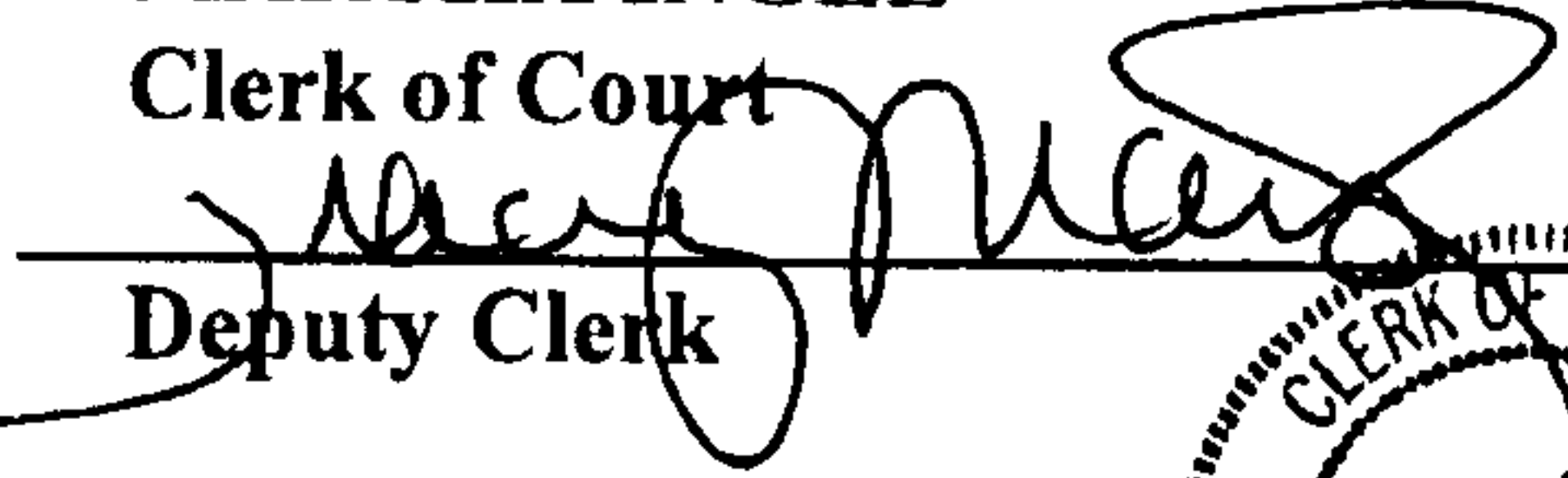
I HEREBY CERTIFY that a copy of the foregoing has been furnished to the following by regular U.S. mail this the 1st day of March, 2012.

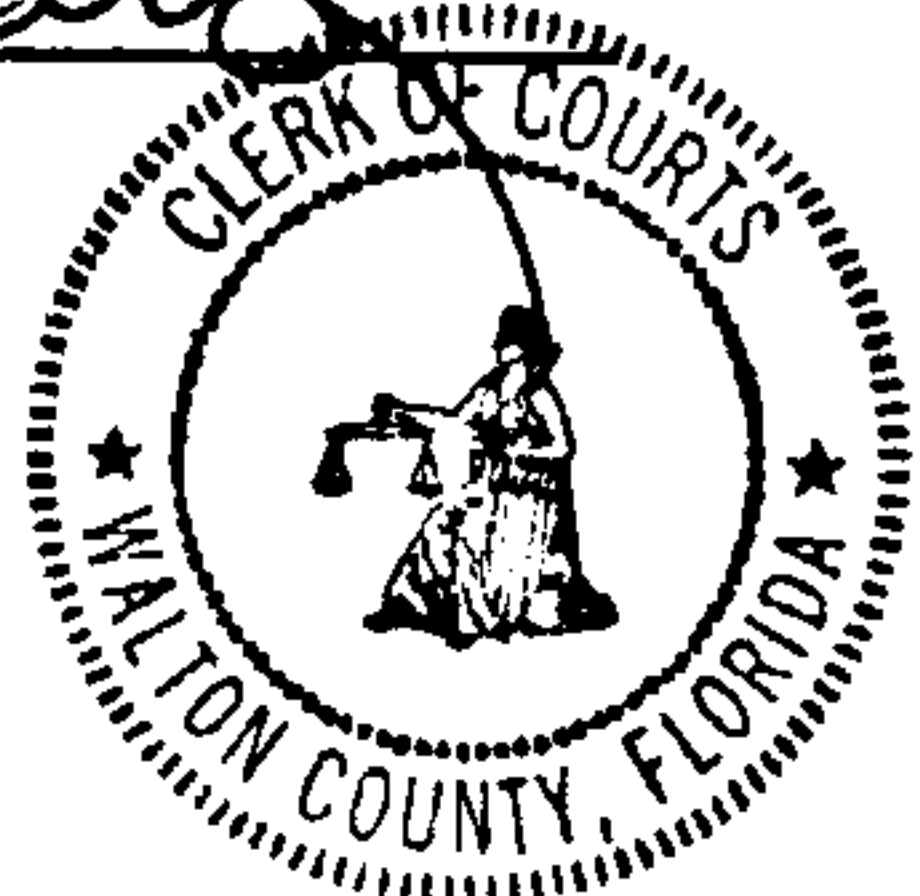
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