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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF VERMONT

IN RE:	)	
PASQUALE J. VESCIO and VATSALA VESCIO,	)	Case No: 96-10153
Debtors.	)	(Chapter 11)
	)	
	)	
BOZZUTO'S INC.,	)	Adv. Pro. 97-1079 #94-1
Plaintiff,	)	
	)	
v.	)	**Memorandum of Decision**
	)	**Holding Bozzuto's, Inc.**
PASQUALE J. VESCIO and VATSALA VESCIO,	)	**Liable as Tenant on Lease and**
Defendants.	)	**Reforming Rent Provision**

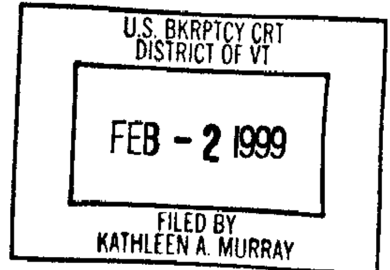
APPEARANCES:

B. Lewis, Esq., of Obuchowski Law Offices, Bethel, VT, and R.P. Gerety, Jr., White River Junction, VT, for Bozzuto's Inc., ("Bozzuto's").

J.T. Schwidde, Esq., of Glinka and Schwidde, Rutland, VT for Pasquale J. Vescio and Vatsala Vescio ("Debtors").

We are asked to resolve[1] two of the most basic issues under any lease agreement - (1) who is the tenant; and (2) how much is the rent? We hold Bozzuto's is a tenant under the lease,

[1]Our subject matter jurisdiction over this controversy arises under 28 U.S.C. §1334(b) and the General Reference to the Court under Part V of the Local District Court Rules for the District of Vermont. This is a core matter under 28 U.S.C. §157(b)(1); (b)(2)(B), (b)(2)(C), (b)(2)(E), (b)(2)(F), and (b)(2)(M). This Memorandum of Decision constitutes findings of fact and conclusions of law under Fed.R.Civ.P. 52, as made applicable by Fed.R.Bktcy.P. 7052.



and that the rent is $13,125 per month.

Factual and Procedural History

In 1994, Debtors opened a supermarket in Brattleboro, Vermont. Bozzuto's was Debtors' major food and inventory supplier. *Transcript of December 2, 1998 Trial pp. 316-317* ("*Tr.*"). Bozzuto's lent Debtors $200,000 to acquire equipment and fixtures for the supermarket, and retained a security interest in the property purchased. *Tr., Dec. 2 at 316-317.* For a myriad of reasons not germane to this proceeding there was insufficient cash to service the debt owed to Merchant's Bank and to pay Bozzuto's on its loan and for the inventory on a regular basis. Realizing this, Debtors asked Bozzuto's to take over operation of the store. *Tr., Dec. 2 at 317-318.*

Discussions regarding the takeover began in September of 1994. *Tr., Dec. 2 at 319.* On September 28, 1994, Mr. Robert H. Wood, Vice President of Finance at Bozzuto's, faxed a letter to the Debtors stating Bozzuto's would purchase the existing inventory and equipment of the supermarket, and that Bozzuto's would form a subsidiary corporation, Brat-Marl, Inc. ("Brat-Marl")[2], which would lease the store from Debtors. *Tr., Nov. 30 at 24-27.* Negotiations concluded on October 7, 1994[3] with the execution of two documents, a Surrender Agreement and

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[2]Brat-Marl, Inc., is sometimes referred to in papers submitted by both parties as 'Brat Marl, Inc.,' and at other times as 'Brat-Marl, Inc.' For the purpose of consistency, we use the latter, as used in the corporation's articles of incorporation.

[3]The parties met at the law office of Thomas French in Brattleboro, Vt., local counsel for Bozzuto's, to finalize the agreement. Present during most of that time were: Pasquale Vescio; Vatsala Vescio; Robert Evans (Mr. & Mrs. Vescio's attorney); Robert Wood (Vice President of Finance, Bozzuto's); Kevin Daly (Director of Legal Affairs, Bozzuto's) Thomas French; (local

a Lease Agreement.

The Surrender Agreement stated Debtors would surrender to Bozzuto's and Brat-Marl all of their assets and equipment located at the supermarket,[4] and Debtors agreed to execute a lease satisfactory to Bozzuto's and Brat-Marl. The Lease Agreement, dated October 7, 1994, was signed by Debtors, Bozzuto's, and Brat-Marl.[5] Only Brat-Marl was named as 'tenant' in the body of the lease, but both Bozzuto's and Brat-Marl were named as parties to the lease on an attached cover sheet.[6]

Although an application for an employer identification number and trade-name registration for Brat-Marl were filed before the lease was executed, Brat-Marl's Articles of

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counsel for Bozzuto's and Brat-Marl); and Carolyn Gitardi (Thomas French's legal secretary).

[4]Debtors surrendered their equipment and inventory directly to Bozzuto's in exchange for Bozzuto's paying $308,750 to the Merchant's Bank. **See** Vescio's Ex. U.

[5]Robert H. Wood signed the lease as Bozzuto's Vice President and Duly Authorized Agent. On a separate signature line, Mr. Wood also signed for Brat-Marl as Brat-Marl's Vice President and Duly Authorized Agent. Mr. Daly witnessed both signatures. Mr. And Mrs. Vescio signed the lease individually.

[6]Robert Wood and Kevin Daly, two witnesses for Bozzuto's, testified that the cover page was not attached at the October 7 execution ceremony. *Tr., Nov. 30 at 46,66, 143.* Thomas French, Bozzuto's third witness, and Mr. Vescio, both testified that the cover sheet was attached. *Tr., Dec. 2 at 222, 354.* It also appears that Mr. French transmitted the lease to Debtors with the cover sheet. Mr. French said that Bozzuto's inclusion on the cover sheet was a mere secretarial error, but the secretary who allegedly made this error was not called as a witness by either party. We find that the cover sheet naming Bozzuto's as a party to the lease was attached to the lease when the lease was signed by the parties. In finding so, we do not in any way question the truthfulness or character of Mr. Wood or Mr. Daly. We found all of these witnesses credible. We think it is likely, however, that Mr. Wood and Mr. Daly either did not recall seeing the cover sheet or merely overlooked it at the execution ceremony.

Incorporation were filed with the office of the Vermont Secretary of State on October 11, 1994. Accordingly, Brat-Marl was not a legally existing corporation at the execution of the lease, and thus could not be a party to the lease under the facts testified to at the trial. **See** 11A V.S.A. § 2.03(a) ("Unless a delayed effective date is specified, the corporate existence begins when the secretary of state issues a certificate of incorporation, after finding that the articles of incorporation conform to law, and that all fees imposed...have been paid."). Bozzuto's paid the first month's rent, and that sum was later paid back to Bozzuto's by Brat-Marl. *Tr., Nov. 30 at 38.* Thereafter, rent payments from Brat-Marl were made via the Accounting Services Division of Bozzuto's, Retail Services Agency.[7] *Tr., Nov. 30 at 37.* It is difficult to determine who actually paid the rent, Bozzuto's or Brat-Marl, but because of the corporate structure we find that Bozzuto's paid the rent.

On February 19, 1996, Debtors filed a voluntary Chapter 11 petition, and continued the business as Debtors-in-Possession. On August 19, 1996, this Court confirmed Debtors' Third Amended Chapter 11 Plan, under which Debtors assumed the October 1994 lease.[8] Over a year later, Bozzuto's filed a Declaratory Complaint against Debtors, claiming it was not a tenant under the lease. Debtors counterclaimed against Bozzuto's and commenced a third party complaint against Brat-Marl to recover alleged post-petition payments on a disallowed debt made

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[7]Retail Services Agency is a division of Bozzuto's which provides accounting and bookkeeping services for a fee. It provides these services to its subsidiaries, customers of its supermarket supply business, and others. *Tr., Nov. 30 at 37.*

[8]**See**, Order Confirming Third Amended Chapter 11 Plan, Vescio's Ex. N at 2.

to Bozzuto's via rent concessions. Later, Bozzuto's filed a Motion for Summary Judgment. Denying Bozzuto's Motion, Senior Bankruptcy Judge Marro held that the lease was ambiguous as a matter of law.[9] The matter was set for trial.

On November 30, 1998 and December 2, 1998, we conducted a trial. We find Bozzuto's is a tenant, and that the parties intended that the monthly rent is $13,125.

Bozzuto's is a Tenant Under the Lease

For reasons fully discussed in Judge Marro's Memorandum of Decision and Order Denying Summary Judgment, the lease is ambiguous regarding Bozzuto's status under the lease.[10]

Our primary objective in interpreting a contract is to ascertain the parties' intent. **Abbiati v. Buttura & Sons, Inc.**, 161 Vt. 314, 319, 639 A.2d 988, 991 (1994). Due to the ambiguities in

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[9]"Parol evidence shall be admissible on all issues relating to the interpretation of the Lease Agreement and the provisions contained therein as well as the obligations of the parties in this Adversary Proceeding." Memorandum of Decision and Order May 7, 1998 at 8 by Senior Bankruptcy Judge Charles J. Marro.

[10]Judge Marro succinctly summarized the ambiguities in the lease:

> The conduct of the parties to the Surrender and Lease Agreements as well as the execution of these documents in final form left much to be desired....
>
> Bozzuto's, Inc., was a signatory to the lease even though it does not designate the capacity to which it signed.
>
> These actions taken by the parties, the alleged admissions made by the legal representative of Bozzuto's, the failure of corporate existence of Brat-Marl, Inc., the tenant named in the body of the lease, all tend to support the conclusion that the lease itself is ambiguous.
>
> Once an ambiguity has been found, the court must resort to subordinate rules of construction....This includes extrinsic or parole (sic) evidence.

Memorandum of Decision and Order May 7, 1998 at 8 (citations omitted).

the lease noted above, we look to the contract itself and extrinsic evidence to determine the parties' intent. **Housing Vermont v. Goldsmith & Morris**, 685 A.2d 1086, 1088 (1996). This intent is a question of fact to be resolved by us. **Id.**

While the lease agreement itself is ambiguous, an examination of its four corners supports the conclusion that Bozzuto's is a tenant. Though not explicitly named as 'tenant' in the body of the contract, Bozzuto's is named as a party on the cover sheet. The cover sheet is important in determining the intent of the parties to this contract.[11] In his decision denying summary judgment, Judge Marro highlighted Bozzuto's claim that the cover sheet was not attached. "The cover sheet recites that Bozzuto's, Inc. is a party to the Lease. Yet Bozzuto's asserts that it can show that the cover sheet was not attached to the body of the lease when it was executed. If this can be established, Bozzuto's, Inc.'s position that it was not a party to the lease would be entitled to support...." Memorandum of Decision and Order May 7, 1998 at 8. Bozzuto's claim that it is not a party to the lease is accordingly entitled to less support, because we have found as a fact that the cover page was attached at execution.

According to witnesses for Bozzuto's, Bozzuto's signed the lease merely to show its approval of the lease as required under the Surrender Agreement of the same date.[12] *Tr., Nov. 30 at 49, 165.* Bozzuto's signature, however, is in no way limited by or referenced to the Surrender

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[11]**See, Richardson Engineering Co. v. Int'l. Business Mach. Corp.,** 554 F.Supp. 467, 470 (D.Vt. 1981) *aff'd* 697 F.2d 296 (2d.Cir.1982) (Cover letter transmitting contract, as other extrinsic writings, may constitute part of contract).

[12] Surrender Agreement, Oct. 7, 1994, Pl's Ex. 27.

Agreement. Bozzuto's points to a line of cases holding that when an entity not named in the body of a contract signs the contract for no apparent reason, the signer is not bound under the contract. **See, In Re Estate of Dickerson**, 600 S.W.2d 714 (Tenn.1980).

The cases cited by Bozzuto's , however, do not necessarily apply here because Bozzuto's is named as a party to the lease on the cover sheet. It might therefore be inferred that it signed for that purpose. **See, St. Regis Apartment Corp. v. Sweitzer**, 32 Wis.2d 426, 145 N.W.2d 711, 715 (1966) (holding that even if signer is not explicitly named in body of contract, court could look at ambiguities in contract and extrinsic evidence to determine that signer was still bound as a party). Thus, while Bozzuto's signature on the lease alone is not enough to hold it liable as a tenant, when combined with the cover sheet naming Bozzuto's as a party to the lease, we find that this shows some intent of the parties to hold Bozzuto's liable as a tenant.

This intent is further evidenced by Bozzuto's later conduct. On various occasions, Bozzuto's either affirmatively represented or failed to object to Debtors' representations that it was a tenant. **See** Answer of Defendants Bozzuto's Inc., and Brat-Marl, Inc. to Defendant Town of Brattleboro's Cross Claim, Windham Superior Court Dk. # S65-2-95WmC, Vescio's Ex. S ("Wherefore, Defendants Bozzuto's Inc. And Brat-Marl Inc. request....(t)hat these defendants be permitted to continue...as lessee of the lands..."); Vescio's First Disclosure Statement, June 17, 1998, Vescio's Ex. KK (making repeated references to Bozzuto's as a tenant under the lease with no objections filed by Bozzuto's or Brat-Marl); Third Amended Chapter 11 Plan, Vescio's Ex. N at para. 7.0. Further, this Court treated Bozzuto's as a tenant under this lease on various

occasions, and Bozzuto's did not protest to such treatment.[13] While not binding as judicial admissions in this proceeding,[14] these actions and admissions of Bozzuto's and its representatives do constitute evidence of the parties' overall intent.

We note a number of documents produced by representatives for Bozzuto's in which only Brat-Marl is referred to as a tenant under the lease: Letter from Thomas French to Gail Westgate of 1/26/95, Pl's Ex. 13; Letter from Kevin Daly to Thomas French of 11/27/95, Pl's Ex. 15; Letter from Kevin Daly to Nina Vescio of 3/14/96, Pl's Ex. 16; Letter of Kevin Daly to Nina Vescio of 1/30/97, Pl's Ex. 18; Letter from Kevin Daly to Nina Vescio of 3/19/97, Pl's Ex. 19. None of these documents, however, state that Brat-Marl is the exclusive tenant, nor do they make any mention of Bozzuto's status (or lack thereof) under the lease.

We are unwilling to find that the mere omission of Bozzuto's in some correspondence is enough to evidence Bozzuto's intent not to be bound, especially considering Bozzuto's explicit admissions of its status as a tenant in numerous other pleadings, papers, statements, and correspondence. In fact, Bozzuto's referred to itself as a 'tenant' on so many different occasions that this Court, late in the trial, prevented admission of many of such instances as being

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[13]**See** March 6, 1996 Ex-Parte Order, Vescio's Ex. M (directing rents be paid to Debtors-in-possession, listing Bozzuto's as one of the tenants); Amended Order Confirming Third Amended Chapter 11 Plan, Vescio's Ex. N There is no record of any objection in those proceedings made by Bozzuto's regarding its treatment as a tenant.

[14]Though Bozzuto's admissions were made to this court in various aspects of the Debtors' bankruptcy proceeding, no such admission was made in this declaratory judgment action. Those admissions are therefore not binding as judicial admissions in this Declaratory Judgment Action. **Jenkins v. Tomlinson (In re Basin Resources Corporation),** 182 B.R. 489 (Bankr.N.D.Tx. 1995).

redundant. Response of Bozzuto's Inc. and Brat-Marl, Inc. to Defendants Vescios Motion For Injunctive Relief, Vescio's Ex. R (denied admission as redundant); Synopsis Form in Windham Superior Court, Dk. # S65-2-95WmC October 30, 1995, Vescio's Ex. Q (denied admission as redundant); April 28, 1995 pleading filed by Bozzuto's and Brat Marl in Windham Superior Court Action, Vescio's Ex. G (denied admission as redundant).

Bozzuto's witnesses said any ambiguity in their written words should be excused because all parties knew that Brat-Marl was the only tenant. *Tr., Dec. 2 at 299.* Mr. Daly testified that at the October 7, 1994 meeting, Mr. Vescio demanded Bozzuto's be liable under the lease. Mr. Daly said Mr. Vescio's demand was adamantly refused, and that he made it clear to Mr. Vescio that Bozzuto's refused to be a tenant on this lease. *Tr. Nov. 30 at 144-145.* Mr. French testified that he overheard this conversation, and agreed that it was abundantly clear that Bozzuto's had no intention of being a tenant under this lease. *Tr. Dec. 2 at 233, 299.* Mr. French said that any such requirement would be a 'deal breaker'. *Tr. Dec. 2 at 233, 299.* Accordingly, Bozzuto's claims that any lack of clarity in the lease or its later representations is excused by the fact that Debtors knew Bozzuto's had no intention of becoming a tenant.

Mr. Vescio denied any such conversation with Mr. Daly took place, and said that throughout the negotiations it was clear to him that Bozzuto's as well as Brat-Marl would be tenants. *Tr. Dec. 2 at 325-326.* We find as a fact that no matter what, if anything, was actually said at the meeting, Bozzuto's failed to evidence any intent not to be bound as a tenant under the

lease.[15]

This conclusion is bolstered by an examination of Bozzuto's pre- and post-execution conduct. According to Bozzuto's, the issue of its liability under the lease was a 'deal-breaker'; an issue of extreme importance raising a red flag with its officers and negotiators. *Tr. Dec. 2 at 233, 299.* But the facts don't support this scenario. If the issue of its tenancy were such a 'deal-breaker', Bozzuto's should have been especially vigilant in making sure it was not identified in any way as a tenant under the lease. But Bozzuto's showed no such vigilance. Instead, it signed a lease that named it as a party, continuously made representations that it was a tenant, and was the only legally recognized corporation that signed the lease at its execution. Such a lackadaisical or negligent attitude regarding its status under the lease is wholly inconsistent with Bozzuto's assertion that this issue was an important 'deal-breaker' contested vigorously by its counsel and agents.

Accordingly, we find that the parties intended Bozzuto's to be bound as a tenant under the lease. This finding is based upon the wording of the lease agreement, the cover sheet naming Bozzuto's as a party, Bozzuto's unqualified signature on the lease, Bozzuto's various admissions of its tenancy, and the pre- and post-execution conduct of the parties. **See also** note 15.

Reformation of Monthly Rent

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[15] In so holding, we do not question the veracity of Bozzuto's' witnesses nor Mr. Vescio. **See** note 6. In a sense, we are discounting the oral testimony of these witnesses because it is so contradictory and because we have found all of these gentlemen to be honest and forthright in their testimony. The contradiction may simply be due to the fact that they are human beings; a status that makes them simply imperfect on occasion.

Debtors filed a Counterclaim against Bozzuto's and a third-party claim against Brat-Marl,[16] claiming the tenants received post-petition payments on a disallowed claim in the form of rent concessions. After Bozzuto's took over the store, all agreed Debtors still owed Bozzuto's a deficiency, originally calculated between $80,000 to $100,000. Debtors argue the Surrender Agreement acknowledges this deficiency, and that the rent was lowered from a commercially reasonable $7.50 per square foot to $7.00 per square foot in order that Bozzuto's be paid back the shortfall, over time, in the form of rental concessions. Debtors claim that they are now entitled to rent of $7.50 per square foot, and repayment of the post-petition rental concessions because the debt to Bozzuto's has since been disallowed.[17] They also ask us to reform the contract language to include a minimum monthly rent of $13,125.

Bozzuto's argues that while the lease is ambiguous regarding its status under the lease, the lease is definitively clear regarding the rental amount.[18] The lease itself makes no reference to any alleged rental concessions, and Bozzuto's claims that the parties never intended for the

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[16]The space rented out by Debtors constituted 21,000 square feet. At an increase of $.50 per square foot, Debtors claim they are entitled to $875 more per month. At the time of the counterclaim, Bozzuto's had continued to pay the reduced rent for 20 months following the filing of their Chapter 11 Bankruptcy petition on February 19, 1996. Hence the $17,500 claim (20 months x $875). Since that time, Debtors have continued to receive the reduced rent, for a total of 33 months, bringing the claim to $28,875. (33 x $875).

[17] The alleged claim of Bozzuto's was listed on Debtors' petition as a disputed claim. Bozzuto's did not file a proof of claim and the claim was disallowed by us in an Order dated Dec. 9, 1996.

[18]The lease lists the 'Minimum Rent' at $12,250 per month.

rent to automatically increase once the shortfall was paid off.

We must enforce a contract according to the plain meaning of its terms. **Workman v. Agency of Transportation**, 163 Vt. 606, 608 (1994). As a court of equity, however, we are not bound by the wording and labels used in a contract when they contradict the actual substantive intent of the parties. "It is well established that a bankruptcy court, as a court of equity, may look through form to substance when determining the true nature of a transaction as it relates to the rights of parties against a bankrupt's estate." **Liona Corp., Inc. v. PCH Ass. (In Re PCH Ass.)** 949 F.2d 585, 597 (2d Cir. 1991) (citing **Pepper v. Litton,** 308 U.S. 295, 304 (1939)). We may properly consider all relevant evidence to determine the economic reality of the transaction. "(E)ven apart from the propriety of admitting parol evidence...to clarify ambiguity, it was not error to look behind the form of the agreements to the economic substance of the transactions." **Liona Corp., v. PCH,** 949 F.2d at 597 (quoting **In Re PCH Assoc.**, 804 F.2d 193, 198 (2d.Cir.1986)).

While the lease does not mention any rental concessions, the Surrender Agreement executed on the same date clearly shows the parties intended that the rent be discounted from the fair market value as a means for Debtors to make payments on the debt owed Bozzuto's.[19] Although the monthly payment due Debtors is labeled 'Minimum Rent' under the lease, the

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[19]"Fifty Thousand... Dollars of the equipment value shall be applied to the reduction of the indebtedness due Bozzuto's. The deficiency balance shall be calculated in accordance with Schedule 3. Said deficiency shall be reduced on an annual basis at the rate of fifty...cents per square foot times twenty-one thousand...square feet equaling Ten Thousand Five Hundred...Dollars shall be paid in full." Surrender Agreement, Oct. 7, 1994 at 2. It is obvious that the parties intended the diminished rental rate to act as payment via rental concessions.

evidence makes it obvious to this Court that this rent has been calculated in such a manner as to allow Debtors to repay a debt to Bozzuto's, over time, via rental concessions.[20] "It is the economic substance of a transaction that should determine the rights and obligations of interested parties." **Liona Corp. v. PCH,** 949 F.2d at 597.

Because this 'Minimum Rent' is a means to repay a debt, we will look at it as such when determining the rights of the parties here. **Id.** The debt owed to Bozzuto's has since been disallowed by this Court. It is inequitable to mandate continued payments on a disallowed debt. Therefore, we increase the 'Minimum Rent' stated on the lease $875 monthly to $13,125 per month, and order tenants (Bozzuto's and Brat-Marl) to repay $28,875 to Debtors received in post-petition rental concessions. This holding is consistent with the intent of the parties at the time they entered into the lease.

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[20]**See** note 22. The parties only intended that the rent be 'fixed' at the lowered rate until the shortfall was paid. "We are also of the opinion that the fair market value rent for that location is in the $7.25-$7.50 square foot range. Therefore, for purposes of computing the contribution to the shortfall due Bozzuto's, Inc., *we shall be using a rental figure of $7.50 per square foot. This would require that the rent be fixed for a period of at least eight (8) years based on the anticipated shortfall of $80,000-$100,000.*" Letter from Kevin R. Daly to Pasquale Vescio of 10/3/94, Pl's Ex. 5 (emphasis added). Contrary to Bozzuto's assertions, it is obvious that neither party intended for the rent to remain at $7.00 per square foot once the debt to Bozzuto's was satisfied.

The language of the above paragraph is even more illuminating when read in context with Bozzuto's express refusal to allow a 'percentage rent clause' once the shortfall was cured. "(N)o percentage rent clause will be acceptable during the period in which a shortfall to Bozzuto's Inc. continues to exist. *Even when this shortfall has been eliminated,* a percentage rent which kicks in at the break even point...is out of the question." Letter from Kevin R. Daly to Pasquale Vescio of 10/3/94, Pl's Ex. 5 (emphasis added). No such language was used regarding the base rent increase.

CONCLUSION

We find that Bozzuto's is a tenant under the lease agreement dated October 7, 1994. We further Order the tenants under the lease (Bozzuto's and Brat-Marl) to jointly and severally repay $28,875 received in post-petition rent concessions to Debtors and increase the Minimum Rent noted on the lease by $875 to $13,125 per month.

Counsel for Debtors to submit an Order consistent with this Memorandum within Ten (10) days notice.

Dated at Rutland, VT, this 1st day of ~~January,~~ Feb 1999

The Honorable Francis G. Conrad
United States Bankruptcy Judge