

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

RAYMOND JAMES & ASSOCIATES,)	
INC.,)	
)	
Plaintiff,)	
)	
v.)	No. 18-cv-2104-JTF-tmp
)	
50 NORTH FRONT ST., TN, LLC,)	
)	
Defendant.)	
)	

ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO DEPOSIT FUNDS INTO
COURT'S REGISTRY PURSUANT TO RULE 67

Before the court by order of reference is plaintiff Raymond James & Associates, Inc.'s ("Raymond James") Motion for Leave to Deposit Funds Into Court's Registry Pursuant to Rule 67. (ECF Nos. 118 & 143.) Defendant 50 North Front St. TN, LLC ("50 North") has responded in opposition, and Raymond James has replied. (ECF Nos. 132 & 139.) At the parties' request, the court conducted a hearing on January 15, 2019. (ECF No. 150.) For the following reasons, the motion is DENIED.

This case arises from a claim for breach of contract. 50 North owns a building located at 50 North Front Street in Memphis Tennessee; Raymond James is the main tenant in that building. Raymond James alleges that 50 North is in breach of its obligations under the parties' lease agreement because it has failed to maintain the building's elevators. Raymond James executed the

lease with 50 North's assignor in June 2014. (ECF No. 118-1 at 2.)
50 North purchased the building and assumed the lease in January
2015. (Id.) Paragraph 11(e) of the lease provides in relevant
part:

Landlord shall not be liable for any damages directly or indirectly resulting from, nor shall any Rent be abated (except as otherwise provided below) by reason of, the installation, use or interruption of use of any equipment in connection with furnishing any of the foregoing services, or failure to furnish or delay in furnishing any such service except when such failure or delay is caused by the gross negligence or willful misconduct of Landlord. The failure to furnish any such services shall not be construed as an eviction of Tenant or relieve Tenant from any of its obligations under this Lease. If Landlord shall fail to provide any Essential Service, defined below, to Tenant, or perform any maintenance to or repair of the Common Areas or Premises, that Landlord is expressly required to provide or perform under the terms of this Lease, and such failure shall continue for a period of five (5) consecutive business days after Landlord's receipt of written notice from Tenant of the existence of such failure, and such failure is not due to a Force Majeure Event (provided [and to the extent] that Landlord doesn't actually receive proceeds from any applicable insurance for rental loss the cost of which is included in Operating Expenses), and as a result of such failure, the Premises or a portion thereof shall be substantially unusable by Tenant, then, commencing with the expiration of such five (5) consecutive business day period, Tenant's Base Rent and Additional Rent shall abate in the proportion that the rentable square footage of the portion of the Premises rendered substantially unusable by such failure bears to the total Rentable Area of the Premises then leased hereunder for the period of time that such portion is substantially unusable.

(ECF No. 41-1 at 37.) The lease defines "Essential Service" to include, *inter alia*, "at least one (1) passenger or freight elevator providing access to the floors of the Building on which

the Premises are located." (Id.) Paragraph 40 of the lease provides in part:

Notwithstanding anything herein to the contrary, Tenant's sole and exclusive method of collecting on any judgment Tenant obtains against Landlord, or any other award made to Tenant in any judicial process requiring the payment of money by Landlord for the failure of Landlord to perform any of its obligations, shall be to proceed against the interests of Landlord in and to the Project.¹

(Id. at 49.) Paragraph 32 further provides that, in the event of a default by Raymond James, 50 North may:

treat the Default as an entire breach of this Lease and Tenant immediately shall become liable to Landlord for damages for the entire breach in an amount equal to the total Rent and all other payments due for the balance of the Term discounted at the rate of six percent (6%) per annum to the then present value, less the fair rental value of the Premises for the balance of the Term (taking into account, among other factors, the probability of reletting the Premises for all or part of the remainder of the Term, and the anticipated duration of the period the Premises will be unoccupied prior to reletting) similarly discounted to present value, plus the cost of repossessing, remodeling and re-renting the Premises and all unpaid Rent through the date of such termination.

(Id. at 46.) Finally, the lease afforded Raymond James a thirty-three month rent-free grace period, with normal rent payments to resume in January 2019. (Id. at 28.)

Raymond James alleges that 50 North's failure to maintain the building's elevators amounts to gross negligence and willfulness, and as a result, it is entitled to an abatement of rent under the lease. (ECF No. 41-1 at 16, 18.) In the present motion, Raymond

¹Under the lease, "'Project': [] mean[s] the Building and the Land." (ECF No. 41-1 at 28.)

James asserts that a bona fide dispute exists regarding its ability to abate rent due to (1) 50 North's gross negligence or willfulness in failing to furnish elevator service as required by the lease, (2) 50 North's failure to comply with the portions of the lease pertaining to maintenance and repair of the elevators, and (3) a portion of the building being rendered substantially unusable by that failure. (ECF No. 118-1 at 8.) Raymond James requests leave under Federal Rule of Civil Procedure 67 to deposit the monthly rent payments (\$300,000 per month) into the court's registry until such time that the parties' rights and obligations are determined by the court. (Id.)

Federal Rule of Civil Procedure 67(a) provides:

(a) Depositing Property. If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party--on notice to every other party and by leave of court--may deposit with the court all or part of the money or thing, whether or not that party claims any of it. The depositing party must deliver to the clerk a copy of the order permitting deposit.

"The district court has discretion on whether to allow any funds to be deposited under the Rule." Jones v. Elite Emergency Servs., LLC, No. 3:12-cv-203, 2018 WL 2355167, at *1 (M.D. Tenn. Feb. 20, 2018). "The central purpose of Rule 67 is to protract a party holding contested funds from responsibility of disbursement of those funds among those claiming entitlement to them." Id. (citing Alstom Caribe, Inc. v. George P. Reintjes Co., Inc., 484 F.3d 106, 113 (1st Cir. 2007)). "This means, by extension, that a court

should not grant a Rule 67 motion unless the assets to be deposited with that court are in dispute." Russian Collections, Ltd. v. Melamid, No. 2:09-cv-300, 2009 WL 1625296, at *1 (S.D. Ohio June 5, 2009); see also Gillison v. State Farm Fire and Cas. Co., No. 12-15620, 2015 WL 3868690, at *3 (E.D. Mich. June 23, 2015) ("A district court should not grant a Rule 67 motion unless the question of entitlement is genuinely in dispute."). Raymond James argues that Paragraph 11(e) of the lease allows it to abate rent because of the current condition of the building's elevators. (ECF No. 118-1 at 10-13.) 50 North, however, interprets Paragraph 11(e) in a more restrictive manner and contends that Raymond James has no right to abate rent. (ECF No. 132 at 7-9.) The court need not resolve this dispute to decide the instant motion. It is sufficient, for purposes of applying Rule 67, that the court finds that a genuine dispute exists over the rent payments that Raymond James seeks to deposit with the court.

The Rule 67 analysis is not over simply because a genuine dispute exists. "While there are apparently no Sixth Circuit cases discussing Rule 67, courts from this and other circuits have noted that the Rule 'is intended to provide a place of safekeeping for disputed funds pending resolution of a legal dispute and *not to provide means of altering the contractual relationships and legal duties of each party.*'" Pentacles I, LLC v. Pegasus Energy Res. Corp., No. 3:12-cv-308, 2012 WL 12886614, at *2 (E.D. Tenn. Sept.

20, 2012) (emphasis added) (quoting ArcelorMittal Cleveland Inc. v. Jewell Coke Co., L.P., No. 1:10-cv-362, 2010 WL 5158869, at *1 (N.D. Ohio Dec. 14, 2010)). Thus, "Rule 67 is not intended to allow a party to deposit monies into court to avoid a breach of contract or create a fund to secure the satisfaction of a prospective judgment." ArcelorMittal, 2010 WL 5158869, at *1 (quoting Tops Mkts., LLC v. Brookgate Assocs., LLC, No. 1:07-cv-1620, 2007 WL 2156389, at *1 (N.D. Ohio July 23, 2007)); see also The Lincoln Nat'l Life Insurance Co. v. Harnett, No. 2:13-cv-2906-JTF-tmp, 2014 WL 12526277, at *7 (W.D. Tenn. July 1, 2014), amended on other grounds, 2014 WL 12526278 (W.D. Tenn. Aug. 19, 2014) (Fowlkes, J.) ("[T]he courts have also stated that Rule 67 is not intended to allow a party to deposit monies into court to avoid breach of contract or create a fund to secure the satisfaction of a prospective judgment." (internal citation and quotation omitted)).

The court finds that the relief sought by Raymond James is inconsistent with the purpose of Rule 67. Raymond James is basically asking the court to allow it to deposit rent payments into the court's registry to avoid a breach of contract and satisfy a potential judgment that it might obtain against 50 North. (See ECF No. 118-1 at 12.) Using Rule 67 in this manner is improper. Raymond James is also apparently attempting to use Rule 67 to alter its contract with 50 North. Under Paragraph 40 of the parties' lease, Raymond James's "sole and exclusive method of collecting on

any judgment" it obtains against 50 North "shall be to proceed against the interests of Landlord in and to the Project." (ECF No. 41-1 at 49.) Allowing payment into the court's registry under Rule 67 and utilizing that money to subsequently refund Raymond James for rent that should have been abated would change the terms of the parties' contract. In essence, Raymond James is improperly attempting to use Rule 67 "to preserve all of its rights under the contract and to avoid the risk of breach of contract on its own part if its position should turn out to be wrong." Pentacles, 2012 WL 12886614, at *2 (internal citation and quotation omitted).

In its motion, Raymond James relies heavily on Big Lots Stores, Inc. v. Gray Highway Partners, LLC, 5:05-cv-147, 2005 WL 8153042 (M.D. Ga. Oct. 17, 2005). In Big Lots, the plaintiff leased a storefront from the defendant. Id. at *1. The parties' lease included a "Competing Business" clause, which provided that if the defendant leased a storefront in the shopping center to a business that competes with the plaintiff's business, the plaintiff would be entitled to pay less rent. Id. After the parties executed that lease, the defendant leased a storefront to Dollar General. Id. The plaintiff contended that Dollar General was a "Competing Business," and filed suit seeking a declaratory judgment that the defendant violated the Competing Business clause and the plaintiff was entitled to pay reduced rent. Id. During the early stages of litigation, the plaintiff continued to pay the defendant

the entire rent payment under protest. Id. Subsequently, and pursuant to Rule 67, the plaintiff moved to deposit future rent payments into the court's registry until the lawsuit was resolved. Id. The court granted the Rule 67 motion and permitted the plaintiff to deposit "the difference between the full rental rate and the reduced rate, as defined in the lease agreement," into the court's registry. Id. at *2.

The Big Lots court based its decision on a Fifth Circuit case, Gulf States Utilities Co. v. Alabama Power Co., 824 F.2d 1465 (5th Cir. 1987), which "held that the district court *did not abuse its discretion* in granting the plaintiff's Rule 67 motion and allowing the plaintiff to deposit sums due on the contract, pending resolution of the declaratory judgment action." Big Lots, 2005 WL 8153042, at *2 (citing Gulf States) (emphasis added). In Big Lots, the court offered the following reasons for granting the Rule 67 motion:

Deposit of the funds under Rule 67 will promote the fair resolution of the case. It will reduce the degree of leverage that one party might seek to use in any settlement negotiations and take away an incentive for either party to delay the resolution of this matter. In addition, it will decrease the possibility that the losing party will be unable or unwilling to pay. Defendant will not be deprived of the benefit of its bargain, as the money will be held in an interest-bearing account during the pendency of this litigation. The purpose of this litigation is to determine what the true benefit of its bargain was. As the conclusion of the case, each party will receive the amount to which it is entitled under the contract.

Id.

This court respectfully disagrees with the Big Lots court's application of Rule 67. The Big Lots court's interpretation of Rule 67 is inconsistent with district court decisions in this circuit, as cited above. In one case, ArcelorMittal, the district court expressly rejected the Fifth Circuit's decision in Gulf States. See ArcelorMittal, 2010 WL 5158869, at *2 n.1 ("The Plaintiffs also rely upon the holding in Gulf States[.] . . . Although that case supports the Defendant's [sic] position[,] . . . the Court declines to follow that precedent. . . . [T]he Court thinks that Gulf States, as interpreted by Plaintiffs, is incorrect and ascribes a purpose to Rule 67 that could not possibly have been imagined by the drafters of the Rule. The Rule is intended for use in interpleader actions and the Plaintiffs seek to turn it into a powerful mechanism for safeguarding disputed funds.").² Moreover, Big Lots is distinguishable because in that case, the deposit of rent payments into the court's registry apparently did not alter the contractual relationship between the parties. By contrast, allowing Raymond James to deposit its rent payments with the court would alter the parties' lease agreement, in particular, Paragraph

²Additionally, in Pentacles, the Eastern District of Tennessee discussed and distinguished the facts of Gulf States from the case it was deciding. "Plaintiff relies upon Gulf States as support that it should be able to use Rule 67 to deposit the funds. . . . That opinion, which is not binding on this court, is distinguishable from this case. Unlike the present facts, where plaintiff is only suing under the contract and not disputing its validity, the plaintiff in Gulf States was trying to set aside the contracts altogether." Pentacles, 2012 WL 12886614, at *3.

40. By permitting a party to deposit rent payments into the court's registry instead of either paying the rent under protest or withholding payment (and risk breaching the contract), the court would be allowing that party improperly "to preserve all of its rights under the contract and to avoid the risk of breach of contract on its own part if its position should turn out to be wrong." Pentacles, 2012 WL 12886614, at *2 (internal citation and quotation omitted).

For these reasons, Raymond James's motion is DENIED.

IT IS SO ORDERED.

s/ Tu M. Pham

TU M. PHAM
United States Magistrate Judge

January 24, 2019

Date