IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

421 WILLOW CORP., individually and trading as 421 WILLOW STREET PARTNERS, L.P. and SFX ENTERTAINMENT, INC.,	:	MAY TERM, 2001
	:	Nos. 1848 and 1851
Plaintiffs,	:	Control Nos. 021838 and 022047
v.	:	
CALLOWHILL CENTER ASSOCIATES a/k/a CALLOWHILL CENTER ASSOCIATES, L.P.	:	
Defendant.	:	

ORDER and MEMORANDUM OPINION

AND NOW, this 23rd day of May, 2003, upon consideration of Plaintiffs' Motion for Summary Judgment, Defendant's Motion for Summary Judgment, the responses and replies thereto, the briefs in support and opposition thereto, and all other matters of record, and in accord with the contemporaneous Opinion being filed of record, it is hereby ORDERED and DECREED as follows:

1. Plaintiffs' Motion for Summary Judgment is DENIED.

2. Defendant's Motion for Summary Judgment is GRANTED.

3. Plaintiffs' claims for breach of contract, unjust enrichment, and tortious interference with prospective contractual relations are dismissed.

4. Defendant's claims for declaratory judgment and breach of contract are granted as follows:[1]

[1] Defendant did not move for summary judgment with respect to its claims for fraud and tortious interference with contract.

a. 421 Willow Corp. has breached, and is in default of, the Agreement of Lease dated March 28, 1995, by and between Callowhill Center Associates, as Landlord, and 421 Willow Corp., as Tenant (the "Lease"); and

b. The Lease is terminated.

5. The parties may file, within twenty (20) days of the date of this Order, supplemental Motions for Summary Judgment on the issues of what damages, if any, defendant is entitled to receive. If neither party files such a Motion, the parties shall contact the Court to schedule a hearing on the issue of defendant's damages

BY THE COURT,

_____

GENE D. COHEN, J.

Koniec tekstu do tlumaczenia konkursowego!!!

PROSZĘ NIE TŁUMACZYĆ dalszych stron!
TŁUMACZENIE KONKURSOWE OBEJMUJE TYLKO DWIE PIERWSZE STRONY

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MEMORANDUM OPINION

The Motion for Summary Judgment of plaintiffs, 421 Willow Corp. ("Willow") and SFX Entertainment, Inc. ("SFX"), and the Motion for Summary Judgment of defendant, Callowhill Center Associates ("Callowhill") are presently before the Court. For the reasons set forth below, plaintiffs' Motion for Summary Judgment is denied and defendant's Motion for Summary Judgment is granted.

Willow is the tenant and Callowhill is the landlord under a commercial real estate lease dated March 28, 1995 (the "Lease") for a live entertainment venue known as the Electric Factory Club (the "Leased Premises"). From 1995 until 2000, Willow operated the Electric Factory Club in conjunction with certain affiliates, which were owned and controlled by the same principals who owned and controlled Willow. On February 28, 2000, SFX purchased Willow's affiliates, and Willow attempted to assign the Lease to SFX. Callowhill refused to consent to such assignment, so Willow and SFX entered into other arrangements, which Callowhill claims

amount to the same thing as the refused assignment.

In these consolidated actions, Willow asserts claims against Callowhill for breach of the Lease, unjust enrichment, and tortious interference with prospective contractual relations, and SFX joins in the latter two claims. Callowhill has counterclaimed for fraud, tortious interference with contract, and breach of the Lease, and for a declaratory judgment that Willow has breached the Lease and the Lease is terminated.[2] Plaintiffs have moved for summary judgment dismissing Callowhill's counterclaims. Callowhill has moved for summary judgment dismissing all of Plaintiff's claims and granting Callowhill's claims for breach of contract and termination of the Lease. Neither party has addressed the issue of what damages, if any, Callowhill may recover on its claims if it should prevail upon them.

I. Standard for Summary Judgment

"Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Horne v. Haladay, 728 A.2d 954, 955 (Pa. Super. 1999) (citing Pa. R. Civ. P. 1035.2). Further, "in determining whether to grant summary judgment, a trial court must resolve all doubts against the moving party and examine the record in a light most favorable to the non-moving party." *Id*. Summary judgment may only be granted in cases where it is "clear and free from doubt that the moving party is entitled to judgment as a matter of law." *Id*.

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[2] Callowhill originally brought its claims against Willow and SFX in New York state court, but that action was dismissed based on *forum non conveniens*. *See* Amended (Equity) Complaint ¶ 22, attached as Exhibit MM to Defendant's Motion for Summary Judgment.

The Rules of Civil Procedure provide, however, that when confronted with a motion for summary judgment, "[t]he adverse party may not rest upon the mere allegations or denials of his pleading, but must file a response . . . identifying (1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or (2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced." Pa. R. Civ. P. 1035.3. A non-moving party is required to "adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor." Ertel v. Patriot News Co., 544 Pa. 93, 101-02, 674 A.2d 1038, 1042 (1996). Otherwise, summary judgment should be granted.

II. Defendant's Claims For Declaratory Judgment and Breach of Contract Must Be Granted.

This case involves the interpretation of the Lease between the parties. A lease is a contract, and its interpretation poses a question of law for the Court. *See* Charles D. Stein Revocable Trust v. General Felt Industries, Inc., 749 A.2d 978, 980 (Pa. Super. 2000). The Lease that forms the basis for Callowhill's breach of contract claim provides that

> Willow shall not assign . . .or otherwise transfer, . . . nor sublet all or any part of the Leased Premises or permit the same to be occupied or used by anyone other than [Willow and its affiliates] or its employees without the prior written consent of [Callowhill].

Lease, ¶ 10.01 (the "No-Assignment Clause"), attached as Exhibit B to Defendant's Motion for Summary Judgment (hereinafter cited simply as "Lease"). Callowhill contends that Willow has violated the No-Assignment Clause, and thereby breached the Lease, by assigning the Lease to

SFX or otherwise permitting SFX to use the Leased Premises without Callowhill's prior written consent.

The parties do not dispute the fact that Willow failed to obtain Callowhill's consent,[3] but the parties do dispute whether SFX has any prohibited involvement with the Leased Premises. Because the Court finds as a matter of law that Willow has assigned the Lease to SFX and has allowed SFX to use the Leased Premises, all without Callowhill's consent, summary judgment is entered in favor of Callowhill on its claim that Willow breached the Lease.

A. Willow Assigned The Lease to SFX Without Callowhill's Consent.

On February 28, 2000, the principals of Willow entered into a Stock Purchase Agreement (the "SPA") with SFX whereby SFX purchased certain affiliates of Willow. The SPA also provided for the transfer of Willow's interest in the Leased Premises to SFX.

> Within five (5) business days of the date hereof, [Willow's principals] will contact [Callowhill] and use all reasonable efforts which they deem necessary and appropriate to have [Callowhill] consent to the assignment of [the Lease] (the "Lease Assignment"), the result of which Lease Assignment will allow [SFX] (i) to manage and operate the Electric Factory Club, and (ii) to receive no less that fifty percent (50%) of the annual net income earned at the Electric Factory Club. In the event that [Willow's principals] cannot obtain the consent of [Callowhill] to the aforementioned Lease Assignment within fifteen (15) days of the date hereof, [Willow's principals] shall cause [Willow] to enter into a management agreement with [SFX], which such Management Agreement will provide [SFX] with the same economic benefits and control as would have been received by [SFX] had [Callowhill] consented to the Lease Assignment.

SPA, ¶ 7.5, attached as Exhibit Q to Defendant's Motion for Summary Judgment. Willow now

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[3] Willow admits that it never obtained Callowhill's consent to any assignment of the Lease to, or use of the Leased Premises by, SFX, and instead argues that such consent was unreasonably withheld. *See* Plaintiffs' Response to Defendant's Motion for Summary Judgment ¶¶ 34-41. For the reasons a set forth in Section II. A., *infra*, there was nothing wrong with Callowhill's decision to withhold its consent to the assignment from Willow to SFX.

claims that this provision was never put into effect because no formal Lease Assignment or Management Agreement was ever entered into between Willow and SFX. However, the terms of the SPA are clearly mandatory, not discretionary.[4]

If, as occurred here, Callowhill refused to consent to the assignment, then the SPA directs that Willow's principles "shall" enter into the Management Agreement with SFX. There is no requirement that the Management Agreement be in writing, and the terms of the Management Agreement as set forth in the SPA are clearly enforceable by SFX against Willow and its principals. Therefore, Willow is deemed to have entered into such Management Agreement with SFX by entering into the SPA.

Although the parties to the SPA apparently viewed the Management Agreement as something different than a formal Assignment of the Lease, the Management Agreement is obviously the same thing as an Assignment, particularly since the terms of the Management Agreement are identical to those of the contemplated Assignment. *See* SPA, ¶ 7.5. It does not matter what the parties choose to call their arrangement; what matters is the effect of their arrangement. *See* Morrisville Shopping Center, Inc. v. Sun Ray Drug Co., 381 Pa. 576, 584, 112 A.2d 183, 187 (1955) (calling a prohibited sub-lease a "license" does not make it any less a sub-lease).

Since the execution of the SPA resulted in a transfer from Willow to SFX of the right to manage and operate the Leased Premises, Willow was required first to obtain Callowhill's consent to it under the Lease. *See* Lease, ¶ 10.01. Since there is no dispute that Willow did not

[4] Like the Lease, the SPA is a contract the interpretation of which is a question of law for the Court. *See* Charles D. Stein Revocable Trust v. General Felt Industries, Inc., 749 A.2d 978, 980 (Pa. Super. 2000).

obtain Callowhill's consent to any such transfer of its rights under the Lease to SFX, Willow has clearly breached the Lease by agreeing to such transfer to SFX.

B. Willow Has Allowed SFX to Use the Leased Premises Without Callowhill's Consent.

In addition to receiving a *de facto* Assignment of the Lease under the SPA, SFX also purchased three of Willow's affiliates. These affiliates had always been responsible for organizing the live entertainment at the Leased Premises, and they continue to do so now that they are owned by SFX (the "SFX entities"). Callowhill claims that the SFX entities are "using" the Leased Premises by advertising, promoting, and producing live shows at the Leased Premises and that Willow has breached the Lease by not first obtaining Callowhill's consent to such use by the SFX entities, which are no longer Willow's affiliates. *See* Lease, ¶¶ 10.01, 10.03. Willow does not deny that the SFX entities are responsible for advertising, producing and promoting the shows that are featured at the Leased Premises, but it claims that all of the SFX entities' activities are conducted on behalf of Willow, at Willow's principals' direction, from offices that are not located at the Leased Premises, so that the SFX entities are not using the Leased Premises. *See* Plaintiff's Response to Defendant's Motion for Summary Judgment, ¶¶ 9-11,14-18.

The Lease defines "use" as operating "a restaurant with retail sale of alcohol . . . with live performance of music and appurtenant office space." Lease, ¶ 3.01. Furthermore, one of the principals of Willow admitted in his deposition that putting on live music performances was the intended "use" of the Leased Premises contemplated under the Lease. Deposition of Adam Spivak, pp. 73-4, attached as Exhibit C to Defendant's Motion for Summary Judgment.[5]

[5] The other principal of Willow equated the ability to put on and promote concerts at the Leased Premises with "control" over such premises. Deposition of Larry Magid, p.122, attached

Therefore, the fact that the SFX entities advertise, produce, and promote live music performances at the Leased Premises, whether for themselves or for Willow, constitutes a "use" of the Leased Premises by SFX. Since Willow did not first obtain Callowhill's consent to such use by the SFX entities, as required by the Lease, Willow has breached the Lease by allowing the SFX entities to so use the Leased Premises.

III. Defendant is Entitled to Terminate the Lease Due to Plaintiff's Breach.

The Lease permits Callowhill to terminate the Lease upon the occurrence of an "Event of Default." Lease, ¶ 13.02 (a). Willow's "failure to perform any non-monetary obligation under th[e] Lease" constitutes such an "Event of Default." *Id.* ¶ 13.01(b). One of Willow's non-monetary obligations under the Lease is to obtain Callowhill's "prior written consent" to any assignment of the Lease to, or use of the Leased Premises by, a third party such as SFX. *Id.* ¶ 10.01.

As set forth above, Willow has both assigned the Lease to SFX and allowed the SFX entities to use the Leased Premises without the consent of Callowhill. Therefore, Willow has breached its obligation under the Lease to first obtain such consent. Since Willow has breached one of its "non-monetary obligations" under the Lease, it has caused an "Event of Default" to occur, and Callowhill is entitled to terminate the Lease as a result. *See* Morrisville Shopping Center, Inc. v. Sun Ray Drug Co., 381 Pa. 576, 112 A.2d 183 (1955).

IV. Plaintiffs' Claim for Breach of Contract Against Defendant Must Be Dismissed.

Willow claims that Callowhill breached the Lease by unreasonably withholding its

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as Exhibit A to Defendant's Motion for Summary Judgment. Under that definition, the SFX entities now control the Leased Premises without the consent of Callowhill, which is also a violation of the No-Assignment Clause. *See* Lease, ¶ 10.01.

consent to the assignment of the Lease to SFX. However, as a matter of law there was nothing wrongful in Callowhill's withholding its consent, so Willow's breach of contract claim must be dismissed.

A. The Lease Does Not Require That Callowhill's Refusal to Consent to the Assignment of the Lease Be Reasonable.

Under the Lease, Willow was not permitted to assign the Lease to, or allow the Leased Premises to be used by, SFX "without the prior written consent of [Callowhill]." Lease, ¶ 10.01. The Lease further provides that Callowhill "shall approve or disapprove of the request within thirty days of receipt of the written request and may impose reasonable conditions on the approval." *Id.* ¶ 10.02.

Willow contends that, under the No-Assignment Clause, Callowhill was not permitted to refuse consent to the assignment to, or use by, SFX without good reason. However, the No-Assignment Clause does not expressly require that Callowhill be reasonable in exercising its power to refuse consent. Furthermore, no court in Pennsylvania has yet implied such a duty of reasonableness in an assignment provision in a lease, although other state courts and the authors of the Restatement have done so. *See, e.g.*, Julian v. Christopher, 320 Md. 1, 575 A.2d 735 (1990); Restatement (Second) Property, Landlord and Tenant § 15.2 (1977). *Cf.* Kuhn v. Crown American Corp., 19 D&C 3d 311, 315 (Cumberland Co. 1981) (recognizing that "some courts, as well as the American Law Institute, have held that a landlord's consent to an assignment or sublease cannot be withheld unreasonably").

Since the Pennsylvania appellate courts have not yet adopted the new Restatement view, this Court must presume that Pennsylvania continues to follow the older, majority, rule which

permits a landlord arbitrarily and capriciously, for any reason or for no reason, to refuse its consent to a lease assignment if the lease does not expressly require that such refusal be reasonable. *See* Porter v. Jordan, 41 Del. Co. 104 (1953). *See also* B&R Oil Co., Inc. v. Ray's Mobile Homes, Inc., 139 Vt. 122, 422 A.2d 1267 (1980) (declining to imply a reasonableness requirement); Restatement (Second) Property, Landlord & Tenant § 15.2, Reporter's Note 1 (1977) (recognizing that implying a duty of reasonableness is the minority view).

In this case, Callowhill was not prohibited under the express terms of the Lease from refusing to consent to the assignment of the Lease from Willow to SFX, so Callowhill did not breach the Lease by withholding such consent. Therefore, Willow's breach of contract claim against Callowhill must be dismissed.

B. Callowhill's Refusal to Consent to the Assignment of the Lease Was Reasonable.

Even if this Court were to adopt the reasoning of the Restatement and impose a duty of reasonableness on Callowhill, Callowhill's refusal to consent to the assignment of the Lease to SFX was reasonable. "A reason for refusing consent, in order for it to be reasonable, must be objectively sensible and of some significance and not be based on mere caprice or whim or personal prejudice." Restatement (Second) Property, Landlord & Tenant § 15.2, Comment 4 (1977).

Willow has offered evidence that Callowhill refused its consent to the assignment of the Lease because Callowhill wanted to charge a market rent to SFX, which would be greater than the rent charged under the Lease. *See* Affidavit of Myron J. Berman, ¶ 21, attached as Exhibit E to Plaintiffs' Motion for Summary Judgment. Willow cannot seriously contend that such a

motive is capricious, whimsical, or prejudiced. In fact, from a business perspective, it is obviously economically significant and objectively sensible, especially where, as here, a landlord is faced with a different tenant and different market conditions than when it originally entered into the Lease. Therefore, Callowhill's refusal to consent to the assignment of the Lease from Willow to SFX was not unreasonable.

V. Plaintiffs' Tortious Interference with Prospective Relations Claim Against Defendant Must Be Dismissed.

"One who intentionally and improperly interferes with the performance of a contract . . between [plaintiff] and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability for the pecuniary loss resulting to the [plaintiff] from the failure of the third person to perform the contract." Restatement (Second) Torts § 766 (1979). In this case the SPA is the contract with which plaintiffs claim that Callowhill interfered. By refusing to consent to the assignment of the Lease, Landlord allegedly caused Willow not to perform the assignment provisions of the SPA to SFX's alleged detriment.

To the extent that Willow asserts a claim for tortious interference, it is barred under the gist of the action doctrine because the gist of Willow's action against Callowhill sounds in contract, i.e for breach of the Lease. *See* Etoll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10 (Pa. Super. 2002). Since SFX is not a party to the Lease, it is not prohibited from asserting a claim against Callowhill for tortious interference with the SPA. However, even if SFX may assert such a claim, in order for SFX to succeed on it, SFX must offer evidence to show that Callowhill's interference was improper.

"Deliberately, and at his pleasure, one may ordinarily refuse to deal with another, and the

conduct is not regarded as improper, subjecting the actor to liability." Restatement (Second) Torts § 766, Comment b (1979). In this case, Callowhill's right to refuse to deal with SFX is set forth in the No-Assignment Clause. *See* Lease, ¶ 10.01. Since the Lease does not require that Callowhill's refusal to consent be reasonable, and since Callowhill's refusal was reasonable, it was not improper for Callowhill to refuse to deal with SFX, i.e. to refuse to allow the assignment of the Lease. Therefore, SFX cannot claim that Callowhill's refusal to consent to the assignment constituted improper or tortious interference with the contemplated assignment, and such claim must be dismissed.

VI. Plaintiffs' Unjust Enrichment Claim Against Defendant Must Be Dismissed.

The Lease states that "[u]pon expiration or termination of the Lease, Tenant shall deliver the Leased Premises, including the Tenant Improvements and all furniture, fixtures and equipment installed in or brought to the Leased Premises, to Landlord . . ." Lease, ¶ 7.05. In other words, Willow would not normally be entitled to receive reimbursement for the value of the improvements upon termination of the Lease.

Willow claims that it is entitled to such reimbursement here because Callowhill has terminated the Lease early. However, Willow can obtain such reimbursement only if it can show that Callowhill's termination of the Lease and its retention of the improvements would be unjust, i.e. only if the termination was wrongful, improper, and/or a breach of the Lease. *See* Chesney v. Stevens, 435 Pa. Super. 71, 644 A.2d 1240 (1994) (lease did not address improvements; landlord was unjustly enriched by leading improving tenant to believe that lease would last longer than it did); Drysdale v. Woerth, 153 F. Supp. 2d 678 (E.D. Pa. 2001), *aff'd*, 2002 WL 31927681 (3d Cir. 2002) (landlord was unjustly enriched by improvements when he breached the covenant of

quiet enjoyment 17 years before expiration of lease).

In this case, Callowhill was entitled under the terms of the Lease to terminate the Lease due to Willow's improper assignment of the Lease to SFX. *See* Lease, ¶ 13.02 (a). Therefore, Callowhill's retention of the improvements, i.e, its enrichment, was not unjust, and Willow is not entitled to be reimbursed for the improvements it made. Likewise, SFX's claim for unjust enrichment exists only if: 1) Willow properly assigned the Lease and the right to use the improved Leased Premises to SFX; and 2) Callowhill improperly terminated the Lease and took from SFX its right to use the Leased Premises. Since neither event occurred, SFX's claim for unjust enrichment must also be dismissed.

Conclusion

For all of the foregoing reasons, Plaintiffs' Motion for Summary Judgment is denied, and Defendant's Motion for Summary Judgment is granted.

BY THE COURT,

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GENE D. COHEN, J.

Dated: May 23, 2003