NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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March 31, 2023

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300 N. Washington Street, Suite 204
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Re: *PW Limited Partnership* v. *Liem Nguyen, et al.*, CL 2022-734

Dear Mr. Roche and Mr. O'Donnell:

This matter is before the court on Plaintiff's motion to reconsider the court's oral ruling of July 27, 2022 granting Defendants' motion to strike at the close of Plaintiff's case-in-chief.[1] In the oral ruling, the court found that Plaintiff's evidence showed that the third tenants did not execute an assignment of the Lease to the fourth tenants and, as a result, no interest in the Lease was passed from the third tenants to the fourth tenants. Accordingly, the first, second, and third tenants, as well as the fourth and fifth tenants, had no liability for the breach of the Lease by the sixth tenant.

[1] The oral ruling was subsequently set forth in a written Order and a Final Judgment of September 9, 2022, which were suspended by Order of September 29, 2022. This Letter Opinion does not affect the validity of the written Order and the Final Judgment of September 9, 2022.

OPINION LETTER

MATERIAL FACTS[2]

The first tenants entered into the Lease with Plaintiff on July 12, 1994; the term of the lease was from August 1, 1994 to September 30, 1997, which was subsequently extended to September 30, 2002.

On June 11, 1997, the first and second tenants executed a *Contract To Sell Business Known As "Nail Plus"*. On August 28, 1997, Plaintiff and the first and second tenants entered into an *Agreement of Assignment of Lease And Assumption Of Obligations*, which provided in pertinent part:

> 2. **Assignment**. Assignor hereby grants, transfers and assigns to Assignee, all of Assignor's right, title, interest and estate in and to the Lease (including the security deposit held by Landlord under the Lease), to have and to hold same unto Assignee, its successors and assigns for the period from and after the date hereof through the remaining term of the Lease (including any renewal, extension or modification thereof).
>
> 3. **Acceptance**. Assignee hereby accepts such Assignment, and for the benefit of Assignor and Landlord and their respective successors and assigns, assumes the performance of all of Assignor's obligations under the Lease for the period from and after the date hereof through the expiration of the Lease (including any renewal, extension or modification thereof).
>
> 4. **Acknowledgment Regarding Assignor**. Assignor acknowledges and agrees, for the benefit of Landlord and Landlord's successors-in-interest, that Assignor shall remain liable, jointly and severally, for the performance and observance of the covenants and conditions in the Lease (including any renewal, extension or modification thereof).
>
> 5. **Landlord Consent**. Landlord, in consideration of the undertakings herein of the Assignor and Assignee, hereby consents to the assignment of the lease hereunder.[3]

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[2] As the case turned exclusively on interpretation of the contracts admitted in evidence, the material facts are drawn from those contracts.

[3] The agreement of Plaintiff and first and second tenants to assignment of the Lease was necessitated by the Lease, which provides in pertinent part:

> Tenant shall not assign this Lease . . . without first obtaining the written consent of Landlord . . . . Any attempted assignment . . . without landlord's prior written consent shall be void.

Lease at ¶ 35.

On December 17, 2001, the second and third tenants executed a *Contract Agreement* "to sell the Nail Plus Salon . . . ." On June 4, 2002 (effective December 18, 2001), Plaintiff and the second and third tenants entered into a *Second Agreement of Assignment of Lease And Second Assumption Of Obligations*, which, in pertinent part, was identical to the first *Agreement;* the same day, they entered into an agreement to extend the Lease to September 30, 2007.

On October 15, 2003, the third and fourth tenants entered into a *Contract Agreement* dated in which the sellers agreed to "sell the Nail Plus Salon . . . ."

On February 27, 2004 (effective as of October 15, 2003), Plaintiff and the fourth tenants entered into an *Assumption Of Lease and Lease Obligations*, in which the fourth tenants:

> assume[] all of Third Tenant's *right, title, interest, and estate in and to the Lease* . . . for the period from and after the date hereof through the remaining term of the Lease (including any renewal, extension, modification, or assignment thereof) . . . ." (Emphasis added).

Assumption at ¶ 3.

The *Assumption* also states:

> Even though Original Tenant, Second Tenant, Third Tenant and Guarantors are not signatories to this Assumption, nothing herein shall be construed to relieve any of the foregoing parties from any of their respective obligations under the terms and conditions of the Lease (including any renewal, extension or modification thereof) and/or under the Guaranty. Original Tenant, Second Tenant, Third Tenant and Guarantors shall remain liable, jointly and severally, for the performance and observance of the covenants and conditions in the Lease (including any renewal, extension, modification, or assignment thereof (*i.e.*, their liability is not affected, modified, or diminished by reason of this Assumption, and their obligations now includes the provisions of the Lease, as assumed under this Assumption).

Assumption at ¶ 6.

Plaintiff and the third and fourth tenants did not enter into an *Agreement of Assignment of Lease And Assumption Of Obligations*, as had Plaintiff and the first and second tenants, and Plaintiff and the second and third tenants.

On September 13, 2006, the fourth and fifth tenants executed an *Agreement of Sale* for "Nails Plus Salon."

On December 7, 2006, Plaintiff and the fourth tenants entered into an extension of the Lease to September 30, 2012. *Third Amendment and Extension of Lease*, ¶ 3. The *Third Amendment and Extension of Lease* also provided:

> Although Original Tenant, Second Tenant, Third Tenant and Guarantors are not signatories to this Third Amendment, nothing herein shall be construed to relieve any of the foregoing parties from any of their respective obligations (or reduce or limit any such obligations) under the terms and conditions of the Lease (as amended by this Third Amendment) and/or under the Guaranty. Original Tenant, Second Tenant, Third Tenant and Guarantors shall remain liable, jointly and severally, for the performance and observance of the covenants and conditions that accrue under the Lease (as amended by this Third Amendment) for the benefit of Landlord and Landlord's successors-in-interest through the expiration of the Lease (as amended by this Third Amendment) (including any renewal, extension, modification, and/or assignment thereof).

Third Amendment and Extension of Lease at ¶ 6.

On the same date, Plaintiff and the fourth and fifth tenants entered into a *Fourth Agreement of Assignment of Lease And Fourth Assumption Of Obligations*, which, in pertinent part, was identical to the first *Agreement of Assignment of Lease And Assumption Of Obligations*.

On February 26, 2008, the fifth tenant and Hannah Ngoc Ly executed a *Letter of Intent for Asset Purchase of Nail Plus Salon*.

On April 15, 2008, Plaintiff and the fifth tenant entered into an extension of the Lease to September 30, 2017. On the same date, Plaintiff and the fifth and sixth tenants entered into a *Fifth Agreement of Assignment of Lease And Fifth Assumption Of Obligations*, which, in pertinent part, was identical to the first *Agreement of Assignment of Lease And Assumption Of Obligations*.

On August 5, 2016, Plaintiff and the sixth tenant entered into a *Fifth Amendment of Lease* to:

> memorialize certain agreements and understandings with respect to (i) a conditional suspension of the Arrearage Amount . . . due under the Lease, (ii) a reduction of the Minimum Guaranteed Rent, and (iii) certain other matters.

Fifth Amendment of Lease at ¶ Q.

At that time, the Lease was due to expire on September 30, 2017

and the sixth tenant was in arrears "through April 30, 2015" in the amount of $137,345.89. *Id.* at ¶ 3.

On August 31, 2017, Plaintiff and the sixth tenant entered into a *Sixth Amendment of Lease* to extend the Lease to September 30, 2022.

ANALYSIS

I. Defendants Did Not Waive Their Argument Concerning A Defect In The Chain Of Assignments

Plaintiff contends that Defendants' argument of a defect in the chain of assignments was waived because it was:

> never raised by any Defendant in any part of this matter prior to its passing reference as part of the oral Motion to Strike despite: (a) the lengthy period this case has been pending; (b) a detailed pleading from Plaintiff outlining how title/tenancy under the Lease passed from one tenant to the next, . . .; and (c) Defendants having amended their pleadings less than two (2) weeks prior to the trial in this matter yet failed to disclose this defense even then.

Motion at 7.

Because the argument was raised in the Defendants' oral motion to strike at the close of Plaintiff's case, none of Plaintiff's contentions have merit.

In a breach of contract action, a plaintiff claiming damages "is required to prove (1) a valid contract; (2) a breach of that contract; (3) damages . . . ." *Shenandoah Co. v. Phosphate Corp.*, 161 Va. 642, 650 (1933). Thus, in the case at bar, the burden was on Plaintiff to establish the existence of a valid contract and breach of that contract. Because that burden was on Plaintiff, Defendants were free to argue to the court, on a motion to strike, that Plaintiff had not met its burden. Defendants successfully made a motion to strike.

As this case was resolved on a motion to strike, the length of the time the case was pending or the existence of a *pleading* filed by Plaintiff or the fact that Defendants had amended their *pleadings* shortly before trial are not relevant to whether Plaintiff met its burden *at trial*. It is also irrelevant that Defendants "failed to disclose this defense" when they amended their pleadings as Defendants' argument on the motion to strike was not a "defense" that had to be pled; Defendants' argument instead focused on a deficiency in Plaintiff's case-in-chief at trial. In light of Plaintiff's own evidence establishing that the third tenants did *not* assign the Lease to the fourth tenants, Defendants could argue on their motion to strike that Plaintiff had failed to meet its burden of showing a valid

contract and a breach of that contract and thus showing damages.

II. There Was A Break In The Chain Of Assignments

There is no doubt that Plaintiff and the third and fourth tenants did not enter into an Agreement of Assignment of Lease and Assumption Of Obligations as had been done by Plaintiff and the first and second tenants, and by Plaintiff and the second and third tenants. Thus, unlike the second and third tenants, the fourth tenants did not agree to "assume[] the *performance of all of [the third tenant's] obligations*" (emphasis added) under the Lease "through the expiration of the Lease (including any renewal, extension or modification thereof)." Plaintiff argues, however, that the five (5) contracts selling the business "evidence a 'sale of the Lease' in question" (*Motion* at 3) and thus evidence assignments.

A. *The Sales Contracts Do Not Evidence A Sale of the Lease*

None of the sales contracts reference a sale of the Lease; the first sale contract references sale of the assets of the business, the second and third sale contracts reference the sale of the business, the fourth sale contract references the sale of business assets, and the fifth purported sale contract is actually merely a letter of intent to sell the assets of the business.

Plaintiff further argues that, because the Lease is an asset of the business, "the leasehold interest necessarily must transfer under a sale involving the entirety of the business." *Motion* at 4. The Lease itself undercuts Plaintiff's contention.

The Lease provides in pertinent part:

> Tenant shall not assign this Lease . . . without first obtaining the written consent of Landlord . . . . Any attempted assignment . . . without landlord's prior written consent shall be void.

Lease at ¶ 35.

The "term 'assignment' includes":

> any transfer (by operation of law or otherwise) of this Lease, any transfer of effective control of Tenant's business . . . and any sale of all or a substantial part of the assets owned or used by Tenant in the operation of Tenant's business on the Premises.

Lease at ¶ 35.

Accordingly, the Lease cannot transfer merely by virtue of a sale

involving the entirety of the business; the transferor must first obtain written consent of Plaintiff.

B. *The Purported Assignment Was Void*

Plaintiff asserts that the definition of "assignment" quoted, *supra*, "provides that" a sale of the entirety of the business "shall constitute an assignment" and thus, by selling the entirety of the business, there has been an assignment. *Motion* at 4. While it is true that a sale of the entirety of the business constitutes an assignment, Plaintiff's understanding of ¶ 35 of the Lease turns the "assignment" definition on its head.

From the plain language of ¶ 35 of the Lease, it is evident that the purpose of the "assignment" definition is to prevent a tenant from transferring the Lease (or transferring effective control of the business or selling the assets used in the operation of the business) without the landlord's prior written consent since the operative language of ¶ 35 is the prohibition on assignment without the landlord's prior written consent. A definition of "assignment" is thus included to ensure that not only a transfer designated as an "assignment" is included, but that other modes of transfer which are not designated as "assignments" are included as well such that the transferor must first obtain written consent of Plaintiff. That being the case, transferring the Lease (or transferring effective control of the business or selling the assets used in the operation of the business) without landlord's prior written consent is void.

As transferring the Lease (or transferring effective control of the business or selling the assets used in the operation of the business) without landlord's prior written consent is void, Plaintiff must show that it gave prior written consent to the third tenants to transfer the Lease (or to transfer effective control of the business or to sell the assets used in the operation of the business) to the fourth tenants. This is particularly important because the third tenants did not execute an assignment of the Lease to the fourth tenants (with or without the prior written consent of Plaintiff) and the fourth tenants did not agree to assume the performance of all of the third tenant's obligations under the Lease.

The only possible source of Plaintiff's prior written consent to the third tenants would be have to be found in a contract signed by Plaintiff and the third tenant, *i.e.*, the *Second Amendment and Extension of Lease* or the *Second Agreement of Assignment of Lease And Second Assumption Of Obligations* as they are the only contracts entered into by Plaintiff and the third tenants.

In the *Second Amendment and Extension of Lease*, the only reference to assignment is in ¶ 11, which requires that, if the third tenant desires to assign the Lease "in accordance with the provisions of

Paragraph 35 of the Original Lease," the third tenant "shall provide Landlord with all documentation related to such proposed . . . assignment" and shall pay a $500 fee. This is not prior written consent by Plaintiff; it is merely a step toward obtaining such consent. As to the *Second Agreement of Assignment of Lease And Second Assumption Of Obligations*, there is nothing which even hints as being prior written consent by Plaintiff.

Moreover, even if one also considers the *Assumption Of Lease and Lease Obligations* (entered into by Plaintiff and the fourth tenants on February 27, 2004) as possible documentation of Plaintiff's prior written consent, it recites only that, "[o]n or about October 15, 2003, Third Tenant sold the assets of the business operating on the premises" to the fourth tenants and that, on the same day, the fourth tenants "assumed from Third Tenant the day-to-day operations of the business . . . ." Thus, it did not constitute even retroactive written consent by Plaintiff to the assignment (by virtue of the sale of the assets of the business) and the assignment was thus void under ¶ 35 of the Lease. Further, the operative language was simply that the fourth tenants "assumed all of Third Tenant's right, title, interest, and estate in and to the Lease," not that the fourth tenant assumed the performance of all of the third tenant's obligations under the Lease. As the third tenants were not parties to the *Assumption Of Lease and Lease Obligations*, there is no corresponding assignment by the third tenants.[4]

Plaintiff fares no better with the *Third Amendment and Extension of Lease* as it merely extended the lease from September 30, 2007 to September 30, 2012. Additionally, the *Third Amendment and Extension of Lease* was entered into on December 7, 2006, which was after the "assignment" of the Lease (by virtue of the sale of the assets of the business) from the third tenants to the fourth tenants on October 15, 2003.

C. *Liability of The Fourth, Fifth, and Sixth Tenants*

Plaintiff contends that "it would seem that the 4th Tenants, 5th Tenants, and 6th Tenants have undeniable liability under the Lease." *Motion* at 6. Plaintiff bases this hesitantly-asserted conclusion on the fact that the fourth tenants, fifth tenants, and sixth tenants each "was in possession of the underlying business and Premises, owned the

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[4] *9625 Lee Highway v. Virginia Garden Restaurants,* 19 Cir. L198835, 58 Va. Cir. 178 (2002) does not assist Plaintiff as it refers to benefits and burdens that "*pass with the land* ***to the assignee***" (bold emphasis added); here, the very issue before the court is whether the fourth tenants were assignees. The same is true with regard to two other cases cited by Plaintiff: *Cavalier Square Partnership v. Virginia ABC Board,* 246 Va. 227, 231 (1993) (involved "assignment of a lease") and *Jones v. Dokos Enterprises, Inc.,* 233 Va. 555, 557 (1987) (involved "assignment of the leases").

rights, title, and interest in the underlying Lease, and has assumed all rights/liabilities under the Lease." *Id.* In support of its position, Plaintiff cites to *Link Assoc. v. Jefferson Standard,* 223 Va. 479 (1982), which found "persuasive" the holding in *United States* v. *Idlewild Pharmacy, Inc.*, 308 F. Supp. 19 (E.D. Va. 1969).

In *Link Assoc.*, the Court explained that *Idlewild Pharmacy, Inc.* involved "an action by the government to collect rent due, [and where] a tenant at Dulles Airport sought rescission of the lease on the ground that anticipated passenger volume had been misrepresented." 223 Va. at 488. *Link Assoc.* further explained that the tenant "never paid the minimum rental but Judge Kellam found that the tenant ratified the lease" because the tenant "'continued to operate under the contract for a period of five years'" and "'took no action to rescind the contract, or to repudiate or revoke it.'" The tenant also "'paid the percentage of rent called for thereby, and attempted to negotiate an amendment.'" 223 Va. at 488 (quoting *Idlewild Pharmacy, Inc.*, 308 F. Supp. at 23). *Idlewild Pharmacy, Inc.* thus held:

> One entitled to relief can affirm or avoid the contract, but he cannot do both; if he adopts a part, he adopts it all. He must reject it entirely if he desires to obtain relief. Defendant cannot accept the benefits of the contract and then assert he is entitled to be relieved of its obligations. His action was a confirmation of the contract and a waiver of any alleged misrepresentation, mistake, fraud or other wrong. The time for him to demand relief is upon the discovery of the alleged misrepresentations.

223 Va. at 488-489 (citing 308 F. Supp. at 23).

In the case at bar, there is no doubt that the fourth tenants, fifth tenants, and sixth tenants were bound by the terms of the Lease as they expressly agreed to be so bound. In the *Third Amendment and Extension of Lease*, Plaintiff and the fourth tenants "hereby ratify the terms and conditions of the Lease . . . ." ¶ 12. In the *Fourth Agreement of Assignment of Lease And Fourth Assumption Of Obligations*, the fifth tenant "assumes the performance of all of [fourth tenant's] obligations under the Lease . . . ." ¶ 3. Similarly, in the *Fifth Agreement of Assignment of Lease And Fifth Assumption Of Obligations*, the sixth tenant "assumes the performance of all of [fifth tenant's] obligations under the Lease . . . ." ¶ 3.

As there is no doubt that the fourth tenants, fifth tenants, and sixth tenants were bound by the terms of the Lease, and *Link Assoc.* dealt only with the issue of whether the tenant was bound by the lease at issue, *Link Assoc.* has no bearing on the case at bar.

CONCLUSION

Having not shown that there was any error in the court's ruling of July 27, 2022 granting Defendants' motion to strike at the close of Plaintiff's case, Plaintiff's motion for reconsideration is DENIED.

An appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

PW LIMITED PARTNERSHIP	)	
	)	
Plaintiff/Appellant	)	
	)	
v.	)	CL 2022-734
	)	
LIEM NGUYEN, *et al.*	)	
	)	
Defendants/Appellees	)	

ORDER

THIS MATTER came before the court on Plaintiff's motion to reconsider the court's oral ruling of July 27, 2022 granting Defendants' motion to strike at the close of Plaintiff's case-in-chief, and

IT APPEARING that the oral ruling was subsequently set forth in a written Order and a Final Judgment of September 9, 2022, which were suspended by Order of September 29, 2022, and

THE COURT, having reviewed the memoranda filed by counsel for the parties and the parties' oral arguments, it is hereby

ORDERED, for the reasons set forth in the court's letter opinion of today's date, that Plaintiff's motion to reconsider is DENIED, and it is further

ORDERED that the suspension of the Final Judgment of September 9, 2022 is terminated.

ENTERED this 31st day of March, 2023.

[redacted]
Richard E. Gardiner
Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA