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Ariz. R. Crim. P. 31.24



DIVISION ONE
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CAMEL SQUARE, L.L.C., a Delaware) 1 CA-CV 09-0342
limited liability company,)
) DEPARTMENT D
Plaintiff/Appellee,)
) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 28, Arizona Rules of
THE RUBIN COMPANIES, INC., a) Civil Appellate Procedure)
Delaware corporation,)
)
Defendant/Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2004-091356

The Honorable Joseph C. Kreamer, Judge

AFFIRMED

Timothy Barnes, P.C.	Phoenix
By Timothy H. Barnes	
and	
Holloway Odegard Forrest & Kelly, P.C.	Phoenix
By Charles M. Callahan	
Co-Counsel Attorneys for Plaintiff/Appellee	
Porter Law Firm	Phoenix
By Robert S. Porter	
and	
Wright & Associates	Mesa
By Ryan P. Dyches	
Co-Counsel Attorneys for Defendant/Appellant	

T H O M P S O N, Judge

¶1 Defendant/appellant The Rubin Companies ("TRC") appeals from the trial court's decision granting summary judgment to plaintiff/appellee Camel Square, L.L.C. on TRC's counterclaims for damages arising from an allegedly wrongful lockout from the property it leased from Camel Square and from Camel Square's denial of TRC's option to renew. TRC contends that the court erred in interpreting the lease, resulting in the conclusion that TRC had defaulted under the lease. TRC further challenges the trial court's finding of the amount of rent owed for the period TRC, with agreement of Camel Square, continued to occupy the premises after TRC had first been locked out. For the following reasons, we affirm both rulings by the trial court.

FACTS AND PROCEDURAL HISTORY

¶2 In June 1998, the Rubin Companies ("TRC") entered into an office lease with the predecessor in interest of Camel Square, L.L.C., which was to run from October 1, 1998, to September 30, 2003. The lease contained two separate options to renew for two years. The option required TRC to give notice of its intent to exercise the option at least thirty days prior to the expiration of the lease term. The lease further stated that the option was available "provided . . . Tenant is not in default under any of the other terms and conditions of the lease

at the time of notification or commencement" of the option.

With respect to assignment and subletting, the lease provided:

20.1 Landlord's Consent. Without Landlord's prior written consent, which consent shall not be unreasonably withheld or delayed . . . , Tenant shall not Assign this Lease or Sublet any portion of the Premises. Tenant may Assign this Lease or Sublet the Premises to any entity controlled by Tenant as The Rubin Companies, Daniel E. Rubin or any Affiliate without Landlord's consent, ~~but no such assignment or subletting shall be binding on Landlord until Tenant gives Landlord written notice of the proposed Assignment or Sublease and delivers to Landlord a fully executed, written instrument, provided by Landlord, by which the Acceptable Affiliate assumes and agrees to perform all obligations of the Tenant under this Lease.~~ For purposes of this Lease: . . . (b) the phrase "Sublet the Premises" means sublet the Premises or any part thereof, license the Premises or any use thereof or permit anyone other than Tenant (and its employees) to occupy or use the Premises or any part thereof; . . . and (e) the term "Acceptable Affiliate" means: (i) if the Tenant making the assignment or subletting (the "Transferor") is an individual, then any corporation, partnership or other entity in which the Transferor owns at least 51% of the total equity interests; or (ii) if the Transferor is a corporation, partnership or other entity, then any individual who owns at least 51% of the total equity interests therein, or any other corporation, partnership or other entity in which the Transferor owns at least 51% of the total equity interests therein. However, if Tenant assigns or sublets any portion of the Premises to any individual or entity partially owned by The Rubin companies, Inc., Daniel E. Rubin or any Affiliate, with interest of less than 51%, then at

Landlord's option, Landlord may request The Rubin Companies, Inc. to guaranty the Lease and no further consent by Landlord shall be required.

¶13 In March or April of 2003, Daniel Rubin, the owner of TRC, contacted David Alcorn and suggested that he move into TRC's office space to see if Alcorn and TRC could do business together. Alcorn formed Pacific Capital Advisors ("PCA") in June 2003¹ and moved into TRC's office space, occupying two offices. Also in June, Alcorn went into the office of the property manager for Camel Square, SMDI, to ask that signage for his company be placed on the building and that he be assigned a separate suite number within TRC's offices.

¶14 SMDI sent a letter to TRC dated June 19, 2003, stating that it had learned that additional entities were occupying the premises and requesting that TRC provide the appropriate documentation that the entities were affiliated with TRC by June 26. By letter dated June 25, Rubin told SMDI that "Pacific Capital Advisors, [L.L.C.] are affiliated with The Rubin Companies, Inc.," that there were no plans to execute a sublease arrangement, but that TRC requested that PCA be assigned a separate suite number and allowed to place signage on the windows. By letter to Rubin dated June 26, 2003, SMDI noted that Rubin had provided no information about any affiliation,

¹ PCA did not achieve legal status with the Arizona Corporation Commission until July 30, 2003.

that Alcorn had stated no ownership interest was held by either company in the other, and that the lease did not require the owner to consider consenting to a sublease until certain information, specified in the lease, was provided. SMDI also noted that it had already requested the information and warned that if it did not receive the requested information by July 11, 2003, Camel Square would consider TRC to be in default of the lease. By letter dated June 30, 2003, Rubin advised SMDI that it was exercising the option to renew the lease; the letter included no reference to the subleasing issue. By letter dated July 22, 2003, SMDI noted that TRC had failed to provide the information requested and therefore had failed to cure its breach of the lease by the July 11, 2003 deadline. The letter declared that an event of default had occurred and noted that, to the extent that TRC may have validly exercised its option to renew, Camel Square had the right to retake possession of the premises. SMDI stated that it would seek replacement tenants but that, if TRC submitted the requested documents prior to Camel Square retaking possession, Camel Square would waive its right to retake possession, and permit TRC to extend its lease if TRC agreed to execute Camel Square's standard form lease and terminate the existing lease.

¶15 TRC did not respond or provide the requested information. By letter dated September 2, 2003, SMDI advised

TRC that it would retake possession of the premises on September 30, 2003, the expiration of the lease term. TRC did not vacate the premises. On October 24, 2003, SMDI sent a letter declaring TRC in holdover status and under a month-to-month tenancy. The letter advised that, pursuant to Arizona Revised Statutes ("A.R.S.") § 33-341(B), SMDI was providing TRC with ten days notice that Camel Square was terminating the lease effective 11:59 p.m. on November 3, 2003. TRC was locked out of the premises shortly after midnight November 4, 2003.

¶6 On November 7, the parties entered into a Mutual Release Agreement, by which they agreed to negotiate in good faith for a new lease agreement and to waive any claims against each other. TRC was allowed restricted access to the property while the parties negotiated.

¶7 No agreement was reached on a new lease, and in February 2004, Camel Square filed a forcible detainer ("FED") action against TRC. TRC did not contest the action, and an FED judgment was entered against TRC on May 11, 2004.

¶8 On May 19, 2004, Camel Square filed this action against the TRC seeking \$97,000 in unpaid rent for the period of November 2003 to May 18, 2004.

¶9 TRC filed a counterclaim against Camel Square and SMDI. TRC denied having breached the lease, contending that it had the right to sublease the premises to any entity under TRC's

control without Camel Square's consent. TRC also contended that it had exercised its option to renew the lease by letter dated June 30, 2003. The counterclaim asserted claims for breach of contract, violation of A.R.S. § 33-361, and wrongful lockout, all based on Camel Square's retaking possession of the property when, according to TRC, TRC had committed no default.

¶10 Camel Square filed a motion for partial summary judgment on TRC's liability, asserting that the FED judgment established TRC's liability and precluded the counterclaims. In denying the motion and finding the counterclaims not precluded, the court noted that the FED was uncontested, no issue was litigated, and that the FED complaint had alleged two grounds for entitlement to possession and the judgment did not indicate it was entered on the same ground at issue in the subsequent litigation.

¶11 In July 2008, Camel Square filed a motion for summary judgment on TRC's counterclaims. Camel Square argued that TRC's counterclaims were premised on its claim that Camel Square's lockout of TRC from the premises was a breach of the lease. Camel Square contended that TRC had defaulted under the lease by subletting a portion of the premises to David Alcorn and PCA, that the default existed and had not been cured when TRC attempted to exercise its option to renew, and that the option to renew was therefore invalid and Camel Square was entitled to

retake the premises. Camel Square further argued that, despite its several requests, TRC failed to produce documentation of its relationship with PCA, and that, under the lease, unless TRC controlled PCA or had a fifty-one percent interest in PCA, PCA's occupancy of the premises without Camel Square's consent was a violation of the lease.

¶12 Camel Square filed a separate motion for summary judgment seeking a judgment that neither Alcorn nor PCA was an affiliate of TRC under Section 20.1 of the lease. Camel Square argued, among other things, that the lease language did not allow TRC to sublease to "any affiliate" of TRC or Mr. Rubin. Camel Square argued that the court should apply the definition of "acceptable affiliate" also in Section 20.1, which provided that, where the tenant making the sublease is a corporation, partnership, or other entity, an acceptable affiliate as sublessee would be (1) any individual who owns at least fifty-one percent of the total equity interest in the tenant or (2) a corporation, partnership or other entity in which the tenant owns at least fifty-one percent of the interest.

¶13 In response to both motions, TRC argued that it did not need Camel Square's consent to allow Alcorn to use a small portion of the premises because "none is required for an affiliate, or for any entity controlled by TRC." TRC argued that it exercised control over Alcorn because Alcorn's use of

the space was at the discretion of TRC and also argued that Alcorn and PCA were closely associated and affiliated with TRC because Alcorn spent more than half of his time working on projects for Rubin. TRC asserted that the term "acceptable affiliate" had been crossed out of the lease between the parties and so was inapplicable, but even if it did apply, the lease provided that a tenant could sublease to an entity provided TRC guaranteed the lease, which it did. TRC also argued that it was not in default when it exercised its option to renew, that it had a right to renew the lease for two additional years on the same terms, and that Camel Square tried to make TRC accept different terms. TRC argued that by trying to make it accept different terms and by asserting TRC had failed to provide information regarding Alcorn's relationship with TRC, Camel Square had anticipatorily repudiated the lease.

¶14 At oral argument, the court advised counsel that it read Section 20.1 as requiring a sublessee to be controlled by TRC and that control would appear to be as defined in "acceptable affiliate." The court explained that it viewed "control" as controlling the company, not controlling "where he puts his desk or whether he's going to come in." TRC argued that Alcorn was an individual when he occupied the premises and that, under the last sentence of Section 20.1, the tenant could sublease to an individual without the consent of the landlord,

although the landlord could ask the tenant to guarantee the lease.

¶15 The court granted both Camel Square's motion for summary judgment on TRC's counterclaims and its motion for partial summary judgment on whether Alcorn or PCA was an affiliate. The court reasoned:

I think the intent of 20.1 is clearly that any tenant who is going to sublease to anyone that the tenant does not control in terms of the classic sense of control, 51 percent or better, then the landlord has the right to approve or not approve.

And I think that even in a situation in terms of here, Mr. Alcorn, who everybody knew and clearly was above board; there was no intent to deceive. It's still a material term because, from a landlord's perspective, controlling who physically is present in the property, I think, is a [sic] important concern. And I think a breach of 20.1 is material, despite the fact that here everybody knew who Mr. Alcorn was.

I think that the - reading 20.1 in common, everyday language leads the Court to the conclusion that Mister - or the Rubin Companies needed the landlord's consent. The Rubin Companies did not get the landlord's consent. There might be an issue as to whether, on June 30th, there was a breach in terms of, number one, whether the landlord sufficiently pointed out - pointed it out and/or the formation of Pacific Capital Advisors on July 30th, but there's no doubt in the Court's mind that as of September 30th that Mr. Rubin was in breach. And therefore, under the rider, rider A, he no longer had the option to renew.

The court entered judgment on the counterclaims in favor of Camel Square.

¶16 At an October 31, 2008, status conference, the court set the matter for jury trial on January 26, 2009, on the issue of the unpaid rent owed Camel Square for the November 2003 to May 2004 period.

¶17 On November 12, 2008, Camel Square filed a motion seeking an order that TRC was not entitled to a jury trial based on language in the lease that declared that any action arising out of the lease would be heard by a court "sitting without a jury" and expressly stating that "each [party] hereby waives all rights to trial by jury." TRC objected, arguing that Camel Square had waived any right to assert the jury waiver because it had waited too long to raise it. TRC noted that it had first mentioned its request for a jury trial on February 16, 2005.² The court granted Camel Square's motion finding that the right to a jury trial did not exist pursuant to the lease.

¶18 The court held a bench trial on January 26, 2009. In its opening statement, TRC characterized the issue at trial as the determination of the rent owed for the holdover period

² On this date, TRC filed a controverting certificate to Camel Square's motion to set that referred to a demand for jury trial filed simultaneously. The demand for jury trial is not in the record.

defined by the lease as "a rental rate based on Fair Market Value then in effect for like space in the Project."

¶19 The president of SMDI testified that after TRC was locked out, it was allowed access to the premises from 8:00 a.m. to 5:00 P.M. Monday through Friday, while the parties attempted to negotiate a new lease. She testified that prior to the expiration of TRC's lease, TRC was paying rent at the rate of \$20.50 per square foot with an option to renew at \$21.00 per square foot for a space of 8,140 square feet. Jim Tiemeyer, the Chief Engineer with SMDI, testified that during the lockout period, he was responsible for opening the premises for TRC in the morning and relocking it at the end of the day. He explained that someone from TRC would call him on his cell phone in the morning to unlock the premises, and then call later to relock the space. He testified he was aware of no time when someone from TRC called him and was unable to reach him or he was unable to provide access to the property. He also testified that he kept notes on when and for whom he unlocked and relocked the premises and that those notes had been compiled into a log that was admitted into evidence. The log showed that the premises were opened at various times in the morning and relocked at various times in the afternoon and that the premises were opened on at least one weekend.

¶120 TRC presented testimony from an independent contractor who testified that she went to the premises several days each week after the lockout to meet someone at TRC and that on one occasion her contact called her in the morning to tell her that she could not get into the premises. She also testified that the evidence that the facility was unlocked at various times in the morning was inconsistent with her knowledge that her contact was to be at work by 9:00 a.m. and that prior to the lockout people would be in the office from 6:30 a.m. until 9:00 p.m. as well as on the weekends. Rubin testified that after the lockout, the monument signage for TRC was removed and he lost use of two handicapped parking spaces that he needed for personal use. He further testified that on the day of the lockout he was unable to keep an appointment with people who had flown in from New York; he denied having received the October 24 ten-day letter giving notice of the pending lockout. He contended that the restricted access during the lockout period destroyed his ability to do business because his business involved working with investment bankers, lawyers, and others from out of town and involved keeping irregular hours not possible with the restricted access. He testified that between November 10, 2003, and May 2004 he was at the premises approximately ten days and he never attempted to contact anyone to gain access to the property. He testified that in February

2004 TRC offered to enter into a new lease on the same terms as the option to renew, including the \$21.00 per square foot rental rate, but also with a period of free rent. In an offer made several days earlier, TRC proposed a rental rate of \$19.00 per square feet as "more commensurate with the market rental rate for the premises" and one year of free rent.

¶21 In closing argument, Camel Square suggested that the court could determine the square foot market rental value by accepting the \$19.00 per square foot figure and applying a percentage based on the percentage of time access was allowed to the premises. TRC argued that nothing was owed because Camel Square did not prove the market rental value of the property with the restrictions, the loss of signage, and the loss of parking resulting in the loss of the ability to function day to day. TRC suggested that if the court were inclined to award an amount, that amount should be no more than \$10.00 per square foot.

¶22 After the court expressed concerns about the lack of expert testimony regarding fair market rental value, Camel Square argued that it did not need to prove market value pursuant to the lease because at the relevant time, the lease had expired and TRC's tenancy had been terminated. Camel Square contended TRC occupied the premises between November and May by virtue of a new agreement separate from the terminated lease and

that the common law as codified by statute applied to determine the rent.

¶23 The court entered judgment finding that Camel Square was entitled to recover damages from TRC based upon a rate of \$15.00 per square foot. The judgment provided for damages in the amount of \$64,868.11 for unpaid rent and rent tax, in addition to attorneys' fees. TRC timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

¶24 TRC argues that the trial court erred in granting summary judgment in favor of Camel Square on TRC's counterclaims. Summary judgment may be granted when "there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c). In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000).

¶25 TRC argues that the language of Section 20.1 is ambiguous and creates questions of fact that should be resolved by a fact finder. Camel Square correctly notes that TRC did not argue ambiguity in the trial court. In response to the motion for summary judgment, TRC took the position that Section 20.1

did not require consent to sublease a portion of the premises to an entity within the tenant's control or an affiliate of the tenant. TRC argued that it had control over Alcorn because he occupied the premises at TRC's discretion and that Alcorn and PCA were affiliated with TRC because they had been associated with each other. At oral argument, TRC argued that PCA had not been formed until the end of July 2003 so Section 20.1 had to be read with respect to subleasing to an individual; TRC maintained that under the last sentence of Section 20.1, consent was not necessary. TRC did not argue that Section 20.1 was ambiguous and should be submitted to a fact finder to determine the intent of the parties. Moreover, TRC does not point to any evidence in the record outside the four corners of the document from which a fact finder could discern the intent of the parties. A contract is not ambiguous simply because the parties disagree as to its meaning. *In re Estate of Lamparella*, 210 Ariz. 246, 250, ¶ 21, 109 P.3d 959, 963 (App. 2005).

¶126 TRC argues that Alcorn's occupancy did not trigger a default because Alcorn was under TRC's control and therefore consent of the landlord was not required under Section 20.1. TRC contends the trial court erred in interpreting "control" under the lease as requiring a tenant to have at least fifty-one percent interest in a sublessee.

¶127 The interpretation of a contract is a question of law, which we review de novo. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593, ¶ 9, 218 P.3d 1045, 1050 (App. 2009). Our goal in interpreting a contract is to discern and enforce the parties' intent, which we do by considering the plain meaning of the words in the context of the contract as a whole. *Id.* We "'apply a standard of reasonableness' to the contract language." *State ex rel. Goddard v. R.J. Reynolds Tobacco Co.*, 206 Ariz. 117, 120, ¶ 12, 75 P.3d 1075, 1078 (App. 2003).

¶128 Section 20.1 begins with the clear statement that the tenant "shall not . . . Sublet any portion of the Premises" without the consent of the landlord. The remainder of the section provides the exception by which the tenant could sublet the premises without the landlord's consent. The remainder of the section, viewed as a whole, demonstrates that the parties intended that assigning or subleasing without the landlord's consent would be limited to individuals or entities with an actual ownership relationship with the tenant, its owner, or affiliates of the tenant.

¶129 A portion of Section 20.1 that was crossed out but left visible in the lease, shows that the parties used the term "Acceptable Affiliate" to describe the assignee or sublessee. This crossed-out portion would have required the assignee or sublessee to agree to assume and perform all the obligations

under the sublease. Although "Acceptable Affiliate" was deleted from this portion of Section 20.1, it was not deleted from the remainder of Section 20.1.³ Section 20.1 defines "Acceptable Affiliate" where the tenant is an individual as a corporation, partnership or other entity in which the tenant owns at least a fifty-one percent interest. Where the tenant is a corporation or other entity, "Acceptable Affiliate" is (1) an individual who owns at least fifty-one percent interest in the tenant or (2) a corporation, partnership or other entity in which the tenant owns at least fifty-one percent interest. Section 20.1 then describes the circumstances under which a tenant may assign or sublease the premises to an assignee or sublessee with which it has an ownership interest of less than a fifty-one percent interest. Similarly, with respect to assigning the lease, the provision precludes a tenant that is a corporation, partnership, or other entity from transferring in any fashion more than forty-nine percent of the interest in the tenant. Taken as a

³ TRC contends that because "Acceptable Affiliate" was crossed out in the one portion of Section 20.1, the term is irrelevant in the remainder of the section. If possible, we interpret a contract so as not to make any portion superfluous. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 158 n. 9, 854 P.2d 1134, 1144 (1993). We interpret the crossing out of the term as a consequence of the parties' eliminating the requirement that the assignee or sublessee assume the obligations of the lease. We do not interpret the striking out of the term in that context as showing any intent by the parties to intentionally eliminate the ownership requirement for assignments and subleases without consent where the parties did not actually delete that definition from the section.

whole, Section 20.1 demonstrates that the parties intended that the exception to the requirement that the tenant obtain the landlord's consent for an assignment or sublease applied only where the tenant had an ownership relationship with the assignee or sublessee such that the tenant had control over the sublessee or, if the sublessee was an individual, the sublessee had a controlling interest in the tenant.

¶30 The trial court found that Section 20.1 required the tenant to obtain permission from the landlord to sublease to a sublessee that the tenant did not "control in terms of the classic sense of control, 51 percent or better." We concur in that interpretation. The parties do not dispute that TRC had no ownership interest in PCA or that Alcorn had no ownership interest in TRC. TRC was therefore required to obtain consent from Camel Square to sublease to Alcorn.

¶31 TRC argues that even if it were required to obtain Camel Square's consent, Camel Square was required to consent because Section 20.1 declares that Camel Square's consent "shall not be unreasonably withheld." The lease states, however:

20.3 Requests for Approval. Landlord shall be under no obligation to decide whether consent will be given or withheld unless Tenant has first provided to Landlord: (a) the name and legal composition of the proposed assignee or subtenant and the nature of its business; (b) the use to which the proposed assignee or subtenant intends to put the Premises;

(c) the terms and conditions of the proposed assignment or sublease and of any related transaction between Tenant and the proposed assignee or subtenant; (d) information related to the experience, integrity and financial resources of the proposed assignee or subtenant; (e) such information as Landlord may request to supplement, explain or provide details of the matters submitted by Tenant pursuant to subparagraphs (a) through (d); and (f) reimbursement for all costs incurred by Landlord, including attorneys' fees, in connection with evaluating the request and preparing any related documentation.

¶132 The record shows that TRC did not request consent for the sublet, instead taking the position that no consent was required. Even after Camel Square requested TRC to comply with the lease requirements and provide information about Alcorn, TRC failed to provide any of the requested information. The burden to provide the information was on TRC and failure to do so was justification for withholding consent. *See Campbell v. Westdahl*, 148 Ariz. 432, 438, 715 P.2d 288, 294 (App. 1985) (trial court properly instructed jury that assignor of lease had burden of providing financial information to landlord and that landlord would be justified in withholding consent if adequate financial information was not provided).

¶133 TRC now argues that it complied with Camel Square's request for information along with Alcorn by a letter dated August 12, 2003, and that Camel Square never claimed the information provided was inadequate. Alcorn testified at

deposition that he sent a letter to SMDI to provide the information that Camel Square was requesting. He also testified that he sent it himself and not at the request of TRC. Even assuming that a letter from the sublessee would satisfy the tenant's obligations, the August 12 letter is not part of the record. It was mentioned first in a motion for reconsideration,⁴ and never produced for a determination of whether it did, in fact, provide the information required by Section 20.3 of the lease. In reviewing a motion for summary judgment, we consider only evidence in the record when the trial court decided the motion. *GM Dev. Corp. v. Cmty. Am. Mortgage Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990) (rejecting consideration of transcripts of depositions referred to, but not included, in the motions). Consequently, we do not consider the effect, if any, of the August 12 letter on the trial court's ruling.

¶134 Under the lease, Camel Square was under no obligation to consider whether it should consent to the sublease until TRC provided Camel Square with the information required by Section 20.3. On this record, TRC did not provide that information.

⁴ In its written response to the motion for summary judgment, TRC admitted that it did not provide information and contended it had no obligation to do so. At oral argument, TRC claimed that, because Alcorn had negotiated with Camel Square about the renewal, Camel Square knew who he was and therefore unreasonably withheld consent. TRC did not argue that the August 12, 2003, letter provided the information requested until TRC filed a motion for reconsideration on the court's ruling granting summary judgment in favor of Camel Square.

Therefore, Camel Square was not required to consent even if it could not have reasonably withheld consent once provided with the required information.

¶35 TRC contends that Alcorn's occupancy of the premises was, at most, an immaterial breach. The tenant of a commercial lease does not forfeit the right to exercise an option to renew because of an immaterial breach. *Maleki v. Desert Palms Prof'l Props., L.L.C.*, 222 Ariz. 327, 332, ¶ 24, 214 P.3d 415, 420 (App. 2009). The standards used to determine whether a breach is material are:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

(b) the extent to which the injured party can be adequately compensated [by damages] for the part of that benefit of which he will be deprived;

(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Found. Dev. Corp. v. Loehmann's, Inc., 163 Ariz. 438, 446-47, 788 P.2d 1189, 1197-98 (1990) (adopting Restatement (Second) of Contracts § 241).

¶36 TRC does not address these factors. Rather, TRC contends that Camel Square seized on a minor breach to eliminate TRC's renewal rights when TRC would not make certain requested concessions in renewal negotiations. Alcorn, who negotiated for TRC, testified at deposition that at Rubin's request he began negotiations with Camel Square around the time of the July 22, 2003, letter, which was the third letter sent by Camel Square regarding TRC's subleasing without seeking the landlord's consent. The July 22 letter noted that the fifteen-day cure period had expired and declared that an event of default had occurred. The record shows that Camel Square was asserting its rights under the lease before any negotiation for a new lease had begun. TRC's claim that the assertion of the breach was in response to failed negotiations for new lease terms is not supported by the record.

¶37 TRC also claims it provided all the information necessary for Camel Square to consent to Alcorn's occupancy. TRC admitted, however, in response to Camel Square's motion for summary judgment, that it never provided the documentation requested by Camel Square. TRC appears again to be relying on

the August 12 letter by Alcorn to SMDI, which is not part of the record.

¶138 TRC argues that Alcorn occupied approximately one percent of the premises for less than ten percent of TRC's lease term. These facts work in TRC's favor under the *Loehmann's* factors. Under factor (c), "a failure to perform will not be deemed material if it occurs late, after [the breaching party's] substantial preparation or performance." *Loehmann's*, 163 Ariz. at 447, 788 P.2d at 1198 (internal quotations omitted). At the time of the breach, TRC had been a tenant for almost five years, and the record does not show any other breach during that time. Other factors, however, support finding the breach to be material.

¶139 Camel Square bargained for the right to have only those persons or entities of which it consented occupy any portion of its premises. The lease specifically states that the subletting of "any portion" of the premises was subject to prior consent by the landlord unless the exceptions to the consent requirement applied. A landlord has a justifiable interest in exerting some control over the individuals or entities occupying and doing business on its premises, and Camel Square, having bargained for that right, reasonably expected that benefit. In addition, the landlord here gave TRC two opportunities to cure before declaring an event of default and additional

opportunities to cure after declaring a default. TRC did not provide the information requested and so never cured the default. TRC argues that a good faith dispute existed about whether Alcorn's occupancy constituted a default. TRC, however, does not appear to have made any effort to communicate its position that it was not required to obtain consent to Camel Square. Other than TRC's letter of June 25, 2003, stating that PCA was "affiliated with" TRC and was occupying space on the premises, the record shows no response by TRC to Camel Square's inquiries. Rather than engage in a good faith dispute, TRC appears to have ignored Camel Square's concerns.

¶40 We note, too, that the breach here was not merely of a technical nature. See *Loehmann's*, 163 Ariz. at 446-447, 788 P.2d at 1197-98 (two-day delay in rent payment not material). It involved an ongoing failure to comply with an express provision of the lease.

¶41 TRC also argues that Camel Square repudiated the lease, thereby excusing any breach by TRC. One party's breach of a material provision in a contract excuses the other party's performance. *Zancanaro v. Cross*, 85 Ariz. 394, 400, 339 P.2d 746, 750 (1959). "The insistence by one party upon terms not contained in a contract constitutes an anticipatory repudiation." *United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 277, 681 P.2d 390, 429 (App. 1983)(emphasis omitted).

An anticipatory breach requires an unequivocal refusal to perform one's obligations under the contract. *Id.*

¶42 TRC contends, "[a]t the time Camel Square first asserted that TRC was in breach . . . , Camel Square was itself refusing to renew the lease on its existing terms." These stated facts are not reflected in the record. The record shows that Camel Square, through SMDI, first notified TRC about a possible violation of the lease in a letter dated June 19, 2003, in which the landlord requested the documentation required under the lease be submitted by June 26. On June 26, SMDI sent a second letter requesting the information and warning that if the information was not received by July 11 the landlord would consider TRC in default. On July 22, SMDI sent a third letter in which it noted TRC's failure to provide the requested information, declared TRC to be in default, and outlined the consequences under the lease of an event of default, including the loss of TRC's option to renew. According to the record, only at this point did Camel Square and TRC begin to negotiate a new lease with new terms. TRC has directed us to no evidence in the record showing that, prior to TRC's default, Camel Square either breached any term of the lease or positively and unequivocally indicated that it would refuse to perform under the lease so as to excuse TRC's breach.

¶143 We affirm the trial court's grant of summary judgment to Camel Square on TRC's counterclaims.

¶144 With respect to the trial for damages on Camel Square's complaint, TRC argues that it was entitled to a jury trial despite the jury waiver provision contained in the lease. TRC asserts that Camel Square waived the right to assert the jury waiver by waiting until approximately two months before trial to enforce the lease provision. TRC further argues that Camel Square's position that the lease applies to enforce the waiver is inconsistent with its position taken at the close of trial that the lease provision defining holdover rent did not apply because the term at issue - November 2003 to May 2004 - was a term after the lease had been terminated by lockout and when TRC's occupancy was based on a separate agreement while the parties were attempting to negotiate a new lease. TRC contends that the trial court ruled that the damages provision of the lease did not apply.

¶145 We agree with TRC that Camel Square's positions are inconsistent. We do not agree, however, that the trial court ruled that the lease provision concerning holdover rent was inapplicable, nor do we find that Camel Square waived its right to assert the jury trial waiver provision. Whether a party is entitled to a jury trial is a question of law we review de novo.

In re Estate of Newman, 219 Ariz. 260, 271, ¶ 42, 196 P.3d 863, 874 (App. 2008).

¶146 Section 34.5 of the lease provides: "Landlord and Tenant agree that any action or proceeding arising out of this lease shall be heard by a court of competent jurisdiction sitting without a jury, and each hereby waives all rights to trial by jury." Camel Square sought to enforce this provision by motion filed November 12, 2008, for trial scheduled on January 26, 2009.

¶147 TRC does not contest the validity of the provision, but argues that Camel Square waived it by waiting too long to assert it. TRC relies on *Import Alley of Mid-Island, Inc. v. Mid-island Shopping Plaza, Inc.*, 477 N.Y.S.2d 675 (N.Y. App. Div. 1984). In *Import Alley*, the court held that a landlord could not assert a jury waiver clause in the lease on the day of trial to strike the tenant's previous demand for a jury trial. *Id.* at 676-77. Similarly, in *St. George Chicago, Inc. v. George J. Murgess & Associates, Ltd.*, the court found that a plaintiff that waited until the day of trial to assert a contractual jury waiver had itself waived the right to strike the jury demand. 695 N.E.2d 503, 510 (Ill. App. 1998). The court noted that the plaintiff had waited three years since the demand was filed and that the court had spent several weeks considering motions in limine and other pretrial matters. *Id.* The court found that,

from the conduct inconsistent with the contractual waiver, one could infer a waiver of the contractual term. *Id.*

¶148 Here, Camel Square did not file its motion to enforce the jury waiver provision for more than three years after TRC made its demand for a jury trial. Nevertheless, Camel Square did not make its motion on the eve of trial, but more than two months before trial was set to begin. We find no error in the trial court's decision to enforce the contractual jury waiver.

¶149 TRC also argues that Camel Square waived its right to enforce the jury waiver provision by arguing to the court at the end of trial that the lease provision on damages did not apply because the term at issue was after TRC had been locked out of the premises. We agree that, if the damages provision did not apply because the term of occupancy at issue was not pursuant to the lease, then the jury waiver provision, which pertained to any action arising out of the lease, likewise would not apply. However, Camel Square's argument was made briefly, in its rebuttal closing and, from our reading of the transcript, does not appear to have influenced the court's decision in awarding damages. We see no basis for finding that the argument constituted a waiver requiring a retrial.

¶150 TRC further argues that Camel Square did not present sufficient evidence to establish damages pursuant to Section XXVI of the lease which provided in pertinent part:

In the event of any continued occupancy or holding over of the Leased Premises without the express written consent of Landlord beyond the expiration or earlier termination of this Lease or beyond the expiration or earlier termination of Tenant's right to occupy the Lease Premises, whether in whole or in part, . . . this Lease shall be deemed a monthly tenancy and Tenant shall pay ~~two~~ (2) times the Annual Basic Rent a rental rate based on Fair Market Value then in effect for like space in the Project, in advance at the beginning of the hold-over month(s)

TRC argues that Camel Square did not present any evidence showing the fair market rental value of the space at issue, and so the court should have awarded zero damages.

¶51 On appeal from a trial to the court, we view the evidence and reasonable inferences from that evidence in the light most favorable to the prevailing party and must affirm if any evidence supports the trial court's judgment. *Inch v. McPherson*, 176 Ariz. 132, 136, 859 P.2d 755, 759 (App. 1992). An award of damages cannot be based on conjecture or speculation; the fact finder must be guided by some rational standard and evidence that makes an approximately accurate estimate possible. *Felder v. Physiotherapy Assocs.*, 215 Ariz. 154, 162, ¶ 38, 158 P.3d 877, 885 (App. 2007).

¶52 The trial court determined that damages would be based on a rental rate of \$15.00 per square foot. The trial court received evidence that TRC had been paying rent of \$20.50 per

square foot and that the renewal rate would have been \$21.00 per square foot. The court also had evidence that TRC had offered to enter into a new lease with a rental rate of \$19.00 per square foot, which TRC described as "more commensurate with the market rental rate of the Premises." The court heard testimony that during the period at issue, access to the premises was restricted in that TRC had to have someone from property management unlock and then relock the premises. The court also heard conflicting evidence as to whether TRC was ever unable to access the premises as well as evidence that TRC was given access on at least one weekend and that on some days TRC did not attempt to access the property. Rubin testified that from November 2003 to May 2004 he did not have use of two handicapped parking spaces that were for his personal use and that were part of his lease agreement and the signage for his business had been removed from the monuments and the building. Neither Camel Square nor TRC offered evidence of the reduction in value of the premises as a consequence of the restrictions placed on TRC's access to the property.

¶153 The court had evidence that TRC considered the market value of the property with full rental rights to be \$19.00 per square foot. The court's reduction of that amount to \$15.00 per square foot based on the restrictions placed on the premises, while not supported by actual testimony assigning a value to the

restrictions, is nevertheless reasonably supported by the testimony before the court. The court as trier of fact heard competing claims regarding the ability of TRC to make use of the property and adjusted the rate accordingly. The court's ruling is supported by the evidence, and we therefore affirm.

¶154 Camel Square requests an award of attorneys' fees on appeal pursuant to Section XXVII of the lease, which provides in pertinent part:

[I]f any action shall be instituted by either of the parties hereto for the enforcement or interpretation of any of their respective rights or remedies in or under this Lease, the prevailing party shall be entitled to recover from the losing party all costs incurred by the prevailing party in such action and any appeal therefrom, including reasonable attorneys' fees to be fixed by the court.

Pursuant to the lease, we award Camel Square its reasonable attorneys' fees upon its compliance with Rule 21(a) of the Arizona Rules of Civil Appellate Procedure.

CONCLUSION

¶155 Section 20.1 required Camel Square's consent for TRC to sublease a portion of its premises to Alcorn, and TRC's failure to seek that consent or provide the appropriate information required by the lease resulted in a material breach of the lease. We affirm the trial court's grant of summary judgment on TRC's counterclaims.

¶156 We further find that Camel Square did not waive its right to invoke the jury waiver provision of the lease and that the trial court's ruling on damages is supported by the evidence. The trial court's rulings are affirmed.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Presiding Judge

/s/

SHELDON H. WIESBERG, Judge