

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

**THE REALTY ASSOCIATES FUND III, L.P.,** :  
Plaintiff, :  
 :  
 :  
 :  
 v. : C.A. No. 02C-08-130 CLS  
 :  
 :  
 :  
 :  
 :  
**LUCENT TECHNOLOGIES, INC.,** :  
Defendant. :

Submitted: September 26, 2003  
Decided: April 30, 2004

On Defendant Lucent Technologies’  
Motion for Summary Judgment.  
**GRANTED.**

On Plaintiff Realty Associates Fund III’s  
Motion for Partial Summary Judgment.  
**DENIED.**

**MEMORANDUM OPINION**

Thomas G. Macauley, Esquire, Zuckerman Spaeder LLP, Wilmington, Delaware;  
Robert E. Greenberg, Esquire, and Thomas F. Murphy, Esquire, Friedlander,  
Misler, Sloan Kletzkin & Ochsman, PLLC, Washington, DC; Attorneys for  
Plaintiff Realty Associates Fund III, L.P.

Thomas P. McGonigle, Esquire, Gary W. Lipkin, Esquire, Duane Morris LLP,  
Wilmington, Delaware; Matthew A. Taylor, Esquire and Keith J. Verrier, Esquire,  
Duane Morris LLP; Philadelphia, Pennsylvania; Attorneys for Defendant Lucent  
Technologies, Inc.

**SCOTT, J.**

## **I. INTRODUCTION**

Defendant Lucent Technologies, Inc. (“Lucent”) has filed a Motion for Summary Judgment. Plaintiff Realty Associates Fund III, L.P. (“Fund III”) has filed a Motion for Partial Summary Judgment on the issue of liability under a lease agreement between the parties. Both parties have agreed that no genuine issues of material fact are present. The issue before the court is interpretation of a lease provision concerning recapture of the leased premises by Fund III upon assignment of the lease by Lucent. Upon consideration of the evidence presented at oral argument and a review of the parties’ motions and responses, this court concludes Lucent’s Motion for Summary Judgment should be **GRANTED** and Fund III’s Motion for Partial Summary Judgment should be **DENIED**.

## **II. BACKGROUND**

In 1990, a lease agreement (“Original Lease”) was executed between the Prudential Insurance Company of America (“Prudential”), as landlord, and Octel Communications Corporation (“Octel”), as tenant, for certain commercial real property in San Jose, California. Fund III is the successor in interest to Prudential. Octel is a wholly owned subsidiary of and assignor to Lucent. The Original Lease was amended in 1992, 1993, 1994, and for a fourth time in 1998 (“Fourth Amendment”).

The Original Lease included a section (“¶ 14”) providing rules governing assignment and subletting. Paragraph 14 established a two-tier system governing the tenant’s ability to assign its rights or sublet its space. The general rule established in ¶ 14(a) requires consent of the landlord as a precondition of any assignment or sublease. Paragraphs 14 (b), (c), (d), (e), (f), and (g) delineate procedures to follow under the general rule of ¶ 14(a). In particular, ¶ 14(d) detailed the options available to the landlord when notice of a proposed assignment has been received. The Original Lease gave the landlord the option to consent to the assignment or refuse consent, and gave the landlord 30 days to make this decision.

An exception to the general rule requiring the landlord’s consent is detailed in ¶ 14(h). Paragraph 14(h) provides that the tenant may transfer the lease, without the landlord’s consent, to an affiliate “or to any person or entity which acquires [substantially] all of the assets of tenant as a going concern of the business that is being conducted on the premises.”<sup>1</sup>

The Fourth Amendment extended the term of the Original Lease for five years as well as provided additional rights to the landlord pertaining to assignment and subletting. In particular, ¶ 5.2 of the Fourth Amendment (“¶ 5.2”) gives the

---

<sup>1</sup> Paragraph 14(h) of Original Lease. Text in brackets [] represents changes made in an Addendum to the Original Lease.

landlord an option to recapture the premises, “in addition to the elections described in ¶ 14(d) of the Original Lease.”<sup>2</sup>

In August, 2000, Lucent notified Fund III of its intent to assign, under ¶ 14(h), its lease of the Premises. Several letters were sent to Insignia/ESG of California, Inc. as Fund III’s agent for purposes of notice under the lease. In September, 2000, Fund III responded, referencing both the proceeding under ¶ 14(h) as well as giving consent. Fund III’s letter stated its position that ¶ 5.2 of the Fourth Amendment doesn’t just amend ¶ 14(d) of the Original Lease, but that it is a stand-alone provision that applies to all assignments and that Fund III was exercising its right to recapture.

Lucent proceeded with the sale of the business at the premises and assignment, but added a provision indemnifying the purchaser for any litigation expenses associated with the recapture issue. Fund III and Lucent also agreed to allow the purchaser to occupy the premises pending resolution of the dispute by the court.

### **III. STANDARD OF REVIEW**

The court will grant summary judgment only if there are no genuine issues of material fact “and the moving party must show he is entitled to judgment as a

---

<sup>2</sup> Paragraph 5.2 of Fourth Amendment (emphasis added).

matter of law.”<sup>3</sup> In determining whether there is a genuine issue of material fact, the evidence must be viewed in the light most favorable to the non-moving party.<sup>4</sup> Summary judgment, therefore, is appropriate only if, after viewing the evidence in the light most favorable to the non-moving party, the court finds no genuine issue of material fact.<sup>5</sup> When parties file cross-motions for summary judgment, they “implicitly concede the absence of material factual disputes and acknowledge the sufficiency of the record to support their respective positions.”<sup>6</sup> However, cross-motions do not act “*per se* as a concession that there is an absence of factual issues.”<sup>7</sup>

#### **IV. DISCUSSION**

The court is asked to decide whether, by referencing ¶ 14(d) of the Original Lease, ¶ 5.2, which adds the option of recapture of the premises to the options available to the landlord, applies only to situations where the landlord’s consent is

---

<sup>3</sup> *Deakyne v. Selective Insurance Co.*, 728 A.2d 569, 570 (Del. Super. 1997) (internal citation omitted).

<sup>4</sup> *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).

<sup>5</sup> *Guy v. Judicial Nominating Com’n.*, 659 A.2d 777, 780 (Del. Super. 1995); *Figgs v. Bellevue Holding Co.*, 652 A.2d 1084, 1087 (Del. Super. 1994).

<sup>6</sup> *Browning-Ferris, Inc. v. Rockford Enterprises, Inc.*, 642 A.2d 820, 823 (Del. Super. 1993) (internal citation omitted).

<sup>7</sup> *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. Super. 1997).

required for an assignment; or whether the recapture option is available to the landlord when the assignment is done under ¶ 14(h) which does not require the consent of the landlord to effectuate the assignment. The court concludes ¶ 5.2 does not add the recapture option to assignments made under ¶ 14(h) of the Original Lease agreement. Therefore, Fund III does not have the right to recapture the premises when Lucent assigns the lease under ¶ 14(h).

A. Parties' Contentions.

Fund III argues that ¶ 5.2, giving the landlord the right of recapture of the premises, applies no matter to whom Lucent assigns its right. Fund III's arguments center on the presence of the word "all" in reference to subleases in ¶ 5.2. Fund III notes that the term "Permitted Assignees" was defined in the Fourth Amendment to refer to assignees under ¶ 14(h). Had the parties wished to exclude such persons in ¶ 5.2, Fund III argues there would have been a specific reference to "Permitted Assignees."

Lucent argues that ¶ 5.2 merely adds an option to the landlord's choices in ¶ 14(d) of the Original Lease when there is a sublease/assignment that requires the landlord's consent. Lucent argues that the Original Lease and the Fourth Amendment must be read together and that to contend, as Fund III does, that ¶ 5.2 applies to all subleases would render meaningless their ability to assign without the landlord's consent under ¶ 14(h).

In addition, Lucent argues that the use of the word “proposed” in ¶ 5.2 indicates that it only applies to subleases or assignments where the landlord’s consent is required. This usage corresponds with usage of “proposed” in ¶¶ 14 (c), (d), and (e) of the Original Lease which refer only to subleases/assignments under ¶ 14(a) where the landlord’s consent is required.

Lucent further argues that Fund III is estopped from asserting the recapture provision as they did not raise the issue until Lucent had materially changed its position by assigning the lease.

B. Construction of the Lease Provisions.

The court notes the Original Lease contains a choice of law provision designating California law as governing. Where a contract contains a choice of law provision, Delaware courts will generally give effect to that provision.<sup>8</sup> The premises in question are located in California, giving this court sufficient basis for upholding the choice of law provision.<sup>9</sup> Under California law, commercial leases, such as the one at issue in the case at bar, are to be construed to “give effect of the mutual intentions of the parties as existed at the time of contracting, so far as the

---

<sup>8</sup> *J.S. Alberici Constr. Co., Inc. v. Mid-West Conveyor Co., Inc.*, 750 A.2d 518, 520 (Del. 2000).

<sup>9</sup> *See Gloucester Holding Corp. v. U.S. Tape and Sticky Products LLC*, 832 A.2d 116, 124 at n.17 (Del. Ch.) (finding Massachusetts law applied “. . . in connection with the lease of real property . . . located in Massachusetts”).

same is ascertainable and lawful.”<sup>10</sup> The intent of the parties is to be inferred, if possible, solely from the plain meaning of the written provisions of the contract.<sup>11</sup>

California law instructs the court to interpret a contract as a whole if at all possible.<sup>12</sup> The court notes Fund III’s argument focuses solely on the interpretation of a single word in the crucial ¶ 5.2 – all. The court finds this position fails to provide a unified interpretation of the contract as a whole. As noted, when the contract can be interpreted in such a manner so as to give credence to all parts of the contract, the court must follow that interpretation.<sup>13</sup>

The court further finds that if Fund III’s argument were to hold, it would nullify Lucent’s ability to assign the lease without the landlord’s consent. The court finds that since there is no indication that this ability was repealed by any of the amendments to the Original Lease, this ability must still stand. The court finds Fund III’s argument that Lucent could avoid the recapture provision by not

---

<sup>10</sup> See Cal. Civ. Code § 1636; see also *AIU Ins. Co. v. Superior Court of Santa Clara County*, 799 P.2d 1253, 1264 (Cal. 1990).

<sup>11</sup> *AIU In. Co.*, 799 P.2d at 1264.

<sup>12</sup> See Cal. Civ. C. § 1641 (“[t]he whole of a contract is to be taken together, so as to give effect to every part . . .”); see also *College Block v. Atlantic Richfield Co.*, 254 Cal. Rptr. 179, 182 (Cal. Dist. Ct. App. 1988); *Blaisair, Inc. v. Fireman’s Fund Ins. Co.*, 90 Cal. Rptr. 2d 374, 378 ) Cal. Dist. Ct. App. 1999).

<sup>13</sup> *Id.*



assigning all of the lease spacious. In order to fall within the provisions of ¶ 14(h), Lucent is required to transfer all or substantially all the assets of the business on the premises.<sup>14</sup> Thus, if Fund III's argument were valid, there could never be a possible scenario where Lucent could assign the lease under ¶ 14(h) without triggering the recapture provision of ¶ 5.2. This is not a logical result as it leads to the conclusion Lucent no longer has any right to assign the lease without triggering the recapture provision. As noted above, there is no indication the parties either intended, or actually did, remove this provision from the lease agreement in making any of the amendments. The court finds, therefore, that any interpretation of the contract that leads, as a consequence, to a nullification of the tenant's right to assign without the landlord's consent is invalid.

The court thus concludes that the recapture provision of ¶ 5.2 of the Fourth Amendment only applies in cases where the landlord's consent is required. Fund III, therefore, has no right to recapture the premises when Lucent assigns the lease pursuant to ¶ 14(h) of the Original Lease.

Because the court has decided the issue presented based on contract interpretation, it need not, and does not, reach the issue of estoppel.

---

<sup>14</sup> See *supra* at n. 1.

**V. CONCLUSION**

For the above reasons, Fund III's Motion for Partial Summary Judgment is **DENIED**, and Lucent's Motion for Summary Judgment is **GRANTED. IT IS SO ORDERED.**

---

Calvin L. Scott, Jr.  
Superior Court Judge