PLAINTIFF'S MOTION FOR LEAVE TO FILE SURREPLY TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

216 JAMAICA AVENUE, LLC,	)	Civil Action No. 06-1288
Plaintiff,	)	(Judge Boyko)
v.	)	
S & R PLAYHOUSE REALTY CO.,	)	
Defendant.	)	

PLAINTIFF'S SURREPLY MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

As we described in our motion for leave to file a surreply to S&R's motion for summary judgment, S&R has advanced two arguments in its reply brief that S&R had not previously raised and that are not responsive to arguments that we raised in our opening brief or opposition brief. Below, we explain why both of these new arguments lack merit.

ARGUMENT

I. The 1982 Assignment and Assumption effected a novation of the Lease.

We demonstrated previously that the assignor, S&R, and the lessor—that is, all three relevant parties—consented explicitly to the novation of the Lease, including the gold clause, that was effectuated through the 1982 Assignment and Assumption. Mem. in Supp. of Mot. of Pl. 216 Jamaica Avenue LLC for Summ. J. ("Pl.'s Opening Br.") at 14-16. S&R now contends that there was no novation of the Lease because "no **contemporaneous** consent occurred in this case." Def.'s Reply Br. in Supp. of Def.'s Mot. for Summ. J. ("Def.'s Reply Br.") at 7 (emphasis added). Specifically, S&R argues that the 1982 Assignment and Assumption "was between the old and new lessee only **and did not include the lessor**." Def.'s Reply Br. at 7 (emphasis supplied).

Of course, as we have explained, the lessor's consent to the novation is expressed unambiguously in the terms of the Lease. Pl.'s Opening Br. at 15-16. Although expressed in a document executed long before the 1982 Assignment and Assumption, the lessor's consent is nonetheless contemporaneous with the assignor's and S&R's consent expressed in the 1982 Assignment and Assumption because the lessor's consent is **standing** consent that persists throughout the duration of the Lease. In the Lease, the lessor stated that if the assignee "expressly assume[d] the lessees['] engagements hereunder," then (1) the assignment would be

permitted, (2) the assignee would be substituted for the assignor subject to all the "terms and conditions hereof, with like force and effect in all respects as the same accrue to and are binding upon said original . . . lessees," and (3) the assignor would be discharged of all remaining liability under the Lease. Lease at 4, 6. In other words, as long as the assignor and assignee complied with the lessor's requirements, the assignment would effect a novation of the Lease. Pl.'s Opening Br. at 11-16. This standing consent expires only when the Lease expires. Because the 1982 Assignment and Assumption occurred well before the expiration of the Lease, the lessor's standing consent was still in force at that time.

None of the Ohio decisions that S&R cites are to the contrary. In *Bahner's Auto Parts v. Bahner*, No. 97-CA-2538, 1998 Ohio App. LEXIS 3453, at *24-*25 (Ohio Ct. App. June 23, 1998), and *Garrett v. Lishawa*, 172 N.E. 845, 846, 36 Ohio App. 129, 132-133 (Ohio Ct. App. 1930), the court, making no mention of any contemporaneity requirement, found that there had been no novation because at **no** time did the parties to the relevant contracts even suggest that their later agreement had replaced or extinguished their earlier one. In both *Scioto Savings Ass'n v. Porter*, No. 77AP-788, 1978 Ohio App. LEXIS 10229, at *2 (Ohio Ct. App. Mar. 2, 1978), and *Baker v. All States Life Insurance Co.*, No. 4382, 1950 Ohio App. LEXIS 859, at *17 (Ohio Ct. App. Mar. 30, 1950), the court did state that a novation exists only if the parties intended to effect a novation "at the time the novation took place," but nothing in either decision suggests that the lessor's standing consent here did not exist "at the time" of the 1982 Assignment and Assumption. Rather, the court in *Scioto* found, in an unpublished decision, that there had not been a novation because the creditor had explicitly refused to extinguish the old contract: the creditor had stated expressly in the relevant contract that it " 'consents to the transfer and assumption of the above loan as requested, without, however, releasing from personal liability

anyone already liable for payment.' " 1978 Ohio App. LEXIS 10229, at *3 (quoting transfer agreement). And the court in *Baker* found that there had not been a novation because "the agent of the defendant company had no authority to bind the company to such an agreement." 1950 Ohio App. LEXIS 859, at *17.

Although there does not appear to be any Ohio decision holding squarely that standing consent, such as that given in the Lease in this case, does or does not constitute the requisite consent for a novation, courts in Ohio have suggested twice that such standing consent does constitute the requisite consent for a novation. *See Parkway Bus. Plaza Ltd. P'ship v. Custom Zone, Inc.*, 2006 Ohio 5255, at P21-P30 (Ohio Ct. App. 2006) (no novation because original lease stated expressly that lessor did not consent to discharge of assignor upon subsequent assignment); *Miller v. C.K.L., Inc.*, No. 84-CA-26, 1985 Ohio App. LEXIS 6915, at *4-*5 (Ohio Ct. App. July 19, 1985) (same). Moreover, the great weight of authority in other jurisdictions—and especially the modern authority—makes clear that the standing consent expressed in the Lease here constitutes the requisite consent for a novation. The court in *Fay Corp. v. Bat Holdings I, Inc.* presented an extensive catalogue of these authorities—including decisions from Florida, Washington, Indiana, and Colorado, Professor Corbin's treatise on contracts, the Restatement (Second) of Contracts, the Restatement (Second) of Property, and a treatise on property. 646 F. Supp. 946, 951-52 (W.D. Wash. 1986) (discussing *Sans Souci v. Division of Florida Land, Inc.*, 421 So. 2d 623 (Fla. Dist. Ct. App. 1982); *Spaulding v. Aetna Cas. & Surety Co.*, 4 P.2d 526 (Wash. 1931); *Shadeland Dev. Corp. v. Meek*, 489 N.E.2d 1192 (Ind. Ct. App. 1986); *Baum v. National Fin. Co.*, 114 P.2d 560 (Colo. 1941); CORBIN ON CONTRACTS § 866, at 456-57 n.39. n13; RESTATEMENT (SECOND) OF CONTRACTS § 280, at 378; RESTATEMENT (SECOND) OF PROPERTY (Landlord and Tenant), Reporters Notes § 16.1(5); A.J. CASNER,

AMERICAN LAW OF PROPERTY, "Landlord and Tenant" § 3.61, at 310 (1954)), *aff'd*, 896 F.2d 1227 (9th Cir. 1990) (per curiam). In addition, the decisions in *Trostel*, *Fay*, and *Wells Fargo*, applying Iowa, Washington, and California law, belie S&R's argument, since in each the court found a valid novation of a lease, including a gold clause, on the basis of the lessor's consent given decades earlier in the original lease. *Trostel v. American Life & Cas. Ins. Co.*, 92 F.3d 736, 738-743 (8th Cir. 1996); *Fay*, 646 F. Supp. at 949-52; *Wells Fargo Bank v. Bank of Am.*, 38 Cal. Rptr. 2d 521, 525-29 (Cal. Ct. App. 1995). There is no Ohio decision that conflicts with the well-established law of these other jurisdictions.[1] And S&R has articulated no policy rationale for why this Court should deviate from that law.

II. The 1982 Assignment and Assumption is not ambiguous.

S&R has argued in its opposition brief and reply brief that it did not assume the gold clause obligation because S&R assumed only the obligations to which the assignor was subject on the date of the 1982 Assignment and Assumption and the assignor was not subject to the gold clause obligation at that time. Def.'s Br. in Opp'n to Pl.'s Mot. for Summ. J. ("Def.'s Opp'n Br.") at 9-11; Def.'s Reply Br. at 8-10. In our reply brief, we explained why this argument fails

[1] S&R also points to *Scott v. Wyoming Oils*, 75 P.2d 764 (Wyo. 1938), and *Emerson-Brantingham Implement Co. v. Sawyer*, 242 S.W. 1007 (Mo. Ct. App. 1922), which the court in *Fay* discussed. Even if those decisions were inconsistent with finding that the 1982 Assignment and Assumption effected a novation of the Lease, they are not persuasive authority because, as the *Fay* court recognized, they conflict with the great weight of modern authorities. 646 F. Supp. at 951-52. Moreover, they differ from this case in significant ways. The decision in *Scott* is like those in *Baker* and *Scioto*: one of the parties to the new agreement lacked the power to extinguish the old agreement on behalf of another. 75 P.2d at 772-73. And although the alleged novation in *Emerson-Brantingham* was vitiated by mis-timed consent, that decision does not support S&R's argument. In that case, all but one of the necessary parties executed a new agreement. The missing necessary party subsequently ratified the new agreement. There was no suggestion that either the missing party or the parties to the new agreement had provided standing consent. Thus, there was no novation because the consent of all necessary parties never synchronized. 242 S.W. at 1007-08. Here, by contrast, the consent of all necessary parties eventually synchronized because the lessor explicitly provided standing consent that persisted through the time of the 1982 Assignment and Assumption.

on the merits.[2] In its reply brief, however, S&R introduced the new argument that the 1982 Assignment and Assumption is ambiguous in two respects. Consequently, S&R contends, it is appropriate to consider parol evidence to resolve those ambiguities. Def.'s Reply Br. at 9 & n.6, 10.

As a threshold matter, we note that even if the 1982 Assignment and Assumption were ambiguous in the ways in which S&R contends, it would still be appropriate to grant summary judgment in favor of plaintiff. As we have explained previously, the question of which particular obligations S&R assumed pursuant to the 1982 Assignment and Assumption relates only to our novation argument and our privity-of-contract argument, **not** to our privity-of-estate argument. Pl.'s Reply Br. at 12. And S&R has offered no legitimate response to our privity-of-estate argument—that the gold clause issued against S&R by virtue of S&R's coming into privity of estate with the lessor in 1982. Pl.'s Reply Br. at 13-15.

In any event, S&R's contentions that it is appropriate to consider parol evidence on the meaning of the 1982 Assignment and Assumption are wrong. S&R purports to identify two ambiguous features of the 1982 Assignment and Assumption. The first is whether the original "lessee's obligations under the 1982 Assignment and Lease are different [from] those of the Assignor[]" at the time of the 1982 Assignment and Assumption. Def.'s Reply Br. at 9 n.6 (quotation marks omitted). Contrary to S&R's assertion, however, the answer to this question does not "turn[] on the intent of the parties." Def.'s Reply Br. at 9 n.6 (quotation marks

[2] It fails on the merits for at least three reasons: it directly contradicts S&R's repeated representations to this Court that it became the lessee under the Lease by virtue of the 1982 Assignment and Assumption; the 1982 Assignment and Assumption states clearly that S&R assumed the obligations of the "lessee," which, as S&R itself has argued, refers to the **original** lessee, who was unquestionably subject to the gold clause; and the assignor was subject to the gold clause at the time of the 1982 Assignment and Assumption notwithstanding the Joint Resolution. Reply Mem. in Supp. of Mot. of Pl. 216 Jamaica Avenue LLC for Summ. J. " Pl.'s Reply Br.") at 12-14.

omitted). This ambiguity—if it existed—would be a pure question of law. If there were a difference between the obligations of the assignor at the time of the 1982 Assignment and Assumption and the original lessee, the only possible source of that difference would be the Joint Resolution.[3] As we have explained already, it is clear under the Joint Resolution that the assignor remained subject to the gold clause just as the original lessee had been. Pl.'s Reply Br. at 13-14. But even if the Joint Resolution were not clear on this question, that ambiguity would present a purely legal question to be resolved by the Court, solely by reference to the language of the Joint Resolution. Thus, the question whether the assignor's obligations at the time of the 1982 Assignment and Assumption differed from the original lessee's provides no opportunity whatsoever for S&R to introduce factual evidence.

The second purported ambiguity in the 1982 Assignment and Assumption is whether S&R assumed the assignor's obligations as they existed at the time of the 1982 Assignment and Assumption or the original lessee's obligations. Because, as we have just noted, the assignor's obligations at the time of the 1982 Assignment and Assumption were the same as the original lessee's, *see* Pl.'s Reply Br. at 13-14, the question of whose obligations S&R assumed is moot and therefore any factual evidence related to this question is inadmissible on the ground of irrelevance.

But even if there were such a difference between the assignor's and the original lessee's obligations, such evidence would still be inadmissible parol evidence because, as S&R has recognized repeatedly, "the language of the 1982 Assignment [and Assumption is]

[3] Absolutely nothing in the Lease suggests that the obligations of the assignor might differ from the obligations of the original lessee, and S&R has pointed to nothing to the contrary. And the 1982 Assignment and Assumption does not and could not purport to affect the obligations of the original lessee or the assignor because the lessor was not a party to the 1982 Assignment and Assumption.

unambiguous." Def.'s Reply Br. at 9 n.6 (emphasis added); *see also* Def.'s Opp'n Br. at 9 (The "language of the 1982 Assignment [and Assumption is] **clear**.") (emphasis added). S&R emphasizes that the 1982 Assignment and Assumption states that S&R assumed the obligations of the assignor, *see, e.g.*, Def.'s Reply Br. at 9, but the 1982 Assignment and Assumption in fact states explicitly and unambiguously that S&R assumed the obligations of **both** "Assignor **and lessee**." 1982 Assignment and Assumption at 2 (emphasis added). And, as S&R has explained in the course of distinguishing *Trostel*, the term "lessee" in this context refers to the original lessee.[4] Regardless of the import of the gold clause, there can be no doubt that the original lessee was bound by it. Thus, because the terms of the 1982 Assignment and Assumption provide unambiguously that S&R assumed the obligations of the original lessee, which include the gold clause, any parol evidence on the question of whether S&R intended to assume the obligations of the assignor or the original lessee is inadmissible.[5]

[4] Specifically, S&R observes that the assignment and assumption at issue in *Trostel* "refers only to the **lessee's** performance under the lease and makes no reference to the assignor's obligations." Def.'s Opp'n Br. at 10-11 (emphasis supplied); *see also* Def.'s Reply Br. at 8. And, as S&R states, "[t]he *Trostel* Court reasoned that the defendant agreed to be bound by the terms of the original lease . . . [and that] the lease included a gold clause." Def.'s Opp'n Br. at 11. It therefore follows that the term "lessee" refers to the original lessee.

[5] If the Court finds that such factual evidence is admissible and material to the parties' motions for summary judgment, however, we respectfully request the opportunity to develop and present factual evidence and to submit relevant supplemental briefing on this issue prior to a decision on the merits.

December 5, 2006

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify on December 5, 2006, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this through the Court's system.

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