

IN THE COURT OF APPEALS OF IOWA

No. 8-1058 / 08-1158
Filed February 4, 2009

B.P. JOHNSON CONSTRUCTION, INC.
Plaintiff-Appellee,

vs.

**N'SITE SOLUTIONS, INC. and
OMEGA CLAIMS SOLUTIONS, INC.,**
Defendants-Appellants.

N'SITE SOLUTIONS, INC.,
Third Party Plaintiff-Appellant,

vs.

OMEGA CLAIMS SOLUTIONS, INC.,
Third-Party Defendant.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II,
Judge.

N'Site Solutions, Inc. appeals from the district court's order granting
summary judgment in favor of B.P. Johnson Construction, Inc. **REVERSED AND
REMANDED.**

David W. Nelmark and Stephen R. Eckley of Belin, Lamson, McCormick,
Zumbach & Flynn, P.C., Des Moines, for appellants.

John C. Conger of Conger Law Firm, P.L.C., and David L. Wetsch of
Wetsch & Abbott, P.L.C., Des Moines, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

MAHAN, J.

N'Site Solutions, Inc. (N'Site) appeals from the district court's order granting summary judgment in favor of B.P. Johnson Construction, Inc. (B.P. Johnson). We reverse and remand for further proceedings.

I. Background Facts and Proceedings.

On January 16, 2003, N'Site entered into a lease agreement with B.P. Johnson for office space located in Urbandale, with a term from February 1, 2003, to May 3, 2009. N'Site used the office space to house its claims management outsourcing business. On November 12, 2006, N'Site sold its business to Omega Claims Solutions, Inc. (Omega). As part of the transaction, Omega agreed to assume the lease with B.P. Johnson, including all liabilities and rights of the lease. N'Site and Omega did not inform B.P. Johnson of Omega's assumption of the lease from N'Site.

In December 2006 B.P. Johnson sent notice to N'Site and Omega that they were in default of the lease because B.P. Johnson had not consented to the assignment of the lease. N'Site and Omega had relied on a provision of the lease allowing an assignment without consent of B.P. Johnson to "an entity acquiring all or substantially all of the stock or assets of tenant." B.P. Johnson then prepared a document titled "Assumption of Lease," which was signed by B.P. Johnson and Omega on January 29, 2007. B.P. Johnson's prior claim of default against N'Site was apparently dropped at that time.

On October 1, 2007, Omega defaulted on its rental payments. On November 29, 2007, B.P. Johnson filed suit against Omega and N'Site, seeking damages for nonpayment of rent. On April 18, 2008, B.P. Johnson moved for

summary judgment against both defendants. The defendants resisted the motion. On June 18, 2008, the district court granted the motion and entered judgment in favor of B.P. Johnson, finding the defendants jointly and severally liable for the sum of \$151,063.03 plus interest, future rental payments owed under the terms of the lease in the event B.P. Johnson was unable to relet the property, attorney fees, and court costs. N'Site now appeals.¹

II. Scope and Standard of Review.

We review the district court's summary judgment ruling for the correction of errors at law. Iowa R. App. P. 6.4; *Lobberecht v. Chendrasekhar*, 744 N.W.2d 104, 106 (Iowa 2008). We may uphold the ruling on any ground raised before the district court, even if that ground was not a basis for the court's decision. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3); *Lobberecht*, 744 N.W.2d at 106. The moving party has the burden to establish it is entitled to judgment as a matter of law, and the evidence must be viewed in the light most favorable to the nonmoving party. *Hunter v. City of Des Moines Mun. Housing Auth.*, 742 N.W.2d 578, 584 (Iowa 2007).

III. Merits.

N'Site argues the district court erred in granting summary judgment in favor of B.P. Johnson because N'Site assigned the lease to Omega, B.P. Johnson consented to the assignment, and N'Site was relieved of any liability

¹ Defendant Omega did not appeal the district court's decision.

under the lease. B.P. Johnson contends the district court was correct in granting summary judgment in its favor because there is no evidence that Omega entered into a substituted lease with B.P. Johnson or that N'Site was released or otherwise relieved of its obligations under the lease.

N'Site and Omega relied on paragraph nine of N'Site's lease with B.P. Johnson to assign the lease without consent of B.P. Johnson:

9. ASSIGNMENT AND SUBLETTING. Any assignment of the Lease or subletting of the Premises, without the Landlord's written permission shall be a breach of this Lease. Such permission may not be unreasonably withheld by Landlord. Any request for such permission must include a \$500.00 non-refundable processing fee payable to Landlord. Notwithstanding the provisions of this paragraph 9, Tenant shall have the right to sublet the Premises or any portion thereof or to assign this Lease or any interest therein without the consent of Landlord to (a) an affiliate, subsidiary or parent of Tenant, (b) an entity acquiring all or substantially all of the stock or assets of Tenant, and (c) an entity into which Tenant is merged, consolidated or formed upon a reorganization (d) a customer, vendor, or joint venture of Tenant desiring to co-locate all or part of its business activities on the premises.

B.P. Johnson thereafter prepared a document titled "Assumption of Lease," which stated in part:

WHEREAS, Seller [N'Site] has assigned its rights under the Lease to Buyer [Omega]; and

WHEREAS, Buyer [Omega] desires to formally assume the Lease from Seller [N'Site]; and

WHEREAS, the Landlord [B.P. Johnson] has agreed to permit Buyer [Omega] to formally assume the Lease from Seller [N'Site].

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. Assumption of Lease: Buyer [Omega] hereby accepts the assignment of the Lease and assumes all of the Seller's [N'Site] rights and obligations under the Lease Agreement.

2. Landlord Consent: Landlord [B.P. Johnson] consents to the assignment and assumption of the rights and obligations of Seller [N'Site] under the Lease as set forth herein.

B.P. Johnson delivered the "Assumption of Lease" to N'Site on January 17, 2007. N'Site's counsel reviewed it and forwarded it to Omega without modification.² The "Assumption of Lease" was signed by B.P. Johnson and Omega on January 29, 2007, and Omega began making the rental payments for the property. Omega failed to make the rental payments in October 2007, and B.P. Johnson sought recovery from both Omega and N'Site.

The district court concluded N'Site was not relieved from its obligation under the lease. However, there is nothing in its lease with B.P. Johnson that says N'Site would be responsible upon assignment, and there is nothing in the "Assumption of Lease" that says N'Site continues to have rights and obligations under the lease. We conclude summary judgment is improper where the extent of N'Site's obligations under the lease remains a genuine issue of fact. We therefore reverse the grant of summary judgment against N'Site and remand for further proceedings.

REVERSED AND REMANDED.

² In the affidavit of N'Site's corporate legal counsel, Laura Bertin, she stated, "At all times during my communications with counsel for B.P. Johnson, it was my understanding and expectation that the Assumption of Lease relieved N'Site of further obligations under the lease."