

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

EXPEDITORS INTERNATIONAL OF  
WASHINGTON, INC., a Washington  
corporation,

Respondent,

v.

TROIANI SEATTLE, LLC, a Washington  
limited liability company; PAUL S.  
MACKAY, SR. and GAIL MACKAY, and  
the marital community thereof; CHAD  
MACKAY and JENNIFER MACKAY, and  
the marital community thereof; RICHARD  
TROIANI and JANE DOE TROIANI, and  
the marital community thereof; and  
KENNETH SHARP and JANE DOE  
SHARP, and the marital community  
thereof,

Appellants.

) No. 66207-4-1

) DIVISION ONE

) UNPUBLISHED OPINION

) FILED: February 13, 2012

Appelwick, J. — Troiani’s lease with Expeditors allowed Troiani to assign the lease to affiliates under certain conditions. It did not mention assignment to third parties. Troiani attempted to assign the lease to a third party and, at the assignee’s request, asked Expeditors for consent. After Expeditors refused, Troiani ceased payment. The trial court granted Expeditors motion for partial summary judgment, ruling that Troiani breached the lease. We determine that Troiani retained the right to assign the lease to third parties. Therefore, triable issues of fact remain. We reverse.

### FACTS

In July 2003, Troiani Seattle LLC entered into a lease with Expeditors International of Washington Inc. for restaurant space in Expeditors’ building located on Third Avenue in downtown Seattle. Troiani’s performance was personally guaranteed by Paul Mackay, Chad Mackay, Richard Troiani, and Kenneth Sharp.

The lease constituted “the entire agreement between the parties and [could] not be modified except in writing signed by both parties.” The assignment provision did not mention third parties:

#### 12. ASSIGNMENT AND SUBLETTING.

12.1 Landlord’s Consent. Tenant shall have the right to assign or sublease the Premises under this Lease to an affiliate (“Affiliate”) provided that (i) Landlord determines that the Affiliate is an entity which is controlled by, controls, or is under common control with Tenant, or an entity into which Tenant is merged or with which Tenant is consolidated, (ii) Landlord determines that the net worth of the Affiliate is no less than the greater of a) net worth of Tenant upon execution of this Lease or b) net worth of Tenant immediately prior to said transfer, (iii) Tenant notifies Landlord of any such assignment or sublease at least thirty (30) days prior to its effective date, and (iv) Tenant promptly supplies Landlord the following in connection with any such request:

- a. True and complete copy of the proposed sublease,

assignment and all side letters or other agreements pertaining thereto;

b. Current financial statements, including income and expense statements and balance sheets, or other adequate financial information, for the then current year-to-date and two most recent years for the prospective sublessee or assignee;

c. Current credit report from a recognized credit agency identifying the credit history of the prospective sublessee or assignee; and,

d. Any other documents or information requested by Landlord regarding such assignment or sublease or such Affiliate.

Landlord's decision with regard to acceptance or rejection of a sublease or assignment shall be given in writing within fifteen (15) days after delivery of the items specified in this Paragraph 12.1. In addition, in the event the proposed assignee or subtenant is not an individual, personal guaranties shall be required of the principals as a condition to Landlord's consent.

.....

**12.3 Continued Responsibility.** Regardless of any approved assignment or sublease of this Lease, Tenant shall not be released from liability nor shall any guaranties be affected or releases as a result of such assignment or sublease. However, in the event of a default by any such assignee or sublessee, Landlord shall give Tenant notice of the default, shall accept cure of the default by Tenant within ten (10) days after such notice and shall permit Tenant to reenter and repossess the Premises for the then unelapsed portion of the Lease Term subject to all of the provisions of this Lease. Subsequent amendments or modifications of this Lease without notice to or consent of the Landlord will not relieve the Tenant of any liability under this Lease.

(Boldface omitted.)

It was important to Expeditors that the space be used for a first-class restaurant, and Troiani developed a restaurant with that in mind. In November 2003, Troiani opened an upscale Italian restaurant. But, the restaurant struggled significantly. Over the next six years, Troiani made substantial efforts to generate business. It started a

happy hour, prepared dishes tableside, offered wine tastings, offered coupons with other restaurants, modified the menu, and played with price points. Further, it borrowed over \$1.4 million from Paul Mackay to keep the restaurant afloat.

In April 2009, Troiani explained its financial difficulties to Expeditors, and requested a lease modification. Negotiations were unfruitful. By July 2009, Troiani realized it had to list the restaurant for sale. It entered a business opportunity purchase and sale agreement with Cerro Blanco LLC. Cerro Blanco agreed to pay \$600,000 to Troiani, and assume Troiani's obligations under the lease. Under the lease terms, Troiani would also remain obligated on the lease. The agreement conditioned the sale on Expeditors' consent. Troiani provided Expeditors with appropriate documents and requested consent for the sale and assignment. Expeditors responded over a month later. It refused to consent and asserted that Troiani had no right to assign the lease to a third party. Expeditors also claimed Cerro Blanco's proposed restaurant was not appropriate for the building. As a result of Expeditors' refusal, Cerro Blanco backed out of the deal.

Troiani tried to negotiate with Expeditors to rebrand the restaurant and modify the lease terms. Negotiations fell through, and Troiani could no longer afford to continue operating. The restaurant closed its doors on September 26, 2009. On October 13, Expeditors sent a letter notifying Troiani it had breached the lease by ceasing operations. On November 2, Expeditors sent another letter notifying Troiani that it was in default. Sometime in November, the lease was terminated and Troiani vacated the premises.

Expeditors sued Troiani for breaching the lease by ceasing restaurant

operations and defaulting, and sued the individual guarantors and their marital communities for breaching their personal guaranties. Troiani and the personal guarantors counterclaimed, asserting that Expeditors tortiously interfered with a business expectancy by not consenting to the assignment, and that Expeditors breached the lease by refusing to consent.

The trial court granted Expeditors' motion for partial summary judgment. It dismissed Troiani's counterclaim for breach of contract. Later, the parties stipulated that the tortious interference claim be dismissed. The trial court left the determination of damages for trial.

Troiani unsuccessfully filed a motion to reconsider and a motion to vacate. Along with its motion to vacate, Troiani attached a draft lease it claimed was admissible as newly discovered evidence. It argued that the draft lease unequivocally showed that Troiani negotiated for the right to assign to third parties, because it showed that the phrase, "nor shall this Lease or any interest thereunder be assignable," had been crossed out from the assignment provision.

A commissioner of this court granted discretionary review.

#### DISCUSSION

We review a summary judgment order de novo. Hadley v. Maxwell, 144 Wn.2d 306, 310-11, 27 P.3d 600 (2001). Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The evidence is construed in the light most favorable to the nonmoving party. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). We review the order based solely on the record before the trial court at the time of the

motion for summary judgment. RAP 9.12; Wash. Fed'n of State Emps., Council 28 v. Office of Fin. Mgmt., 121 Wn.2d 152, 163, 849 P.2d 1201 (1993).

In general, restrictions on the assignment of contractual rights may be freely made to protect the contracting party's right to select the person with whom he deals. Portland Elec. & Plumbing Co. v. City of Vancouver, 29 Wn. App. 292, 295, 627 P.2d 1350 (1981). But, leases are conveyances whose covenants are interpreted under contract law. Lane v. Wahl, 101 Wn. App. 878, 883, 6 P.3d 621 (2000). Thus, they are a special form of contract and general contract rules do not necessarily apply. Id.

With leases, reasonable restraints upon the alienation of property are enforceable, but will be construed to operate within their exact limits. Alby v. Banc One Fin., 119 Wn. App. 513, 523, 82 P.3d 675 (2003), affirmed, 156 Wn.2d 367, 128 P.3d 81 (2006). Covenants against assignment constitute a restraint against alienation and are not favored. Shoemaker v. Shaug, 5 Wn. App. 700, 704, 490 P.2d 439 (1971). In fact, anti-assignment provisions are to be "strictly—even literally—construed." Burleson v. Blankenship, 193 Wash. 547, 549, 76 P.2d 64 (1938). Thus, when a lease forbids subletting, but does not specifically mention assignment, the tenant retains the right to assign the lease. Willenbrock v. Latulippe, 125 Wash. 168, 172, 215 P. 330 (1923). Likewise, when a lease forbids assignment, but does not specifically mention subletting, the tenant retains the right to sublet. Burns v. Dufresne, 67 Wash. 158, 161, 121 P. 46 (1912). The general rule emanating from these decisions is that any ambiguity in an anti-assignment provision will be construed in favor of assignability.

Further, in a fully integrated contract, parol evidence can only be used to interpret what was written. Brogan & Anensen, LLC v. Lamphiear, 165 Wn.2d 773,

775, 202 P.3d 960 (2009). It cannot be used to add to or modify the agreement. Id.

Expeditors' essentially asks for the court to add the word "only" to the assignment provision. We cannot do so. In an integrated agreement, an anti-assignment provision is enforced as written. The assignment provision here restricted the manner in which Troiani could assign to a specific class of potential assignees. That restriction had no effect on the remaining universe of potential assignees.

Even under this interpretation of the lease, Expeditors argues that it did not have any duty to consent to assignment. Every contract contains an implied duty of good faith and fair dealing. Badgett v. Security State Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). But, the duty requires only that the parties perform the obligations imposed by their agreement in good faith. Id. It does not inject substantive terms into the parties' contract or create a free-floating duty of good faith. Id. at 569-70. Thus, the duty to cooperate exists only in relation to the performance of a specific contract term. Id. at 570.

In Badgett, the bank did not have a duty to consider a loan modification proposal. Id. at 569, 572. That right was at best tangential to their agreement. Here, the lease explicitly contemplated assignment to affiliates. Due to the lack of an explicit restriction on the right to assign to third parties, Troiani's affirmative right to assign to third parties was implicit in the assignment provision. Troiani's right to assign was contemplated by the lease, and Expeditors had to act in good faith.

Whether Expeditors breached its duty to act in good faith and whether that breach was a material breach that excused Troiani's performance are questions of fact for the trial court. Therefore, triable issues of fact remain and summary judgment was



improper.

Expeditors also asserts other bases for relief. It argues that Troiani failed to name Expeditors in default as contemplated by the lease. Further, it argues that the individual guarantors are liable regardless of whether Troiani breached the lease. Those arguments were not explicitly made below, and the trial court did not base summary judgment on those theories. We will not consider them now.

Troiani requests reasonable attorney fees for this appeal pursuant to RAP 18.1 and section 32 of the lease. Because Troiani has not yet prevailed on the merits, we defer to the trial court to award attorney fees at a later time. Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 153, 94 P.3d 930 (2004).

We reverse.

WE CONCUR:

Leach, a.c.j.

Appelwick, J.  
Schiveller, J.