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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1090-14T1

CORTLANDT STREET ASSOCIATES,
a New Jersey General Partnership,

Plaintiff-Appellant,

v.

ELEMENTIS SPECIALTIES, INC.,

Defendant-Respondent.

Argued November 17, 2015 – Decided December 23, 2015

Before Judges Fisher, Espinosa and Rothstadt.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-3214-11.

Mark G. Yates argued the cause for appellant (Law Offices of William J. Courtney, L.L.C., attorney; Mr. Yates, of counsel and on the brief).

William P. Quinn, Jr., (Morgan, Lewis & Brockius, L.L.P.) of the Pennsylvania bar, admitted pro hac vice, argued the cause for respondent (Morgan, Lewis & Bockius, L.L.P., attorneys; Mr. Quinn and Christopher Iannicelli, on the brief).

PER CURIAM

This appeal requires our consideration of a lease provision that granted the tenant "the ongoing right to terminate its

obligations" provided "the tenant is selling or moving [its] business" (emphasis added). In granting partial summary judgment in the tenant's favor, Judge Dennis F. Carey, III, concluded that this provision permitted the tenant to terminate the lease years after the sale of its business because the right to terminate was described by the parties as "ongoing." We agree and affirm.

I

The judge correctly observed that the facts and circumstances were undisputed and the parties' cross-motions for partial summary judgment turned on the proper meaning of the termination provision. In applying the same Brill standard[1] that governed the trial court, W.J.A. v. D.A., 210 N.J. 229, 237-38 (2012), we also confine ourselves to the ordinary meaning of the words contained in the parties' contract since no extrinsic evidence was offered to illuminate that language, Solondz v. Kornmehl, 317 N.J. Super. 16, 22 (App. Div. 1998).

A

The record reveals that in 1984, Jeffrey Simon Associates, which was later succeeded by plaintiff Cortlandt Street

[1] Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Associates (landlord), leased commercial property in Belleville to Hardman Incorporated, which was later succeeded by defendant Elementis Specialties, Inc. (tenant); the lease was scheduled to terminate on December 16, 1992. In 1987, the parties executed a modification agreement which extended the lease term to December 16, 1998. And, in January 2004, the parties executed a similar agreement which extended the lease to December 16, 2013.

The January 2004 agreement included a provision that granted tenant the right to terminate the lease prior to 2013:

> Provided the Tenant is selling or moving the business, Tenant shall have the ongoing right to terminate its obligations under the Amendment upon twelve (12) months' written notice to Landlord. In no event shall Tenant use this option as a tool for renegotiating rent. The exercise of this Termination Option shall not be conditioned on the payment by Tenant to Landlord of any termination or other like fees.
>
> [Emphasis added.]

B

By contract dated March 23, 2005, the tenant sold its Belleville operation, including all or substantially all of the associated assets, to Royal Adhesives & Sealants, LLC. This contract required that the tenant assign to Royal all of the tenant's "right, title, and interest in" the lease of the Belleville property. Paragraph 1.5(a) of the contract also provided that the tenant "shall use its commercially reasonable

efforts to obtain . . . the consent of such third party to the assignment or transfer." Because the lease did not require the landlord's consent to an assignment, paragraph 1.5(a) had no direct application. The tenant nevertheless sought the landlord's consent to the assignment. The landlord refused.

The tenant's contract with Royal also anticipated that consent from third parties might not be obtained by the time their transaction closed. According to paragraph 1.5(b), in such an instance the tenant "shall[] make available to [Royal] all contract rights or other benefits of [the purchased asset] . . . in some other appropriate manner." Because the landlord refused to consent to an assignment, the tenant and Royal entered into an agreement, on June 10, 2005, that provided Royal with the benefit of "all of the terms and conditions set forth in" the lease.

C

On February 13, 2009, Royal notified the tenant that it was moving its Belleville operation to South Bend, Indiana, and that it was ending — effective February 28, 2010 — its obligations pursuant to their agreement. A few days later, the tenant notified the landlord that it was terminating the lease effective February 28, 2010.

Royal vacated the premises in February 2010. Landlord took possession but failed to find a new tenant and sold the property in 2013.

II

To capture the parties' arguments in a nutshell, the landlord contends that the tenant's option to terminate existed only during the time frame within which "the Tenant is selling or moving the business" (emphasis added), a period that the landlord claims expired once the business was sold to Royal in 2005. The landlord argues that, without the right to terminate in that circumstance, the tenant remained obligated to pay rent until the expiration of the lease term, i.e., December 16, 2013. The tenant contends that its right to terminate upon the sale of the business was "ongoing" and could be exercised at any point during the remaining life of the lease. By giving twelve-months' notice in February 2009, the tenant claims it was no longer obligated to pay rent after February 28, 2010.

The practical effect of their disagreement is not insignificant. In seeking to vindicate its interpretation of the lease, the landlord argued that it was entitled, for the time between February 2010 and December 2013, to $1,616,787 in rent and $447,493.23 in real estate taxes. After Judge Carey granted tenant's motion and denied landlord's cross-motion for

partial summary judgment on this issue, the parties entered into a stipulation of settlement of all other claims, preserving the landlord's right to appeal the partial summary judgment and, if successful, to further pursue the claim in the trial court.

With the disposition of all issues as to all parties, landlord filed this appeal, arguing the judge erred in finding the tenant retained the right to terminate the lease after it sold the business and in determining that the tenant had assigned its lease with the landlord to Royal.

III

Courts do not make or rewrite contracts, Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 116 N.J. 517, 529 (1989), and when clear and unambiguous, contracts will be enforced as written, Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960). When, however, a contract's wording allows for multiple plausible interpretations, B.D. v. Div. of Med. Assistance & Health Servs., 397 N.J. Super. 384, 391 (App. Div. 2007), a court must engage in the difficult process of finding meaning in "the symbols of expression" without "giv[ing] effect to some supposed unexpressed intention of the parties," Krosnowski v. Krosnowski, 22 N.J. 376, 386 (1956). Contract interpretation poses a question of law. Selective Ins. Co. of Am. v. Hudson E. Pain

Mgmt. Osteopathic Med. & Physical Therapy, 210 N.J. 597, 605 (2012).

In many cases, it is helpful to consider extrinsic evidence, such as evidence reflecting the manner in which the parties performed, to obtain a better understanding of what the parties intended. Casriel v. King, 2 N.J. 45, 50-51 (1949) (observing that "[t]he admission of extrinsic facts is not for the purpose of changing the writing, but to secure light by which to measure its actual significance"). At the same time, "[m]ere speculation as to the probabilities of an intention is not enough." Krosnowski, supra, 22 N.J. at 386-87. Consequently, we rely upon the words the parties chose to express their intent and interpret the contract "in accord with justice and common sense." Id. at 387 (quoting Clark v. State St. Trust Co., 169 N.E. 897, 903 (Mass. 1930)).

Because the landlord acknowledges — and there is no doubt — that the transaction between the tenant and Royal vested in the tenant the right to terminate the lease, the problem this appeal poses concerns whether that right expired once the tenant closed with Royal or whether the right remained available to the tenant for the balance of the lease term. In advocating their positions, the parties emphasize different words in the provision. The landlord emphasizes the word "is" in the first

line, claiming it links the right to terminate to a finite time period:

> Provided the Tenant is selling or moving the business, Tenant shall have the ongoing right to terminate . . .
>
> [Emphasis added.]

In that way, the landlord would have us de-emphasize the word "ongoing," asserting the right was "ongoing" in the sense that it existed only for so long as a sale or move was or would be occurring, but that it would end when the triggering transaction was completed.

On the other hand, while the tenant agrees the right to terminate was dependent on a sale or move of the business, it insists that — once triggered — it possessed the right to terminate for the balance of the lease term. In short, the tenant argues we should be guided chiefly by the word "ongoing" and its close relationship to the "right to terminate," i.e.,

> Provided the Tenant is selling or moving the business, Tenant shall have the ongoing right to terminate . . .
>
> [Emphasis added.]

Neither position is unreasonable. But the fact that both parties have presented plausible interpretations does not make our task insurmountable. Begging the question no further, we

turn to two particular principles that compel our adoption of the tenant's interpretation.

First, to accept the landlord's position, we would be required to largely ignore the word "ongoing" that the parties used to define the duration of the right to terminate. This we cannot do. The word "ongoing" was given an exalted place in the provision, adjacent to the very thing the provision was meant to describe — the right to terminate. See Germann v. Matriss, 55 N.J. 193, 220 (1970) (recognizing that the meaning of words "may be indicated and controlled by those [words] with which they are associated"); see also Miah v. Ahmed, 179 N.J. 511, 521 (2004); Isetts v. Borough of Roseland, 364 N.J. Super. 247, 257 (App. Div. 2003). In short, the word is far from surplusage. "Ongoing," in this or any other context, should be understood as describing something in progress that will continue unbroken. See The Oxford English Dictionary (2d ed. 1989), Vol. X at 815 (something "continuing, continuous; that is in progress; current; proceeding, or developing"); The Random House Dictionary of the English Language (2d ed. 1987) 1354 (something "continuing without termination or interruption"); Webster's II New Riverside University Dictionary (1984) 821 (something "progressing or developing"; "persisting"). With such a potentially broad scope, "ongoing" is not a word a lawyer would

carelessly toss about in defining the life expectancy of a contract right of such magnitude. Because of its obvious importance, we conclude that the word "ongoing" must not be ignored or de-emphasized when seeking an understanding of the provision. We are guided by the principle that a construction that voids a clause or renders a particular word meaningless — and certainly a word of obvious significance — is to be avoided. See Hardy v. Abdul-Matin, 198 N.J. 95, 103-04 (2009); Homesite Ins. Co. v. Hindman, 413 N.J. Super. 41, 47 (App. Div. 2010); Cumberland Cnty. Improvement Auth. v. GSP Recycling Co., 358 N.J. Super. 484, 497 (App. Div.), certif. denied, 177 N.J. 222 (2003).

Second, when read literally, Five Per Cent Disc. Cases, 243 U.S. 97, 106, 37 S. Ct. 346, 347, 61 L. Ed. 617, 621 (1917) (Holmes, J.) (recognizing "a strong presumption that the literal meaning is the true one"), but with an overriding regard for its context, Jacobs v. Great Pac. Century Corp., 104 N.J. 580, 586 (1986); Schenck v. HJI Assocs., 295 N.J. Super. 445, 452-53 (App. Div. 1996), certif. denied, 149 N.J. 35 (1997), as well as the contract's design, Krosnowski, supra, 22 N.J. at 387; Allied Bldg. Prods. Corp. v. J. Strober & Sons, LLC, 437 N.J. Super. 249, 261-62 (App. Div.), certif. denied, 220 N.J. 207 (2014), we conclude the tenant's interpretation is more commensurate "with

justice and common sense," Krosnowski, supra, 22 N.J. at 387. The overwhelming sense of the provision — when considered as a whole, Borough of Princeton v. Bd. of Chosen Freeholders of Cnty. of Mercer, 333 N.J. Super. 310, 325 (App. Div. 2000), aff'd, 169 N.J. 135 (2001) — is that a sale or move would trigger the tenant's right to terminate the lease, and that right would be "ongoing," and would not expire, once the business moved or a sale of the business closed.[2] Indeed, the

[2] Indeed, that the right to terminate would survive a move or a closing of a sale of the business seems logical in the circumstances. As the tenant persuasively questioned, if the right to terminate was to be exercised concurrently with a sale or move of the business:

> Does that mean, in the case of a sale, at the precise moment legal title to the Belleville business passes from seller to buyer? It not, then one is left to wonder when the period during which the right may be exercised begins and ends because the [l]ease provides no guidance whatsoever — other than, of course, its stipulation that the right is "ongoing." Did [tenant's] right to terminate arise when it first conceived of the idea of selling its business? When it first disclosed its intention to a third party? When [tenant] and Royal reached a binding agreement on the terms of a sale? And at what point in time did the "concurrent" right [landlord] hypothesizes expire? Upon signing an agreement of sale? Upon closing on the sale? Within some unspecified period of time thereafter? This fundamental inability to determine the temporal scope of a "concurrent" right to

(continued)

word perfectly fits the interpretation urged by the tenant and its relationship to the phrase upon which the landlord places the most emphasis. That is, because "ongoing" refers to an existing circumstance that will continue to persist into the future, the earlier phrase — "[p]rovided the Tenant is selling or moving the business" — defines when the right to an early termination is triggered, not its duration. On the other hand, that which follows the comma after "business" actually does define the duration of the right to early termination, i.e., "ongoing" or until the lease ended on its own terms.

Ultimately, we have no crystal ball for gazing into the minds of the business persons who reached this agreement. The record provides nothing other than the contract itself to enlighten us about the parties' actual intentions. We have only the words employed by the parties to describe their intentions. In considering the provision's meaning, we have acknowledged that the landlord's proffered interpretation is by no means preposterous. In the final analysis, however, were we to reword the contract to provide an unambiguous description of what the

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(continued)

> terminate renders [landlord's] interpretation illogical and implausible.

landlord contends is the proper interpretation,[3] we would have to do far more violence to the provision than necessary were we to reword the provision to unambiguously describe the tenant's version.[4] For these reasons, we conclude that the interpretation urged by the tenant — and employed by Judge Carey — is that which is more compatible with "justice and common sense." Krosnowski, supra, 22 N.J. at 387.

IV

We also find insufficient merit in the landlord's argument that the tenant and Royal entered into a sublease rather than an assignment — and that this circumstance precluded the termination of the lease by way of the 2009 notice — to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only the following brief comments.

As observed earlier, the tenant was required to and did in fact assign to Royal its rights under the lease. In that way, Royal obtained the rights possessed by the tenant and when Royal

[3] E.g., "Upon selling or moving the business, the tenant shall have the ongoing right to terminate, provided however, that the right to terminate will end upon completion of the sale or the move."

[4] E.g., "Upon selling or moving the business, the tenant shall then and thereafter retain the ongoing right to terminate."

decided in February 2009 that it would relocate to Indiana, the tenant's "ongoing" right to terminate the lease was triggered.

Landlord makes much of the fact that it never consented to this assignment. But that is irrelevant because the lease gave the tenant the unfettered right to assign its rights without the landlord's consent. The landlord also contends that the tenant and Royal entered into a sublease and, for that reason, Royal's rights extended only as far as the sublease; thus, landlord argues Royal's move to Indiana had no impact on the contract between the tenant and landlord.

Although the agreement between the tenant and Royal was titled "Agreement of Sublease," its label has no bearing on the parties' rights. In understanding a transaction's true nature, we look to its substance, not its form. See Applestein v. United Bd. & Carton Corp., 60 N.J. Super. 333, 348-49 (Ch. Div.), aff'd, 33 N.J. 72 (1960); see also Liberty Mut. Ins. Co. v. Garden State Surgical Ctr., L.L.C., 413 N.J. Super. 513, 523-24 (App. Div. 2010). The essence of the agreement between the tenant and Royal called for the tenant's conveyance of all of its interest in the leasehold, as paragraph 1.1 of that agreement unequivocally states:

> At the Closing, [Tenant] shall grant, sell, convey, transfer, assign and deliver or cause to be sold, conveyed, transferred, assigned and delivered, to [Royal], and

> [Royal] shall purchase, accept, acquire and receive, all of [Tenant's] right, title and interest in, to and under the Purchased Assets[5] as they exist at Closing, free and clear of any Liens, except Permitted Liens, all upon the terms and subject to the conditions set forth herein, and in reliance on the respective representations, warranties, covenants and agreements of the parties hereto.

The fact that the agreement required that the tenant make commercially reasonable efforts to obtain the landlord's consent — even though the tenant's contract with the landlord did not require the landlord's consent — is of no moment; it is merely evidence of cautious lawyering. The transaction was an assignment, not a sublease. See Berkeley Dev. Co. v. Great Atl. & Pac. Tea Co., 214 N.J. Super. 227, 236 (Law Div. 1986).

Affirmed.

[5] The purchased assets indisputably included the lease.