STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1988

KTJ Limited Partnership One Hundred Thirty,
Appellant,

vs.

Little Italy, LLC,
Respondent,

Little Italy Investments,
Respondent,

Leaning Tower Investments, LLC,
Respondent,

Steven Stadheim,
Respondent,

Darrin Stadheim,
Respondent,

Linda Stadheim,
Respondent,

Daniel Madrid,
Respondent.

Filed April 19, 2011
Affirmed
Klaphake, Judge

Steele County District Court
File No. 74-CV-08-2808

Ryan R. Dreyer, Morrison, Fenske & Sund, P.A., Minnetonka, Minnesota (for appellant)

Jeffrey S. Haff, Dady & Gardner, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Larkin, Presiding Judge; Klaphake, Judge; and Minge, Judge.

U N P U B L I S H E D O P I N I O N

KLAPHAKE, Judge

In this dispute about contract rights under a lease and an assumption of the lease, appellant KTJ Limited Partnership One Hundred Thirty challenges the district court's grant of summary judgment to respondents, Little Italy, LLC, Little Italy Investments, Leaning Tower Investments, LLC, Steven Stadheim, Darrin Stadheim, Linda Stadheim, and Daniel Madrid. Appellant contends that the district court erred in its construction of the contract terms.

Because the district court did not err in its construction of this unambiguous contract based on the plain language of the lease and the assumption agreement, we affirm.

D E C I S I O N

The district court shall enter summary judgment when, based on the record before the court, there are no genuine issues of material fact and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. We review the district court's decision to determine whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Brookfield Trade Ctr. v. County of Ramsey*, 584 N.W.2d 390, 392-93 (Minn. 1998). The parties agreed that there were no

genuine issues of material fact and that the contract was unambiguous, but appellant disagrees with the district court's conclusions as to the meaning of the contract.

The purpose of contract construction is to give effect to the parties' intention as expressed by the contract language. *Art Goebel, Inc. v. North Sub. Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). The construction and effect of an unambiguous contract is a question of law. *Brookfield Trade*, 584 N.W.2d at 394. Contract language is given its plain and ordinary meaning. *Id.* Contract terms are read in the context of the entire contract and in such a way as to give meaning to all provisions. *Id.*

Appellant contends that the district court erred in its construction of the lease terms defining when default occurs and when an incurable default occurs, and its construction of the assumption agreement. The lease contained the following language regarding default for failure to pay rent, which was due on the first day of each month:

> The occurrence of any one or more of the following events set forth in this Section shall constitute a default and breach of the lease by Tenant . . . [t]he failure by Tenant to make any payment of Rent or Other Costs, as and when due, where such failure shall continue for a period of five (5) days after written notice from Landlord to Tenant.

The district court concluded that respondents had not defaulted on the January 1, 2008 rental payment because the rental payment was made within five days of appellant's written notice of late rent; thus the January rental payment was not a default under the language of the lease.

Based on the plain language of this section of the contract, the district court's conclusion is correct: this section states that no default occurs until the tenant fails to pay

rent within five days after receiving a written notice of late payment. Appellant argues that the inclusion of the words "and breach" somehow changes the meaning of this phrase. We disagree. This is the only part of the lease that defines the term "default," and we must accept the plain and ordinary meaning of this language. If the lease agreement defined "default" only as "[t]he failure by Tenant to make any payment of Rent or Other Costs, as and when due," appellant would be correct; but this definition is modified by the following phrase, "where such failure shall continue for a period of five (5) days after written notice from Landlord to Tenant."

Second, the district court also concluded that the following language, which sets forth an alternative means of default, did not apply: "Notwithstanding the above [definition of default], an incurable default shall be deemed to occur upon delivery by Landlord of such notice if at least two (2) other notices have been sent to Tenant under this subsection within the previous twelve (12) months." The district court determined that although three such notices were given in a 12-month period, the first two were sent to respondent Little Italy, while the third notice was sent to respondent Leaning Tower, and "[t]herefore this was not the third notice given to a tenant, and was not a default as defined in the Lease."

As defined in the contract upon formation, "Tenant" referred to Little Italy. Little Italy, with appellant's permission, assigned its interests under the lease to Leaning Tower. "An assignment operates to place the assignee in the shoes of the assignor, and provides the assignee with the same legal rights as the assignor had before assignment." *Illinois Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 803 (Minn. 2004). Unless

it involves personal rights, such as recovery for personal injuries or performance of a personal contract, contractual rights and duties are assignable. *Mountain Peaks Fin. Servs., Inc. v. Roth-Steffen*, 778 N.W.2d 380, 385 (Minn. App. 2010), *review denied* (Minn. Apr. 28, 2010).

But generally an assignee does not assume liability for the assignor's unperformed acts without a specific agreement. *Borer v. Carlson*, 450 N.W.2d 592, 594 (Minn. App. 1990) ("The general rule is that the mere assignment of rights under an executory contract does not cast upon the assignee any of the personal liabilities imposed by the contract on the assignor"), *review denied* (Minn. Mar. 8, 1990); *see also Midtaune v. Burns*, 434 N.W.2d 474, 476 (Minn. App. 1989) ("[a]n assignment of an executory contract does not create a personal liability on the part of the assignee to perform the provisions of the contract to be performed by the assignor unless there is a provision to that effect"), *review denied* (Minn. Mar. 29, 1989).

Here, the assignment included a clause that stated:

> Assignor and Guarantors hereby agrees [sic] promptly to indemnify and hold harmless Assignee from any cost, expense or liability resulting from any default by Assignor under the Lease prior to the Effective Date. Conversely, Assignee hereby agrees promptly to indemnify and hold harmless Assignor and Guarantors from any cost, expense or liability resulting from any default by Assignee under the Lease on or after their Effective Date.

This language, which was approved by appellant, suggests that Leaning Tower was not assuming responsibility for the actions of the other respondents that predated the effective date of the assignment, August 1, 2007. Thus, the two earlier notices of default

that appellant sent to Little Italy do not apply as to Leaning Tower; therefore, the notice of default sent January 2, 2008, to Leaning Tower was not the third notice of default to a tenant within a 12-month period and no incurable default occurred.

Finally, the district court concluded that, based on its determination that there was no default and no incurable default under the lease terms, respondents were released from their personal guarantees and obligations under the lease as set forth in the assignment agreement. Under the assignment agreement, if Leaning Tower did not default under the lease for six months from the effective date of August 1, 2007, the remaining respondents[1] would be released from their responsibilities under the lease and their personal guaranties. Appellant contends that the six-month period ended on February 1. The district court interpreted the term to mean the six months of August through January. Under the terms of the lease agreement, default in February would not occur until a late notice was sent and payment was not received within five days; this is more than six months beyond the effective date of the assumption agreement. Therefore, respondents would no longer have any responsibility under the lease agreement or by virtue of their personal guaranties.

Appellant further argues that respondent Little Italy breached the implied covenant of good faith and fair dealing implicit in all contracts when it leased restaurant equipment to Leaning Tower for a six-month period of time ending February 1, 2008, without providing for renewal of the lease.

[1] This does not include respondent Daniel Madrid; this also does not include Linda Stadheim, who did not sign a personal guaranty.

Every contract has an implied covenant of good faith and fair dealing that requires that one party to a contract not unjustifiably hinder the other party's performance of the contract. *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995). In this instance, appellant asserts that Little Italy breached this duty in its equipment lease contract with Leaning Tower, arguing that the short lease term indicated that the parties did not intend the business to continue. The implied covenant of good faith and fair dealing does not generally extend beyond the scope of the underlying contract. *Id.* at 503. As appellant was not a party to the equipment lease contract, this separate contract does not demonstrate that Little Italy breached its implied covenant and fair dealing in its contract with appellant.

Affirmed.