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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1999-09T3

NTH250E, L.L.C.,

Plaintiff-Appellant,

v.

GLOBAL TOYS ACQUISITION LLC,
TOYS "R" US HOLDINGS, INC.,
TOYS "R" US, INC., and TOYS
"R" US DELAWARE, INC.,

Defendants-Respondents.

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Argued October 5, 2010 - Decided March 3, 2011

Before Judges Carchman, Graves and Messano.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-9470-06.

Bruce S. Koppel argued the cause for appellant.

Mark S. Olinsky argued the cause for respondents (Sills Cummis & Gross, P.C., attorneys; Mr. Olinsky and Jonathan S. Jemison, on the brief).

PER CURIAM

Plaintiff, NTH250E L.L.C., appeals from the grant of summary judgment dismissing its complaint against defendants Toys "R" Us Holdings, Inc. (Toys/Holdings), Toys "R" Us Inc. (Toys), and Toys "R" Us Delaware Inc. (Toys/Delaware)

(collectively, defendants). We have considered the arguments raised in light of the record and applicable legal standards. We affirm.

I.

We need not set forth at length much of the factual history which is largely undisputed and marginally relevant to the issues raised. It suffices to say that in 1972, plaintiff's predecessor, N.T. Hegeman & Co., owner of certain property on Route 4 in Paramus, entered into a ground lease with T.R.U. Realty Corp. (TRU) that provided for the tenant to construct a building "for operation of a toy store."[1] The term of the ground lease was forty-five years, with an option to renew for an additional ten years. TRU's obligations were guaranteed by Interstate Stores, Inc., predecessor of Toys.

TRU assigned the lease to an independent investment partnership, Paramus Properties, which in turn subleased the property to Children's Bargain Town USA, Inc. (CBT). The sublease between Paramus Properties and CBT was for an initial twenty-five year term, with three additional renewal terms of ten years each. CBT merged into Toys.

Paramus Properties defaulted on its construction mortgage and the ground lease, compelling TRU and Toys to assume its

[1] To simplify, we shall refer to Hegeman as plaintiff.

obligations. As a result, TRU became tenant on the ground lease, and, in turn, Toys became TRU's tenant under the sublease.

In subsequent negotiations, TRU agreed to assign plaintiff its interests in both the ground lease and sublease, effectively eliminating the ground lease and making Toys plaintiff's tenant under the terms of the sublease. Although plaintiff would assume the balance due under the construction mortgage, plaintiff's managing member, M. John Germain, certified there were potential advantages to plaintiff. In particular, Germain noted that the sublease contained provisions for the payment of "additional rent" if Toys assigned its interests under the agreement during any renewal term.

These provisions of the sublease are the crux of the dispute in this case. Article 19, entitled "Assignments, Subletting and Encumbrances," provides in pertinent part:

> Tenant shall have the right, without the Landlord's consent, to assign this Lease . . . at any time . . . provided, however, that if any assignment . . . shall occur during any Renewal Term or shall be effective during . . . any Renewal Term, then Tenant shall pay to Landlord, as additional rent, an amount determined as follows:
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> (a) With respect to any assignment . . . of this Lease, Tenant shall pay to the Landlord a portion of the net proceeds of any fee, payment or other consideration, howsoever

> denominated, but specifically excluding any fee, payment or other consideration howsoever denominated attributable to a bona fide sale of Tenant's inventory, trade fixtures, alterations or improvements which shall not be in excess of book value (hereinafter called "Lease Consideration") paid, directly or indirectly, to Tenant, or to any parent, subsidiary or affiliate of Tenant after deduction of all reasonable expenses, including but not limited to brokerage fees and real estate transfer taxes, if any, specifically as consideration for such assignment . . . .
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> . . . .
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> Any dissolution, merger, consolidation or other reorganization of or any pledge of the corporate stock or any sale or transfer of a controlling percentage of the corporate stock of Tenant shall constitute an assignment of this lease for the purposes of this Section. The term "controlling percentage" as used herein shall mean the ownership of stock possessing, and the right to exercise, at least fifty-one per cent (51%) of the total combined voting power of all classes of stock, issued and outstanding.[2]

Section 19.3 of the same article provided:

> Notwithstanding the foregoing provisions, Tenant may at any time during the term of this Lease, without Landlord's consent, assign this Lease . . . to any parent, affiliate or wholly-owned subsidiary of Tenant . . . or to any corporation which succeeds to all or substantially all of the

[2] Although the sublease refers to this provision only as Article 19, followed thereafter by sections 19.2 and 19.3, the parties refer to this section as 19.1, which we shall adopt for the balance of this opinion.

> assets and business of Tenant; provided however, that the net worth of such corporation, following such assignment, equals or exceeds the net worth of Tenant at the date hereof or immediately prior to such assignment, whichever is greater. . . .

In October 1983, plaintiff, TRU and Toys executed an assignment and assumption agreement, as well as a collateral assignment of the sublease. Plaintiff provided TRU and Toys with a general release of all claims, except as to any claims arising under the sublease and the guaranty. In the years following 1983, Toys assigned its interest in the sublease to an affiliated entity, and, thereafter, subsequent mergers, followed by assignments of the sublease, occurred. Germain certified that "[t]o the best of [his] knowledge, none of the assignments and mergers . . . were for anything other than nominal consideration . . . and came about as a result of decisions made by Toys . . . for internal reasons." By the end of 2002, Toys/Delaware was plaintiff's tenant having become the successor-in-interest to Toys' rights and obligations under the sublease. Plaintiff did not object to these assignments, nor did it assert that any of them triggered the additional rent provisions of the sublease.

On October 10, 1996, defendants exercised the option to extend the sublease for the first renewal term, with an

additional ten years "commenc[ing] on February 1, 1998, and . . . expir[ing] on January 31, 2008."

The events leading to this litigation began in 2005 when Toys, until then a publicly-traded company, was privately acquired by a group of investors in a leveraged buyout for $6.6 billion. These investors formed Global Toys Acquisition, LLC (Global), which, after a series of mergers, became the parent company of Toys, its wholly-owned subsidiary. To effectuate the transaction, Toys merged a number of its subsidiaries into Toys/Delaware, permitting the real estate and assets held by those subsidiaries to secure credit then used to buy out the public shareholders of Toys. Toys/Delaware ultimately held a majority of the debt incurred to fund the leveraged buyout.

In his certification supporting defendants' summary judgment motion, Michael L. Tumolo, real estate counsel and assistant secretary for defendants Toys and Toys/Delaware, described the transaction as follows:

> While many assets shifted amongst Toys-related entities, the Sublease remained an asset of [Toys/Delaware] throughout the privatization transaction thereafter. Moreover, while certain subsidiaries of Toys . . . and [Toys/Delaware] merged into [Toys/Delaware], and certain of the assets of those subsidiaries were used to finance the transaction, neither the Sublease nor the leasehold interest it governed was posted as collateral to finance the privatization transaction.

On November 16, 2005, plaintiff's counsel wrote to defendants as follows:

> It has recently come to our attention that a change in the "controlling percentage . . . [of] the ownership of the stock possessing . . . at least fifty-one percent (51%) of the total combined voting power" has occurred with respect to the tenant's interest in the leasehold. Accordingly, under Article 19 of the governing lease instrument, . . . additional rent is payable to the landlord . . . .

On November 30, Tumolo responded:

> [N]o assignment has occurred under the terms of the Sublease and, accordingly, no additional rent is payable to the Landlord under the Sublease.
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> . . . .
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> Please be advised that [Toys/Delaware] has not assigned its interest as, and remains the Tenant under the Sublease. At all times both prior to and after the Global Merger, Toys . . . owned and controlled 100% of the stock and voting power, and controlled the management of, [Toys/Delaware]. [Toys/Delaware] has not undergone any dissolution, merger, consolidation or other re-organization, nor has there been any pledge of its stock or any transfer of a controlling interest in [Toys/Delaware]. Accordingly, no assignment has occurred . . . under the terms of the Sublease.

Plaintiff continued to accept rent from Toys/Delaware.[3] On November 9, 2006, Toys/Delaware notified plaintiff that it was exercising its option for the second ten-year renewal term under the sublease, thus, extending the term to January 31, 2018.

On December 22, 2006, plaintiff filed a three-count complaint against Global and defendants alleging that the leveraged buyout of Toys resulted in an assignment of the sublease entitling plaintiff to "additional rent," and specifically seeking relief for breach of contract and unjust enrichment. The third count of plaintiff's complaint sought a declaration that "an event of an assignment, as defined by Article 19.1 of the Lease, ha[d] occurred by virtue of the 2005 Acquisition; [and] . . . an accounting whereby the amount of additional rent due to Plaintiff is fixed and awarded . . . ."[4] Defendants answered and asserted a counterclaim seeking declaratory relief, specifically a declaration that they had validly exercised their option for a second renewal term.[5]

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[3] Defendants have not argued that plaintiff waived its right to additional rent under the sublease as a result.

[4] In its amended complaint, plaintiff alleged that "[s]ubsequent transactions interposed Holdings . . . [as] the parent of Toys." In its second amended complaint, plaintiff no longer named Global as a defendant. The theories of recovery remained the same in all three complaints.

(continued)

Plaintiff and defendants filed motions for partial summary judgment and summary judgment respectively. The judge heard oral argument on the motions on November 13, 2009. In a written decision dated November 17, the judge correctly characterized each side's contentions and focused on sections 19.1 and 19.3 of the sublease. Strictly construing these provisions, the judge concluded that:

> [I]n order for the conversion transaction [i.e., the private acquisition of Toys] to be an assignment under section 19.1, it would have to have resulted in an actual assignment of the sublease interest from the tenant to a third party in exchange for specific consideration. Here, however, in the record there is no credible evidence to prove that the interest of [Toys/Delaware] in the sublease was assigned.
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> Not only did the tenant remain the same but there was no consideration identified for an alleged assignment. . . . Though $6.6 billion was paid in consideration of the privatization, none was specifically paid in consideration of the assignment of the sublease. The money was paid as consideration for the public shareholders' interest in Toys . . . . Plaintiff has not been able to identify a profit attributable to [Toys/Delaware] as a result of the assignment of the sublease. . . .

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(continued)

[5] Any issue regarding defendants' exercise of the option for the second renewal term is moot since plaintiff acknowledged in its brief that it "withdrew its objection to the renewal, reasoning that Toys could remain a tenant if [plaintiff] prevailed and Toys paid the awarded additional rent."

> Nor is there any credible evidence to prove that there was a reorganization of [Toys/Delaware]. However, even if the reorganization of [Toys/Delaware] was an assignment, the Court finds the transaction to fall under the exclusion of Article 19.3. . . . Transactions that fall under Article 19.3 are not subject to the additional rent obligation. Because the privatization transaction was completely internal between Toys . . . and its wholly[-]owned [Toys/Delaware], the "safe harbor" provision of Article 19.3 would apply.

The judge entered an order denying plaintiff's motion for partial summary judgment, and a separate order granting defendants' motion. This appeal ensued.[6]

II.

In large part, the parties have reiterated before us the arguments made below. Plaintiff contends that the private acquisition of Toys was an "assignment" as defined in section 19.1 of the sublease, that consideration for the assignment was paid, thus, entitling plaintiff to "additional rent," and that defendants "cannot obtain refuge under" section 19.3. Defendants argue that Toys/Delaware never assigned its interests under the sublease, "was not paid any money 'specifically as consideration' for any such assignment, and thus had no obligation to pay additional rent to . . . its landlord."

[6] In its brief, plaintiff acknowledges that at the time the summary judgment motions were heard, it agreed to dismiss the complaint as to Toys/Holdings.

Defendants further argue that if a "reorganization" occurred, section 19.3 provides a "[s]afe [h]arbor" against plaintiff's claim for additional rent.

When reviewing a grant of summary judgment, we employ the same standards used by the motion judge. Atl. Mut. Ins. Co. v. Hillside Bottling Co., Inc., 387 N.J. Super. 224, 230 (App. Div.), certif. denied, 189 N.J. 104 (2006). We first determine whether the moving party has demonstrated there were no genuine disputes as to material facts. Ibid.

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
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> [Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).]

We then decide "whether the motion judge's application of the law was correct." Atl. Mut. Ins., supra, 387 N.J. Super. at 231. In doing so, we owe no deference to the motion judge's legal conclusions. Ibid. (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

At issue is the interpretation of Article 19 of the sublease. "'[I]nterpretation and construction of a contract is

a matter of law for the court subject to de novo review.'" Kaur v. Assured Lending Corp., 405 N.J. Super. 468, 474 (App. Div. 2009) (quoting Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 190 (App. Div.), certif. denied, 196 N.J. 85 (2008)).

Recently, in McMahon v. City of Newark, 195 N.J. 526, 545-46 (2008), the Court re-established the following guideposts that inform our review:

> [T]his Court repeatedly has hewed to the maxim that [c]ourts cannot make contracts for parties. They can only enforce the contracts which the parties themselves have made. In other words, [w]hen the terms of [a] contract are clear, it is the function of a court to enforce it as written and not to make a better contract for either of the parties [because t]he parties are entitled to make their own contracts. Thus, [a]s a general rule, courts should enforce contracts as the parties intended. In doing so, the judicial task is clear: the court must discern and implement the common intention of the parties [and its] role is to consider what is written in the context of the circumstances at the time of drafting and to apply a rational meaning in keeping with the expressed general purpose.
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> [(alterations in original) (citations and quotations omitted).]

"The court makes the determination whether a contractual term is clear or ambiguous." Schor v. FMS Fin. Corp., 357 N.J. Super. 185, 191 (App. Div. 2002). "If the terms of the contract are susceptible to at least two reasonable alternative

interpretations, an ambiguity exists. In that case, a court may look to extrinsic evidence as an aid to interpretation." Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 238 (2008) (citation omitted).

However, even if the terms of the contract are not ambiguous, "[w]e consider all of the relevant evidence that will assist in determining the intent and meaning of the contract." Conway v. 287 Corp. Ctr. Assocs., 187 N.J. 259, 269 (2006). "Such evidence may 'include consideration of the particular contractual provision, an overview of all the terms, the circumstances leading up to the formation of the contract, custom, usage, and the interpretation placed on the disputed provision by the parties' conduct.'" Ibid. (emphasis added) (quoting Kearny PBA Local # 21 v. Town of Kearny, 81 N.J. 208, 221 (1979)).

Plaintiff contends there was an "assignment" of the sublease as defined by section 19.1 "due to the transactions involving [Toys/Delaware]," and/or because "of the change in the beneficial ownership of the tenant." Pursuant to section 19.1, an assignment occurred if there was "[a]ny dissolution, merger, consolidation or other reorganization of or any pledge of the corporate stock or any sale or transfer of a controlling percentage of the corporate stock of" Toys/Delaware.

A "controlling percentage" means "ownership of stock possessing, and the right to exercise, at least fifty-one per cent (51%) of the total combined voting power of all classes of stock, issued and outstanding." Plaintiff seemingly concedes that the only relevant inquiry is whether the privatization of Toys resulted in some "other reorganization of" Toys/Delaware so as to trigger this provision of the sublease.

Plaintiff relies on a memorandum from Deloitte Tax LLP that sets forth the complex outline of the leveraged buyout of Toys. An exhibit to the memorandum, entitled "Reorganization of [Toys/Delaware]," displays the various subsidiaries of Toys that were to be merged into Toys/Delaware. Plaintiff also relies upon a tax form filed by a Toys subsidiary, Toys R Us-Mass., Inc., naming itself as a "party to a reorganization" with Toys/Delaware.

However, we agree with defendants that Deloitte's use of the term "reorganization" in the context of a highly complex financial transaction designed to achieve favorable tax treatment, or the filing of a necessary tax form to achieve that goal, cannot be dispositive. The lease provisions control.

The sublease was executed in 1972 and both sides acknowledge that discovery shed no light on "the circumstances leading up to the formation of the contract." Conway, supra,

187 N.J. at 269. From "an overview of all the terms" contained in Article 19, ibid., it is clear that the parties intended for the tenant to be able to freely assign its interest in the lease without approval by the landlord. However, if the assignment occurred during the renewal term, the landlord was entitled to "additional rent," the amount of which was determined by the "Lease Consideration," i.e., "a portion of the net proceeds of any . . . consideration . . . paid to [the] Tenant." However, "[n]otwithstanding the foregoing," the tenant was permitted to assign the lease "to any parent, affiliate or wholly-owned subsidiary of" the tenant, "provided . . . the net worth of" the assignee exceeded the net worth of the tenant.

Simply put, the parties intended that the landlord would share in any consideration the tenant received for any assignment made during the renewal term; but if the assignment were made to a closely-related entity, and the landlord was adequately secured because the assignee was at least as financially sound as the tenant, the tenant would not have to pay "additional rent." That reasonable construction of these provisions of the sublease reveals "the common intention of the parties," McMahon, supra, 195 N.J. at 546, and demonstrates that plaintiff was not entitled to additional rent in this case.

The fact that the ownership of Toys now rested ostensibly with the sponsors of the leveraged buyout, as opposed to the public shareholders, does not reflect a "reorganization" in our opinion. Defendants contend, and it is apparently undisputed, that Toys was the owner of 100% of the stock of Toys/Delaware both before and after the transaction. A change in the ownership of the parent corporation does not equate to a "reorganization" of the subsidiary. See, e.g., Cellular Tel. Co. v. 210 E. 86th St. Corp., 839 N.Y.S.2d 476, 479 (N.Y. App. Div. 2007) (noting that acquisition of the tenant's parent corporation by a third party did not constitute an assignment under the lease since the tenant's "stock was not transferred, in the broadest sense, by the sale of [the parent] to [a third party], and none of the stock actually transferred in the sale").

However, we acknowledge that Toys/Delaware may have undergone "reorganization" as a result of the numerous mergers of Toys subsidiaries into Toys/Delaware, enabling Toys/Delaware to have sufficient assets to support the debt used to finance the buyout. But, assuming arguendo that an assignment occurred under the broadest reading of the term "reorganization" as contained in section 19.1, we are convinced that section 19.3 exempts the assignment from any demand for additional rent.

Plaintiff contends that section 19.3 does not provide a "safe harbor" because the Toys/Delaware mergers were only steps in an integrated transaction, with its ultimate purpose to transfer ownership of all Toys assets to the private investors. It invokes the so-called "step-doctrine," arguing that section 19.3 was not intended to shield an assignment when the very purpose of the integrated transaction was to divest the ownership rights of the existing public owners of the tenant and parent corporation in favor of new private ownership. See, e.g., True v. United States, 190 F.3d 1165, 1174 (10th Cir. 1999) ("Simply stated, the step transaction doctrine provides that 'interrelated yet formally distinct steps in an integrated transaction may not be considered independently of the overall transaction.'") (quoting Comm'r v. Clark, 489 U.S. 726, 738, 109 S. Ct. 1455, 1462-63, 103 L. Ed. 2d 753-766 (1989)). The step transaction doctrine is primarily seen as "an answer" to "a recurring problem in the field of tax law." Ibid.

Our function in this case is quite different from trying to assess the tax consequences of the privatization of Toys. We are asked only to "'enforce [the] contract[] as the parties intended.'" McMahon, supra, 195 N.J. at 546 (quoting Pacifico v. Pacifico, 190 N.J. 258, 266 (2007)). The clear intention of the parties, as evidenced by the plain language of

section 19.3, was to permit the free assignment of the sublease, without the payment of additional rent, "to any parent, affiliate or wholly-owned subsidiary of" Toys/Delaware. Clearly, the new Toys/Delaware that emerged from the reorganization was, at the least, an "affiliate" of its former self. Therefore, summary judgment was properly granted to defendants.

Affirmed.