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COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

HIGH DESERT HEALING, LLC, an Arizona limited liability company; HARVEST DISPENSARIES, CULTIVATIONS & PRODUCTION FACILITIES, LLC, an Arizona limited liability company; HARVEST HEALTH & RECREATION, INC., a British Columbia corporation,

Plaintiffs/Appellees,

v.

CEC 141202761, LLC, an Arizona limited liability company,

Defendant/Appellant.

Case No. 1 CA-CV 23-0195

Maricopa County Superior Court
Case No. CV 2021-016161
Hon. Danielle J. Viola

OPENING BRIEF

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Statement of the Issues

Effect of attempted assignment. The commercial lease stated precise and mandatory terms, conditions, and procedures that High Desert had to satisfy to obtain an assignment from CEC. High Desert attempted an assignment without obtaining CEC's prior written consent and without paying the mandatory and simultaneous $500 fee.

Was that attempt at an assignment null and void? Did that attempt give CEC an the absolute and unfettered right to end the Lease entirely, with no need whatsoever for CEC to give High Desert any notice of any sort or any cure period?

Withholding consent to an assignment. Did the trial court err by finding that CEC had unreasonably withheld its consent for the lease assignment when High Desert undeniably failed to comply with the precise, mandatory conditions and steps needed to obtain an assignment from CEC and CEC had an absolute and unfettered right to refuse to allowing the assignment?

Standard of Review

On review after a bench trial, this Court accepts the superior court's factual findings unless they are clearly erroneous. *Shooter v. Farmer*, 235 Ariz. 199, 200 ¶ 4 (2014). "We review de novo, however, any questions of law, including the ultimate legal conclusions drawn from the superior court's factual findings." *Lake v. Hobbs*, 525 P.3d 664, 668 ¶ 4 (App. 2023).

Statement of the Case

A. Nature of the Case

This case is about whether a lease with certain strict terms concerning an attempted assignment of the lease can result in drastic consequences that a court must enforce.

B. Basis of Appellate Court's Jurisdiction

This Court has jurisdiction under Ariz. Const. art. 6, § 9 and A.R.S. § 12-2101(A)(1).

C. Statement of Facts.

1. The commercial lease, the tenant, and the lessee.

The present dispute arose from the termination of a commercial lease. The Lease was for a dispensary in Chandler, Arizona. (IR-044 at 1).

The Landlord was CEC 141202761, LLC ("CEC"), an Arizona limited-liability company. (IR-044 at 1-2).

The Tenant was High Desert Healing, LLC ("High Desert"). (IR-044 at 1). High Desert is a wholly-owned subsidiary of Harvest Dispensaries, Cultivations & Production Facilities, LLC ("Harvest"). (IR-044 at 2).

The Lease was for a dispensary in Chandler, Arizona. (IR-044 at 1). CEC leased the building to High Desert starting in March 2018. (IR-044 at 1).

(In general, for purposes of the briefing in this matter, the term "High

Desert" will often collectively refer to Plaintiffs/Appellees High Desert Healing, LLC, Harvest Dispensaries, Cultivations & Production Facilities, LLC, and Harvest Health & Recreation, Inc.).

2. The dispute over improvements to the property.

Harvest began improvements at the property. (IR-044 at 1). At various points, CEC expressed objections to Harvest about the nature and extent of the construction and improvements. (IR-044 at 1-2). In part, CEC claimed High Desert had completed improvements without CEC's approval. (IR-044 at 2).

The pre-execution negotiations and litigation, as well as disagreements on the tenant's various improvements led to a difficult landlord-tenant relationship. (IR-044 at 2). That led to the subject dispute underlying the appeal. (IR-044 at 2).

3. High Desert's improper and invalid request for an assignment.

On August 6, 2021, by e-mail, CEC received a letter from High Desert notifying CEC of an impending merger with Trulieve Cannabis Corp. ("Trulieve") and asking CEC's written approval for an assignment of the Lease. (IR-044 at 2).

On September 29, 2021, CEC sent a letter to High Desert refusing consent to the requested assignment. (IR-044 at 2).

The lease agreement specified that a lessee (here, High Desert) cannot assign the lease in whole or in part of any part of the leasehold premises or property without having notified the lessor in writing of the terms of the assignment and

without having obtained prior written approval of the lessor (CEC). (IR-044 at 3).

It is true that the lease agreement stated that the lessor generally could not withhold approval of an assignment of the lease unreasonably. (IR-044 at 3). Grounds for legitimately withholding consent included: (1) the lessee being in default or (2) the proposed assignee's net worth being not at least equal to or greater that the lessee's as of the lease date. (IR-044 at 3).

But under Section 10(e) of the Lease, there was a clear, absolute requirement that each assignment request had to be in writing "together with a fee of $500 as consideration for the Lessor's [CEC's] considering and processing [that] request." (IR-044 at 4, Lease at § 10.1(e)).

The trial court found that High Desert "did not pay the $500 required by Section 10(e) of the Lease immediately upon making its request for consent of the assignment" on August 6, 2021. (IR-044 at 7 ¶¶ 33, 36).

On September 1, 2021, High Desert tendered $500 in an apparent effort to comply with what Section 10(e) of the Lease required—but did not do that simultaneously with making its August 6, 2021 request for an assignment of the lease, as Section 10(e) absolutely and clearly required. (IR-044 at 7 ¶ 38) (IR-044 at 4, Lease at § 10.1(e)).

It was CEC's position that High Desert had a duty to pay the $500 fee due under Section 10(e) of the Lease contract before the consent to any assignment of

the Lease could even be considered. (IR-044 at 8 ¶ 43).

Although under Section 10(e) of the Lease there was a clear, absolute requirement that each assignment request had to be made in writing "together with a fee of $500 as consideration for the Lessor's [CEC's] considering and processing said request" (IR-044 at 4, Lease at § 10.1(e)), the trial court indicated that, in its opinion, CEC wrongfully refused to approve the assignment. (IR-044 at 9 ¶ 54).

4. The trial court's conclusion about the $500 payment that was not simultaneously tendered with the written request for an assignment.

The trial court acknowledged that payment of the $500 fee was "a condition precedent to CEC's consideration of the request for assignment." (IR-044 at 13).

Despite that, the trial court stated that it "concludes the failure to pay upon request is inconsequential because [High Desert] explained that it would pay the $500 fee with the September 2021 rent and it did so." (IR-044 at 13).

"On balance," the trial court found and held that "the breach (if any) was not material and enforcing a forfeiture under the circumstances would not be just." (IR-044 at 13).

But the Lease contract specifically stated that:

> Any attempt at an Assignment without Lessor's prior written consent shall be null and void, confer no rights upon a third person, and shall, at the option of Lessor, be a Breach pursuant to Section 11.1(b) without the necessity of any notice or cure period, in which case Lessor may terminate this Lease and exercise any and all remedies described in this Lease,

(IR-044 at 3, Lease § 10).

Thus, once High Desert made an "attempt" as an assignment without CEC's prior written consent—which it undeniably did—that attempt was null and void. (IR-044 at 3, Lease § 10). On top of that, at that point, CEC had the absolute and unfettered right to end the Lease entirely, with no need whatsoever for CEC to give High Desert any notice of any sort or any cure period. (IR-044 at 3, Lease § 10).

D. Procedural History

The relevant facts and procedure are straightforward and relatively brief. On October 15, 2021, High Desert Healing, LLC, Harvest Dispensaries Cultivations & Production Facilities, LLC, and Harvest Health & Recreation, Inc. (collectively "High Desert"), filed a Complaint against CEC141202761 ("CEC"). (IR-001).

High Desert alleged claims for relief for: (1) declaratory judgment and specific performance; (2) breach of contract; (3) injunctive relief; and (4) tortious interference with business expectancy. (IR-001).

In an Order filed October 26, 2021, the trial court consolidated a forcible-entry-and-detainer complaint with the present one. (IR-017).

CEC's position was that this was a simple breach-of-contract and forcible-entry-and detainer action over a commercial lease. Tenant High Desert and its guarantor breached the lease by failing to obtain written consent from CEC before transferring more than 50% of their respective voting control—as the lease

required. CEC terminated the lease under its lease power and because of the breaches High Desert committed. (IR-028 at 2).

On November 16, 2021, the trial court filed a Stipulated Preliminary Injunction that barred CEC from acting as if the lease on the premises located at 13422 East Chandler Boulevard, Chandler, Arizona 85255 had been terminated. (IR-024).

On February 2, 2022, CEC filed its Answer. (IR-029).

A bench trial was held on May 2, 2022 (IR-038), May 3, 2022 (IR-041), May 4, 2022 (IR-042), and May 5, 2022. (IR-043).

In an "Under Advisement Ruling" filed July 5, 2022, the trial court ruled in favor of High Desert and against CEC, holding, among other things, that CEC had unreasonably withheld its consent for the assignment. (IR-044).

After some skirmishing over forms and formalities, the trial court filed a signed Rule 54(c) Judgment was filed on February 7, 2023. (IR-078). On March 8, 2023, the trial court filed a timely Notice of Appeal. (IR-081).

Legal Argument

1. The trial court erred as a matter of law in failing to enforce the mandatory terms of the Lease contract in CEC's favor.

On August 6, 2021, High Desert tried to assign the Lease contract without simultaneously paying "a fee of $500 as consideration for the Lessor's [CEC's] considering and processing [that] request." (IR-044 at 4, Lease at § 10.1(e)).

The trial court itself agreed that, on August 6, 2021, High Desert "did not pay the $500 required by Section 10(e) of the Lease immediately upon making its request for consent of the assignment." (IR-044 at 7 ¶¶ 33, 36). The trial court acknowledged that payment of the $500 fee was "a condition precedent to CEC's consideration of the request for assignment." (IR-044 at 13).

Despite that, the trial court stated that it "concludes the failure to pay upon request is inconsequential because [High Desert] explained that it would pay the $500 fee with the September 2021 rent and it did so." (IR-044 at 13).

On September 1, 2021, High Desert tendered $500 in an apparent late effort to comply with what Section 10(e) of the Lease required—but did not do that simultaneously with making its request for assignment of the lease, as § 10(e) absolutely and clearly required. (IR-044 at 7 ¶ 38) (IR-044 at 4, Lease at § 10.1(e)). Thus the late payment had no contractual exoneration effect whatsoever.

Since High Desert failed to tender the mandatory $500 fee simultaneously with the written request for an assignment, under the terms of the Lease contract, CEC had the absolute right to deny the assignment and declare the Lease contract null and void. (IR-044 at 3-4, Lease at §§ 10 & 10.1(e)).

Notably, no delay in the approval of disapproval of the assignment, or even the acceptance of rent or any performance of the Lease contract's provisions, would "constitute a waiver or estoppel of [CEC's] right to exercise its remedies for

a Breach by [High Desert] of [the] Lease." (IR-044 at 3, Lease at § 10.1(b)).

The Lease contract also specifically stated that:

> Any attempt at an Assignment without Lessor's prior written consent shall be null and void, confer no rights upon a third person, and shall, at the option of Lessor, be a Breach pursuant to Section 11.1(b) without the necessity of any notice or cure period, in which case Lessor may terminate this Lease and exercise any and all remedies described in this Lease,

(IR-044 at 3, Lease § 10).

Under the clear language of the Lease contract, CEC had an absolute and unfettered right to regard High Desert's attempt at an assignment without CEC's prior written consent and without simultaneously paying the $500 fee as null and void. That gave CEC the option to terminate the Lease without giving High Desert any notice of any kind and without giving High Desert any period of time or opportunity to cure the breach of the Lease contract.

The Lease contract heavily favored CEC. When High Desert attempted to assign the Lease contract without precisely complying with the terms of the Lease contract, CEC had the absolute and unfettered right to reject the attempted assignment, to regard the attempted assignment as a breach of the Lease contract, and to terminate the Lease contract. (*See* IR-044 at 3-4, Lease at §§ 10, 10.1(b) & 10.1(e)).

The trial court therefore erred when, despite the Lease contract's clear, mandatory language:

(1) The trial court found that "breach (if any) [of the Lease contract] was not material and enforcing a forfeiture [of the Lease contract] under the circumstances would not be just." (IR-044 at 13).

(2) The trial court denied CEC's request to receive immediate possession of the leased property. (IR-044 at 14).

(3) The trial court concluded "that CEC unreasonably withheld consent to the assignment" and "the alleged breaches were not material." (IR-044 at 14).

(4) The trial court granted High Desert's request for a judicial determination that High Desert did not breach the Lease contract and that CEC had an obligation to approve in writing an assignment of the Lease as High Desert had requested. (IR-044 at 13).

The trial court's notion that it could not enforce the Lease contract's terms because that might result in a forfeiture was categorically wrong. "As a sound general proposition, equity follows the law and a court will enforce a valid contract according to its terms, even though enforcement may be harsh or result in a forfeiture." *Freedman v. Continental Serv. Corp.*, 127 Ariz. 540, 545 (App. 1980).

The Lease contract's terms may seem harsh, but CEC and High Desert agreed to those terms as they were written. It is a "principle of contract law . . . that when parties bind themselves by a lawful contract the terms of which are clear and

unambiguous, a court must give effect to the contract as written." *Grubb & Ellis Management Services, Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, 86 ¶ 12 (App. 2006). The trial court had no right to nullify terms that it did not prefer to enforce because they seemed harsh to it.

Indeed, in 2022, in a return to long-established and fundamental common-law principles, the Arizona Supreme Court emphasized that our state's "courts will not refuse to enforce a contract merely because one party made a bad deal, even when the terms are harsh." *Zambrano v. M & RC II LLC,* 254 Ariz. 53, 58 ¶ 10 (2022). In fact, a "party cannot complain of the harshness of the terms nor expect a court to relieve [that party] of the consequences." *Galbraith v. Johnston*, 92 Ariz. 77, 80 (1966).

The commercial lease stated precise and mandatory conditions and steps that High Desert had to satisfy to obtain an assignment from CEC. It undeniably failed to comply with them. There are only "rare occasions" when Arizona courts will find any public policy paramount to the freedom of contract and prohibit enforcement of terms that the parties have agreed to in their contract. *Zambrano*, 254 Ariz. at 56, 58, 68 ¶¶ 1, 11, 48 (2022). There is nothing remotely "rare" about this "occasion" that wouldto allow evasion of the Lease contract's plain terms.

High Desert and CEC voluntarily entered into the Lease contract. In Arizona, parties are generally free to contract as they please, and when entered into

voluntarily, courts will enforce the contract's provisions. *Bridges v. Nationstar Mortgage L.L.C.*, 253 Ariz. 532, 534 ¶ 9 (2022) (citations and internal quotation marks omitted). Indeed, Arizona contract law "seeks to preserve freedom of contract." *Flagstaff Affordable Housing Ltd. v. Design All., Inc.*, 223 Ariz. 320, 323 ¶ 14 (2010).

Arizona law generally presumes that "private parties are best able to determine if particular contractual terms serve their interests. Society also broadly benefits from the prospect that bargains struck between competent parties will be enforced." *1800 Ocotillo, LLC v. WLB Grp., Inc*., 219 Ariz. 200, 202 ¶ 8 (2008). It has long been the "law in Arizona is that a valid contract must be given full force and effect even if its enforcement is harsh. It is not within the power of this court to revise, modify, alter, extend or remake a contract to include terms not agreed upon by the parties." *G&S Investments v. Belman*, 145 Ariz. 258, 268 (1984) (citing *Isaak v. Massachusetts Indem. Life Ins. Co.*, 127 Ariz. 581, 584 (1981)).

2. The trial court had no right to rewrite the terms of the Lease contract to create terms that it regards as better or more equitable.

"It is not within the province or power of the court to alter, revise, modify, extend, rewrite or remake an agreement. Its duty is confined to the construction or interpretation of the one which the parties have made for themselves." *Goodman v. Newzona Inv. Co.*, 101 Ariz. 470, 472 (1966).

"When 'the provisions of the contract are plain and unambiguous upon their

face, they must be applied as written, and the court will not pervert or do violence to the language used, or expand it beyond its plain and ordinary meaning or add something to the contract which the parties have not put there.'" *IB Prop. Holdings, LLC v. Rancho Del Mar Apts. Ltd. P'ship*, 228 Ariz. 61, 66-67 ¶ 16 (App. 2011) (quoting *Employers Mutual Casualty Co. v. DGG & CAR, Inc.*, 218 Ariz. 262, 267 ¶ 24 (2008)).

"A court may not add something to the contract that is not there." *Paulden Industrial LLC v. Big Chino Materials LLC,* 249 Ariz. 442, 446 ¶ 23 (App. 2020). "Courts, in construing contracts, cannot modify them." *Beaugureau v. Beaugureau*, 11 Ariz. App. 234, 237 (1970). And so, courts "will not draw a new contract for the parties." *Graham County Electric Co-op., Inc. v. Town of Safford,* 95 Ariz. 174, 175 (1963).

The trial court, in other words, had no right to impose any reasonableness conditions into the Lease contract when they do not exist within it. When the trial court did that, it erred as a matter of law.

In addition, the trial court's decision to refuse to enforce the contract as written implicates the Arizona Constitution, which commands that: "No . . . law impairing the obligation of a contract, shall ever be enacted." Ariz. Const. art. 2, § 25. "The obligation of a contract is defined as the law or duty which binds the parties to perform their agreements." *Tower Plaza Investments Ltd. v. Dewitt,* 109

Ariz. 248, 252 (1973).

Indeed, the "contract clauses of the federal and Arizona Constitutions are designed to assure that a law will not deprive a party of the benefit of its contract." *McLead v. Pima County*, 174 Ariz. 348, 359 (App. 1992). Article 2, § 25 of the Arizona Constitution—the "contract clause"—"limits the state's ability to impair existing contract obligations." *Dobson Bay Club II DD, LLC v. La Sonrisa de Siena, LLC*, 242 Ariz. 108, 116 ¶ 41 (2017).

Conclusion

"Freedom of contract and freedom in the use and disposition of one's own are no less sacred than freedom of speech." *Merrill v. Gordon*, 15 Ariz. 521, 531 (1914). "A man may do as he will with his own, and if he chooses to give or contract it away, so long as it does not interfere with the rights of others, the contract will stand." *Warren v. Mosher*, 31 Ariz. 33, 38 (1926).

CEC asks the Court to vacate the Judgment entered against it and to remand for the trial court to enforce the actual terms of the Lease contract in favor of CEC as those terms were written and agreed to. Defendant/Appellant CEC also asks the Court to award to it the reasonable costs it has incurred in prosecuting this appeal, in accordance with A.R.S. §§ 12-331, 12-332, 12-341, and 12-342, and under Ariz. R. Civ. App. Proc. 21.

DATED this 5th day of June, 2023.

AHWATUKEE LEGAL OFFICE, P.C.

/s/ David L. Abney, Esq.
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