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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1885**

TBF Financial, LLC,  
Respondent,

vs.

DRF Services, Inc., et al., defendants and third party plaintiffs,  
Appellants,

vs.

Kumbaya, LLC, third party defendant,  
Respondent.

**Filed May 7, 2012  
Affirmed  
Connolly, Judge**

Ramsey County District Court  
File No. 62-CV-11-1187

Richard L. Muske, Woodbury, Minnesota (for respondent)

Robert V. Espeset, Espe Law, PLLC, White Bear Lake, Minnesota; and

Karen R. Cole, St. Paul, Minnesota (for appellants)

William L. H. Lubov, Lubov & Associates, LLC, Golden Valley, Minnesota (for  
respondent Kumbaya, LLC)

Considered and decided by Stauber, Presiding Judge; Connolly, Judge; and Randall, Judge.\*

## **UNPUBLISHED OPINION**

**CONNOLLY**, Judge

Appellants, the former owners of a business for which they leased a copy machine, challenge the summary judgments granted to respondents, the successor in interest of the lessor and the purchaser of appellants' business. Because we conclude that appellants are liable to respondent lessor under the finance lease for the copy machine, we affirm that summary judgment decision; because we conclude that the sale agreement between appellants and respondent purchaser did not impose the duty on respondent to make the lease payments, we also affirm that summary judgment decision.<sup>1</sup>

### **FACTS**

In March 2008, appellants DRF Services Inc. (DRF) and its guarantor, Douglas R. Field, leased a copier from CIT Technology Services (CIT) for their business, PostNet. The lease, a finance lease, required 48 monthly payments of \$358.04, a total of \$17,185.92; and DRF made the first seven payments.

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

<sup>1</sup> Because we affirm the grant of summary judgments, appellants' arguments that the district court erred in denying their motions to compel discovery and to amend the complaint are moot.

In November 2008, respondent Kumbaya LLC (Kumbaya) purchased PostNet and its assets from appellants. The sale agreement, between DRF as seller and Kumbaya as buyer, provided in relevant part that:

1.1 Assets Purchased. Seller agrees to sell to Buyer and Buyer agrees to purchase from Seller . . . the following assets . . . :

1.1.1 All equipment . . . used or located at the Business including, but not limited to, any items listed on attached Exhibit A.<sup>2</sup>

....

1.1.3 . . . all equipment leases, and other contracts, including, but not limited to those listed on Exhibit B. Prior to closing, Seller shall provide to Buyer true, correct and complete copies of all the contracts listed on Exhibit B.<sup>3</sup>

1.2 Liabilities Assumed. Buyer shall . . . assume and perform all of Seller's obligations under the leases and other contracts listed on Exhibit B. . . .

....

9.4 Title to Assets. . . . [Seller represents that it] holds good and marketable title to the Assets, free and clear of restrictions on or conditions to transfer or assignment, . . .

....

9.6 Transfer Not Subject to Encumbrances or Third-Party Approval. The execution and delivery of this Agreement by Seller and the consummation of the contemplated transactions, will not result in the creation or imposition of any valid lien, charge, or encumbrance on any of the Assets, and will not require the authorization, consent, or approval of any third party . . . .

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<sup>2</sup> Exhibit A lists "Copiers" and specifies the Konica C-451 leased by CIT/TBF to appellants.

<sup>3</sup> Exhibit B is headed "Equipment Leases and Other Contracts," but does not list the finance lease with CIT.

17.2 Seller's Indemnification.

17.2.1 Seller each agree (sic) to indemnify and hold Buyer, its successors, and assigns harmless from and against: . . . .

(2) Any and all damage or deficiency resulting from any material misrepresentation, breach of warranty or covenant, or nonfulfillment of any agreement on the part of Seller under this Agreement.

It is undisputed that appellants did not provide Kumbaya with a copy of the lease or tell Kumbaya that there were restrictions on the transfer of the copier and of the lease.

Kumbaya, using DRF's account number, made the payments until CIT stopped accepting Kumbaya's payments and refused to allow Kumbaya to assume the lease. The refusal was based on language in the lease. It provided in relevant part:

1. . . .BY SIGNING THIS LEASE YOU [LESSEE] AGREE THAT: (i) YOU HAVE READ AND UNDERSTAND ALL TERMS AND CONDITIONS OF THIS LEASE; (ii) THIS LEASE IS A NET LEASE THAT YOU CANNOT TERMINATE OR CANCEL. YOU HAVE AN UNCONDITIONAL OBLIGATION TO MAKE ALL PAYMENTS DUE UNDER THIS LEASE, AND YOU CANNOT WITHHOLD, SET OFF OR REDUCE SUCH PAYMENTS FOR ANY REASON; . . . (v) THIS LEASE WILL BE GOVERNED BY THE LAWS OF THE STATE OF NEW JERSEY. . . . .

. . . . .  
4. . . . You agree not to transfer, sell, sublease, assign, pledge, or encumber either the Equipment or any rights under this Lease without our [lessor's] prior written consent. We may, without notice to you, sell, assign, or transfer the Lease and/or the Equipment and the new owner will have the same rights and benefits we now have (but not our obligations) and will not be subject to any claims, defense, or setoffs that you may have against us or any supplier.

5. . . . You are responsible for all loss or damage to the Equipment during the lease term. If either occurs, at our option you must either repair the Equipment to our satisfaction or pay the amount in 8 (ii). . . . You will

(1) insure the Equipment against all loss or damage naming us as loss payee (2) obtain liability and third party property damage insurance naming us as an additional insured and (3) deliver satisfactory evidence of such coverage with carriers, policy forms and amounts acceptable to us. . . .

. . . .  
8. . . . You are in default under this Lease if: (a) you fail to pay a Lease payment or any other amount when due; [or] (b) you breach any other obligation under the Lease . . . . If a default occurs, we may . . . require you to immediately pay us, as compensation for loss of our bargain and not as a penalty, a sum equal to (1) the present value of all unpaid Lease payments, past due, due, and to become due . . . , plus the present value of our anticipated residual interest in the Equipment, . . . plus (2) all other amounts due or that become due under this Lease . . . .

9. . . . TO THE EXTENT THIS LEASE IS GOVERNED BY ARTICLE 2A OF THE UNIFORM COMMERCIAL CODE, YOU ACKNOWLEDGE THAT IT QUALIFIES AS A “FINANCE LEASE” THEREUNDER.

(Emphasis added.) It is undisputed that appellants did not seek or obtain CIT’s written consent before transferring the copier and assigning the finance lease to Kumbaya.

In June 2010, respondent TBF Financial LLC (TBF) purchased CIT and its assets, including the copier and the lease.<sup>4</sup> In October 2010, TBF brought this action against appellants, seeking damages of \$15,974.10 for the breach of the lease. Appellants filed an answer and counterclaim against TBF and a third-party complaint against Kumbaya; Kumbaya filed an answer and counterclaim against appellants, alleging among other things breach of contract and indemnification. Appellants moved for summary judgment against Kumbaya and against TBF; Kumbaya and TBF each moved for summary

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<sup>4</sup> CIT and TBF are collectively referred to as CIT/TBF.

judgment against appellants. Following a hearing, the district court denied appellants' motions and granted TBF's and Kumbaya's motions.

Appellants challenge the grants of summary judgment, arguing that they are not liable to TBF under the lease and that Kumbaya is liable to appellants for breach of the sale agreement.

## D E C I S I O N

### I. Standard of Review

This court reviews de novo the two questions relevant to an appeal from summary judgment: whether there are genuine issues of material fact and whether the district court erred in applying the law. *STAR Ctrs. Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). Both summary judgment decisions were based on the interpretation of contracts. "The construction and effect of a contract are questions of law for the court, but where there is ambiguity and construction depends upon extrinsic evidence and a writing, there is a question of fact for the jury." *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979). "Absent ambiguity, the terms of a contract will be given their plain and ordinary meaning and will not be considered ambiguous solely because the parties dispute the proper interpretation of the terms." *Knudsen v. Transp. Leasing/Contract, Inc.*, 672 N.W.2d 221, 223 (Minn. App. 2003), *review denied* (Minn. Feb. 25, 2004). "[W]hen a contract is unambiguous, a court gives effect to the parties' intentions as expressed in the four corners of the instrument, and clear, plain, and unambiguous terms are conclusive of that intent." *Id.*

## II. Summary Judgment Granted to TBF

The district court concluded that the lease is plainly written without ambiguity; that appellants breached the lease by transferring the copier and the lease without the prior written permission of CIT/TBF and by not making 48 monthly payments to CIT/TBF, and that appellants were liable to CIT/TBF “for all unpaid lease payments in the amount of \$15,947.19.”

Appellants argue first that they are not liable under the lease because they had a statutory right to assign their lease obligations to Kumbaya and did so. Specifically, appellants rely on language of the Uniform Commercial Code as adopted by New Jersey, which states that:

[A] provision in a lease agreement which (i) prohibits the voluntary or involuntary transfer . . . of an interest of a party under the lease contract . . . or (ii) makes such a transfer an event of default, gives rise to the rights and remedies provided in subsection (4), but a transfer that is prohibited or is an event of default under the lease agreement is otherwise effective.

N. J. Stat. Ann. § 12A:2A-303(2) (2010).<sup>5</sup> Appellants argue that, under this provision, even though the transfer of their interest under the lease to Kumbaya was an event of default because they did not obtain CIT/TBF’s prior written consent, the transfer was otherwise effective, and the obligation to make the lease payments was transferred and became Kumbaya’s.

But two other provisions of New Jersey law defeat this argument. First, “if a transfer is made which is made an event of default under a lease agreement, the party to

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<sup>5</sup> Minnesota has an equivalent provision codified at Minn. Stat. § 336.2A-303(2) (2010).

the lease contract not making the transfer . . . has the rights and remedies described in 12A:2A-501(2).” N. J. Stat. Ann. § 12A:2A-303(4)(a) (2010). Second, “[i]f the lessor or the lessee is in default under the lease contract, the party seeking enforcement has rights and remedies as provided in this chapter and, except as limited by this Article, as provided in the lease agreement.” N. J. Stat. Ann. § 12A:2A-501(2) (2010). Thus, TBF has the remedies provided for default in the lease, i.e., “a sum equal to (1) the present value of all unpaid Lease payments, past due, due, and to become due . . . , plus the present value of our anticipated residual interest in the Equipment, . . . plus (2) all other amounts due or that become due under this Lease.” Thus, under both New Jersey law and the finance lease, appellants are liable to TBF.

Appellants also argue that they are not liable under New Jersey caselaw, relying on *Bel-Ray Co. v. Chemrite Ltd.*, 181 F.3d 435, 442-43 (3d Cir. 1999) (concluding that, when trade agreement required one party’s consent prior to the other party’s assignment of its interest, and consent was not given prior to assignment, assignee could not refuse to arbitrate on the ground that the assignment was ineffective). But, even if the assignment was valid and enforceable, the assignor’s breach of the requirement to obtain consent could “render it liable in damages to the non-assigning party.” *Id.* at 442. This is what happened here: appellants, having breached the requirement to obtain CIT/TBF’s consent before assigning their interest, are liable in damages to CIT/TBF. Appellants’ reliance on *Bel-Ray* to defeat their liability to CIT/TBF is misplaced.

**A. CIT/TBF's alleged breach of duty of good faith and fair dealing**

Appellants argue that, by withholding consent to their assignment of the finance lease to Kumbaya, CIT/TBF breached the duty of good faith and fair dealing implied in the lease by the UCC and New Jersey law. *See* N. J. Stat. Ann. § 12A:1-203; *Ass'n Grp. Life, Inc. v. Catholic War Veterans*, 293 A.2d 382, 384 (N.J. 1972) (“[N]either party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.”). But appellants had already breached a duty explicit in the finance lease, i.e., not assigning without the lessor’s prior written consent, before they asked CIT/TBF to fulfill the implicit duty of good faith and fair dealing.<sup>6</sup>

Moreover, appellants transferred not only the lease but the copier itself without asking for CIT/TBF’s consent, and they do not argue that a lessor has no right to require that its consent be obtained before leased equipment is transferred to a third party. Appellants had already defaulted on the lease, and CIT/TBF was already entitled to the remedy for default provided by the lease, when appellants asked for CIT/TBF’s written consent—which, in any event, could not have been “prior” written consent. CIT/TBF’s failure to provide written consent to something that had already happened without its consent, in violation of the lease provision, was not a breach of the duty of good faith and fair dealing.

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<sup>6</sup> As the district court correctly noted, this case could have had a different result if, prior to assigning the lease and transferring the copier, appellants had sought CIT/TBF’s written consent and CIT/TBF had unreasonably refused that consent.

### III. Summary Judgment Granted to Kumbaya

Appellants argue that Kumbaya breached the sale agreement by not making payments to CIT/TBF and is therefore liable to appellants. But appellants breached the sale agreement by not delivering a copy of the finance lease to Kumbaya prior to the closing. Kumbaya did not know of the requirement that CIT/TBF give prior written consent to the transfer of the copier and the finance lease.<sup>7</sup>

The district court agreed with Kumbaya that, under the finance lease, CIT/TBF's consent to the transfer of the obligation to make payments was a condition precedent for Kumbaya's assumption of that obligation under the sale agreement. Because CIT/TBF did not consent, appellant had no obligation. *See Nat'l CIT/TBFy Bank v. St. Paul Fire & Marine Ins. Co.*, 447 N.W.2d 171, 176 (Minn. 1989) (when a party's performance under a contract is subject to a condition precedent, there is no obligation to perform unless and until that condition occurs). Appellants argue that there was no condition precedent because CIT/TBF's consent was not required, but this argument ignores the plain language of the finance lease.

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<sup>7</sup> Analogously, appellants are equitably estopped from seeking damages for Kumbaya's failure to perform under the sale agreement. Appellants induced Kumbaya to enter into that agreement by not letting Kumbaya know that CIT/TBF's consent to the transfer was required and by leading Kumbaya to believe that its purchase of PostNet would include a color copier with an assignable lease. Appellants cannot argue that Kumbaya is obliged to perform under the sale agreement when appellants' misrepresentations caused Kumbaya to enter into that agreement. *See Pollard v. Southdale Gardens of Edina Condominium Ass'n, Inc.*, 698 N.W.2d 449, 454 (Minn. App. 2005) (holding that a party may invoke equitable estoppel against another party that made a promise or inducement on which the party invoking estoppel reasonably relied if that party can show it will be harmed if estoppel is not applied).

Appellants point out that “there is absolutely no record evidence that Kumbaya ever asked [appellants] for an ‘assignment’ of the [finance l]ease, either at or after the closing.” But, at the closing, Kumbaya had never seen the finance lease, so it would not have known of the requirement for CIT/TBF’s consent; after the closing, Kumbaya contacted CIT/TBF and learned that it would not consent, so no assignment could occur.

Appellants argue both that their “[finance lease] interests were . . . transferred to Kumbaya,” and that there was no assignment of those interests because the sale agreement required Kumbaya only to make the payments appellants owed under the finance lease, not to substitute itself for appellants on the finance lease.<sup>8</sup>

Thus, appellants argue that one of two things happened: either Kumbaya acquired liability for the finance lease payments, or CIT/TBF lost its right to the payments by not consenting to the transfer of the equipment and lease to Kumbaya. But the language of the two relevant documents refutes these arguments. Under the terms of the sale agreement, the finance lease, and New Jersey law, TBF and Kumbaya were each entitled to summary judgment against appellants.

**Affirmed.**

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<sup>8</sup> As appellants point out in their reply brief to Kumbaya, Kumbaya’s argument that the lease agreement entitled them to maintenance on and insurance of the copier fails. A reading of the finance lease shows that maintenance and insurance were the responsibilities of the lessee, not the lessor.