

CASE NO. A08-1324

**State of Minnesota  
In Court of Appeals**

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SOUTHCROSS COMMERCE CENTER, LLP,

*Plaintiff/Appellant,*

vs.

RHS REALTY, LLC,

*Defendant/Respondent,*

and

TUPY PROPERTIES, LLC,

*Defendant.*

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**REPLY BRIEF OF APPELLANT**

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## **STATEMENT OF LEGAL ISSUES**

### **Issue No. 1:**

Has RHS offered any evidence of an agreement between Tupy and RHS that is inconsistent with the common law presumption of assignment?

### **Issue No. 2:**

Has RHS offered any evidence that Tupy reserved any part of the term of the Lease when it assigned or subleased to RHS?

## STATEMENT OF THE CASE

RHS' statement of the case contains several factual errors. First, it states that the Complaint alleges that RHS (denominated as "*Sublessee*") was liable as a legal or equitable assignee "*by operation of law*" is incorrect. Respondent's Brief ("Resp. Br."), at p. 3. The Complaint does not contain such language. Complaint, Apx., p. A-1. In addition, nowhere does the Complaint refer to RHS as "Sublessee." *Id.*

Second, Respondent states that its Answer, Counterclaim and Cross-Claim refers to RHS as "*Sublessee* RHS Realty." *Id.* The pleading makes no such reference. Answer, Counterclaim and Cross-Claim, Apx. pp. A-3—A-10.

## STATEMENT OF FACTS

Respondent's Statement of Facts is remarkable for its mind-numbing recitation of immaterial facts, mischaracterizations of the record, and citations to documents outside of the record on appeal. Resp. Br., at pp. 3-21; *See*, Appellant's Motion To Strike Respondent's Brief and Appendix, on file herein.

Respondent's paragraphs numbered 2 and 3 misdirect the Court's attention to Article 13 of the Lease, which prohibits assignment or subletting without Landlord's prior consent. Resp. Br., at p. 5-6. However, such a lease provision is solely for the protection of the Landlord and is unavailing to an assignee or sublessee when sued for rent. *In re Assignment of Dickinson Co.*, 72 Minn. 483,

484, 75 N.W. 731, 732 (1898). Plainly, Southcross consented too the assignment to RHS by allowing it to hang its signs on the outside of the building, on the monument sign, and on the tenant directory.

Respondent's paragraph numbered 6 misdirects attention to the provisions of an Asset Purchase Agreement between RHS and HomStar, Tupy Deposition Exhibit 4, which is not a part of the trial court record or the appellate record. Resp. Br., p. 7. *See*, Appellant's Motion To Strike Respondent's Brief and Appendix. Because Tupy was not a party to the Asset Purchase Agreement, it is immaterial to Tupy's agreements with RHS. The trial court findings based upon the Asset Purchase Agreement (Findings 5, 3B, 5C) are without evidentiary basis and therefore erroneous.

Respondent's paragraph numbered 7 cites "Tupy Deposition Exhibit 12," which is not part of the record because it was not filed in the trial court. Resp. Br., at p. 9. Therefore, the trial court's findings based thereon (Findings 6G) are without evidentiary basis and are erroneous. Paragraphs 7G and 7H again misdirect attention to requirements for the Landlord's consent under Article 13 of the Lease, which is immaterial. *Id.*, at pp. 9-10.

In paragraph numbered 10 Respondent asserts that "all parties agree that there was no written assignment of the Tupy Properties/HomStarUSA leases to RHS Realty." Resp. Br., p. 11. Southcross has not stipulated to any such facts,

but it is not aware of any written assignment. However, RHS' citations in support of this proposition are not direct evidence that there was no written assignment. The deposition testimony of RHS' vice president Louis Olsen at 29:7-13, Apx. p. A-60, is inapposite because it is only the statements of Olsen to Tupy and Skauge about his intentions. *Id.* The citation to Tupy Deposition 46:17, Apx. p. A-41, is inapposite because it is only a denial of knowledge of any agreement between Southcross and RHS. There is no direct evidence in this record that there was no written assignment of the Lease to RHS. The burden of making such a showing and a showing of its legal status with respect to the premises, by direct evidence, is on RHS under the common law presumption of assignment. *Fitterling, supra.* Because review is *de novo*, the district court findings cited by RHS are not evidence on which this Court may base its decision.

In paragraph numbered 11 Respondent asserts that RHS was a sublessee of Tupy Properties without citation to any evidence on this record, and no such evidence exists. Resp. Br., p. 11. As a result, the trial court's Conclusion 5 is without evidentiary support and is erroneous. If RHS believes it is a sublessee, the burden of making an affirmative showing of a sublease is on RHS and they have failed to make such a showing. As a result, under *Fitterling* the common law presumption of assignment has not been overcome.

Similarly, in paragraph numbered 12 Respondent asserts that there was a

verbal sublease without citation to any evidence in the record. Resp. Br., p. 11. At most, the evidence in this record shows that there was an agreement that RHS would take over the premises and operate a real estate brokerage with its signs hung on the building in place of HomStar's, and there was an agreement that RHS would reimburse Tupy's rent. Significantly, RHS itself refers to its payments to Tupy as a reimbursement of the rent. Resp. Br., p. 12 ("RHS Realty . . . refused to reimburse Tupy Properties..."). There is no evidence of any negotiation of the amount of monthly sublease rent.

Moreover, no direct evidence exists on this record that RHS had entered into a sublease with Tupy, much less any evidence that that RHS and Tupy agreed to occupy only a part of the premises or that the term was anything less than the remainder of the Lease. Because the burden of proof of a sublease is on RHS and it has failed to make such a showing, the presumption of assignment has not been overcome. Because Finding 14 and Conclusion 3 are contrary to the common law presumption of assignment, they are erroneous.

Immaterial assertions of fact are proffered in paragraphs numbered 12A and 12B. Resp. Br., p. 12. Whether RHA became aware that Tupy Properties was the lessee under the Lease when it moved in after the asset purchase, is a matter of no consequence to RHS' burden of proving that it was not an assignee of the Lease. In addition, the citation in paragraph 12B to the Olsen Deposition 15:8-18 for any

proposition concerning subleasing is unwarranted. *Id.* The cited testimony is unrelated to the issue of assignment/sublease. As a result Finding 14B is unsupported by the record.

The assertion in paragraph numbered 12D that “the oral sublease was a clear and simple month-to-month sub tenancy,” is belied by its citation to testimony in the Tupy Deposition. Resp. Br., p. 13. In fact the testimony of Tupy is clear that no sublease agreement was ever finalized. *Id.*, p. 14 (“...well, no, [a sublease] never got finalized.”)

The assertion in paragraphs numbered 13A through 13F that the parties failed to enter into one specific written sublease agreement is immaterial. Resp. Br., pp. 14-16.

The assertions in paragraphs 14, 15, and 16 that boxes of HomStar documents remained on the premises after the purchase of the HomStar assets are, ultimately, immaterial. Resp. Br., p. 16. There is no evidence in the record that either Tupy or RHS were aware of their presence at any time material to the tenancy by RHS. As a result, the presence of such documents does not tend to show that the relationship was one of subtenancy rather than assignment.

The unsuccessful negotiation for a superseding lease between Southcross and RHS recited in paragraphs numbered 17 are immaterial to the issue of assignment or sublease between RHS and Tupy. Resp. Br., p. 17.

The assertions in paragraph numbered 18 that RHS paid all rent due to Tupy and that Tupy Properties is the sole entity legally capable of asserting a claim for rent are not assertions of fact; rather they are legal conclusions. Resp. Br., p. 18.

The assertions in paragraph numbered 19 that the landlord hasn't complied with the Article 13 prohibition against assignment or subletting without prior consent is a reiteration of the same irrelevant discussion at paragraph numbered 2. Resp. Br., p. 18. *See, supra*, at pp. 2-3.

The assertions in paragraph numbered 21 about invoices sent for rent under the Lease to Tupy Properties are ultimately immaterial. Resp. Br., at p. 19. Tupy Properties continues to have liability under the Lease regardless whether there has been an assignment or a sublease. *Davidson v. Minnesota Loan & Trust Co.*, 158 Minn. 411, 416, 197 N.W. 833, 835 (1924) ("But the original lessee still remains bound by his contract and liable to the original lessor for any default therein.") As a result, the invoice to Tupy is not an acknowledgement by the landlord that there has been no assignment.

The assertions of fact in paragraph numbered 22 that the RHS sign that it hung on the outside of the building is not evidence of assignment are unsupported by the citation to Skauge Deposition. Resp. Br., p. 20. The fact that RHS hung its sign on the building in place of HomStar's is proof that RHS took over the premises and operated a similar business as in *Fitterling, supra, O'Neil v. A.F. Oys*

*& Sons, Inc.*, 216 Minn. 391, 13 N.W.2d 8 (1944), and *Weide v. St. Paul Boom*, 92 Minn. 76, 99 N.W. 421 (1904).

The assertions of fact in paragraph numbered 23 that Southcross assumed that RHS Realty was a successor to HomStar are immaterial. Resp. Br., p. 20. Assumptions by Southcross, or anyone else, are not material to the existence of an assignment or sublease between Tupy and RHS.

The assertions as fact in paragraph numbered 25 that no privity of estate between RHS and Southcross is unsupported by any citation to the record. Resp. Br., p. 21. This legal conclusion is not an evidentiary fact. In fact, the evidence supports the opposite conclusion. See, Appellant's Br., pp. 3-6. As a successor to the HomStar business who took over the space leased by Tupy Properties the relationship of landlord and tenant was created between Southcross and RHS by privity of estate.

The assertion in paragraph numbered 26 that there was privity of estate between RHS Realty and Tupy Properties necessarily means that there was privity of estate between RHS and Southcross, who was the owner of the property, and results in direct liability by RHS for rent for the remainder of the term until another assignment or sublease. *W.C. Hines Co. v. Angell*, 188 Minn. 387, 389, 247 N.W. 387, 388 (1933); Minn. Stat. Sec. 504B.125.

## SUMMARY OF ARGUMENT

Southcross has produced undisputed evidence establishing that RHS is a third party in possession of Southcross' leased premises. Having established such facts, the common law presumes that RHS is an assignee of the tenant and liable for performance of the lease for the remainder of its term or until an earlier assignment to another. *W.C. Hines Co. v. Angell, supra*; Minn. Stat. Sec. 504B.125. The third party is required to prove by direct evidence what its legal relationship to the premises is. *Fitterling, supra*. Because RHS has failed to proffer evidence rebutting the presumed assignment with direct evidence sufficient to support a finding to the contrary, the presumption has not been overcome and Southcross is entitled to summary judgment for the rent due and owing under the Lease. In addition, regardless of assignment or sublease, RHS is liable as a tenant in possession under Minn. Stat. Sec. 504B.125.

In addition, a conveyance of leased premises to a subtenant without reservation of any part of the lease term constitutes an assignment, as a matter of law. *O'Neil, supra*. The facts are undisputed that RHS accepted conveyance of the premises from Tupy without reservation of any part of the term of the lease or right of reversion. On this additional basis, assignee RHS is liable for performance of the covenants of the lease that run with the land, including payment of rent.

## ARGUMENT

### **I. RESPONDENT HAS FAILED TO PRODUCE SUBSTANTIVE EVIDENCE TO OVERCOME THE PRESUMPTION OF AN ASSIGNMENT.**

Southcross argued in its opening brief that at least three decisions of the Supreme Court require that RHS prove more than the absence of an agreement between the Tupy and RHS; they require proof of the character of the possession by direct evidence. *Fitterling, supra; O'Neil, supra; Weide, supra*. It is reversible error to find for the assignee in the absence of direct evidence and based solely upon the assignee's rejection of one proposed assignment. *Fitterling, id.* RHS has offered no authority to the contrary.

RHS argues that the common law presumption of assignment is overcome by "a simple showing that Tenant and Sublessee have agreed to transfer less than his entire interest to the party in possession, or less than the whole term of the lease." Resp. Br., p. 26. However, the RHS is mistaken that it has made any such showing. At most, RHS has shown only that it agreed to reimburse the rent that Tupy was paying and rejected Tupy's offer of a written sublease. The proof of a rejection of an agreement to assign the lease does not satisfy the *Fitterling* standard.

RHS first attempts to make that showing by positing that "[i]t is clear that Tupy Properties and RHS never agreed, either orally or in writing that RHS Realty

intended to assume the entire term of the Suite 145 Lease.” Resp. Br., p. 27. Regardless whether that is true, such a showing is insufficient under *Fitterling*, *supra*. RHS misdirects attention from proof of an *agreement* to transfer less than the whole term, to proof of *no agreement* to transfer the entire term. This is the critical distinction on which *Fitterling* was decided and on which RHS’ case founders. The Court in *Fitterling* specifically held that proof of a particular refusal to enter into an assignment was not sufficient to overcome the presumption of assignment.

**A. No Agreement to Reserve a Portion of the Premises Has Been Proven By RHS.**

The evidence cited by RHS in support of its proposition that there was no agreement to make an assignment, is insufficient under *Fitterling* because it lacks direct evidence of status, and insufficient to prove even the lack of an agreement. First, it cites Schedule 2.B of the Asset Purchase Agreement, but that document is not a part of the record on appeal because RHS failed to file it in the district court. Resp. Br., p. 27. Moreover, even if it were a part of the record, Tupy Properties, the lessee under the Lease, was not a party to it and cannot be bound by it.

Second, RHS posits that Tupy “reserved a portion of the entire leasehold interest.” Resp. Br., p. 28. RHS relies on evidence that a portion of Suite 145 was occupied (1) by Chris Royal, HomStar’s attorney from October 1, 2006 to November 20, 2006, who was assisting in the transition of the business from

HomStar to RHS, and (2) by some boxes of records belonging to HomStar that had been left there. However, these facts are unavailing to RHS. First, RHS' argument about reserving a portion of the premises, does not render a sublease what would have otherwise been an assignment. No Minnesota decision has ever so held, and RHS cites none. *Obiter dicta* in *Baehr v. Penn-O-Tex Oil Corporation*, 104 N.W.2d 661, 664 (1960), can be read that broadly, but reliance on it is misplaced. The Court in *Baehr*, referring to transfer of "entire interest," was referring to the entire term, not to transfer of only a portion of the leased space. The facts and the holding of *Baehr* suggest nothing as broad as the proposition for which RHS cites it. In fact, the only decision cited by the Court in *Baehr*, is to the contrary, holding that where a portion of the leased premises is subleased for the whole term, the law regards it an assignment of that portion of the leasehold. *Kostakes v. Daly*, 246 Minn. 312, 75 N.W.2d 191 (1956). As a result, the claim that a portion of the leased premises was reserved by Tupy, rendering the assignment a sublease, is unsupported by both the evidence or the law.

Second, even if RHS is correct about the law, it has not shown any agreement to reserve any portion of the premises between RHS and Tupy with respect to the space occupied by Royal, and RHS cites no such agreement. As a result, RHS has not met its burden under *Fitterling*.

Third, it is undisputed that Royal was out of the premises by November 20, 2006, and that RHS refused to pay Tupy for the portion or the rent attributable to the room occupied by Royal through November 20, 2006. However, thereafter RHS reimbursed the full rent thereafter, which shows an agreement to take the entire premises. RHS is unable to cite any agreement with respect to the boxes of documents that had been left behind by HomStar and there is no evidence that RHS was even aware of them until discovery in this lawsuit.

**B. No Agreement to Reserve a Portion of the Lease Term Has Been Shown By RHS.**

RHS next claims that it assumed less than the entire term of the Lease and that this renders it a sublease rather than an assignment. Resp. Br., p. 29. In support, RHS makes a false claim that there was a verbal agreement that “RHS Realty would pay rent *during the period of its occupancy...*” *Id.* However, RHS is unable to cite anything in support and no such evidence exists in this record. *Id.* In fact, according to the testimony of Tupy, it was agreed that the payments by RHS to Tupy were a reimbursement of the rent, and nothing was said about limiting liability to the period of its occupancy. Olsen’s testimony about the conditions of RHS’ taking occupancy of the leasehold were that “Craig [Tupy] told us . . . he said that if we were going to go in there that we would have to pay the rent he was paying.” Olsen Deposition 14:15-17, Apx. A-56. RHS accepted that offer by “going in there,” substituting its signs on the outside of the building

for those of HomStar, and operating a real estate brokerage in the premises similar to the one operated by HomStar. That acceptance of Tupy's offer is an assumption and an assignment of the Lease. RHS' further citation to Olsen's self-serving testimony about what he was or was not willing to sign is simply immaterial, lacking the elements of a contract. Resp. Br., p. 30.

Thus, RHS has failed to make a showing of an agreement explaining its legal status by direct evidence and under *Fitterling* a finding in favor of the assignee is reversible error.

**C. The Landlord's Consent to a Sublease or Assignment is an Unavailing Argument.**

RHS next make an argument, unconnected to its burden of proof, about whether Southcross gave consent to a sublease or an assignment. Resp. Br., pp. 30-31. Presumably, RHS is implying that such consent or lack of it precludes Southcross from seeking rent from an assignee. However, such language is for the benefit of the landlord only and is no defense to a suit for rent. *See, supra*, at p. 2. The cited language that Southcross approved a sublease proves only an agreement between Southcross and Tupy, and is immaterial to the existence of an assignment between Tupy and RHS, which is the burden of RHS to prove in this case. RHS is grasping at straws to argue that anything that Southcross said or did could constitute an agreement between Tupy and non-party RHS.

RHS' final argument that there was specific document that was rejected by RHS, which would have been a "classic hornbook assignment by operation of law," is specious. Resp. Br., p. 31. RHS cannot relieve itself of the burden of overcoming the presumption of assignment by citing a specific proposed agreement that was not reached. The Court in *Fitterling, supra*, specifically held that the new tenant's rejection of a specific offer of assignment does not overcome the presumption.

As a result, RHS has failed to proffer sufficient evidence to prove an agreement that is inconsistent with the existence of an assignment and has not overcome the common law presumption of assignment. RHS is liable as an assignee for the accelerated

## **II. Transfer of the Leased Premises Without Reservation of a Part of the Term Is An Assignment.**

RHS makes the argument that the decision in *O'Neil, supra*, limits its liability to the period of its occupancy. This is a blatant misrepresentation of the law.

In *O'Neil*, the landlord rented to A.F. Oys & Sons, Inc., who assigned to Oys Brothers, who then subleased for the full term to Miller. The landlord then sued Oys Brothers for the remainder of the term of the lease. The Court held that the assignment to Miller terminated the privity of estate between the landlord and Oys Brothers, which was liable only up to the time that it assigned or subleased to

Miller. *O'Neil*, 216 Minn. at 395, 13 N.W.2d at 10. Because there was neither privity of contract nor privity of estate between landlord and Oys Brothers after the conveyance to Miller, Oys Brother had no further liability to the landlord. *Id.*, 216 Minn. at 395-96, 13 N.W.2d at 10-11. The Court held that it was of no consequence whether the agreement with Miller was a sublease or an assignment. *Id.*

RHS misrepresents *O'Neil* when it asserts that “a sublessee is liable to sublessor (and not to landlord) only for the period of its occupancy.” Resp. Br., at p. 34. Such is not the law or the holding of *O'Neil*. A sublessee is liable to the sublessor for the entire term of the sublease because of privity of contract. In the case of an assignment, the assignee’s liability to the landlord does not expire until it has assigned or sublet to another. *O'Neil* states that explicitly, citing *McLaughlin v. Minnesota L. & T. Co.*, *supra*, and *Cohen v. Todd*, 130 Minn. 227, 153 N.W. 531. *O'Neil*, 216 Minn. at 395, 13 N.W.2d at 10 (“an assignee of a lease may, by assigning it, even to a pauper, put an end to his liability in point of time.”) Because RHS did not assign or sublet to anyone, its privity of estate, as an assignee of Tupy, bound it to the landlord for the accelerated rent. RHS’ citation of *O'Neil* to confine its liability to its period of occupancy is erroneous.

Again, RHS misrepresents that there was a verbal agreement with Tupy to pay rent only “during the period of its occupancy.” Resp. Br., at p. 34. No such

agreement appears in the record and RHS is unable to cite anything in support. It's citations to the trial court's findings are inapposite as evidence. *Id.*

Because of the common law presumption of assignment, RHS has the burden of proving that Tupy reserved a part of the term of the lease, but RHS has produced no evidence that any part of the term of the Lease was reserved. As a result, Tupy's unqualified conveyance of the premises to RHS is an assignment, as a matter of law.

### CONCLUSION

As a result, it was error for the district court to enter judgment in favor of RHS and against Southcross. Appellant respectfully requests that this Court reverse the judgment of the district court with instructions to enter judgment for Southcross.

Respectfully submitted,

Dated: December 4, 2008.



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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 132.01, Subd. 3 of the Minnesota Rules of Civil Appellate Procedure, I, as counsel of record herein for Appellant, hereby certify that the Reply Brief of Appellant is proportionately spaced, has a typeface of 14 points and contains 3,899 words as measured by Microsoft WORD 2007 word count.

Dated: December 4, 2008.

  
Robert J. Bruno