

Cottage Enterprises, LLC,

Plaintiff

v.

**DECISION AND JUDGMENT**

JoAgnes Pasquarella and  
Martha Friberg,

Defendants

This matter was heard on Count I of Plaintiff's Complaint on January 23, 2008.<sup>1</sup> Attorney David Sherman represented the Plaintiff. Attorney David Hirshon represented the Defendants.

Prior to the hearing, the parties submitted legal memoranda, which the Court has reviewed. After consideration of the evidence, and the parties' arguments, the Court makes the following findings and orders as follows:

Findings of Fact

1. Plaintiff is a limited liability company, and is owned by Edward and Donna Herczeg.
2. On January 2, 2003, Defendants sold their business, Cherished Possessions, to Plaintiff. The purchase price for the business was \$350,000.
3. At the time of the sale of the business, Defendants operated the business on property that Defendants owned located at 185 Cottage Road in South Portland, Maine (the property).

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<sup>1</sup> Pursuant to the parties' stipulation, to which the Court acquiesced, the parties tried Count I of Plaintiff's Complaint at this time. The Court will schedule a hearing on the remaining counts of Plaintiff's Complaint in the event that the case continues in accordance with the stipulation.

4. On the date of the sale of the business, the parties entered into a Lease Agreement by which Plaintiff leased the property (the lease). The original term of the lease was for five years, and was scheduled to expire on January 1, 2008.

5. Following the purchase of the business, Plaintiff operated the business on the property.

6. All of the parties reviewed the lease prior to the execution of the lease.

7. While leasing the property, Plaintiff paid for certain improvements to the property, including improvements to the rest room, the replacement of ceiling and floor tiles, and the replacement of a door.

8. During the term of the lease, Plaintiff was current on its rent and related payments with the exception of one payment for an insurance premium. Plaintiff received the notice of the invoice on March 28, 2007, and paid the invoice on June 1, 2007. According to the terms of the lease, Plaintiff was required to pay the premium within 30 days of receipt of the invoice. Defendants did not notify Plaintiff that Defendants considered Plaintiff to be in default under the terms of the lease at any time before the hearing on Defendants' Complaint for Forcible Entry and Detainer on December 20, 2007.

9. In May 2007, Plaintiff decided to sell the business. In an effort to sell the business, Plaintiff negotiated with Laura Thibodeau to purchase the business.

10. If Ms. Thibodeau purchased the business, she intended to operate the business on the property. In order to secure financing for the purchase of the business, Ms. Thibodeau required a lease for the property.

11. On August 16, 2007, Ms. Thibodeau, through LDT Enterprises, LLC, a limited liability company that she established to own and operate the business, and Plaintiff executed a purchase and sale agreement by which LDT Enterprises would purchase the business. On the same date, the same parties executed a sublease for the property.

12. Although Plaintiff and LDT Enterprises executed the sublease on August 16, 2007, they agreed that it was not effective until and unless Defendants consented to the sublease.

13. On or about August 30, 2007, Edward Herczeg met with Defendant JoAgnès Pasquarella to discuss Plaintiff's proposed sale of the business to LDT Enterprises. During the meeting, Mr. Herczeg provided Defendant Pasquarella with a copy of the proposed sublease, and requested the Defendants' consent to the sublease.

14. On or about September 5, 2007, Edward and Donna Herczeg, Laura Thibodeau, and Defendant Pasquarella met to discuss the proposed sublease of the property to Ms. Thibodeau's company, LDT Enterprises.

15. Two days after the meeting, Plaintiff received a letter from Defendants by which letter the Defendants informed Plaintiff that Defendants would not consent to the sublease of the property to LDT Enterprises. Citing section 10A(f) of the lease, Defendants demanded immediate possession of the property.

16. The language contained in section 10A(f) of the lease is same language that was included in a lease for the property between Defendants and Cherished Possessions, Inc., which lease was signed on April 30, 1999.

17. On or about September 25, 2007, citing section 3 of the lease, Plaintiff notified Defendants that it was exercising its right to extend the term of the lease. In addition, Plaintiff also informed Defendants that it was exercising its option to purchase the property in accordance with section 24 of the lease.

### Discussion

Preliminarily, the Court will address the issue raised by Defendant at the conclusion of the hearing - that the District Court's judgment Defendant's favor and against Plaintiff on Defendant's Complaint for Forcible Entry and Detainer.<sup>2</sup> A forcible entry and detainer action "is a summary proceeding to determine the single issue: who is entitled to the immediate possession of the property." *First Vacationland Props., Inc. v. Palmer*, 1999 ME 15, p. 15, 723 A.2d 418, 421 (citing

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<sup>2</sup> Defendant did not delay in raising the issue with the Court. The parties and the Court were not aware that the trial court in the Forcible Entry and Detainer action had issued a decision until the conclusion of the hearing in this action.

*Tozier v. Tozier*, 437 A.2d 645, 647 (Me. 1981). In *Fraser v. Fraser*, 598 A.2d 751, 753 (Me. 1991), the Law Court wrote, “the ultimate issue to be decided in a forcible entry and detainer action ... is not in whom title to property is ultimately vested, but rather, as between the parties, who has a right to immediate possession to the exclusion of others.” (*citations omitted*). The summary proceeding to determine *immediate* possession of the property does not permit the Court to adjudicate all of the parties’ legal rights and obligations, including the parties’ contractual rights. Instead, it is recognized that after the more pressing issue of *immediate* possession is resolved, the parties can present their claims in a more traditional manner. In short, given the limited nature of a forcible entry and detainer action, and the narrow issue to be decided in a forcible entry and detainer action, the Court concludes that the decision on Defendant’s Complaint for Forcible Entry and Detainer action does not preclude the Court from acting on Plaintiff’s claims in this action.

The central issue presented by Count I of Plaintiff’s Complaint is whether Defendants were authorized, under the terms of the lease, to demand immediate possession of the property in September and as a result effectively terminate the lease.<sup>3</sup> Plaintiff contends that because Defendants did not consent to the sublease, Defendants were not permitted under the terms of the lease to demand possession of the property.

To resolve the dispute, the Court is required to interpret section 10A(f) of the lease.<sup>4</sup> Section 10A(f) provides:

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<sup>3</sup> In addition to asserting their rights pursuant to section 10A(f) of the lease, Defendants argued that Plaintiff was in default under the terms of the lease for the late payment of the insurance premium, and the execution of the sublease without Defendants’ consent. Because Defendants accepted the payment of the insurance premium without reservation in June 2007, and because Defendants did not assert that Plaintiff was in default for the late payment at any time before the December 2007 hearing on Defendants’ Complaint for Forcible Entry and Detainer, the Court concludes that Defendants waived the ability to declare a default for that particular late payment. In addition, because both parties to the sublease agreed that the sublease was not effective until and unless the Defendants consented to the sublease, Plaintiff’s execution of the sublease does not constitute a default under the terms of the lease.

<sup>4</sup> Plaintiff argues that section 10A(f) has no application to the case because regardless of the Court’s interpretation of section 10A(f), Plaintiff maintains its option to purchase under the terms of the lease. Without commenting upon the merit of Plaintiff’s argument, because Defendants contend that section 10A(f) allows the Defendants to demand immediate possession of the property and effectively terminate the lease, including Plaintiff’s option to purchase the property, the Court will first address the interpretation and application of section 10A(f).

Throughout the duration of the Lease term, and any extension thereof, Tenant agrees ... [n]ot to assign this Lease nor make any sublease without on each occasion obtaining prior written consent of Landlord, which consent shall not be unreasonably withheld. In the case of any such consent, Landlord shall have the right to require that all (or any portion of) the Premises which Tenant proposes to sublease or as to which Tenant proposes to assign this Lease (if the sub-tenant or assignee is not an entity controlled by the same interests which control Tenant) be surrendered to Landlord for the term of proposed sublease or assignment in consideration of the appropriate pro rata adjustment of, or cancellation of, the Tenant's rental obligations.

(*Plaintiff's Exhibit 5, p. 3*). Plaintiff argues that pursuant to the plain language of the provision, Defendants must consent to the sublease as a precondition to Defendants' ability to require the surrender of the property. Defendants assert that to require Defendants' actual consent is nonsensical insofar as the Defendants could not occupy the property if they consented to the sublease. Defendants, therefore, urge the Court to interpret the provision as granting to Defendants the right to require the surrender of the property upon Plaintiff's *request for consent*.

When interpreting the terms of a contract, "the language employed by the parties is to be construed to give effect to the plain meaning of the words used." *Fleet Bank of Maine v. Zimelman*, 575 A.2d 731, 734 (Me. 1990). As mentioned above, Defendants contend that the plain language of section 10A(f) is illogical, and that the intent of the parties was to confer upon Defendants the ability to demand possession of the property whenever Plaintiff requested Defendants' consent to the sublease of the property. In support of Defendants' argument, Defendant Pasquarella testified that Defendants wanted the ability to obtain possession of the property upon a request for consent because Defendants had agreed to a favorable rent for Plaintiff, and did not necessarily want another person or entity to benefit from the terms of the lease.

Simply stated, the plain language of section 10A(f) does not require supplementation (i.e., the addition of language to provide that upon *request for consent*, Defendants can require the surrender of the property). The plain language of the lease makes it clear that Defendants can require possession of the property upon *consent*, not upon the request for consent. Contrary to Defendants' argument, the term is logical. The provision was intended to allow Defendants the opportunity to continue to monitor the property effectively, and have a direct relationship with the subtenant during the term of the sublease.<sup>5</sup> Consistent with this interpretation, section 10A(f) gives

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<sup>5</sup> Defendant Pasquarella's assertion that the provision was intended to permit Defendants to demand possession of the property in order to prevent another person from benefiting from favorable rent

Defendants the right to require possession of the property only “for the term of [the] proposed sublease”. Had the parties intended for the provision to authorize the Defendants to terminate the lease upon request for consent, there would have been no need to limit Defendants’ right to possess the property to the length of the proposed sublease.

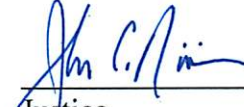
Conclusion

Based on the foregoing analysis, the Court concludes that section 10A(f) did not give Defendants the right to demand possession of the property and/or terminate the lease upon Plaintiff’s request for consent of the sublease. Accordingly, Plaintiff’s request for Defendants’ consent to the sublease did not give Defendants the ability to require Plaintiffs to relinquish possession of the property, and did not give Defendants the right to terminate the lease.<sup>6</sup> The Court, therefore, enters judgment in favor of Plaintiff on Count 1 of Plaintiff’s Complaint and finds as follows:

1. Defendants did not terminate the lease in accordance with the terms of the lease.
2. The lease remained in effect as of September 25, 2007.
3. Plaintiff properly exercised its right to extend the term of the lease in accordance with the terms of the lease.
4. Plaintiff properly exercised its right to purchase the property in accordance with the terms of the lease.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Judgment into the docket by reference.

Date: 2/19/08

  
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terms negotiated by Plaintiff is unpersuasive particularly given the fact that the same provision was included in an earlier lease between Defendants and Cherished Possessions, Inc., a corporation controlled by Defendants. (*Defendant’s Exhibit 2*).

<sup>6</sup> Because the Court has concluded that section 10A(f) does not give Defendants the ability to require Plaintiff to surrender the property or terminate the lease, it is not necessary to address Plaintiff’s contention that the option to purchase the property survives Defendants’ exercise of their right to possession pursuant to section 10A(f).

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