

MEMORANDUM

TO: Laurie Lawyer
FROM: Jodie Toohey
DATE: 11-11-99
SUBJECT: Tony L. Suther

STATEMENT OF FACTS:

Suther signed a 10-year lease from Salas/Salas-Engels Realty in 1994 to operate a tanning salon in a commercial building in Oak Brook. The salon started to decline after a few years. Salas refused to let Suther out of the remainder of the lease. Suther found Ms. Navarro who was interested in subleasing the location to open an aerobics studio. Salas objected to the transfer and referred Suther to language in the lease stating, "Tenant may not assign or sublet the lease to any other party without Landlord's prior consent."

ISSUES PRESENTED:

Whether Navarro is financially responsible, ready, willing, and able to sublease from Suther and whether an aerobics studio would be damaging to the building and therefore, allow or prevent Salas from reasonably refusing to consent to the sublease. Also, if Salas did unreasonably refuse to consent to the sublease, whether she is required to let Suther out of the lease and if Suther is liable for the remaining rent on the lease.

DISCUSSION:

The following case law dictates even if a lease states a landlord must consent to a sublease/assignment, the landlord cannot unreasonably withhold consent. *Jack Frost Sales v. Harris Trust & Savings Bank*, 104 Ill. App. 3d 933, 433 N.E.2d 941, 60 Ill. Dec. 703 (1st Dist. 1982). Refusal to consent is unreasonable if the tenant presents the landlord with a financially responsible, ready, willing, and able

subtenant. *Jack Frost Sales v. Harris Trust & Savings Bank*, 104 Ill. App. 3d 933, 433 N.E.2d 941, 60 Ill. Dec. 703 (1st Dist. 1982); *Reget v Dempsey-Teglar & Co.*, 70 Ill. App. 2d 32, 216 N.E.2d 500 (5th Dist. 1966); *Vranas & Associates, Inc. v. Family Pride Finer Foods, Inc.*, 147 Ill. App. 3d 995, 598 N.E.2d 333, 101 Ill. Dec. 151 (2d Dist. 1986); *Wohl v. Yelen*, 22 Ill. App. 2d 455, 161 N.E.2d 339 (1st Dist. 1959). Refusal to consent is reasonable if the landlord believes the proposed use by the subtenant would be damaging to the building. *Reget v Dempsey-Teglar & Co.*, 70 Ill. App. 2d 32, 216 N.E.2d 500 (5th Dist. 1966). It is unreasonable if the proposed use by the subtenant is identical to that of the tenant. *Wohl v. Yelen*, 22 Ill. App. 2d 455, 161 N.E.2d 339 (1st Dist. 1959). If the landlord does refuse to consent to a financially responsible/able, ready, willing, and able subtenant, the tenant is not liable for the remaining rent on the lease. *Vranas & Associates, Inc. v. Family Pride Finer Foods, Inc.*, 147 Ill. App. 3d 995, 598 N.E.2d 333, 101 Ill. Dec. 151 (2d Dist. 1986); *Wohl v. Yelen*, 22 Ill. App. 2d 455, 161 N.E.2d 339 (1st Dist. 1959).

If a lease provides a consent is needed to sublease, the landlord can refuse to consent to the sublease for any reason at all. *Drake v. Diggins*, 39 N.E.2d 1023, 314 Ill App. 192 (1st Dist. 1942). This reference, found in *Illinois Digest 2d, Landlord & Tenant*, key 76(3), page 36, lists this case as contrary to the findings in the following cases but I could not acquire the reporter it was in. It is worth mentioning because it is still good law although it is from 1942 and the rest of the mentioned cases are more recent.

Where a lease forbids any sublease or assignment without the consent of the landlord, the landlord cannot unreasonably withhold consent. *Reget v Dempsey-Teglar & Co.*, 70 Ill. App. 2d 32, 216 N.E.2d 500 (5th Dist. 1966); *Jack Frost Sales v. Harris Trust & Savings Bank*, 104 Ill. App. 3d 933, 433 N.E.2d 941, 60 Ill. Dec. 703 (1st Dist. 1982). In *Reget*, the landlord refused to consent to a sublease of

a building because of the proposed assignee's/subtenant's unacceptable credit. The court found a proposed tenant's credit is a valid factor in determining the suitability of the proposed tenant and, therefore, valid for the basis of the landlord's refusal to consent. *See Reget*, 216 N.E.2d at 503. In *Jack Frost Sales*, the court held the landlord did not unreasonably withhold consent to the assignment/sublease. It so held because the subtenants were found to have minimal capital and the tenant did not present any other evidence to the landlord regarding the assignee's/subtenant's financial ability. *See Jack Frost Sales v. Harris Trust & Savings Bank*, 104 Ill. App. 3d 933, 433 N.E.2d 941, 60 Ill. Dec. 703 (1st Dist. 1982). In our situation, Navarro's credit history is unknown. Suther has not presented Salas with any information regarding Navarro's financial ability. Therefore, Salas' refusal to consent is not unreasonable. If Salas is presented with Navarro's unfavorable credit history, Salas' refusal to consent would be valid. If Suther presents Salas with evidence of Navarro's good credit history, Salas' refusal to consent would be unreasonable.

A landlord is obligated to accept a subtenant unless the landlord has a valid objection. . *Wohl v. Yelen*, 22 Ill. App. 2d 455, 161 N.E.2d 339 (1st Dist. 1959). In *Wohl*, the court found the landlord was obligated to accept the subtenant because the landlord previously stated he would allow a sublease and because there is a "general duty to mitigate damages." *Id.* at 342. That is to say the landlord had a duty to alleviate the loss of losing the rent of the subtenant by allowing the sublease. *See id.* In our situation, Salas never told Suther she would agree to sublease. However, because of her duty to mitigate her damages, she may be required to accept Navarro as a subtenant provided Navarro meets all of the requirements for a suitable subtenant.

Refusal of the landlord to consent to a sublease/assignment to a financially responsible subtenant is unreasonable. *Vranas & Associates, Inc. v. Family Pride Finer Foods, Inc.*, 147 Ill. App. 3d 995, 598

N.E.2d 333, 101 Ill. Dec. 151 (2d Dist. 1986). In *Vranas*, the tenant, through his attorney, presented the landlord with a subtenant with a financial statement illustrating the subtenant's net worth of over \$312,000. The court affirmed the trial court's finding the refusal to consent for this reason was unreasonable. *See id.* In our situation, Suther did not present Salas with any financial information regarding Navarro. Therefore, Salas' refusal to consent would not be unreasonable. However, if Suther furnishes Salas with such financial information and she still refuses, her refusal would be unreasonable.

A landlord cannot refuse to consent to a subleasee/assignee who is ready, willing and able to sublease/take assignment. *Jack Frost Sales v. Harris Trust & Savings Bank*, 104 Ill. App. 3d 933, 433 N.E.2d 941, 60 Ill. Dec. 703 (1st Dist. 1982). In *Jack Frost Sales*, the tenant leased space for a bar but began to lose money. He decided to sell his business and found prospective buyers to buy the business and take and assignment of the lease. After negotiations with the landlord, the buyers decided they wanted an option on the lease. The landlord refused and the deal fell through. The court held that because the buyers didn't want an assignment of the lease without the option, there was no longer a ready, willing, and able assignee/subleasee. *See id.* In our situation, Navarro has already taken assignment of the lease which is evidence Suther has a subleasee/assignee who is ready and willing. However, we don't know how able (financially) she is. If Navarro is an able subleasee, it is unreasonable for Salas to refuse to consent to the sublease.

Refusal of the landlord to consent to a sublease/assignment to a subtenant who is ready, willing, and able to take the sublease/assignment is unreasonable. *Vranas & Associates, Inc. v. Family Pride Finer Foods, Inc.*, 147 Ill. App. 3d 995, 598 N.E.2d 333, 101 Ill. Dec. 151 (2d Dist. 1986). In *Vranas*, the landlord argued the subtenant was not ready, willing, and able to accept the assignment of the lease.

The subtenants were unwilling to comply with additional requirements the landlord wanted included in the lease. The tenant argued the fact that the subtenant invested money into his business was evidence that the subtenant was ready, willing, and able to accept the sublease. The court held the subtenant was ready, willing, and able to take over the lease. *See id.* In our situation, Navarro has already accepted the transfer of the remaining 5 years on the lease. This is proof she is at least ready and willing to take over the lease. Therefore, Salas cannot argue she refused to consent to the sublease because there was not a ready and willing subtenant. Since we do not know the state of Navarro's financial affairs, Salas may be able to argue she refused to consent because of Navarro's inability to take over the lease.

Refusal of the landlord to consent to a sublease/assignment to a subtenant whose proposed business is identical to the tenant's business is unreasonable. *Vranas & Associates, Inc. v. Family Pride Finer Foods, Inc.*, 147 Ill. App. 3d 995, 598 N.E.2d 333, 101 Ill. Dec. 151 (2d Dist. 1986). In *Vranas*, the subtenant's business was a grocery store, identical to that of the tenant. Therefore, the court found the landlord's refusal to consent to the sublease/assignment for this reason was unreasonable. *See id.* In our situation, Suther, the tenant, operates a tanning salon and Navarro, the subtenant, operates an aerobics studio. It could be argued these businesses are similar enough to make Salas' refusal to consent to the sublease/assignment unreasonable.

A landlord is not required to sublease a building for a different purpose if the landlord believes that purpose will damage the building. . *Reget v Dempsey-Teglar & Co.*, 70 Ill. App. 2d 32, 216 N.E.2d 500 (5th Dist. 1966). In *Reget*, the landlord argued he didn't desire a change in the use of the building. The court held a landlord "should not be required to re-let the premises for a different purpose if he reasonably believes that such use will damage the premises", quoting *Consumers Market House v.*

Powers, 192 Ill. App. 89. *Id.* 216 N.E.2d at 503. In our situation, a tanning salon is not that different from an aerobics studio. Actually, an aerobics studio may have less of an adverse affect on the building. Both enterprises need showers/dressing rooms. The only difference is the aerobics studio would need open spaces where a tanning salon would need small rooms. Because a tanning salon and aerobics studio are compatible, Salas would not be able to refuse her consent to the sublease for that reason. An aerobics studio would be no more damaging to the building than a tanning salon.

The burden of proving there is a reasonable subtenant lies on the tenant. *Reget v Dempsey-Teglar & Co.*, 70 Ill. App. 2d 32, 216 N.E.2d 500 (5th Dist. 1966). In *Reget*, the court held the tenant must present evidence to the landlord the subtenant met “reasonable commercial standards.” *Id.* 216 N.E.2d at 503. In our situation, Suther did not present evidence to Salas that Navarro met reasonable commercial standards, therefore, he did not meet his burden of proof. Therefore, Salas’ refusal to consent, in this respect, is valid.

Unreasonable refusal of a landlord to consent to a sublease/assignment eliminates the tenant’s further obligation to pay rent. *Vranas & Associates, Inc. v. Family Pride Finer Foods, Inc.*, 147 Ill. App. 3d 995, 598 N.E.2d 333, 101 Ill. Dec. 151 (2d Dist. 1986). In *Vranas*, the tenant presented the landlord with a subtenant who was financially responsible, ready, willing and able to take over the lease. The court found the landlord’s refusal to consent to the sublease/assignment was unreasonable and the tenant had no further obligation to pay rent. *See id.* 101 Ill. Dec. at 156. The appellate court affirmed this decision. *See id.* at 101 Ill. Dec. at 161. In our situation, if it can be found Salas’ unreasonably refused to consent to the sublease, Suther would not be obligated to pay the remaining rent on the lease. The reasonableness of refusal would be determined by previously discussed cases.

If a landlord is presented with an acceptable tenant and unreasonably refuses to consent to the assignment/sublease, the tenant cannot be held liable for rent. *Wohl v. Yelen*, 22 Ill. App. 2d 455, 161 N.E.2d 339 (1st Dist. 1959). In *Wohl*, the agent of the landlord told the tenant he would consent to a sublease if the tenant found a subtenant who would pay the same rental fee. The tenant advertised and found a subtenant. The landlord, through the agent, then refused to consent to the sublease. The court held the tenant could not be held liable for the remaining rent because the tenant found an acceptable subtenant. *See id.* 161 N.E.2d at 343. Our situation is different from *Wohl* in that Salas never said she would consent to a sublease, neither before or after a subtenant was found. It is also different in that Suther wants an assignment of the lease. In *Wohl*, the tenant was still going to be liable on the lease through the sublease agreement. *See id.* Because Suther did not present Salas with Navarro's credentials, Salas was not able to reasonably or unreasonably refuse to consent to the sublease. Therefore, Suther is liable for the remaining rent on the lease. However, if Suther furnishes Salas with the required information and Navarro is in fact a suitable subtenant, Salas' refusal could be construed to be unreasonable. Suther would not be liable for the remaining rent.

ACTION RECOMMENDED:

Case law has shown even if a lease states a landlord must consent to a sublease/assignment, the landlord cannot unreasonably withhold consent. *Jack Frost Sales v. Harris Trust & Savings Bank*, 104 Ill. App. 3d 933, 433 N.E.2d 941, 60 Ill. Dec. 703 (1st Dist. 1982). Refusal to consent is unreasonable if the tenant presents the landlord with a financially responsible, ready, willing, and able subtenant. *Jack Frost Sales v. Harris Trust & Savings Bank*, 104 Ill. App. 3d 933, 433 N.E.2d 941, 60 Ill. Dec. 703 (1st Dist. 1982); *Reget v Dempsey-Teglar & Co.*, 70 Ill. App. 2d 32, 216 N.E.2d 500 (5th Dist. 1966); *Vranas & Associates, Inc. v. Family Pride Finer Foods, Inc.*, 147 Ill. App. 3d 995, 598 N.E.2d

333, 101 Ill. Dec. 151 (2d Dist. 1986); *Wohl v. Yelen*, 22 Ill. App. 2d 455, 161 N.E.2d 339 (1st Dist. 1959). Refusal to consent is reasonable if the landlord believes the proposed use by the subtenant would be damaging to the building. *Reget v Dempsey-Teglar & Co.*, 70 Ill. App. 2d 32, 216 N.E.2d 500 (5th Dist. 1966). It is unreasonable if the proposed use by the subtenant is identical to that of the tenant. *Wohl v. Yelen*, 22 Ill. App. 2d 455, 161 N.E.2d 339 (1st Dist. 1959). If the landlord does refuse to consent to a financially responsible/able, ready, willing, and able subtenant, the tenant is not liable for the remaining rent on the lease. *Vranas & Associates, Inc. v. Family Pride Finer Foods, Inc.*, 147 Ill. App. 3d 995, 598 N.E.2d 333, 101 Ill. Dec. 151 (2d Dist. 1986); *Wohl v. Yelen*, 22 Ill. App. 2d 455, 161 N.E.2d 339 (1st Dist. 1959).

I recommend Suther gather and present to Salas evidence of Navarro's past credit history and financial responsibility. If Navarro's credit/financial history is suitable and Salas still refuses to consent to the sublease, the refusal to consent would be unreasonable. All other requirements for unreasonable refusal are met. An aerobics studio could be argued to be the same as or even less detrimental to the building than a tanning salon. They are similar in nature and require similar facilities. The issues of Navarro's readiness and willingness to take over the lease are proven by the fact Navarro has already taken assignment of the lease. The only issue that remains is that of financial ability/responsibility.

If Navarro is found to be financially responsible/able and such evidence is presented to Salas and Salas still refuses to consent to the sublease/assignment, I would recommend to Suther he cannot be forced to continue operation and lease the building. He also would not be liable for the remaining rent under the lease.