CHAPTER 7

Decisions Applying the Reasonable Consent Standard to Assignments

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I. INTRODUCTION

There are few words that commercial leasing lawyers deal with more often in drafting, negotiating, and interpreting leases than the word "reasonableness." These frequent encounters are seldom pleasant. After all, "reasonableness" means different things to different people, and the reputation of the word as engendering litigation is only enhanced in the context of landlord consents to commercial real estate lease assignments of tenants' interests. In researching most issues construing clauses frequently used in commercial real estate leases, one is often struck by the paucity of reported decisions. The opposite experience is had in researching express and implied reasonableness standards in lease assignment and sublease clauses, with nearly 100 applicable cases from various jurisdictions being accessible and on point.

Therefore, what is a landlord to do when the tenant requests consent to an assignment of the tenant's interest in its lease, in the context of either (1) a requirement that consent "not be unreasonably withheld" being stated in the lease's assignment clause (without further guidance), or (2) the law of the applicable jurisdiction implying a requirement that a landlord's consent to a commercial lease assignment not be unreasonably withheld? The large body of case law available does provide some rules of thumb, as analyzed below, and although there are a few court decisions that seem to lead to atypical results, as noted below, the cases are surprisingly consistent. Some have argued (in briefs cited in reported cases) that the reasonableness standard is applied differently in dealing with a state's implied reasonableness requirement under common law than it is in dealing with a lease clause stating that the landlord's consent is not to be unreasonably withheld. However, such distinction is noted in no more than one or two of the court opinions,

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and the decisions are cited interchangeably in both contexts. Therefore, the source of the reasonableness standard does not really matter. Also, there is little distinction in the application of the "reasonableness" consent standard to assignments as opposed to subleases, so decisions from both assignment and sublease cases are discussed below.

There are many decisions regarding assignments in the context of residential leases (especially in New York, due to the state's rent control provisions, which have produced an astonishing number of cases), but these decisions are not relevant here. The holdings and reasonings in residential lease decisions are based on different equities and factors than the commercial lease cases.

The cases discussed here are primarily outside of the context of a tenant bankruptcy. Due to the extraordinary powers of the bankruptcy courts to render any anti-assignment provisions in a lease unenforceable, any discussions of the reasonableness of the landlord's consent is not truly dispositive in such cases.[1]

This chapter first discusses the overall definitions and standards of reasonableness articulated by the courts in construing commercial lease assignments. It then moves to the actual factors looked at by the courts in applying these vague, general definitions and standards, followed by observing some specific applications of facts to the factors looked at by the courts. This chapter concludes with some observations regarding applications of these "reasonableness" decisions to commercial leasing practice.

II. GENERAL DEFINITIONS AND STANDARDS OF REASONABLENESS

A. Definitions

Various definitions of "reasonableness" used by courts in the assignment and subleasing context include "reasonable commercial grounds";[2] a reason that is "objectively sensible and of some significance";[3] that the assignee is acceptable by "reasonable commercial standards";[4] and objective grounds, not subjective concerns and personal desires.[5] The standard to be applied is that of a reasonable person owning and leasing a commercial property,[6] or, stated in another way, a

1. *E.g., In re* Serv. Merch. Co., 297 B.R. 675 (Bankr. M.D. Tenn. 2002) (bankruptcy court found that landlord did not reasonably withhold consent to assignment and sublease in bankruptcy, but noted that lease's purchase option remedy upon reasonable denial of consent is invalid anti-assignment provision unenforceable within bankruptcy).

2. Restatement (Second) of Property § 15.2(2) reporter's note 7 (1977), *cited by* Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 844 (Cal. 1985).

3. Tucson Med. Ctr. v. Zoslow, 712 P.2d 459, 462 (Ariz. Ct. App. 1985).

4. Homa-Goff Interiors, Inc. v. Cowden, 350 So. 2d 1035, 1040 (Ala. 1977).

5. Toys "R" Us, Inc. v. NBD Trust Co., No. 88 C 10349, 1995 U.S. Dist. LEXIS 14878, at *112 (N.D. Ill. Sept. 29, 1995). *See also* Athar v. Hudson Serv. Mgmt., Inc., 853 N.Y.S.2d 170 (N.Y. App. Div. 2008).

6. Fahrenwald v. LaBonte, 653 P.2d 806, 811 (Idaho Ct. App. 1982).

"reasonably prudent person in the landlord's position exercising reasonable commercial responsibility."[7]

As one can gather from these definitions, ordinarily reasonableness should be considered a question of fact for the jury.[8] However, in many decisions, the courts have made the determination on reasonableness themselves if they found the factual situation strong enough to treat the issue as a question of law, especially if "a landlord behaves unreasonably as a matter of law" when consent to a lease transfer is withheld for subjective, personal concerns, and not for objectively reasonable commercial grounds.[9]

Decisions are unreasonable or arbitrary if they are "without a fair, solid and substantial cause or reason,"[10] or arrived at "through the exercise of will or by caprice, one supported by mere option or discretion and not by a fair or substantial reason."[11]

B. Key Principles

Despite the use by courts of many factors discussed below in arriving at a decision of whether a landlord has been reasonable, a few general rules are fairly reliable. First, a landlord is not reasonable if consent is denied solely to improve the landlord's general economic position or because the landlord wants to receive increased rent.[12] Stated slightly differently, denied consent is not reasonable if the refusal is due to a general economic benefit so that the landlord gets more than it was entitled to before under the lease[13] or a desire of the landlord to get substantially more than entitled to before under the lease.[14] Second, consent is reasonably denied if it is denied "to protect the lessor's interest in the preservation of property and performance of lease covenants,"[15] or if "the interest to be protected by refusing consent relates to the ownership and operation of the leased property, not the lessor's

7. Brigham Young Univ. v. Seman, 672 P.2d 15, 18 (Mont. 1983). *See also* Van Sloun v. Agans Bros., Inc., 778 N.W.2d 174, 180 (Iowa 2010) (reviewing the law of other states and the *Restatement*, and applying a "reasonably prudent person standard").

8. Homa-Goff Interiors, Inc. v. Cowden, 350 So. 2d 1035, 1038 (Ala. 1977); Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 845 (Cal. 1985).

9. *E.g.*, KIT Corp. v. Tomokane, 2003 N. Mar. I. LEXIS 17 (Sup. Ct. N. Mar. I., 2003).

10. Leggett of Va. v. Crown Am. Corp., No. CIV.A.94-0040-D, 1995 U.S. Dist. LEXIS 6536, at *6 (W.D. Va. Mar. 8, 1995).

11. Bedford Inv. Co. v. Folb, 180 P.2d 361, 362 (Cal. Ct. App. 1947).

12. *See, e.g.*, *In re* Fashion World, Inc., 44 B.R. 754, 757–58 (Bankr. D. Mass. 1984) (applying then-undecided area of Massachusetts law, later followed by Massachusetts court); Worcester–Tatnuck Square CVS, Inc. v. Kaplan, 601 N.E.2d 485, 489 (Mass. App. Ct. 1992); W. Farms Assocs. v. Sofro Fabrics, Inc., SPH 850126555, HA759, 1986 Conn. Super. LEXIS 91, at *11 (Conn. Super. Ct. July 2, 1986).

13. *See, e.g.*, *Kendall*, 709 P.2d at 845; 1010 Potomac Assocs. v. Grocery Mfrs. of Am., Inc., 485 A.2d 199, 209–10 (D.C. 1984).

14. Funk v. Funk, 633 P.2d 586, 589 (Idaho 1981).

15. *Kendall*, 709 P.2d at 845.

general economic interest."[16] Courts have said that they must determine the real motive for the landlord's refusal and dismiss any pretextual reasons.[17] Thus, courts will analyze whether reasons offered by the landlord to deny assignment are made up after the fact.[18]

C. Burden of Proof

Most decisions hold that the tenant bears the burden of proving that the landlord acted unreasonably in withholding consent.[19] The Restatement is consistent with this position.[20] However, there are a couple of cases that hold the opposite, imposing on the landlord the burden of proving the failure of the landlord to consent is reasonable.[21]

D. Rule of Construction

Although mentioned in very few assignment consent opinions, it appears that a rule of construction exists that clauses permitting assignment only with the consent of the lessor are covenants for the lessor's benefit and are to be construed against the lessor.[22]

E. Information for Decision

The tenant has the burden to furnish sufficient information for the landlord to make a decision on whether to grant or withhold consent; the landlord has no duty to seek out this information.[23] Thus, the refusal of a landlord to consent to an assignment and sublease if the tenant does not furnish sufficient evidence

16. Econ. Rentals, Inc. v. Garcia, 819 P.2d 1306, 1317 (N.M. 1991). *See also* Buck Consultants, Inc. v. Glenpointe Assoc., 217 F. App'x 142, 148 (3d Cir. 2007) (applying New Jersey law and holding that "reasonable consent" clauses are for "the protection of the landlord in its ownership and operation of the particular property—not for its general economic protection") (internal quotation mark omitted).

17. Toys "R" Us, Inc. v. NBD Trust Co., No. 88 C 10349, 1995 U.S. Dist. LEXIS 14878, at *111–12 (N.D. Ill. Sept. 29, 1995).

18. *See, e.g.*, 446 Main St., LLC v. Lebel, NBSP049972, 2008 Conn. Super. LEXIS 2382, at 7–8 (Conn. Super. Ct. June 20, 2008) (after rejecting landlord's purported basis for reasonable withholding of consent, court found that landlord's true motivation for denying consent was "animosity" between parties).

19. *See, e.g.*, Ring v. Mpath Interactive, Inc., 302 F. Supp. 301, 305 (S.D.N.Y. 2004); *Toys "R" Us*, No. 88 C 10349, 1995 U.S. Dist. LEXIS 14878, at *111; Whitman v. Pet, Inc., 335 So. 2d 577, 579–80 (Fla. Dist. Ct. App. 1976); *Funk*, 633 P.2d at 589; Jack Frost Sales, Inc. v. Harris Trust & Sav. Bank, 433 N.E.2d 941, 943 (Ill. App. Ct. 1982); Davis v. JT Bldg. & Dev., LLC, C.A. No. PB 07-4683, 2010 R.I. Super. LEXIS 155, at *26 (R.I. Super. Ct. Nov. 5, 2010).

20. Restatement (Second) of Prop.: Landlord & Tenant § 15.2 cmt. g (1976).

21. *In re* Fifth Ave. Originals, 32 B.R. 648, 656 (Bankr. S.D.N.Y. 1983); Campbell v. Westdahl, 715 P.2d 288, 293 (Ariz. Ct. App. 1985).

22. *See, e.g.*, *In re* Fashion World, Inc., 44 B.R. 754, 757 (Bankr. D. Mass. 1984); *Davis*, C.A. No. PB 07-4683, 2010 R.I. Super. LEXIS 155, at *24–26.

23. *See, e.g.*, Campbell v. Westdahl, 715 P.2d 288, 294 (Ariz. Ct. App. 1985); D'Oca v. Delfakis, 636 P.2d 1252, 1253–54 (Ariz. Ct. App. 1981); Camel Square, L.L.C. v. Rubin Cos., 1 CA-CV 09-0342, 2010 Ariz. App. Unpub. LEXIS 1319, at *24 (Ariz. Ct. App. July 13, 2010) (citing *Westdahl*).

for the landlord to make a determination regarding the new party (consisting of things such as the assignee's financial condition, the assignee's experience in operating its business, and how the premises are to be used) is reasonable.[24]

F. Principles behind Implied Reasonableness Doctrine

The general definitions discussed above are supplemented in some cases by additional standards (often vague and confusing when actually applied to facts). For example, it has been said that the reasonableness of the withholding of consent is determined by "comparing the justification for a particular restraint on alienation with the quantum of restraint actually imposed by it."[25] Obviously, this reflects the fact that one of the rationales for the implied reasonableness standard in some states is that the lease assignment clause constitutes an invalid restraint on alienation. The reasonableness determination is "governed by principles of fair dealing and commercial reasonableness."[26] This reflects the alternate justification for the implied reasonableness requirement in most states: the doctrine of commercial good faith and fair dealing. Thus, it has been said that denial of a consent must be in good faith to be reasonable,[27] which is not surprising.

G. Timing

It is notable that the length of time in which the landlord makes the decision on whether to consent or not to consent to a requested assignment does matter. This is true even though, unfortunately, very few lease assignment clauses state a time period in which the landlord has to make its decision. Thus, it will look bad and could well lead to a finding of "unreasonableness" if a landlord instantly refuses consent before it has all relevant information that should be obtained in making the consent decision.[28] Again, the type of information that the landlord ought to have in making the consent decision includes not only financial information but also knowledge regarding projected sales, gross income, income per square foot, and, in the case of partial subleases, the size of the subleased space.[29] However, if under the scenario the landlord is not given a reasonable amount of time by tenant to issue a decision, the withholding of consent can be found reasonable due to

24. *See, e.g.*, *Campbell*, 715 P.2d at 294; *D'Oca*, 636 P.2d at 1254; Lightway Realty, Inc. v. Nicotra-Weiler Inv. Mgmt., Inc., NH 251, 1984 Conn. Super. LEXIS 346, at *5 (Conn. Super. Ct. May 15, 1984); Losurdo Bros. v. Arkin Distrib. Co., 465 N.E.2d 139, 143 (Ill. App. Ct. 1984); 752 Pac. LLC v. Pac. Carlton Dev. Corp., 836 N.Y.S.2d 503, 503 (N.Y. Gen. Term 2007); 8902 Corp. v. Helmsley-Spear, Inc., 804 N.Y.S.2d 725, 726 (N.Y. Gen. Term 2005).

25. Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 843 (Cal. 1985).

26. Brigham Young Univ. v. Seman, 672 P.2d 15, 18 (Mont. 1983).

27. *In re Fashion World*, 44 B.R. at 758.

28. *See* Toys "R" Us, Inc. v. NBD Trust Co., No. 88 C 10349, 1995 U.S. Dist. LEXIS 14878, at *124 (N.D. Ill. Sept. 29, 1995).

29. *Toys "R" Us*, No. 88 C 10349, 1995 U.S. Dist. LEXIS 14878, at *124.

such circumstances.[30] Yet a landlord's failure to make a decision in a timely manner itself can be found to be unreasonable.[31]

The landlord does not need to consider a sublease request until a definite sublease agreement has been entered into between the sublessor and the sublessee.[32]

H. Drafting Your Own Standards

It is very important to note that if the parties to the lease desire to themselves create a definition of reasonableness, they may do so and the courts will enforce and apply such definitions.[33]

III. FACTORS USED BY COURTS IN DETERMINING REASONABLENESS

In applying the definitions of "reasonableness" discussed above in the context of lease assignment and sublease consents, courts often articulate the "factors" that they look at in making their decision, though such factors are generally not intended to be exhaustive.[34] A large number of cases apply the following factors: (1) the financial responsibility of the assignee; (2) the suitability of the assignee's use for the premises; (3) the legality of the assignee's proposed use; and (4) the nature of the assignee's occupancy.[35] Some, but not all, of the decisions noted above add as a factor the assignee's need for alterations.[36] These standards seem

30. *See, e.g.*, Fahrenwald v. LaBonte, 653 P.2d 806, 811 (Idaho Ct. App. 1982); Losurdo Bros. v. Arkin Distrib. Co., 465 N.E.2d 139, 143 (Ill. App. Ct. 1984). *But see* Paramount Developers & Contractors, Inc. v. M.D. Admin. Servs. Corp., B155076, 2004 Cal. App. Unpub. LEXIS 1184, at *16–17 (Cal. Ct. App. Feb. 5, 2004) (landlord's claim that it had only 24 hours to evaluate subtenant fitness was "misleading," as landlord had known about negotiations, seen letters of interest and intent, and had requested subtenant information prior to this period).

31. Rock Cnty. Sav. & Trust Co. v. Yost's, Inc., 153 N.W.2d 594, 597 (Wis. 1967). *See also* Parr v. Triple L&J Corp., 107 P.3d 1104, 1107 (Colo. App. 2004) ("[landlord's] decision to delay consent amounted to a withholding of consent, especially given plaintiffs' indication that time was of the essence"); No Frills Supermarkets, Inc. v. Brookside Omaha Ltd. P'ship, No. A-10-652, 2011 Neb. App. LEXIS 85, at *20 (Neb. Ct. App. July 5, 2011) (landlord's persistent delay tactics constituted an unreasonable withholding of consent and bad faith).

32. *E.g.*, Worcester–Tatnuck Square CVS, Inc. v. Kaplan, 33 Mass. App. 499, 601 N.E.2d 485 (1992).

33. *Toys "R" Us*, No. 88 C 10349, 1995 U.S. Dist. LEXIS 14878, at *115 (citations omitted) ("where a lease continues provisions giving further meaning to reasonableness clause, the standard of reasonableness varies according to the provisions in the lease"); Whitman v. Pet, Inc., 335 So. 2d 577, 579 (Fla. Dist. Ct. App. 1976) (applying provision in assignment clause that proposed tenant be of "substantially the same type, class, nature and quality of business, merchandise, services and management").

34. *See* Van Sloun v. Agans Bros., Inc., 778 N.W.2d 174, 180–81 (Iowa 2010).

35. *See, e.g.*, Tucson Med. Ctr. v. Zoslow, M.D., 712 P.2d 459, 462 (Ariz. Ct. App. 1985); Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 842 (Cal. 1985); Fernandez v. Vazquez, 397 So. 2d 1171, 1174 (Fla. Dist. Ct. App. 1981); Maxima Corp. v. Cystic Fibrosis Found., 568 A.2d 1170, 1176 (Mo. Ct. Spec. App. 1990); Newman v. Hinky Dinky Omaha-Lincoln, Inc., 427 N.W.2d 50, 54 (Neb. 1988); Am. Book Co. v. Yeshiva Univ. Dev. Found., Inc., 297 N.Y.S.2d 156, 160 (N.Y. Gen. Term. 1969); Jones v. Andy Griffith Prods., Inc., 241 S.E.2d 140, 143 (N.C. Ct. App. 1978).

36. *E.g.*, *Kendall*, 709 P.2d at 845. *See also* Speedway Superamerica, LLC v. Tropic Enters., Inc., 966 So. 2d 1, 4 (Fla. Dist. Ct. App. 2007) (applying *Fernandez* factors).

odd to a lease practitioner; after all, aren't requirements for such things as use and legality specifically governed by other clauses in the lease?

The following factors are frequently stated to be unreasonable reasons to deny assignment requests, if solely due to such reasons: personal taste, convenience, sensibility, or desire for increased rent.[37]

Specific reasons that courts have found to be reasonable in denying consent to assignments or subleases include the landlord's desire to ensure performance of the lease covenants, such as restrictions on use;[38] to prevent a loss in revenue under a percentage rent clause;[39] a desire to meet commercial objectives for the properties, such as to have only one "lead tenant";[40] to prevent competition with other businesses in the same shopping center that would prejudice the landlord's relationship with other tenants;[41] and if the sublease would injure or devalue lessor's interest in the property.[42] However, the landlord should investigate and quantify the reasons for rejection of the assignee on each such basis. For example, in the situation of percentage rent, the landlord must objectively measure the predicted percentage rent from the new tenant and compare this to what the landlord might reasonably have expected to receive under the original lease.[43] If somehow the assignment is to cause the landlord to incur cost of exterior changes and, therefore, the landlord refuses to consent, the landlord should determine the actual cost of the changes first.[44]

On the contrary, specific factors have been held to be unreasonable in withholding consent: a subjective sense of "tone" and "image," though a landlord may consider "tone and "image" to the extent supported by objective evidence that a trier of fact could use to objectively conclude that the assignment would be financially detrimental to the landlord;[45] where "animosity" or disputes between the parties is the cause for the withholding;[46] if the landlord says that its lender would reasonably reject the assignment within the lender's rights but the lender is not

37. *See, e.g.*, *Kendall*, 709 P.2d at 842; *Fernandez*, 397 So. 2d at 1174; Funk v. Funk, 633 P.2d 586, 589 (Idaho 1981); Haack v. Great Atl. & Pac. Tea Co., 603 S.W.2d 645, 650 (Mo. Ct. App. 1980); Brigham Young Univ. v. Seman, 672 P.2d 15 (Mont. 1983); First Am. Bank of Nashville v. Woods, 781 S.W.2d 588, 591 (Tenn. Ct. App. 1989) (all citing Broad & Branford Place Corp. v. J. J. Hockenjos Co., 39 A.2d 80 (N.J. 1944), for unreasonableness of "personal taste, convenience, and sensibility").

38. Pay 'N Pak Stores, Inc. v. Superior Court of Santa Clara Cnty., 258 Cal. Rptr. 816, 819 (Cal. Ct. App. 1989).

39. Norville v. Carr-Gottstein Foods Co., 84 P.3d 996, 1002 (Alaska 2004); John Hogan Enters., Inc. v. Kellogg, 231 Cal. Rptr. 711, 712 (Cal. Ct. App. 1986); *Jones*, 241 S.E.2d at 143–44.

40. *Kendall*, 709 P.2d at 846.

41. Norville v. Carr-Gottstein Foods Co., 84 P.3d 996, 1002 (Alaska 2004).

42. Econ. Rentals, Inc. v. Garcia, 819 P.2d 1306, 1317 (N.M. 1991).

43. Toys "R" Us, Inc. v. NBD Trust Co., No. 88 C 10349, 1995 U.S. Dist. LEXIS 14878, at *120 (N.D. Ill. Sept. 29, 1995).

44. *Id.* at *120.

45. Ernst Home Ctr., Inc. v. Sato, 910 P.2d 486, 493 (Wash. Ct. App. 1996).

46. 446 Main St. LLC v. Lebel, 2008 Conn. Super. LEXIS 2382, at *7–8 (animosity), Parr v. Triple L & J Corp., 107 P.3d at 1107 (disputes).

actually asked to consent;[47] to "change the tenant mix";[48] and simply that to consent to any sublease is against the landlord's "policy."[49] To prove that a landlord has been unreasonable in the refusal to consent, the tenant must also establish that the assignee is more than theoretical and in fact must be ready, willing, and able to take over the lease and meet reasonable commercial standards;[50] the assignee's willingness just to purchase the tenant's store without demonstrating willingness to accept the assignment is not enough.[51] Of course, the ability of the assignee or subtenant to perform under the lease is always something that the landlord should look at, and the landlord is reasonable if it rejects an assignee or subtenant on the basis that the proposed tenant is "insolvent, or of dubious financial responsibility, or has a poor payment record."[52] However, the landlord must demonstrate a basis for its financial concerns, and not merely assert that the landlord believes the assignee to be a financial risk.[53] Courts "consider not only the types of reasons advanced for the refusal of consent but also the reasonableness of the specific factual underpinnings offered in support of those reasons."[54]

IV. SAMPLE OF SPECIFIC HOLDINGS

To provide no more than a flavor of the many holdings reached in specific cases construing the reasonableness of a landlord's consent, a few sample decisions follow. There are several cases in which the landlord said it would not consent unless rent was renegotiated, and therefore the landlord was found to be unreasonable.[55] Similarly, when the landlord said that it would not consent to an assignment or sublease unless it received half of the profits that the lessee would receive (and the original lease did not give landlord such right), the landlord was

47. *Toys "R" Us*, No. 88 C 10349, 1995 U.S. Dist. LEXIS 14878, at *128–29.

48. W. Farms Assocs. v. Sofro Fabrics, Inc., SPH 850126555, HA759, 1986 Conn. Super. LEXIS 91, at *11 (Conn. Super. Ct. July 2, 1986).

49. Stern's Gallery of Gifts, Inc. v. Corporate Prop. Investors, Inc., 337 S.E.2d 29, 38 (Ga. Ct. App. 1985). *See also* Nisby v. Sheskey, 2007 Mass. App. Div. 103, 104 (Mass. Dist. Ct. 2007) (landlord stated "no one subleases anything from my property by their own leases").

50. Jack Frost Sales, Inc. v. Harris Trust & Sav. Bank, 433 N.E.2d 941, 944 (Ill. App. Ct. 1982).

51. Krupa, Inc. v. Leonardi Enters., C.A. No. 04 C 7809, 2007 U.S. Dist. LEXIS 60446, at *8–9 (N.D. Ill. Aug. 15, 2007).

52. Vranas & Assocs., Inc. v. Family Pride Finer Foods, Inc., 498 N.E.2d 333, 339 (Ill. App. Ct. 1986) (citation omitted) *See also* Darin, LLC v. StratEdge Corp., 2007 Mass. App. Div. 91, 91 (Mass. Dist. Ct. 2008) (subtenant had no operating capital or business plan); O'Neil v. M. V. Barocas Co., No. 243356, 2004 Mich. App. LEXIS 1506, at *12 (Mich. Ct. App. June 15, 2004) (concerns about an assignee's ability to run a business based on its past poor performance were reasonable); WHTR Real Estate Ltd. P'ship v. Venture Distrib., Inc., 825 N.E.2d 105, 109 (Mass. App. Ct. 2005) (tenant did not produce the necessary "ready, willing, and able" candidate for subleasing by merely showing a "probable future business relationship" with tenant's potential sublessee). *Cf.* Davis v. JT Bldg. & Dev., LLC, C.A. No. PB 07-4683, 2010 R.I. Super. LEXIS 155, at *28 (R.I. Super. Ct. Nov. 5, 2010) ("[t]he primary factor courts consider is the financial ability of the proposed tenant to perform under the lease").

53. Ring v. Mpath Interactive, Inc., 302 F. Supp. 2d 301, 306 (S.D.N.Y. 2004).

54. Safeway v. CESC Plaza Ltd. P'ship, 261 F. Supp. 2d 439 (E.D. Va. 2003).

55. *See, e.g.*, Tucson Med. Ctr. v. Zoslow, M.D., 712 P.2d 459 (Ariz. Ct. App. 1985); Campbell v. Westdahl, 715 P.2d 288, 294 (Ariz. Ct. App. 1985).

held unreasonable.[56] The landlord was held to be unreasonable when it denied consent based on the lack of a guaranty from the principal of an assignee, when the assignee itself was financially responsible and its business was identical to the original lessee.[57] Landlords have been found to be reasonable when the refusal was based on the lack of a guaranty and the assignee was a new business and had no rental history or experience in the assignee's business operations.[58] Yet the landlord must establish a need for such a guaranty.[59]

There are, of course, a few decisions that stand out as being odd or controversial. The primary one in the reasonable-consent context is undoubtedly *Astoria Bedding, Mr. Sleeper Bedding Center, Inc. v. Northside Partnership*.[60] This lease had a use clause stating that the premises would be used only for the "purpose of conducting and operating retail bedding, home furnishings and accessory business."[61] The court held that the landlord was unreasonable in denying subletting to the operator of a packaging and mailing service because the sublease clause, which said consent could not be unreasonably withheld, controlled instead of the use clause.[62] Therefore, the sole reliance on the purpose clause was unreasonable.[63] Astoria is a good example of a case that contributes to the constantly increasing length of lease agreements, as the court indicated that if the lease had specifically stated in its sublease clause that compliance with the use clause was a condition to sublease approval, then under the same facts the withholding of consent would have been reasonable.[64] This drafting tip was proven effective in Beauty Plus Stores II, Inc. v. 404 6th Ave. Realty Corp.,[65] in which the lease explicitly incorporated limits on use into its conditions for assignment or sublease; the court held that the landlord was reasonable in failing to consent to a sublease that would have changed the use of the premises from a beauty salon to a mobile telephone store.

Less disturbing legally but probably more controversial as a practical matter was a requested sublease to Planned Parenthood (which would use the space for the original tenant's same uses, which were offices, stockrooms, and storage). The landlord, a university, refused consent because it "considers the activities of the proposed subtenant to be inconsistent with the present use of the premises and with the educational activities of the university." The court held that the basis of

56. *See, e.g.*, Bedford Inv. Co. v. Folb, 180 P.2d 361, 362 (Cal. Ct. App. 1947); Warner v. Konover, 553 A.2d 1138 (Conn. 1989); 1010 Potomac Assocs. v. Grocery Mfrs. of Am., Inc., 485 A.2d 199, 209 (D.C. 1984).

57. Vranas & Assocs., Inc. v. Family Pride Finer Foods, Inc., 498 N.E.2d 333, 338–40 (Ill. App. Ct. 1986).

58. Pakwood Indus., Inc. v. John Galt Assocs., 466 S.E. 2d 226, 228–29 (Ga. Ct. App. 1995).

59. *See Davis*, C.A. No. PB 07-4683, R.I. Super. LEXIS 155, at *31–32 (distinguishing *Pakwood* and finding refusals unreasonable where assignee's lease obligations were still personally guaranteed by the original guarantor and assignees had experience in the relevant industry).

60. 657 N.Y.S.2d 796, 797 (N.Y. App. Div. 1997).

61. *Id.* at 797.

62. *Id.*

63. *Id.*

64. *Id.*

65. 2008 N.Y. Misc. LEXIS 9053, at *5 (N.Y. Gen. Term Dec. 4, 2008).

denial was unreasonable, since it was based on "alleged philosophical and ideological inconsistencies between itself and the proposed subtenant."[66]

V. CONCLUSIONS AND PRACTICE POINTERS

What can one learn from the decisions of various courts applying the reasonableness standard to assignment consents? The decisions are truly helpful, regardless of whether one represents a landlord or tenant or whether one is dealing with the requested lease assignment or with drafting a lease.

It has often been said in real estate leasing negotiations that ultimately it is "all about the money" and that all the sophisticated arguments that are made and detailed reasons given for negotiation positions only mask that fact. Perhaps that is true, but in dealing with an assignment request, the landlord had better make sure that it does not look like it is all about the money, at least in a general sense. If a landlord wishes to be found to have reasonably denied an assignment request, the reason for the denial must be only "about the money" in the sense of the impact of the assignment on the value, condition, and operation of the property in question. The denial cannot be "all about the money" in the general sense of the landlord trying to get a better deal than it negotiated with the original tenant when the lease was signed.

This overall philosophy can guide the landlord in deciding whether it can deny a requested assignment. This is a hard decision to make given the fact that a denied assignment or sublease request may likely result in a suit by the tenant against the landlord for tortious interference with the contract between the tenant and the contemplated assignee or subtenant. Therefore, the landlord cannot use the assignment or sublease request as an opportunity to renegotiate the lease unless there is very strong and clear lease language that limits the definition of reasonableness and provides a factor that can be relied on by the landlord in denying the request.

Later on, if a landlord wishes to withhold consent, it should enumerate *all* its grounds for refusal in its communications to the tenant so that it preserves all arguments for reasonableness in litigation.[67]

The landlord should also keep in mind that the reasonableness inquiry may affect its position outside of the consent issue. Even if a lease allows a landlord to withhold consent for any reason, the situation may require that the landlord mitigate damages when a tenant breaches a lease, and this can operate "as a practical constraint on [the landlord's] exercise [of its right to withhold consent]."[68] From the tenant's perspective, the tenant will want to set itself up in advance for a stron-

66. Am. Book Co v. Yeshiva Univ. Dev. Found., Inc., 297 N.Y.S.2d 156, 159 (N.Y. Gen. Term. 1969).

67. *See* Golden Eye, LTC. V. Fame Co., No. 0603166/2007, 2008 N.Y. Misc. 8571, at *16 (N.Y. Gen. Term Jan. 16, 2008) ("the Court may not determine reasonableness of withholding consent based on grounds that were not included in the letter refusing consent").

68. *See* Brennan Assocs. v. OBGYN Specialty Grp., P.C., 15 A.3d 1094, 1101 (Conn. App. Ct. 2011) (internal quotation marks omitted) (noting that if there is a duty to mitigate, a landlord must make *reasonable efforts* to do so, but holding that landlord had no such duty in this case).

ger tortious interference claim by first having an assignment or sublease document signed with the assignee or subtenant, contingent upon the landlord's consent to the first transaction, before seeking the request. The tenant will want to keep in mind throughout negotiations that the tenant's objective is to unveil as the landlord's true reason for denying the consent a desire to obtain greater rent from the proposed assignee or subtenant. The tenant should also supply to landlord upon the initial assignment request as much information as possible concerning the assignee's financial status and proposed operations, to avoid having the landlord reasonably rely on a lack of information as a basis for denying consent.

It is elementary that the landlord will want to include the lease language that narrows the "reasonableness" standard from the standard espoused in the applicable case law (for details on the drafting of assignment clauses, see chapter 23). The lengthy clauses that one sees defining "reasonableness" and setting forth specific reasons that are agreed in advance by the parties to be "reasonable" should be very effective if drafted unambiguously. The landlord will also want to buy itself time (and leverage) by specifying in the lease detailed information about the assignee that must be provided in order for the landlord to consider an assignment request. The tenant should deal up front with any flexibility it needs to have in dealing with the leased premises and should never simply rely upon a general "reasonableness" clause in the lease as being sufficient in covering such situations.

Unfortunately, the "reasonable consent" clause is yet another instance in which the client's near-universal desire for brief, "simple" language is unlikely to be able to accomplish the client's true objectives.