

Thursday, November 4, 2021
11:00 AM – 12:15 PM

Peer to Peer 6

Show Me Assign; Take Assignment and Subletting to the Limit, One More Time

Tom Cahill
Owner
Thomas B. Cahill, Attorney at Law, P.C.
1155 South Washington Street
Suite 106
Naperville, Illinois 60540
Tom@tbclaw.com

John Lewis
Senior Counsel
Hartman Simons & Wood LLP
6400 Powers Ferry Road NW
Suite 400
Atlanta, Georgia 30339
John.Lewis@hartmansimons.com

I. Introductions

II. Discussion Fact Pattern 1

Joltz is the latest retail sensation sweeping the country. It is a 30,000-square foot emporium featuring espresso, high end lighting fixtures and electric scooters. The stores are fit out with many high-end finishes, much more extravagant than normal retail spaces.

The money behind Joltz is Virginia Potts a cryptocurrency billionaire. Ms. Potts has already started and made healthy profits selling companies featuring kickboxing studios and river barge cruises through America's heartland. Ms. Potts hopes to repeat her success with Joltz, but is not afraid to cut her losses and exit the business. Joltz organizes a single purpose entity for each store, but Ms. Potts is willing to sign an acceptable guaranty for each location. Joltz has just started franchising some of its stores. Recently, Ms. Potts has been considering licensing the espresso business at each location to Electric Espresso a start up in the espresso business

The preferred developer for Joltz is Anthony Stark. Mr. Stark had a good track record of developing specialty retail projects featuring high end and mid-point retail. His projects always come in on time and under budget. Mr. Stark typically uses a mini-perm construction loan to develop his projects. Like Joltz Mr. Stark organizes a single purpose entity for each project. Mr. Stark usually sells his projects to Universal Holdings a publicly traded REIT. Occasionally, he will sell a project to Henry Gondorff, a private investor who buys and holds retail projects for the long term.

Your table will be assigned to represent either Ms. Potts or Mr. Stark. Please develop a bullet pointed list of suggested positions for your client to consider and negotiate as they negotiate the subletting and assignment language for their next five transactions. Please consider the following provisions:

- Subletting and assignment
- Landlord's Transfer Rights
- Name under which tenant will operate
- Concerns with the license to Electric Espresso
- Other provisions

III. Discussion Fact Pattern 2

Walter's Wonderful Widgets ("WWW") has been a darling of the retail world for the last several years. WWW sells a wide variety of items that, while not useful in homes and other private settings, are particularly popular for group social settings and other in-person gatherings, including business meetings, weddings, sporting events, and live concerts. WWW's products are highly use-specific and often require in-person examination for customers to fully understand their use and applicability for any given gathering. The products are manufactured in, and shipped from, multiple foreign countries.

WWW has enjoyed record sales and profits for the last several years and has been recognized as one of the nation's fastest-growing retailers. By virtue of its in-person focus, it has been viewed as a beacon of hope for brisk-and-mortar retail. With no end to the company's prosperity in sight, WWW has expanded rapidly and widely.

WWW has a long-term lease for 80,000 square feet of space in the Typical Shopping Center (the "Typical Center"). Twelve years remain in the initial term, with four 5-year options. The lease has a specific use clause and requires continuous operation for the initial term. There is no sales kick-out provision. Rent and CAM are typical for the market, and there is percentage rent as well. The lease has a very limited force majeure provision.

The WWW location in the Typical Center has produced very healthy revenue and profits during the first several years of the lease term. However, a few months ago the nation and the world began to take notice of a new viral outbreak of a previously-unknown but deadly disease. The nation is united in how best to beat the disease, and a uniform set of restrictions, with few variations, is put into place by federal, state and local government authorities with near-uniform observation and compliance with the restrictions by individuals and businesses alike. The science is clear, and the restrictions will need to stay in place for at least three years.

Because of the nature of the disease, retail establishments are limited to very restricted hours of operation, with extremely limited customer capacity, and all in-person social, business, sporting and other gatherings are limited to no more than five people. In addition, the importation of foreign products is severely limited, both to prevent disease spread and as a result of supply-chain interruptions. These restrictions particularly impact operators such as WWW, whose sales, revenues and cash flow consequently plummet. In an effort to stave off financial ruin, management of WWW instructs its expert real estate team to find any way possible to cut expenses, including store closures, lease terminations, assignments of leases, and subletting of spaces. Subletting is viewed as particularly attractive, as management is confident that business will rapidly recover once the restrictions are lifted, so WWW wants to be able to reclaim its premises and resume operations as in the past, since an event such as the current disease-induced downturn would surely never happen again.

For the WWW location in the Typical Center, the WWW real estate team, led by its Vice President, I. Noe Itall, assisted by the company's Director of Leasing, Clu Less, has found a perfect subtenant, Consolidated Retail and Other Omni-Channel Sales ("CROOCS"). CROOCS is an omni-channel marketing company that, among other things, (i) offers online sales of a variety of American-made (and thus not affected by the import restrictions) sporting goods, home improvement products and groceries for home delivery or curbside pick-up, (ii) arranges (for a substantial fee) delivery of meals from local restaurants (which are not permitted to offer in-restaurant dining), (iii) operates an online bank, (iv) provides telehealth services through a network of private physicians, and (v) operates a call center selling extended auto warranties. CROOCS has only been in operation for a year and a half and it has limited financial records and resources. However, CROOCS operates each of its locations with a minimal staff and is barely impacted by the disease-induced restrictions, so from WWW's perspective it appears to be the perfect subtenant candidate to alleviate WWW's financial stress at its Typical Center location. I. Noe Itall and Clu Less have entered into a letter of intent for a sublease to CROOCS, and they are sure that their Typical Center landlord will be thrilled as well. There are a few unsettled items in the LOI, however, including the length of the sublease term and the amount of space to be sublet.

At each table, consider, discuss and develop a list of the most important five or six issues and concerns with respect to the proposed subletting from the perspective of (i) the tenant, (ii) the subtenant, (iii) the landlord, and (iv) the landlord's lender. Without limiting your discussions, consider (among other things) the following:

- What provisions in the WWW lease are important to consider in addition to the assignment and subletting provisions?
- What provisions might there be in other leases for the Typical Center that would affect any proposed subletting of all or part of the WWW space?
- What provisions of the landlord's loan documents might affect how the landlord (and its lender) view any subletting of the WWW space?
- Do the issues differ significantly if the sublease is for only a portion of the tenant's space or for its entire leased premises?
- Do the issues differ significantly depending upon how the length of the proposed sublease compares with the remaining length of the tenant's lease term?