Not Reported in A.2d, 2003 WL 21254847 (Del.Ch.)
**(Cite as: 2003 WL 21254847 (Del.Ch.))**



Court of Chancery of Delaware
SEAFORD ASSOCIATES LIMITED PARTNERSHIP, Plaintiff,
v.
**SUBWAY** REAL ESTATE CORP., Defendant.
**No. Civ.A. 2248.**

Submitted May 5, 2003.
Decided May 21, 2003.

Dean A. **Campbell**, Moore & Rutt, P.A., Georgetown, Delaware, for Plaintiff.

Eugene H. Bayard, Wilson Halbrook & Bayard, P.A., Georgetown, Delaware, for Defendant.

*MEMORANDUM OPINION AND ORDER*

LAMB, Vice Chancellor.

I

***1** A lease, in which time is of the essence, provides that rent is due and payable in advance on the first day of each month. Over the course of the lease, the tenant routinely pays the rent by drawing and mailing a check on or about the first of the month. At no time does the landlord give notice of a default in payment. The lease also includes an option to renew for an additional 5-year period that is expressly made subject to a condition precedent that the tenant "has not been in default hereunder." Relying on the tenant's consistent and continuous failure to deliver the rental payment to the landlord by the first day of the month, the landlord rejects the tenant's attempt to exercise the renewal option. The question presented is whether the tenant's rent payment practices resulted in a series of defaults under the lease, thus preventing the tenant from satisfying the condition precedent to its right to renew.

II.

A. *The Lease And Lease Amendment*

On February 25, 1988, Seaford Associates, L.P. and **Subway** Restaurants, Inc. entered into a lease agreement (the "Lease") for certain premises in the Nylon Capital Shopping Center in Seaford, Delaware. For the past fifteen years, the premises consisted of a 1,380 square foot, free-standing building located at the corner of Stein Highway and Atlanta Road in Seaford, Delaware. Stein Highway and Atlanta Road are two of the major traffic flows into and through Seaford. **Subway** is the first fast food restaurant on the westerly approach to Seaford via State Route 20.

**Subway** Restaurants, Inc. subsequently assigned its interest in the Lease to **Subway** Real Estate Corporation.[FN1] This assignment was recognized in a document entitled Lease Amendment and Extension (the "Lease Amendment") dated February 24, 1997 executed by Seaford Associates and **Subway** Real Estate Corporation.[FN2]

FN1. Both **Subway** Restaurants, Inc. and **Subway** Real Estate Corporation are subsidiary corporations of the same ultimate parent and are used for leasing purposes.

FN2. **Subway** Real Estate Corporation is hereinafter referred to as "**Subway**."

The Lease Amendment, among other things, extended the term of the Lease for five years and granted **Subway** an option to renew the Lease for an additional five years (the "Renewal Option"). Rick Kreiser, the **Subway** franchisee who owned the **Sub-**

**way** that is the subject of this dispute, testified that he took a substantial role in drafting parts of the Lease Amendment. In particular he drafted Paragraph 5, which is commonly referred to as the "Relocation Section." [FN3] The Renewal Option was subject to certain conditions precedent, one of which included, without limitation, the requirement that **Subway** "has not been in default" of the Lease (the "Non-Default Condition"). [FN4] The term "default," however, is not defined in either the Lease or the Lease Amendment.

FN3. The Relocation Section provides:

> At anytime and from time to time throughout the term of this Lease, and any extension and/or renewal thereof, Landlord shall have the right to relocate the Premises (or substitute premises) to another premises in the Shopping Center. In the event Landlord makes such election to relocate: (a) Landlord shall notify Tenant of such election in writing at least one hundred twenty (120) days prior to the date on which such relocation shall be required to occur (the "Relocation Notice"), (b) the new premises shall be no smaller than the existing Premises, (c) the new premises shall have equivalent access to (including drive-thru access) and visibility of the existing premises, (d) Landlord shall pay the entire cost of relocation, including, but not limited to, regulatory agency fees, inspection fees, approval fees, **Subway** Restaurant décor leasehold improvements in effect at the time of relocation, moving Tenant's signage, fixtures, equipment and inventory to the new premises, (e) the new premises shall be deemed "Ready for Occupancy" prior to the time of relocation to minimize the lost business days associated with the relocation and the base rent shall be abated during said lost business days, if any, (f) [i]f Tenant chooses not to be relocated pursuant to this section, Tenant may elect to terminate the Lease by sending written notice to Landlord within thirty (30) calendar days of the date of the Relocation Notice (the "Termination Notice"); within thirty (30) calendar days of the date of said Termination Notice, Landlord may elect to withdraw its election to relocate the premises and keep the Lease in full force and effect, (g) if, after ninety (90) days in the new premises, Tenant's sales have dropped dramatically, the base rent shall be adjusted so as not to exceed six percent (6%) of the average gross sales revenue in the new premises during said 90 day period; the base rent stipulated in the Lease shall be reinstated if and when the said base rent exceeds 6% of the average gross sales revenue in the preceding 90 day period, and (h) this Lease shall remain in effect pursuant to its terms (including rental) with respect to the substitute premises except that Landlord and Tenant shall enter into an amendment of this Lease agreeing to and evidencing the relocation of the Premises

FN4. In particular, Paragraph 3 of the Lease Amendment provided:

> Provided that Tenant has not been in default hereunder, Tenant, at its option, may extend the term of the Lease beyond the Extension Term for a renewal period of five (5) years (the "First Renewal Term"). Tenant shall exercise said option to extend by giving the Landlord written notice of its intention to extend not less than six (6) months prior to the expiration of the then current Lease term.....

The Lease Amendment is the product of a negotiation between the parties [FN5] **Subway** initially

drafted the Lease Amendment with a Non-Default Condition that required, as a condition precedent to **Subway's** right to exercise the Renewal Option, that **Subway** *"is* not in default" of the Lease.[FN6] Seaford Associates later suggested changing the Non-Default Condition to require that **Subway** *"has* not been in default" of its Lease obligations. This language appears in the final executed document.

FN5. PX 1

FN6. *Id.* (emphasis added).

***2** The Lease contains the following additional provisions that are relevant to this litigation:

> SECTION 5. *BASIC RENTALS.* The Basic Rental shall be payable in equal monthly installments in advance on the first day of each full calendar month during the Term.
>
> SECTION 10. *TAXES AND PROPERTY INSURANCE.* Tenant shall pay in each tax year during the term of this Lease, as additional rent, its proportionate share of real estate and ad valorem taxes.... Within thirty (30) days after receipt of such notice from Landlord (notice of pro rata share), Tenant will pay to Landlord the amount stated therein to be due.
>
> SECTION 11. *PAYMENT OF RENTALS.* Tenant covenants to pay all rentals when due and payable.
>
> SECTION 40. *PERFORMANCE BY TENANT.* Tenant covenants and agrees that it will perform all obligations herein expressed on its part to be performed and will promptly upon receipt of written notice specifying action desired by Landlord in connection with any such covenant (excluding the covenant to pay rent), comply with such notice. If Tenant shall not commence and proceed diligently to comply with such notice to the satisfaction of Landlord within five (5) days after delivery thereof, Landlord may enter upon the Premises and do the things specified in said notice ...
>
> SECTION 41. *REMEDIES OF LANDLORD.*
>
> A. If the rent agreed to be paid, including all other sums of money which under the provisions hereof may be considered as Additional Rent, shall be in arrears in whole or in part for five (5) or more days, Landlord may distrain therefor. If Tenant shall violate either (a) the covenant to pay rent and shall fail to comply with said covenant within five (5) days after the time such rent is due and payable to Landlord, or (b) any other covenant, except (a) above, made by it in this Agreement and shall fail to comply or commence compliance within five (5) days after being sent written notice of such violation by Landlord, Landlord may reenter the Premises and declare this Lease and the Tenancy hereby created terminated; Landlord shall be entitled to the benefit of all provisions of applicable laws respecting the speedy recovery of lands and tenements held over by Tenant or proceedings in forcible entry and detainer, shall be entitled to recover all reasonable attorney fees necessitated by such proceedings.
>
> C. Anything in this Lease Agreement to the contrary notwithstanding, at Landlord's option, Tenant shall pay a "late charge" of ten percent (10%) of any installment of rental .... when paid more than seven (7) days after the due date thereof, to cover the extra expense involved in handling delinquent payments.
>
> SECTION 42. *REMEDIES CUMULATIVE.* No reference to any specific right or remedy shall preclude Landlord from exercising any other right or from maintaining any action to which it may otherwise be entitled either at law or in equity.
>
> Landlord's failure to insist upon a strict performance of any covenant of this Lease Agreement or to exercise any option or right herein

> contained shall not be a waiver or relinquishment for the future of such covenant, right or option, but the same shall remain in full force and effect
>
> *3 SECTION 57. *TIME OF THE ESSENCE.* Time is of the essence with respect to the timeliness of all obligations of Landlord and Tenant under this Lease

It is undisputed that Seaford Associates often received rental payments from **Subway** after the first of the month. Robin Lohoefer, Comptroller for CTR Management, Inc., which manages rent receivables for Seaford Associates, testified that it is the policy of Seaford Associates (and CTR Management) that all rental checks are recorded and deposited on the date received. Lohoefer introduced a Tenant Ledger and spreadsheet showing the check date and date rent and common area maintenance (CAM) checks were received between the period January 1999 to March 2003.[FN7] Significantly, the first entry on that spreadsheet shows a check written three days late and received ten days late.[FN8] Lohoefer also testified that Seaford Associates sent Kreiser (the franchisee) an invoice, by the 20th of each prior month, stating that the rent was due on the first day of the following month.

FN7. PX 4.

FN8. *Id.*

Dwight Belcher, the person to whom Kreiser sold his interest in the **Subway** franchise in October 2001,[FN9] testified in his deposition that he made a practice of writing out checks on the first day of the month, or sometimes the next day or days later, and then placing them in the mail.[FN10] Moreover, Kreiser testified that "[t]he rent check was treated exactly like a tax due by the federal government. If it was postmarked by midnight on the 15th of April, if the rent was postmarked by the first, it was considered paid on my account." [FN11]

FN9. Although Belcher purchased Kreiser's interest in the **Subway** franchise in October 2001, he has been involved with that **Subway** franchise since it was opened in 1988. Belcher Dep. at 152.

FN10. *See* Belcher Dep. at 156.

FN11. Kreiser Dep. at 106. In its Post Trial Memorandum, **Subway** argues that it has "mailed the monthly rent on the first of each month" for fifteen years. *See* Def. Post Trial Mem. at 2. This statement was made without any citation to the record and appears false. In particular, that statement is contradicted by deposition testimony and documentary evidence as discussed above. Moreover, Kreiser testified in his deposition that if the first of the month fell on a Saturday, the rent check "was written on Friday, dated the first, and mailed on Saturday." Kreiser Dep. at 105. This testimony, however, is contradicted by the facts as well. For example, May 1, 1999 fell on a Saturday. Yet, the rent check for that month was dated May 3, 1999 and was not received by Seaford until May 4. PX 4. Similarly, December 1, 2001 fell on a Saturday, but the rent check for that month was dated December 3, 2001 and not received by Seaford until December 5, 2001. *Id.* These are but a few examples of checks that were written after the first of the month. There are many others. *See generally id.*

Ernie Oliver, Senior Leasing Representative for **Subway**, testified in his deposition that he may have "glanced" at the Lease but that he had not "gone over it in detail." [FN12] When asked if he knew when rental payments were due, he indicated that he was sure it was on the "first of the month." [FN13] Similarly, Kreiser testified that rent was "[p]ayable on the first of the month." [FN14] He also testified that there was no grace period on rental payments.[FN15] Belcher also admitted that rental payments were "[d]ue on the first of the month." [FN16]

FN12. Oliver Dep. at 12.

FN13. *Id.*

FN14. Kreiser Dep. at 103.

FN15. *See id.*

FN16. Belcher Dep. at 157.

Oliver was asked questions in his deposition regarding how **Subway**, as tenant, ensures that its franchisees or sublessees are paying the rent in a timely manner. Oliver indicated that **Subway** has no controls or policies in place to ensure that franchisees pay rent on time.[FN17] In other words, the actual tenant has no knowledge or assurance that rent is being paid unless the landlord notifies it of the default, which the landlord has no obligation to do.

FN17. Oliver Dep. at 14-16.

B. *Seaford Associates' Attempts To Relocate **Subway***

Since at least 2000, Seaford Associates has been negotiating with Eckerd Drug to lease part of the Nylon Capital Shopping Center. On January 25, 2000, Seaford Associates provided Eckerd cost estimates and a site plan indicating the location of a proposed free-standing building. In order for the proposed Eckerd building to be built, the current **Subway** building must be demolished. In January 2003, Eckerd entered into a lease agreement with Seaford Associates for the leasing and construction of a new, free-standing store at the corner of Stein Highway and Atlanta Road. The lease calls for Eckerd to occupy its new premises by October 1, 2003.

***4** By letter dated January 24, 2002, Seaford Associates sent **Subway** a notice stating that Seaford Associates was exercising its option to relocate **Subway** (the "Relocation Notice") pursuant to the Relocation Section of the Lease Amendment. The Relocation Notice proposed moving **Subway** to a 2,697 square foot site that had previously been occupied by Mellon Bank (the "Mellon Bank Site"). Seaford Associates states in the Relocation Notice that the Mellon Bank Site has "equivalent (if not better) access and visibility as the existing Premises, and the new premises has an existing drive-thru access window." [FN18] The Relocation Notice also states that Seaford Associates will "pay the entire cost of such relocation, as required by said paragraph 5 of the Lease Amendment." [FN19] **Subway** never responded in writing to Seaford Associates' Relocation Notice, but orally rejected the relocation proposed, instead suggesting that Seaford Associates build a new free-standing building to accommodate **Subway's** operation.

FN18. Joint Trial Ex. E.

FN19. *Id.*

The limited discussions that followed led to a series of three letters from Seaford Associates to Kreiser dated February 12, 2002, February 14, 2002 and March 1, 2002, which proposed terms of a new lease contemplating the construction of a free-standing building adjacent to the proposed Eckerd building.[FN20] The proposal in the February 12, 2002 letter was for a 1,700 square foot building with rent set at $50,000 per year and the term of the lease to be twenty years. The proposal in the March 1, 2002 letter was for a 1,700 square foot building but with rent to be $37,500 per year and making the term of the lease ten years. At the bottom of each letter was a disclaimer in bold print that stated they were merely "letter[s] of interest" and that nothing in them was "intended to contractually bind" any of the parties, nor should they be "rel[ied] upon" in any way.[FN21]

FN20. *See* Joint Trial Ex. F. The February 14 letter was also faxed to Ray Burrows, a representative of **Subway**.

FN21. *Id.*

As part of these discussions, Seaford Associates told **Subway** to obtain some architectural drawings so they could further explore the issue. Thereafter, **Subway** hired French + Ryan, an architectural site plan and design firm, to perform some site plan evaluations and preliminary elevations of the proposed new **Subway** building. French + Ryan submitted two invoices to **Subway** for their services on this project, one for $1,600 and one for $2,400. **Subway** remitted payment to French + Ryan.[FN22]

FN22. **Subway** maintains that an agreement was reached whereby Seaford and **Subway** would split the cost of the French + Ryan bill. Seaford Associates agrees and further admits that it has not paid its part of the bill. Seaford Associates has stipulated that it will reimburse **Subway** once it receives an invoice. *See* Pl. Post Trial Br. at 6 n. 2.

On June 27, 2002, Glen Weinberg, an attorney hired by Seaford Associates to help manage and lease the Nylon Capital Shopping Center, learned from French + Ryan that plans were underway for a **Subway** location in another shopping center. Weinberg testified that Belcher told him that **Subway** would leave the Nylon Capital Shopping Center at the end of its lease term. Belcher admitted in his deposition that he was "90% sure" that **Subway** would be leaving the Nylon Capital Shopping Center.[FN23]

FN23. Belcher Dep. at 173.

By letter dated November 22, 2002, however, **Subway** provided written notice to Seaford Associates that it was exercising its option to extend the Lease.[FN24] This notice is on a piece of **Subway** Real Estate Corp. letterhead that is basically divided in half. The top half is a "cover" letter from Ernie Oliver of **Subway** Real Estate Corp. to Seaford Associates. The bottom half is the Notice of Renewal and states that " **Subway** Restaurants, Inc. hereby exercises its option to renew its lease for the above referenced location."[FN25] This Notice of Renewal is signed by Ernie Oliver, who is an authorized signatory for both **Subway** Restaurants, Inc. and **Subway** Real Estate Corp.

FN24. Joint Trial Ex. G.

FN25. *Id.*

III.

***5** On January 21, 2003, Seaford Associates filed a complaint in this action seeking a declaratory judgment that **Subway** has been in default of the Lease, that **Subway's** renewal notice is ineffective, and injunctive relief requiring **Subway** to vacate the premises by May 31, 2003. In its complaint, Seaford Associates claims that **Subway's** exercise of its option to extend was ineffective for two reasons. First, Seaford Associates argues that **Subway** has been in default of the Lease every month since January 1999 for failing to pay rent on time. Second, Seaford Associates argues that exercise of the option was ineffective because the **Subway** Real Estate Corp. letter states that **Subway** Restaurants, Inc. is renewing the Lease and not **Subway** Real Estate Corp.[FN26]

FN26. Because the court finds that **Subway** has been in default under the Lease, it will not reach the question of whether the strict requirements for the form of the Notice of Renewal have been complied with.

In its answer dated February 25, 2003, **Subway** filed a counterclaim seeking a declaratory judgment that **Subway** properly exercised its option and therefore has a lease that will not expire until May 31, 2008.

IV.

To succeed on its claim at trial, Seaford Associates must prove its case by a preponderance of the evidence.[FN27] Determinations of the weight given to evidence is a matter for the trier of fact.[FN28] Fur-

thermore, " '[a] trial court may determine the weight and credibility to be accorded any witness,' and is responsible for resolving conflicts in the evidence." FN29

FN27. *See, e.g., Heller v. Kiernan,* 2002 WL 385545, at *3 (Del. Ch. Feb. 27, 2002), *aff'd,* 806 A.2d 164 (Del. 2002)

FN28. *See Johnson v. Wagner,* 2003 WL 1870365, at *4 (Del. Ch. Apr. 10, 2003).

FN29. *Id.* (quoting *Jones v. Lang,* 591 A.2d 185, 188 (Del. 1990))

V

A. ***Subway** "Has Been In Default" Of The Lease*

**Subway's** right to extend the term of its Lease for a five-year term beyond the May 31, 2003 expiration was expressly subject to a condition precedent. FN30 The clear and unambiguous language of the Lease Amendment, negotiated at arm's-length between two commercial entities, provides that **Subway** may renew the lease for the additional period "[p]rovided that Tenant has not been in default" of its Lease obligations. As earlier mentioned, the language at issue was the subject of negotiation between the parties at the time of the Lease Amendment. The language originally proposed by **Subway** would have conditioned the right to renew merely on the fact that **Subway** "is not in default." During the course of negotiations, however, Seaford Associates required that the condition be changed to provide that **Subway** "has not been in default." Thus, the court will not construe the language at issue in favor of or against either party, but will construe that language in accordance with its ordinary and usual meaning.

FN30. A "condition precedent" is defined as: "An act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises." *Black's Law Dictionary* 289 (7th ed. 1999).

Neither the Lease nor the Lease Amendment defines a "default." The common usage of the term "default" in the legal community is: "[t]he omission or failure to perform a legal or contractual duty; esp[ecially] the failure to pay a debt when due." FN31 Therefore, the question becomes: when was rent due under the terms of the Lease? Belcher, Oliver and Kreiser all admit in their depositions that they knew payment was "due" on the first of the month. Moreover, Belcher admitted that he wrote rent checks on the first day of the month, *or the next business day,* and placed them in the mail. Further, the documentary evidence includes several checks that were written after the first of the month and were received by Seaford Associates days later.

FN31. *Black's Law Dictionary* 428 (7th ed. 1999); *see also Webster's Ninth New Collegiate Dictionary* 332 (1987) (defining default as "failure to fulfill a contract agreement, or duty as: (a) to fail to meet a financial obligation"); *Bradbury v. Thomas,* 27 P.2d 402, 405-06 (Cal.Ct.App. 1933) (default involves the failure to pay interest or principal on a debt when due)

***6** Importantly, **Subway** left the payment of rent to Kreiser and Belcher, its franchisees, who are not the named tenants under the Lease-**Subway** was. It was **Subway** who always had the legal obligation to comply with all of the Lease terms. Oliver, **Subway's** leasing agent, stated that **Subway** understood that rent was due on the first of the month, but confirmed that **Subway** took no steps to verify or assure that such payment obligations were met. Thus, the court readily concludes that **Subway** "has been in default" of its Lease obligations since at least January 1999, when the rent check dated January 4, 1999 was mailed to Seaford Associates.

**Subway** makes several unpersuasive arguments to avoid this conclusion. First, it argues without citation to authority that rent payments should be

treated the same as federal income tax payments to the IRS. It points out that under federal law when taxes are due on April 15 it means that the tax payments must be placed in the mail on April 15, not that the government must receive payments on or before April 15. This argument sheds no light on the common usage of "default" and is simply irrelevant because the current action involves a commercial transaction with private actors, not federal tax payments governed by the Internal Revenue Code and regulations adopted thereunder [FN32] In any event, the evidence in this case, as discussed above, clearly demonstrates that rent checks were not always placed in the mail by the first of the month.

> FN32. A more analogous situation might be the remittance of credit card payments, which do involve commercial transactions with private actors. It is well understood that the due date listed on a credit card bill is the date by which payment must be received by the credit card company. When a cardholder actually writes the check or places the payment in the mail is irrelevant. Indeed, many credit card companies recommend mailing payment at least seven days in advance of the due date in order to avoid a default.

Second, **Subway** argues that Paragraph 41 precludes a finding that default can occur before the five-day grace period found in that paragraph elapses. This is a misreading of Paragraph 41. That paragraph, entitled *Remedies of Landlord,* has nothing to do with whether a default has occurred. Rather, it prescribes actions Seaford Associates must take before it can enforce certain remedies, such as imposition of a late charge or termination of the Lease. For example, notice must be provided before Seaford Associates can impose a late charge or reenter the franchise's premises and terminate the Lease. Of course, Seaford Associates is not attempting to pursue either such remedy in this case.

Finally, **Subway** states that "no late rent notice or late rent payment charge was ever mailed by [Seaford Associates] to **Subway**. No other notice of default was ever mailed by [Seaford Associates] to **Subway**." [FN33] The natural inference from this statement is that Seaford Associates was obligated to provide **Subway** with notice of impending default. [FN34] There are two answers to this argument. First, notice of impending default is not required anywhere in the Lease or Lease Amendment. Second, Seaford Associates did actually send a rent notice each month. Lohoefer testified at trial that Seaford Associates sent the franchisees an invoice, no later than the 20th of each prior month, stating that the rent was due on the first day of the following month. Yet, **Subway** never delivered payment to Seaford Associates by the first of the month.

> FN33. Def. Post Trial Mem. at 1-2.

> FN34. The argument cannot possibly be that Seaford Associates was only obligated to provide notice of actual default because, once a single default occurs, **Subway** no longer has the right to exercise its Renewal Option. **Subway** also argues that since it had paid rent in a similar fashion before executing the Lease Amendment, Seaford Associates should be deemed to have waived its right to declare a default for late payments. This argument, however, is precluded by the non-waiver provision of Paragraph 42. *See, e.g., Capital Commercial Prop. v. Vina Enterprises,* 462 S.E.2d 74, 78 (Va.1995) (failure to complain of any act or omission on the part of the tenant does not constitute a waiver of a landlord's rights to certain conditions precedent in a renewal option when the lease contained a non-waiver clause). Furthermore, **Subway** cannot argue that its failure to pay rent in a timely manner is somehow immaterial. Such an argument must fail because of Paragraph 57 in the Lease, which states that "[t]ime is of the essence with respect to all obligations of . . . [ **Subway**] under

> this Lease." *See, e.g., Bozzachi v. O'Malley,* 566 N.W.2d 494, 495-96 (Wis.Ct.App.1997) (finding that failure to make timely payments, especially when there is a "time is of the essence" clause was in beach of the implied covenant of good faith).

B. *Seaford Associates Has Not Acted In Bad Faith Nor Does It Have "Unclean Hands"*

*7 **Subway** also makes two arguments that even if it were technically in default of the Lease it should nonetheless be entitled to exercise its Renewal Option. These arguments are that Seaford Associates negotiated the Lease Amendment in bad faith and that Seaford Associates is itself in violation of the Lease Amendment and therefore has unclean hands. Neither argument withstands scrutiny.

**Subway** argues that the Renewal Option was negotiated in bad faith. Specifically, **Subway** argues that "the three five-year renewal terms negotiated by **Subway** were meaningless before the amendment was signed, because, according to [Seaford Associates'] definition of default, **Subway** had been in default of its rental payment obligation since 1988 and could never be entitled to exercise any future option to renew." [FN35] The answer to this argument is simple. The Lease Amendment both extended the lease for a five-year period and changed many of its terms. It was, in essence, a new lease, and any defaults that might have occurred before the execution of the Lease Amendment have no bearing on whether **Subway** can satisfy the condition in the right of renewal that it "has not been in default." The relevant inquiry is whether **Subway** "has been in default" since the signing of the Lease Amendment. The facts clearly demonstrate that it has. There has been no evidence presented that, at the time the Lease Amendment was executed, Seaford Associates had some insidious plan in place to negotiate an extension and renewal that could never be exercised by **Subway**. Seaford Associates was merely protecting itself from having to re-lease its premises to a tenant that has not timely performed all of its lease obligations.

> FN35. Def. Post Trial Mem. at 3.

**Subway** also argues that Seaford Associates' attempts to relocate **Subway** violated the Lease Amendment, and, under the doctrine of "unclean hands," Seaford Associates should not be entitled to reject **Subway's** exercise of its Renewal Option. The unclean hands doctrine has been described as:

> Providing courts of equity with a shield from the potentially entangling misdeeds of the litigants in any given case. The Court invokes the doctrine when faced with a litigant whose acts threaten to tarnish the Court's good name. In effect, the Court refuses to consider requests for equitable relief in circumstances where the litigant's own acts offend the very sense of equity to which he appeals [FN36]

> FN36. *Nakahara v. The NS 1991 American Trust,* 718 A.2d 518, 522 (Del. Ch.1998); *see also Merck & Co. v. SmithKline Beecham Pharms. Co.,* 1999 WL 669354, at *44 (Del. Ch. Aug. 5, 1999), *aff'd,* 766 A.2d 442 (Del.2000).

**Subway** has failed to make a showing that Seaford Associates has unclean hands with respect to this litigation. On or about January 24, 2002, Seaford Associates sent **Subway** a letter pursuant to Paragraph 5 of the Lease Amendment seeking to relocate **Subway** to the Mellon Bank Site in the same shopping center in which it is currently located. Weinberg testified that he believed the building to be equivalent to **Subway's** current premises. This Relocation Notice specifically stated that Seaford Associates would pay for the relocation. Belcher notified Weinberg that he disagreed with the assessment of the location and said that **Subway** would not move. Weinberg testified that once Belcher told him that **Subway** would not move pursuant to the Relocation Clause, Weinberg stopped relocation ef-

forts and, instead, attempted to negotiate a new lease for a new free-standing building.

***8 Subway** contends that these new lease negotiations were actually still pursuant to the Relocation Clause, but the documentary evidence in the case disproves this contention. In particular, the series of three letters from Seaford Associates to Kreiser dated February 12, 2002, February 14, 2002 and March 1, 2002, which proposed the construction of a free-standing building adjacent to the proposed Eckerd building, clearly indicate Seaford Associates' intention to negotiate a new lease.[FN37] For example, the letter anticipated charging **Subway** higher rent for the new building. Furthermore, the proposed term of the lease was to be longer than that provided in **Subway's** current lease. Both of these changes were inconsistent with the Relocation Clause, which required that the "Lease shall remain in effect pursuant to its terms (including rental) with respect to the substitute premises...." Moreover, **Subway** and Seaford Associates agreed to split the cost of the architecture firm retained to draft site plans. This too is inconsistent with the Relocation Clause, which provided that Seaford Associates would pay the entire cost of relocation. Viewed in totality, these circumstances plainly show that both parties realized they were negotiating a new lease rather than negotiating to relocate **Subway** pursuant to the Relocation Clause. For all these reasons, nothing in the negotiations surrounding **Subway's** relocation or new lease would lead the court to conclude that Seaford Associates comes to this court with unclean hands.

FN37. *See* Joint Trial Ex. F. The February 14 letter was also faxed to Ray Burrows, a representative of **Subway**.

VI.

For the foregoing reasons, judgment will be entered in favor of Seaford Associates and against **Subway**. **Subway** must vacate the premises no later than May 31, 2003. IT IS SO ORDERED.

Del.Ch.,2003.
Seaford Associates Ltd. Partnership v. Subway Real Estate Corp.
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