Fay Corp. v. BAT Holdings I, Inc., 646 F. Supp. 946 (W.D.Wash. 1986)

The FAY CORPORATION,
a Washington corporation,
Plaintiff,

v.

BAT HOLDINGS I, INC.,
also known as Marshall Field & Co.,
a Delaware corporation; and
Frederick & Nelson Seattle, Inc.,
a Delaware corporation, Defendants.

No. C86-542D.

United States District Court, W.D. Washington,
at Seattle

October 23, 1986.

MEMORANDUM DECISION AND ORDER

DIMMICK, District Judge.

Plaintiff, the Fay Corporation ("Fay"), and defendant, BAT Holdings I, Inc. ("BAT"), cross move for summary judgment. At issue is a 99-year lease containing a provision for payment in gold coin (a "gold clause") originally executed by Fay as lessor in 1929. The Court concludes that a 1982 transfer of the lease to BAT created a new contract (a novation). Thus the gold clause, otherwise unenforceable under a 1933 statute, is revived and enforceable under a 1977 statute.

The parties agree that the issues before the Court can be determined as questions of law. BAT first moved for summary judgment dismissal on the pleadings. Fay cross moved for summary judgment in three alternative forms: (1) enforcement of the gold clause as partial judgment, with resulting rent to be determined; or (2) cancellation of the lease as full judgment due to impossibility of performance; or (3) equitable relief (reformation or rescission) as partial judgment.

After consideration of memoranda and hearing of oral argument, the Court grants Fay's motion for partial summary judgment on the first alternative. It is therefore unnecessary to address the remaining issues.

BACKGROUND

Prior to the Depression era, "gold clauses" in contracts were a popular method of adjusting for inflation. These clauses mandated payment in gold coin, its equivalent, or, with some other wording, tied the dollar amount demanded with the price of gold.[fn1]

In 1933, a joint resolution of Congress invalidated all gold clauses and provided that "dollar for dollar" payments in United States currency would discharge the obligation. 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C.A § 463).[fn2] The following year, the Gold Reserve Act banned private ownership of gold. (Repealed, formerly codified in part at 31 U.S.C.A. §§ 442, 443 (1976).) The holding of gold remained prohibited until 1973, when Congress repealed the 1934 ban on private ownership of gold (87 Stat. 352 (1973), as amended by 88 Stat. 445 (1974), but did not address the 1933 prohibition of gold clauses. This omission was remedied in 1982, when the statute at issue was adopted (31 U.S.C.A. 5118(d)(2)(1983), (hereinafter "section 5118"). The language provided that obligations covered by gold clauses prior to 1977 are, as before, dischargeable dollar for dollar with United States currency. But "an obligation issued after October 27, 1977" is not so limited.[fn3]

FACTS

The Fay Corporation owns the land and building in downtown Seattle now occupied by a major department store. In 1929, Fay executed a 99-year lease of the property and premises to Frederick & Nelson. This lease contained a then-valid gold clause providing that the $8,333 monthly rental be paid "in lawful gold coin of the United States of America of the present standard of weight and fineness."

Between the execution of the lease and the 1982 transfer at issue, the leasehold changed hands twice in transfers which are not before the Court. In 1982, five years after section 5118 created an October 27, 1977 validity date for gold clauses, the lessee in possession, Marshall Field & Company, transferred its rights in the lease by "assignment" to the defendant, BAT Holdings I. BAT accepted the "assignment" and explicitly assumed Marshall Field's obligations under the lease. This was

accomplished using the transfer language required in Article XIII of the original lease.[fn4] Upon a proper assumption by the transferee, the 1929 lease further provided that the assignor would be released from any and all obligations under the Lease after the date of "such sale, conveyance or assignment. . . ."[fn5] BAT does not dispute the 1982 transfer or the release of Marshall Field's obligations under the lease.

ISSUE

Thus, the issue before this Court is whether plaintiff Fay's discharge of Marshall Field's obligations through Article XIII of the lease constitutes a valid "prior mutual assent" to novation, creating a new contractual obligation in the 1982 transfer to defendant BAT and resulting in an enforceable gold clause of an "obligation issued after" the October 27, 1977 effective date of section 5118.

The parties agree that the legislative history of section 5118 reveals that the phrase "obligations issued after October 27, 1977" is intended to mean an obligation (including contractual obligations) "entered into" after that date. The Eleventh Circuit supports that interpretation in Rudolph v. Steinhardt, 721 F.2d 1324 (11th Cir. 1983)[fn6]:

> The legislative history to the amendment reveals that the word "issued" was intended to mean "entered into" . . . . [Senator's Helm's] construction of the word "issue" corresponds with its normal meaning in law. . . .

Id. at 1330.

If the transfer to BAT was a mere assignment, as BAT contends, BAT holds as assignee under the original 1929 contract, and the enforcement of the gold clause is barred by section 5118. If, however, as Fay argues, the transfer was a novation, the contract is a new obligation "entered into" after October 27, 1977 and the gold clause is again effective.[fn7]

ASSIGNMENT

An assignment differs from a novation in two ways: (1) an assignment creates no contract between lessor and assignee, and (2) an assignment does not discharge the assignor's original obligation to the lessor.

At common law, the original tenant's obligation to the landlord arises by virtue of both privity of contract (express terms) and privity of estate (duties that run with the land). When the original lessee assigns his rights to a third party (the assignee), the original lessee, as assignor, is no longer liable to the lessor/owner under privity of estate, but remains liable under privity of contract unless relieved by the lessor. See, e.g., Shadeland Development Corp. v. Meek, 489 N.E.2d 1192 (Ind.App. 1986); Restatement (Second) of Contracts § 318 (1979); Restatement (Second) of Property (Landlord and Tenant) § 16.1 (1976).

A duty cannot be "assigned" in the sense rights are assigned. Properly, rights are assigned and duties are delegated. See, e.g., J. Calamari and J. Perillo Contracts § 254, at 596 n. 6 (1970).

The Restatement (Second) of Contracts § 328(1), recognizes the common usage of the term "assignment" by asserting that, unless language or circumstances are to the contrary, an assignment of "the contract" or of "all rights under the contracts" is to be interpreted as an assignment of assignor's rights and a delegation of his unperformed duties under the contract. However, as noted in comment (a) to this section and recognized by all courts, an assignor's intention that the assignee be substituted for him or her is not completely effective unless the obligor of the assigned rights (the lessor) assents, thus creating a novation.

Section 323(1) of the Restatement provides that "a term of a contract manifesting an obligor's assent to the future assignment of a right or an obligee's assent to future delegation of a duty is effective. . . ." The effect of an obligor's assent may be, as comment (a) explains, "an offer of a new contract by novation, or the acceptance of an offer of novation. . . ."[fn8]

NOVATION

A novation is commonly defined as the replacement of an unexpired contract by another contract reached through renegotiation, or the substitution of a new party concurrent with the release of an original party from liability. Williams Petroleum Co. v. Midland Cooperatives, Inc., 679 F.2d 815 (10th Cir. 1982).

Strictly speaking, a "novation" is a substituted contract that includes as a party one who was neither the obligor nor the obligee of the original duty. Restatement (Second) of Contracts § 280.[fn9] As a novation is a new contractual relationship, it must

conform to basic contractual requirements. The four essential elements of a novation are set forth by the Washington Supreme Court in MacPherson v. Franco, 34 Wn.2d 179, 182, 208 P.2d 641 (1949): (1) A mutual agreement (2) among all parties concerned (3) for the discharge of a valid existing obligation (4) by the substitution of a new valid obligation or substitution of one party for another.

This definition is consistent with other Washington cases and cases from other states. See, e.g., Boise Cascade Corp. v. Distinctive Homes, Inc., 67 Wn.2d 289, 407 P.2d 452 (1965); Pacific States Securities Corp. v. Austin, 146 Wn. 492, 263 P. 732, 734 (1928); Sutter v. Moore Investment Co., 30 Wn. 333, 70 P. 746 (1902); Shiflet v. Marley, 58 Ariz. 231, 118 P.2d 1107 (1941); Sans Souci v. Division of Florida Land Sales & Condomiums, 421 So.2d 623 (Fla.App. 1982), appeal after remand, 448 So.2d 1116 (Fla.App. 1984).

ANALYSIS

The parties before the Court do not dispute the validity of the old or new obligation (except for the applicability of the gold clause), or the fact that the transferor's liability was extinguished by the transfer. The dispute is whether the necessary "mutual agreement among all parties" exists to complete a novation.

BAT cites MacPherson v. Franco, supra at 182, and Sutter v. Moore Investment Co., supra, 30 Wn. at 336, 70 P.2d 746, in support of its argument that FAY's alleged prior consent in the lease clause does not satisfy the "mutual agreement among ALL parties" requirement.

In MacPherson and Sutter, novation fails and succeeds, respectively. MacPherson concerned a real estate sale where the seller told the buyer to pay the agent's commission, but buyer stopped payment on the check. The Supreme Court affirmed the lack of novation, observing that the agent never agreed to the substitution.

In contrast, the Sutter court did find a novation. Defendant landlord agreed to pay the meat bills his restaurateur tenant owed to the supplier plaintiff; tenant turned over receipts to the defendant; and plaintiff agreed to accept defendant instead of the tenant.

The Ninth Circuit has relied on these same principles in applying Washington law. Western Machinery Co. v. Northwestern Improvement Co., 254 F.2d 453 (9th Cir.

1957). Where plaintiff took a promissory note from a third party but did not release the defendant, the court determined that there was "no novation whereby [third party] assumed the debt of [defendant] and [plaintiff] accepted the transfer of liability with the consent of all three parties." Id. at 461.

Restatement (Second) of Contracts § 280, discussing novations and assent, cites section 23, which addresses general mutual assent for contracts: "It is essential to a bargain that each party manifest assent with reference to the manifestation of the other." The usual situation is that one party, by making an offer, assents in advance; the other, learning of the offer, assents by accepting it. The test, according to the Restatement, is whether the accepting party is justified in believing that the offer is made to him or her.

In the instant case, BAT apparently argues that the third requirement of mutual agreement has not been met: that is, Fay's failure to execute a new release of the lessee Marshall Field at the time BAT assumed the lessee's obligations results in a failure to reach agreement by all the parties. BAT, however, admits that the prior lessee, Marshall Field, agreed to transfer its rights to defendant BAT in 1982, and that BAT agreed to accept the rights and also agreed to assume Marshall Field's obligations to plaintiff Fay under the lease. Moreover, BAT does not dispute the fact that Fay released Marshall Field from its obligations and accepted BAT as lessee. This Court views the release contained in Article XIII of the original lease as valid assent by Fay to the assumption by BAT and release of Marshall Field. With this assent, Fay has joined in a mutual agreement with Marshall Field and BAT.[fn10]

BAT's second argument against a valid mutual agreement is that contemporaneous consent is required: the prior consent contained in Article XIII of the lease is not effective, and so mutual agreement to a novation does not exist. Timing of consent for a novation has not been specifically addressed by the Washington courts, however Spaulding v. Aetna Casualty & Surety Co., 164 Wn. 665, 4 P.2d 526 (1931) described later, is clearly applicable. Other jurisdictions are split on whether assent must be contemporaneous or not, with the majority ruling that prior and/or subsequent assent is valid.

BAT looks to Wyoming law for support of its contention that the assent must be contemporaneous with the substitution of the parties. In Scott v. Wyoming Oils, 52 Wyo. 433, 75 P.2d 764 (1938), the court reversed, holding that no novation occurred. The court cited a Missouri case for support that parties must all agree to a novation at

the time it occurs. Emerson-Brantingham Implement Co. v. Sawyer, 210 Mo.App. 535, 242 S.W. 1007, 1008 (1922).[fn11]

A Washington state case addressing release of a surety, however, supports Fay's contention that prior consent is valid. Spaulding v. Aetna Casualty & Surety Co., supra. There, the court recognized that a clause in a lease had the effect of releasing a principal upon assignment, thus releasing the plaintiff's surety. While not defined by the court as a novation, novation is what in effect occurred.[fn12]

A. Corbin, Contracts § 1297 (1963) directly supports this court's interpretation of Spaulding. Section 1297, at 216 provides:

> It is possible for a creditor [lessee] to give his assent to the substitution of a new debtor [lessor] in advance, thus empowering the latter to consummate a novation by causing a third party to undertake performance in his place.

Lessors are not alone in their ability to create a novation through prior consent. Baum v. National Finance Co., 108 Colo. 107, 114 P.2d 560 (1941). (Assent to a novation may be expressed by a contractor at the time the contract is made, empowering the obligor to substitute another for himself.) Corbin § 866, at 456-57 n. 39.[fn13]

This Court concludes that the 1982 transfer by Marshall Fields to BAT was a valid novation, creating a new contractual obligation as of August 28, 1982. Gold clauses are enforceable after October 27, 1977, pursuant to section 5118; moreover, enforcement of the gold clause will not do violence to the purpose of section 5118, because it is not a "past obligation" that the amendment is affecting but a new one entered into after the amendment was in force. Therefore, the gold clause contained in the August 28, 1982 contract is enforceable. The amount of rent owed under the gold clause and the date from which it should accumulate will be determined at trial.

THEREFORE, plaintiff's motion for partial summary judgment is GRANTED.

The Clerk of the Court is instructed to send a copy of this Memorandum Decision and Order to all counsel of record.

[fn1] Kenneth W. Dom, From the Gold Clause to the Gold Commission: A Half Century of American Monetary Law, 50 Chicago L.Rev. 504 (1983).

[fn2] The significant parts of 48 Stat. 112, 113 (1933) provide: Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold . . . is declared to be against public policy. . . . Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar-for-dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Upheld in Holyoke Water Power Co. v. American Writing Paper Co., 300 U.S. 324, 57 S.Ct. 485, 81 L.Ed. 678 (1937); Guaranty Trust Co. of New York v. Henwood, 98 F.2d 160 (8th Cir. 1938), aff'd, 307 U.S. 247, 59 S.Ct. 847, 83 L.Ed. 1266 (1939).

[fn3] Section 5118(d)(2) of 31 U.S.C. (Pub.L. No. 97-258, 96 Stat. 985 (1982)), provides: An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar-for-dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977.

[fn4] Article XIII of the lease entitled "Assignment of Lease" provides, in part: Lessee may sell and convey its interest in said leased premises, and in any building thereon, at any time hereafter; provided . . . such assignee or assignees shall expressly accept and assume all the terms and covenants in this lease contained, to be kept, observed and performed by the Lessee, and shall agree to become bound by all the provisions thereof and to become bound to personally comply therewith. . . .

[fn5] Article XIII of lease also provides that "in the event that any assignment shall be made at the times, under the conditions, and in the manner herein before set forth, the party so selling, assigning or conveying the leasehold estate hereby created shall thereby be forever released and discharged from any and all obligations arising or accruing under the covenants and agreements in this lease contained subsequent to the date of such sale, conveyance or assignment. . . ."

[fn6] There was no transfer at issue in Rudolph when the Court determined that lessees or assigns became obligated at that date to pay rent as it became due, and the 1977 statute did not affect a 1970 lease. Also defining "issued," the court ruled in Gold Bondholders Protective Council v. Atchison, Topeka & Santa Fe Railway, 649 P.2d 947 (Alaska 1982), ruled that a 1980 purchase and delivery of 1895 bonds to new investors did not constitute a new "issue" of the bonds for section 5118 purposes. It is also clear that the 1977 amendment did not, as was argued by some, impliedly

repeal the 1934 gold clause statute, except, under section 5118, as to obligations issued after October 27, 1977. Southern Capital Corp. v. Southern Pacific Co., 568 F.2d 590 (8th Cir. 1978), cert. denied, 436 U.S. 927, 98 S.Ct. 2821, 56 L.Ed.2d 770 (1978).

[fn7] It is appropriate here to discard defendant's alternative argument against reviving the gold clause. In addition to attacking the existence of a novation, defendant reasons that regardless of whether the transfer is an assignment or a novation, the gold clause should not be revived because the amendment, according to its author, Senator Helms, was to "stand neutral" as to past obligations. 123 Cong.Rec. 635 (1977) (remarks of Senator Helms). BAT's argument ignores the legal effect of a novation. A novation is a new obligation unto itself as of the date the substitution of parties is complete.

[fn8] BAT argues against "characterizing" the transfer as a novation. But it is well-settled that whether or not an instrument is an assignment is determined by its effect and not its form. See, e.g., Bedgisoff v. Morgan, 23 Wn.2d 737, 162 P.2d 238 (1945), opinion adhered to by rehearing, 24 Wn.2d 971, 167 P.2d 422 (1946).

[fn9] Restatement (Second) of Contracts § 279 calls a contract between parties which replaces an original contract between the same parties a "substituted contract."

[fn10] Novation of leases is addressed in 66 C.J.S. Novation § 18(f)(2)(1950): "In case of an assignment of a lease a novation is effective where, in pursuance of an agreement, the Landlord accepts the new Tenant and releases the old. . . . [T]here must have been a mutual agreement by the three parties involved. . . ."

[fn11] In attempting to discover any Washington law which might color defendant's argument, this Court found only one case of questionable relevance, Schrock v. Gillingham, 36 Wn.2d 419, 219 P.2d 92 (1950). There, ruling on an evidentiary matter, the Supreme Court agreed with the trial court that statements made by the third party subsequent to the time he delivered a check to plaintiff for the defendant debtor and promised payment of the balance were not material on the question of whether there was a novation at the time the check was accepted.

[fn12] Two recent decisions in different venues directly support this Court's conclusion that a prior consent does act as valid assent to a novation. In Shadeland Development Corp. v. Meek, 489 N.E.2d 1192 (Ind.App. 1986), a lease contained a clause allowing assignment without consent of the lessor, and a release of the lessee

upon acceptance and assumption of the lease obligations by the assignee. The court agreed with plaintiff that the lease clause was "a free right of assignment coupled with a novation" and held that the right to assign was not limited. The second case is remarkably similar to the case before this Court, in that the outcome of a lease transfer is affected by the timing of a state statute banning rent escalation clauses. Sans Souci v. Division of Florida Land, Inc., 421 So.2d 623 (Fla.App. 1982), appeal after remand, 448 So.2d 1116 (Fla.App. 1984). If a novation had occurred in the transfer in question, the statute could be invoked. Remanding to determine the correct date to use, the court observed that an assignment under certain circumstances can be a novation, and found unpersuasive the argument for contemporaneous consent in Scott v. Wyoming Oils, 52 Wyo. 433, 75 P.2d 764 (1938). Upon a subsequent appeal, the Florida court concluded that all parties had not agreed and the state agency below had erred in implying consent from (among other factors not here pertinent) the fact the original lease "allowed assignment". While the court did not set out the lease language, it is clear that if an express release clause had been contained in the lease, the Sans Souci court would have been satisfied that a novation had occurred.

[fn13] Other authorities are in accord with the validity of prior consent to a novation: "it is not necessary for this purpose that all of the parties to the novation manifest their assent simultaneously nor that they all be in the same place. . . ." Restatement (Second) of Contracts § 280, at 378. The reporter's notes to Restatement (Second) of Property (Landlord and Tenant) § 16.1(5) provide that mutual agreement is necessary for a novation and that "[t]he release of a transferor can be controlled by the original parties to the lease in that they can specify by lease provision the terms by which a release can be effected." A.J. Casner, American Law of Property, Landlord and Tenant § 3.61, at 310 (1954) concurs: "[A] novation will release the lessee from liability altogether and a lease may provide that the lessee shall be released upon assignment . . ."

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Fay Corp. v. BAT Holdings I, Inc., 651 F. Supp. 307 (W.D.Wash. 1987)

The FAY CORPORATION,
a Washington corporation,
Plaintiff,

v.

BAT HOLDINGS I, INC.,
also known as Marshall Field & Co.,
a Delaware corporation; and
Frederick & Nelson Seattle, Inc.,
a Delaware corporation, Defendants.

No. C86-542D.

United States District Court, W.D. Washington,
at Seattle

January 7, 1987.

ORDER

DIMMICK, District Judge.

THE COURT has before it the following motions:

(1) Defendants' motion for reconsideration of this Court's Order of October 23, 1986[fn1];

(2) Defendants' motion for clarification of that Order;

(3) Defendants' motion (as an alternative to number 1 above) to permit interlocutory appeal of that Order, pursuant to 28 U.S.C. § 1292(b);

(4) Plaintiff's motion for entry of order of judgment pursuant to Fed.R.Civ.P. 54(b); and

(5) Plaintiff's motion to strike the affidavit of D. Schechter.

The Court concludes that defendants' new-found theories and facts do not warrant reconsideration of the October 23 Order, 646 F. Supp. 946, and that the Schechter affidavit represents new facts not properly before the Court. Plaintiff's request for an entry of final judgment for part of its claim is denied since the claim is part of a larger claim involving the same unresolved issues of law and fact.[fn2] Defendants do, however, present sound reasons for an interlocutory appeal of the October 23 Order,

including the novelty of the issue presented in connection with interpretation of a 1977 statute.

The issue decided in the October 23 Order was that "Fay's discharge of Marshall Field's obligations through Article 13 of the Lease constitutes a valid `prior mutual assent' to novation, creating a new contractual obligation in the 1982 transfer to defendant BAT and resulting in an enforceable gold clause of an `obligation issued after' the October 27, 1977 effective date of section 5118." Order at 5. Defendants seek clarification of the Court's Order: that is, whether BAT's promise to make payments in gold coin of the "present standard of weight and fineness" means as of July 18, 1929, or August 28, 1982. This Court concluded that the effect of novation was to revive the original gold clause. Thus rent after August 28, 1982 is to be made pursuant to the original lease terms "in lawful gold coin of the United States of America of the present standard of weight and fineness. . . ." Lease, Article II. The "present weight and fineness" means as of July 18, 1929.

Defendants offer several grounds for reconsideration. Most significantly, they argue for the first time that the assignment in 1982 from Marshall Field & Company to BAT Holdings I could not be considered a new contract since it was merely an exchange between different tiers of corporations with the same ownership. The acknowledged purpose of the exchange was to take advantage of federal tax law. The affidavit of David Schechter, Vice President and General Counsel of BATUS, Inc. was submitted in support of reconsideration.[fn3]

Additionally, defendants argue for the first time that the 1982 assignment was clearly not intended as a novation and should be excused as a "mutual mistake." Any mistake, however, was between defendants, and plaintiff protests any such characterization of the assignment.

These "new" facts and theories were clearly available to defendants at the time of the earlier ruling, and defendants had ample time and opportunity to present them to the Court. At the time of its October summary judgment ruling, the Court had before it an undisputed record of assignments between various corporations dating back to 1932. Although defendants vigorously opposed plaintiff's theory of novation, at no time did defendants raise as a defense to novation the corporate relationship between the various lessees or the intent of the assignors/assignees. Defendants in fact agreed that the issues embraced in their motion for dismissal and plaintiff's motion for partial summary judgment could be decided as matters of law.

Defendants now argue that the 1982 assignment constituted no change in beneficial ownership. They now insist that the assignment was merely part of a tax motivated internal corporate restructuring. While this Court knows of no reason why creation of a corporation for tax purposes creates any less of a legal entity for contract purposes, it is not necessary to address this question here. Defendants simply have not raised their arguments or proffered their evidence in a timely fashion. Defendants cannot dash onto the playing field after the final score has been posted, shouting "surprise, the loss doesn't count because we're all the same team!"

Summary judgment motions take the place of trials. Motions for reconsideration, therefore, are not justified on the basis of new evidence which could have been discovered prior to the Court's ruling. See, e.g., Frederick S. Wyle, P.C. v. Texaco, Inc., 764 F.2d 604, 605 (9th Cir. 1985); Walker v. Hoffman, 583 F.2d 1073, 1074 (9th Cir. 1978), cert. denied, 439 U.S. 1127, 99 S.Ct. 1044, 59 L.Ed.2d 88 (1979); Keene Corp. v. International Fidelity Ins. Co., 561 F. Supp. 656 (N.D.Ill. 1982), aff'd, 736 F.2d 888 (7th Cir. 1984). Moreover, "after thoughts" or "shifting of ground" are not an appropriate basis for reconsideration. Refrigeration Sales Co. v. Mitchell-Jackson, Inc., 605 F. Supp. 6, 7 (N.D.Ill. 1983), aff'd, 770 F.2d 98 (7th Cir. 1985). In this instance, defendants are particularly remiss in now offering evidence and legal theories that were clearly within their province at the time of this Court's earlier ruling.

THEREFORE, defendants' motion for reconsideration is DENIED; plaintiff's motion for entry of order of judgment pursuant to Fed.R.Civ.P. 54(b) is DENIED; and plaintiff's motion to strike the Schechter affidavit is GRANTED. The Court, however, recognizes that its Order of October 23, 1986 "involved a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation". 28 U.S.C. § 1292(b) (Supp. 1986).

[fn1] Defendants request oral argument in connection with their motion for reconsideration. Because the Court heard oral argument on this issue earlier, and in view of the Court's recognition of the value of interlocutory appeal, oral argument will not be heard.

[fn2] Plaintiff requests the Court's entry of judgment pursuant to the October 23 Order for all future rent as it becomes due and payable. Federal Rule of Civil Procedure 54(b) permits entry of final judgment on less than all claims when the court determines "that there is no just reason for delay." This is not, however, an appropriate

circumstance in which to invoke Rule 54(b). In its October 23 Order, the Court left open the question of how rent was to be calculated: "The amount of rent owed under the gold clause and the date from which it should accumulate will be determined at trial." Order at 14.

[fn3] Schechter attests to among other things the following events in the life of the corporate defendants: In 1982, BAT Holdings I, Inc. ("BAT I") was incorporated as a wholly-owned subsidiary of BATUS, Inc. In the same year BAT I acquired all the stock of Marshall Field & Company. In order to take advantage of sections 331(a)(2) and 346(a)(2) of the Internal Revenue Code, Marshall Field & Company and BAT I entered into an Agreement and Plan of Partial Liquidation. Certain assets and liabilities were exchanged between the two corporations, including the lease which is the subject of this litigation.

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Fay Corp. v. BAT Holdings I, Inc., 682 F. Supp. 1116 (W.D.Wash. 1988)

The FAY CORPORATION,
a Washington corporation,
Plaintiff,

v.

BAT HOLDINGS I, INC.,
also known as Marshall Field & Co.,
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Frederick & Nelson Seattle, Inc.,
a Delaware corporation, Defendants.

No. C86-542D.

United States District Court, W.D. Washington,
at Seattle

March 25, 1988.

MEMORANDUM OPINION AND ORDER

DIMMICK, District Judge.

THIS MATTER was tried before this Court without a jury March 14 to March 17, 1988. Trial followed several rulings by this Court granting partial summary judgment.[fn1] In a prior ruling, the Court determined that a novation had occurred with the 1982 assignment of the 99-year lease of the building and grounds on which the downtown Seattle Frederick & Nelson department store is located. This novation revived the gold clause in the lease and established plaintiff's right to rental payments in gold or its equivalency. The only issues for trial were defendants' affirmative defenses. After full consideration of the evidence and memoranda presented, the Court concludes that defendant BAT Holding I, Inc. (BAT I) is excused under the doctrines of waiver and estoppel for arrearages in rental payments from August 1982 to April 1986, when this lawsuit was filed. Defendant Frederick & Nelson Seattle, Inc. (F & NS), however, is liable for the rental arrearages from April 1986 to December 31, 1987.[fn2]

The plaintiff presents a classic "David versus Goliath" confrontation, with a small family-held corporation taking on a multinational conglomerate. However, both parties acted within the law as they perceived it at the time, and both were ably represented by counsel. If there is any villain in this piece, it is the 1933 Congress which rewrote existing contracts in response to a national economic emergency.

The following Opinion constitutes this Court's Findings of Fact and Conclusions of Law. If any of the findings or conclusions are incorrectly designated, they should be considered as if correctly designated.

FINDINGS OF FACT

The 99-year lease which is the subject of this litigation was executed in 1929 between the Fay Corporation (Fay) and Frederick & Nelson (as distinct from Frederick & Nelson Seattle (F & NS), a defendant here). Neither of the defendants in the present cause of action was a signatory to the original lease. The leasehold was, in fact, transferred several times before the August 28, 1982 assignment from Marshall Field Delaware to BAT Holdings I, Inc. (BAT I). It was the 1982 assignment (novation), combined with action by Congress in 1977 to permit contracts to again contain gold clauses, which created the fortuitous outcome for the Fay Corporation of reviving the gold clause in the lease. Another assignment March 29, 1986, from BAT I to F & NS

was similarly a novation.[fn3]

Article II of the lease required monthly rental payments "in lawful gold coin of the United States of America of the present standard of weight and fineness." In 1933, however, Congress outlawed gold clauses and in effect created a windfall for tenants/lessees with long-term leases. Under the 1929 lease, all of the Fay Corporation's lessees have paid to it $8,333.33 per month since 1929. The parties stipulated to a gold price that has fluctuated since August 1982 to December 1987 from a low of $287 per ounce to a high of $487 per ounce. There is no question that the Fay Corporation received considerably less per month than it would have been entitled to under the gold clause in the lease.

The lease provided that failure to pay the required rent constituted a default.

> Said Lessee further covenants and agrees to and with the said Lessor that if default shall at any time be made by said Lessee, or its assigns, in the payment of the rent, or any part thereof, when due to said Lessor, as herein provided, and such default shall continue thirty (30) days after notice thereof in writing to the said Lessee, or if default shall be made in any of the other covenants, agreements, conditions, or undertakings herein contained, to be kept, observed and performed by the Lessee, or its assigns, and such default shall continue ninety (90) days after notice thereof in writing to the said Lessee, it shall and may be lawful for the Lessor, at its election, to declare the said term ended, and . . . to reenter . . . and to repossess. . . .

Article IX of the Lease. At no time was BAT I informed that it was in default on its rental payments prior to commencement of this lawsuit. Fay accepted BAT I's monthly checks and deposited them without comment for a period of 44 months.

Frustration with the low rental payments caused the Fay Corporation through its President, Donald Frederick Padelford, to seek a remedy. Padelford approached the staff of Senator Jesse Helms for redress. Senator Helms was a primary sponsor of the 1977 legislation that permitted the enforcement of gold clauses in future contracts. Padelford testified to receiving no encouragement from the Senator's staff for asserting revival of the gold clause in a lease executed prior to 1977. Padelford, however, did not abandon his efforts to increase the income from the Frederick & Nelson property.

As early as 1982, he considered litigation. In May of 1983, he contacted an east coast law professor who specialized in gold clauses. That same year, Padelford started to prepare a lawsuit.

In November of 1981 attorney Willard J. Wright, Secretary of the Fay Corporation, wrote to the then lessee of the Frederick & Nelson property (the predecessor to BAT I). In this letter, the Fay Corporation stated its position.

> Except to the extent actually mandated by law, we do not waive our Article II right to be paid in lawful gold coin in the standard weight and fineness prevailing in 1929. At the values prevailing in 1929, this is approximately 4,838 ounces per year. In 1933 the dollar was revalued artificially and 31 U.S.C. § 463 was enacted for the purpose of avoiding windfall profits to creditors. Since that time, artificial valuations of gold have ceased, permitting the original intent of the parties to be realized: a free-market measure of the reasonable value of the leased premises. It appears beyond argument that the current payment of $100,000 present (1981) currency value was entirely uncontemplated — indeed, affirmatively rejected — by the parties in 1929, and is well below an equitable economic return on the property as of this date.
>
> Because circumstances have changed in a manner totally uncontemplated by the parties to the Lease, we are determined to seek equitable adjustment of this matter by any available legal and ethical means. Inasmuch as equity is undoubtedly the objective of Marshall Field as well, we look forward to discussing these matters with Marshall Field in the near future.

Stephen A. Quintin, Senior Vice President of BATUS, Inc., a corporate parent of BAT I, testified to having seen the letter from Mr. Wright only after this litigation was instituted. This letter contains the only direct reference to enforcement of the gold clause in evidence, and plaintiff could produce no knowledge of the 1981 letter on the part of a BAT I official. Moreover, this letter was written prior to the novation which revived the gold clause. It could not serve as notice of Fay's non-waiver of a not-yet-existing right.

Taking another approach to seeking a rental increase, Fay engaged the services of Stephen J. Hall, Jr. in 1984. On several occasions, Hall discussed with Quintin an increase in the rent. Both Hall and Quintin testified that the approach being used by Hall was an appeal to fairness, coupled with threats of litigation which would lead to

bad publicity. BAT I received no notice of Fay's asserted revival of the gold clause under a novation theory until this present suit was filed in 1986.

During negotiations in 1984-85, attempts were made by Fay to buy out the BAT I leasehold. Alternatively, Fay offered to sell the Frederick & Nelson property. Neither of these deals was consummated.

BAT I officials (Quintin in trial testimony and David Schechter by deposition) presented convincing evidence of actions which would have been taken to reduce losses had they been informed of a rental increase of some 2,000 percent. Quintin testified to the standard practice in the retail field of reducing personnel. BAT I also had the options of selling property in Oregon, subletting portions of the Frederick & Nelson property, selling the store and transferring the leasehold (as it did in 1986) or developing a new retail complex on property owned by BAT I across the street.

Defendants presented expert witness Robert Deak in an attempt to prove its hedging and capping defenses. Deak testified to the ability to hedge against rising gold prices by purchasing gold or gold mines during the period of lowest gold prices. His testimony, however, was too speculative for the Court to accept. Fay's expert witness, Paul Malatesta, further convinced the Court of the speculative nature of Deak's testimony on the ability to predict the market and purchase at the low point.

CONCLUSIONS OF LAW

With this Court's prior ruling that the gold clause was resuscitated, defendants turned to their equitable defenses of waiver and estoppel. Defendants' capping and hedging defense is a sub-issue under estoppel, arguing for reduced payments tied to the lowest gold price available between August 1982 and January 1, 1988.

A. Waiver

Defendants' strongest defense to payment of back rent comes under the doctrine of waiver.[fn4] Washington law recognizes a distinction between waiver and estoppel. Bowman v. Webster, 44 Wn.2d 667, 670, 269 P.2d 960 (1954). Waiver is the "voluntary relinquishment of a known right." Birkeland v. Corbett, 51 Wn.2d 554, 565, 320 P.2d 635 (1958). Waiver can be explicit or implied. Panorama Residential Protective Ass'n v. Panorama Corporation, 97 Wn.2d 23, 640 P.2d 1057 (1982) (written waiver).

> An implied waiver may arise when one party has pursued such a course of conduct as to evidence an intention to waive a right, or where his conduct is inconsistent with any other intention than to waive it. . . . Waiver is unilateral and arises by the intentional relinquishment of a right, or by a neglect to insist upon it. . . .

Bowman v. Webster, supra 44 Wn.2d at 670, 269 P.2d 960 (emphasis in original), citing Kessinger v. Anderson, 31 Wn.2d 157, 168, 196 P.2d 289 (1948).

Fay seeks support for its position of non-waiver in cases involving accord and satisfaction. See, e.g., Dodd v. Polack, 63 Wn.2d 828, 389 P.2d 289 (1964); Boyd-Conlee Co. v. Gillingham, 44 Wn.2d 152, 266 P.2d 339 (1954); Seattle Investors Syndicate v. West Dependable Stores of Washington, 177 Wn. 125, 30 P.2d 956 (1934); Ingram v. Sauset, 121 Wn. 444, 209 P. 699 (1922). Plaintiff insists that these cases place the burden on a tenant to express his intent that a proffered check constitutes full payment. Principles governing accord and satisfaction, however, have no application to the circumstances of this case where there was no acknowledged dispute between the parties. BAT I paid $8,333.33 per month as had its predecessors. The checks were cashed by Fay without objection or reservation, and without notice of default under the terms of the lease.

Similarly, Fay fails in its attempt to limit Washington law of waiver only to circumstances in which forfeiture would result. See, e.g., Wilson v. Daniels, 31 Wn.2d 633, 198 P.2d 496 (1948); Schultz v. Cardwell, 142 Wn. 489, 253 P. 822 (1927). At issue in these cases was the effect of a landlord's acceptance of rental payments on breach of other covenants in the lease.

> The payment of rent merely gives the tenant the right of possession of the premises during the term, but it does not, during that term, give him the right to violate other provisions of the lease. Although the acceptance of rent waives the right to declare a forfeiture for prior breaches, it does not operate as a waiver of a continuance of the breaches or of any subsequent breaches.

Wilson v. Daniels, supra 31 Wn.2d at 640, 198 P.2d 496.

Washington law apparently requires that a party waiving its rights have knowledge of those rights.

> A "waiver" is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. The person against whom a waiver is claimed must have intended to relinquish the right, advantage, or benefit, and his actions must be inconsistent with any other intention than to waive them.

Birkeland v. Corbett, 51 Wn.2d 554, 565, 320 P.2d 635 (1958) (quoted with approval in Lester v. Percy, 58 Wn.2d 501, 503, 364 P.2d 423 (1961)). Rights are relinquished by intentional or negligent failure to assert. Bowman v. Webster, supra 44 Wn.2d at 670, 269 P.2d 960.

The issue of a "known right" causes this Court some concern. No Washington cases were found which address the issue of waiver in the context of a legal right judicially determined to have arisen several years before.[fn5]

It is clear to the Court that neither BAT I nor Fay knew with any certainty that the 1982 transfer of the leasehold revived the gold clause. If BAT I had known of the legal consequences, it likely would not have accepted the assignment. If Fay had known, it would have given notice of default pursuant to the lease or commenced suit. Fay, however, was considering several avenues of litigation during the period in question. Fay held back on litigating, trading an uncertain legal outcome in order to accomplish its objective through negotiation. Moreover, Fay is charged with constructive notice with this Court's determination that a novation revived the gold clause.

Thus this Court concludes that Fay waives its right to rent escalation pursuant to the gold clause from the date of novation to the date the lawsuit was filed. Fay is presumed to have known of the revival of its gold clause rights from the date BAT I assumed the lease. Fay sat on its rights during that period as it attempted to negotiate more favorable terms with BAT I under equitable principles.

B. Estoppel

While it is not necessary for the Court to address the estoppel defense for the period between novation and filing of the suit, since the Court has concluded that rent escalation is waived during the same period, defendants have also proved an estoppel defense, which the Court accepts as an alternative to waiver.

To invoke the doctrine of estoppel, a party must prove three things:

> (1) An admission, statement, or act inconsistent with the claims afterwards asserted; (2) action by the other party on the face of such admission, statement, or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

Alcorn Trailer City, Inc. v. Blazer, 18 Wn. App. 782, 789, 572 P.2d 15 (1977). Additionally, the party must prove that his reliance on the admission, statement or act was justified and in good faith.

> A party should be held to a representation made or a position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.

Wilson v. Westinghouse Electric Corp., 85 Wn.2d 78, 81, 530 P.2d 298 (1975).

Fay's failure to assert its gold clause claim, while accepting monthly rental checks, were acts and/or omissions upon which BAT I justifiably relied. While Fay argues that the injury to BAT I was pure speculation, it is clear that BAT I would have taken some action to reduce its loses. It is further evident that that action would have been effective in reducing some of BAT I's liabilities. Whether that action came in the form of personnel layoffs, sales of other properties, subleasing of the Frederick & Nelson store, or development of nearby property is not critical to this analysis. BAT I with its experience in retail and property management was injured by Fay's acquiescence and failure to notify.

C. Capping and Hedging Defense

Defendants offer a defense of partial estoppel for the gold clause claim on the basis that their rental arrearages should be limited to the lowest price per ounce of gold available in the period for which they are liable. BAT I argues that had it known of its duty to pay rent pursuant to the gold clause, it would have invested in the gold market as a hedge to future increases in the price of gold. Gold reached its lowest point during this period in March of 1985, when the London price was $287.25 per ounce. Thus BAT I argues that its arrearages should be capped at that amount.

In view of this Court's conclusion above that rental increases from the date of novation

to the filing of the lawsuit are excused, the only period for which this defense is applicable is from the date of filing, April 15, 1986, to January 1, 1988 (the date from which the settlement with F & NS applies).[fn6]

The Court concludes that defendants' injury in this respect is speculative at best. It is not possible to determine with even relative certainty when the price of gold was at its lowest point. Defendants' capping defense is therefore insufficient.

NOW, THEREFORE, judgment will be entered pursuant to this Order, with defendant BAT Holdings I excused from payment of rental arrearages for the period prior to initiation of this lawsuit April 15, 1986. Defendant Frederick & Nelson, Seattle is liable for payment from May of 1986 to December 31, 1987 pursuant to the terms of its settlement agreement. (See footnote 2 above.)

The parties are instructed to present an agreed form of judgment for this Court's signature.

The Clerk of the Court is directed to send copies of this Memorandum Opinion and Order to all counsel of record.

[fn1] Fay Corp. v. BAT Holdings I, Inc., 651 F. Supp. 307; 646 F. Supp. 946; Order of February 19, 1988.

[fn2] March 15, 1988, plaintiff and defendants Frederick & Nelson Seattle reached a partial settlement, and stipulated to dismissal with prejudice of all claims for rent after December 31, 1987. Claims against BAT Holdings I, Inc. for rent under lease for the period prior to April 21, 1986, were not dismissed, nor were claims against Frederick & Nelson Seattle Inc. for the period from April 21, 1986 through December 31, 1987. The Court was informed of an indemnity agreement between BAT I and F & NS, but was not informed of the details.

[fn3] See this Court's Order of February 19, 1988, so ruling.

[fn4] In its Order of February 19, 1988, this Court held that the non-waiver clause in Article II of the lease should be read against the lessor as drafter. Accordingly, the Court limited this clause to prevent acceptance of currency as a waiver to later insistence of payment in gold coin. Additionally, this Court ruled that language in Article XIX applied only to limit future breaches: No delay or omission of the Lessor

to exercise any right or power arising from any default shall impair any such right or power, or shall be construed to be a waiver of any such default, or an acquiescence therein. No waiver of any breach of any of the covenants of this lease shall be construed, taken or held to be a waiver of any other breach, or waiver, acquiescence in or consent to any further or succeeding breach of the same covenant. (Emphasis added.)

[fn5] In a case contesting the paternity of a minor child, the Washington Supreme Court briefly addressed the issue of waiver on the basis of knowledge and a party's lack of involvement in prior litigation and lack of representation by counsel. McDaniels v. Carlson, 108 Wn.2d 299, 300, 738 P.2d 254 (1987). This case was ultimately decided on collateral estoppel principles.

[fn6] In a prior ruling, the Court determined that the capping and hedging defense would apply only to reduce arrearages incurred prior to April 15, 1986. The Court, however, did agree to reconsider this issue at trial.