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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HUNBEACH, LLC,

Plaintiff and Appellant,

v.

HAWK REAL ESTATE INVESTMENTS,  
LLC et al.,

Defendants and Respondents.

G045205

(Super. Ct. No. 30-2009-00122771)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Affirmed.

Law Offices of Saul Reiss, Saul Reiss; Ferguson Case Orr Paterson, Wendy C. Lascher and John A. Hribar for Plaintiff and Appellant.

Horizon Law Group, William C. Hoggard; Endeavor Law Group and David A. Brewster for Defendants and Respondents Hawk Real Estate Investments, LLC, Weston Carol, LLC, and Douglas Spedding.

Arent Fox, Aaron H. Jacoby, Roy Z. Silva and Victor P. Danhi for Defendant and Respondent G.L. Huntington Beach, LLC.

This appeal by a would-be landlord against two purported subtenants turns on the lack of any intention on the part of the two purported subtenants to make the would-be landlord a third party beneficiary of two subleases which they entered into between themselves. While that conclusion might at first seem counterintuitive, it is supported both by the actual language of the master lease and the two subleases – both of which were made expressly contingent on the would-be landlord’s giving its express approval on any sublease, an express approval that was never given – and by the substantial evidence at trial affirmatively showing that the two subtenants did *not* want to establish any landlord-subtenant relationship when they entered into the two subleases. They had other purposes in mind. Accordingly, we affirm the trial court’s judgment denying the would-be landlord any recovery by way of unpaid lease payments against the two purported subtenants. The landlord’s remedy remains a claim against the original tenant that entered into the master lease with the landlord.

## FACTS

### *1. The Parties*

This case involves five parties who were in some way involved in a commercial lease for certain vacant real property on Beach Boulevard in Huntington Beach. We briefly identify those parties:

Douglas Spedding (Spedding) owned almost all (95 percent) of Weston Carol, LLC (WC), which operated a Nissan dealership on Beach Boulevard. The land under the dealership was owned by Hawk Real Estate, LLC (Hawk), itself totally owned by Spedding. The trial court refused to find any alter ego relationship between Spedding, WC, and Hawk, and no issue is raised on appeal as to the correctness of that decision, so we likewise treat the various entities separately.

Across the street from the dealership was a parcel of vacant land, owned by Hunbeach, LLC (Hunbeach). The Garff Automotive Group (Garff) has more than 30 dealerships in various western and midwestern states and wanted to buy the dealership owned by WC. Garff created G.L. Huntington Beach (GL) as the vehicle to purchase the dealership.

## 2. *The Master Lease*

In 2007 and 2008 both Spedding and Garff anticipated that Nissan would soon require the dealership to expand onto the land across the street owned by Hunbeach. The anticipation was that Nissan would require a service and parts facility there.

Sometime in the spring of 2007 Hawk entered into a lease (the “master lease”) with Hunbeach for the vacant land. Base rent of \$27,500 per month was to commence June 1, 2007.

This master lease prohibited any assignment or subletting without Hunbeach’s prior written consent. In paragraph 12.1, under the boldface heading “Lessor’s Consent Required,” the lease provided: “(a) Lessee shall not voluntarily or by operation of law assign, transfer, mortgage or encumber (collectively, ‘assign or assignment’) or sublet all or any part of Lessee’s interest in this Lease or in the Premises without Lessor’s prior written consent.”

If there *was* any assignment or subletting without the Hunbeach’s consent, paragraph 12.1(d) of the master lease gave Hunbeach the option of treating it as either a “Default curable” or a “noncurable Breach”: “(d) An assignment or subletting without consent shall, at Lessor’s option, be a Default curable after notice per Paragraph 13.1(c), or a noncurable Breach without the necessity of any notice and grace period.”

If Hunbeach elected to treat the breach as “noncurable,” it had the further choice of terminating the master lease or giving notice of increased rent on 30 days written notice. On the other hand, if Hunbeach elected to treat the breach as a “curable”

default, under paragraph 13.1(c) it was required to furnish three days written notice. Paragraph 13.1(c) is among several of a list of particular varieties of defaults in Paragraph 13.1, following (a) “abandonment of the Premises,” and (b) failure to pay rent. Subdivision (c) is “commission of waste” [etcetera] “where such actions continue for a period of 3 business days *following written notice* to Lessee.” (Italics added.)

The master lease also had a clause prohibiting any assignment or subletting without the prospective subtenant’s consent (as well as that of Hunbeach’s). Paragraph 12.2(a) provided: “Regardless of Lessor’s consent, no assignment or subletting shall: (i) be effective without the express written assumption by such assignee or sublessee of the obligations of Lessee under this Lease, (ii) release Lessee of any obligations hereunder, or (iii) alter the primary liability of Lessee for the payment of Rent or for the performance of any other obligations to be performed by Lessee.”

Finally, the master lease had a clause protecting Hunbeach’s right to exercise its remedies for Hawk’s default or breach if Hunbeach took some time in deciding whether to approve or disapprove a proposed assignment. Paragraph 12.2(b) provided: “Lessor may accept Rent or performance of Lessee’s obligations from any person other than Lessee pending approval or disapproval of an assignment. Neither a delay in the approval or disapproval of such assignment nor the acceptance of Rent or performance shall constitute a waiver or estoppel of Lessor’s right to exercise its remedies for Lessee’s Default or Breach.”

### *3. The Sale of the Dealership, and the Four Possible or Purported Subleases or Assignments*

Garff wanted to buy the dealership. By early January 2008 Garff and WC had written up a memorandum of the terms for the deal. By February 1, 2008 Garff and WC had entered into an asset purchase agreement. April 28, 2008 was the closing date for both transactions.

Because both Garff and Spedding believed that Nissan would require expansion onto the vacant land now leased by Hawk from Hunbeach, the question of the transfer of Hawk's lease interest in that land arose.

At this point we must distinguish between no less than *four* subleases or assignments (or in one case a proposed assignment) of the master lease. The difference is not clear from the briefing.

First, there was an *oral* Hawk-to-WC sublease. The date of this sublease is uncertain from the record since Spedding was essentially orally subleasing the vacant land from one of his entities, Hawk, to another of his entities, WC. However, the record is reasonably clear that this oral sublease occurred before April 2008, when it was superseded by a written sublease. According to Spedding's attorney, this oral sublease was merely to establish a "placeholder" required by Nissan to facilitate the transfer of the dealership.

Second, there was the undated *written* sublease from Hawk to WC, in evidence as exhibit 2. Spedding signed for both Hawk and WC in this document. Paragraph 8.1 contains a clause requiring the lessor in the master lease to give its approval for the sublease to be effective: "In the event that the Master Lease requires that Sublessor obtain the consent of Master Lessor to any subletting by Sublessor then, this Sublease shall not be effective unless, within 10 days of the date hereof, Master Lessor signs this Sublease thereby giving its consent to this Subletting." While this written Hawk-to-WC sublease recites that it was to commence April 1, 2007, the evidence was uncontradicted that the written sublease was not prepared until March 2008 at the earliest. This Hawk-to-WC sublease was never shown or communicated to Hunbeach. In fact, Hunbeach did not learn of its existence until this litigation.

Third, there is the formal assignment and assumption of sublease entered into April 28, 2008, the day of the closing of the dealership sale, from WC to GL. This formal assignment and assumption specifically incorporated the Hawk-to-WC sublease,

including a recital that WC “presently subleases” the premises from Hawk. Language in the document points to its role as part of the dealership sale, including a reference to the “APA,” or asset purchase agreement, effectuating that sale. Section 1 of the document makes it “subject to” all provisions in the master lease plus the provisions of the Hawk-to-WC sublease: “This assignment shall be effective as of the time of Closing (as defined in the APA [the dealership sale]. As of the Effective Time, Assignor hereby grants . . . all of Assignor’s right, title, and interest in, to and under the Sublease and Premises, *subject, however, to the provisions of the Sublease, the Lease, the APA (including but not limited to Section 1.15 thereof) and this Assignment.*” (Italics added.) Section 1.15 of the asset purchase agreement similarly states that the lease assignment was being made “on the same terms and conditions set forth in Seller’s [WC’s] existing sublease.” The same section also states that Garff “agrees to provide the landlord such information and guaranties as landlord may reasonably require to permit the assignment of the sublease to Buyer . . . .”

And, fourth and finally, there was a *proposed* assignment and assumption of lease, undated, from Hawk to GL. This proposed assignment and assumption tracked the form used for the WC-to-GL assignment and assumption just discussed, but was undated, and included a provision for lessor consent with a blank left for a recitation of the date rent had been paid through, plus a signature line for the appropriate officer of Hunbeach. This particular assignment and assumption document was sent as an e-mail attachment in an e-mail from Garff’s general counsel to Hunbeach’s counsel on the day of closing of the dealership sale, April 28, 2008.

#### *4. Negotiations After Sale of the Dealership*

In the weeks after the April 28, 2008 close of sale of the dealership from WC to the Garff entity GL, Spedding’s attorney had a number of “communications” with Hunbeach’s attorney on the subject of “what would be sufficient to allow the owner to

... accept an assignment and assumption of sublease of the new entity.” They discussed a security deposit, a letter of credit and having guarantors and the financial stability of the guarantors. Garff was, in fact, willing to have three Garff entities be guarantors of both Hawk and WC’s obligations, and prepared a written guarantee to that effect.

A deal was almost arrived at in a telephone conference between Garff’s general counsel and attorneys for Hunbeach and Spedding on June 3, 2008. Spedding’s attorney had hoped that the presence of three guarantors would be enough to obtain Hunbeach’s approval. However, as Garff’s general counsel later testified, Hunbeach’s attorney “indicated that, in addition, we [Garff] needed to have a security deposit” worth nine months payments “or a letter of credit on top of the guarantors.” Garff was, however, unwilling to supply a security deposit, if only because there was no security deposit in the master lease, and the idea of a letter of credit “fell away,” rejected (as Spedding’s lawyer would testify) by either Hunbeach’s attorney or Garff’s general counsel because “it wouldn’t work.”

Hunbeach never did approve the proposed Hawk-to-GL assignment. At trial, Hunbeach’s manager answered yes to the questions whether it was “accurate to say” that he had “never consented to the assignment of the lease.”

##### *5. The Litigation*

Hawk paid the rent on the master lease in May 2008, then, beginning in June, GL started making the rent payments. GL expected that it would “eventually work through the lease assignment issues with Hunbeach.” GL, now operating as Surf City Nissan, did not want the lease to be “in default” at such time as it would assume Hawk’s obligation under it.

February 2009 was the last rent payment made by GL. There were “a number of reasons” GL stopped. Disagreements had arisen between GL and Spedding. GL thought Spedding had failed to disclose certain facts about the property, and GL

“found out that Nissan didn’t really want us to build across the street.” Rather “their [Nissan’s] preference was to further develop the existing dealership property.” And, since GL thought it “never had been approved as the tenant on the master lease,” from GL’s point of view, all it was doing was gratuitously just “helping Hawk” on its obligation.

In May 2009, Hunbeach filed an unlawful detainer action against Hawk, WC, Spedding, and GL. The case progressed to a third amended complaint for damages by Hunbeach filed in March 2010. Trial to the court began in February 2011. The trial judge provided the parties with a thorough statement of decision. The judge rejected alter ego claims against Spedding, but gave judgment against Hawk for \$769,902, based on expert testimony that the land could have been rented in two years in any event. The judge specifically noted that Hunbeach did not mitigate its losses, thus limiting its recovery against Hawk to that time period.

However, the court rejected Hunbeach’s third cause of action against WC for breach of the Hawk-to-WC sublease, because Hunbeach was not a third party beneficiary of that sublease. The judge first noted that the master lease required Hunbeach to approve the sublease in writing, and Hunbeach never did so. The judge further reasoned that Hunbeach did not know of that sublease until Hawk requested permission to sublease *to GL*, and Hunbeach was in effect trying to approve the Hawk-*to-WC* sublease retroactively.

Likewise, the court rejected Hunbeach’s fourth cause of action against GL on the WC-to-GL assignment. “Again, the main lease says that subleases and assignments without written permission of Hunbeach are ineffective. Hunbeach never gave permission, so it cannot now claim that it can enforce the agreement.”

The statement of decision also ruled that Hunbeach had unreasonably withheld permission to assign the master lease to GL, because GL’s offer was “commercially reasonable,” and GL was “clearly qualified” to run a car dealership.

Hunbeach subsequently filed a timely appeal from the ensuing judgment. The only issues raised by the opening brief concern the exoneration of WC and GL.

## DISCUSSION

### *1. The Civil Code Section 1995.330 Issue*

Hunbeach acknowledges that it did not present a claim under Civil Code section 1995.330 to the trial court. (All further statutory references are to the Civil Code.) Nevertheless, it asks this court to consider its section 1995.330 claim on the theory that the claim “raises a pure issue of law on undisputed facts.”

We decline. Section 1995.330 is a statute which involves the liability of an assignee for a transfer “in violation of a restriction on transfer of a tenant’s interest in a lease.” (Subdivision (a) of the statute provides in its entirety: “An assignee who receives or makes a transfer in violation of a restriction on transfer of a tenant’s interest in a lease is jointly and severally liable with the tenant for contract damages under Section 1995.320. For this purpose, the provisions of Section 1951.2 applicable to a lessee apply to an assignee.”) Had a section 1995.330 claim been raised in the pleadings, it would certainly have affected the trial strategies of WC and GL, and might have implicated additional factual issues as well. (See *In re Marriage of Moschetta* (1994) 25 Cal.App.4th 1218, 1227 [“One of the reasons parties are not normally allowed to raise new issues on appeal is that it is unfair to their opponents who did not have the opportunity to attack that theory factually or legally in the trial court, and to the trial court itself, which may be required to retry issues that might have been handled more efficiently the first time around”].) And this case certainly implicates no “matter of intense public and legal concern,” otherwise justifying relaxation of the need to raise issues in the trial court. (Cf. *id.* at pp. 1227-1228.)

## 2. *The Third Party Beneficiary Issue*

### A. *General Principles*

Hunbeach argues, *as a matter of law*, it was a third party beneficiary of “the sublease and assignment” – meaning presumably either the Hawk-to-WC sublease, the WC-to-GL assignment, or both. (Hunbeach is apparently not referring to the *proposed* Hawk-to-GL assignment, because the evidence is clear that Hunbeach turned that assignment down.)

We disagree. The applicable texts *and* substantial evidence compel the conclusion that neither WC nor GL intended to create a third party beneficiary contract enforceable by Hunbeach.

No third party beneficiary contract is created without the parties to the contract actually intending to create one. (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 524 (*Hess*) [written release signed by personal injury plaintiff with tortfeasor did not extend to automobile manufacturer despite broad, literal language of release releasing all potential tortfeasors because the plaintiff never intended to release the manufacturer]; *Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 348 [“The contracting parties must have intended to confer a benefit on the third party.”]; *Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 674 (*Sessions Payroll*) [a “third party beneficiary can only claim benefits that contracting parties intended it to receive”]; *Kalmanovitz v. Bitting* (1996) 43 Cal.App.4th 311, 314 [“While it is not necessary that a third party be specifically named, the contracting parties must clearly manifest their intent to benefit the third party.”].)

Sometimes the requisite intent to give a third party enforceable rights under a contract is obvious on the face of a written contract – certain kinds of insurance contracts being a clear example of this category. (See *Jones v. Aetna Casualty & Surety Co.* (1994) 26 Cal.App.4th 1717, 1724 (*Jones*) [“A third party may qualify as a

beneficiary under a contract where the contracting parties must have intended to benefit that third party and such intent appears on the terms of the contract.”.)

However, more often the issue of intent to give a third party enforceable rights requires examination of the circumstances surrounding the creation of the written contract. (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 437 [“In determining the meaning of a written contract allegedly made, in part, for the benefit of a third party, evidence of the circumstances and negotiations of the parties in making the contract is both relevant and admissible.”]; *Jones, supra*, 26 Cal.App.4th at p. 1725.)

In fact, to ascertain intent, courts may not only have to examine the circumstances of the contract’s formation, but examine the subsequent conduct of the parties as well. (See *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1029-1030 (*Spinks*).

Accordingly, as a general rule, the question of whether contracting parties intended to give a third party enforceable rights is considered a question of fact. (*Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1233 [“Generally, it is a question of fact whether a particular third person is an intended beneficiary of a contract.”]; *Spinks, supra*, 171 Cal.App.4th at p. 1015 [whether tenant was third party beneficiary of lease entered into between her employer and landlord was question of fact, precluding summary judgment].)

Moreover, a third party claiming enforceable rights under a contract “bears the burden of proving that the contracting parties actually promised the performance which the third party beneficiary seeks.” (*Sessions Payroll, supra*, 84 Cal.App.4th at p. 680.) Thus in the case before us, the burden of proof was on Hunbeach to prove WC and GL actually intended to bestow on Hunbeach enforceable rights under either the Hawk-to-WC sublease or the WC-to-GL assignment and assumption.

And even just looking at the documents alone, any such examination must be tempered by the rule that contracting parties cannot create third party beneficiary

rights by accident or sloppy drafting, a point made by our state Supreme Court in *Hess*, *supra*, 27 Cal.4th 516. *Hess*, in fact, is a vivid example of how far courts will look beyond the bare text of a written agreement to the underlying circumstances of the creation of that agreement.

In *Hess*, a passenger in a pickup truck who had been injured when a car hit the truck at an intersection made a written agreement with the car driver to ““forever discharge”” the car driver, his insurer, *and* “all other persons, firms, corporations . . . from any and all claims” that the passenger might “have due to the accident.” (*Hess*, *supra*, 27 Cal.4th at p. 521.) Later the passenger sued the manufacturer of the pickup truck. A literal application of the release language would have made the manufacturer a third party beneficiary of the contract, but of course the passenger never intended to release the manufacturer from liability. (See *id.* at p. 522.) Our Supreme Court held that the text of the release was “hardly conclusive” because it “arguably” supported a finding the contracting parties did not intend to release the manufacturer from liability. (*Id.* at p. 527.) The court noted the small amount of the settlement, the severity of the injuries, the failure of the release to specifically name the manufacturer, and the awareness of the passenger’s claims against the company. (*Ibid.*) In specific response to the manufacturer’s third party beneficiary argument, the court said that under ordinary contract rules of interpretation established that the parties did not intend the release to “benefit Ford”, which had acquired “no rights for value and could therefore suffer no prejudice from any reformation” of the release based on mutual mistake. (*Id.* at p. 528.) Justice Kennard, joined by Chief Justice George and Justice Werdeger, wrote in a concurring opinion that the admitted evidence “overwhelmingly refute[d]” any claim by Ford that it was intended to give the manufacturer third party beneficiary rights. (*Id.* at p. 535 (conc. opn. of Kennard, J.).)

## *B. Application*

### *i. text*

In this case, the bare texts of the applicable written contracts are *less* indicative than the language of the release in *Hess* of an intent to confer on a third party enforceable rights. First, the master lease contained numerous provisions which required Hunbeach's actual consent before any sublease would be effective. Those provisions include paragraph 12.1's prohibition on subleasing without Hunbeach's consent, paragraph 12.1(d) giving Hunbeach the further *option* of treating any sublease in contravention of the prohibition as either a "Default curable" or a "noncurable Breach," and if Hunbeach elected to treat the sublease as *curable*, it was still required to furnish written notice under paragraph 13.1(c). Together, these provisions establish that no subletting could be effective without some sort of affirmative act on Hunbeach's part. The very structure of the master lease precluded any effective sublease created by accident. Indeed, the master lease's own terms provided that no sublease would be effective without the matter first coming to Hunbeach's attention and Hunbeach making a conscious decision to either accept or reject the sublease.

Beyond the master lease, Hawk, WC and GL were all careful, in the sublease agreements they made, to insure that each document was contingent on Hunbeach's approval. Paragraph 8.1 of the Hawk-to-WC sublease required Hunbeach's approval before the sublease would become effective, and sections 1 and 1.15 of the WC-to-GL assignment and assumption made it contingent on both the master lease (with its requirement of Hunbeach's express approval) and "subject to" the provisions of the Hawk-to-WC sublease, necessarily including paragraph 8.1 of that sublease, which again included the necessity of Hunbeach's approval.

In short, the textual language here affirmatively showed that the relevant parties all desired to *control* whether any sublease would be effective by the *timing* of any notification to Hunbeach.

*ii. extrinsic evidence*

But even assuming the texts of the master lease, Hawk-to-WC and WC-to-GL subleases are not enough, there can be no doubt when we examine the extrinsic evidence bearing on the circumstances of the making of those contracts.

Since the question of intent to create third party rights is a question of fact, and the court received extrinsic evidence bearing on that intent, we must employ a substantial evidence standard of review. If substantial evidence supports the trial court's finding that neither Hawk, WC nor GL intended to confer on Hunbeach enforceable rights in making the Hawk-to-WC sublease or the WC-to-GL assignment and assumption, that is the end of the matter. (*Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947, 954; *US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 908; *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 207.)

Moreover we are required to draw all reasonable factual inferences and uphold all express or implied findings in favor of the trial court's judgment where supported by substantial evidence. (*Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811, 815.)

Substantial evidence does indeed support the court's finding. The underlying circumstances behind the Hawk-to-WC and WC-to-GL documents was the need of both the two Spedding entities, Hawk and WC, and the Garff entity, GL, to establish a "placeholder" in the process of the sale of the dealership in order to satisfy Nissan, *not* to establish any rights enforceable by Hunbeach. It is also significant, to reference *Hess's* no-rights-for-value point, that Hunbeach incurred no prejudice from the Hawk-to-WC and WC-to-GL contracts. Hawk, WC, and GL, in fact, took pains to seal off Hunbeach from those transactions, and Hunbeach throughout these transactions always had what it had in the beginning – a lease with Hawk as tenant.

The subsequent conduct of the parties further demonstrates the lack of intent to confer third party rights on Hunbeach. (See *Spinks, supra*, 171 Cal.App.4th at

pp. 1029-1030.) Rather than put the Hawk-to-WC and WC-to-GL contracts before Hunbeach and request Hunbeach's express approval of those contracts – as might be expected if the parties had actually intended to create effective subleases from Hawk to WC and then from WC to GL – the two Spedding entities, and the one Garff entity, GL, proffered *another* contract to Hunbeach – the Hawk-to-GL contract, an act which was thoroughly consistent with the absence of any intent to create *effective* subleases by way of the Hawk-to-WC or WC-to-GL contracts.

Ironically, Hunbeach's core arguments on appeal is not directly based on the text of the Hawk-to-WC or WC-to-GL contracts, but on a swath of testimony from Spedding's attorney which Hunbeach contends establishes as a matter of law that the Spedding and Garff parties did not intend paragraph 8.1 of the Hawk-to-WC contract to be effective, and therefore supposedly shows an intent on their part to confer third party rights on Hunbeach. An examination of that testimony shows Hunbeach's characterization of the testimony to be incorrect. We now review that testimony in detail:

Spedding's attorney, Michael Connor, had just finished testifying on direct. Hunbeach's attorney, Saul Reiss, began to cross-examine him. Reiss immediately invited Connor's attention to paragraph 8.1 of the written sublease (exhibit 2) from Hawk to WC. Then he asked, "At the time that this document was drafted, was there an intention to ever obtain the consent of the landlord to it?" Connor answered: "For the sublease? No."

Reiss then asked, "And at the time that it was assumed by GL Huntington Beach, were there discussions about whether or not that provision was going to apply to GL Huntington Beach?" And Connor again answered no.

"Why not?" asked Reiss. Connor answered, "I honestly don't know."

Reiss then focused on the conflict of interest which Connor had put himself into by representing two ostensibly separate parties in a transaction: "Was it your intention in drafting this document to leave to GL Huntington Beach the right to walk

away from this sublease and assignment in the event that the landlord didn't consent to an assignment of the master lease?" To this question Connor answered no.

Reiss next asked "What would the consequences of 8.1 being utilized have been?" Connor asked, "To whom?" "To Hawk," Reiss replied.

Connor then said, "To the extent that 8.1 invalidated the sublease, Hawk would have been exposed, I suppose."

Reiss refocused on the exposure to Hawk, Connor's client: "Did you, in fact, intend in drafting this document to expose Hawk to the potential of being solely liable under the master lease if no consent were obtained?" Connor answered no.

"And, in fact," Reiss continued, "that wasn't the intention of any of the parties to the assignment and assumption, was it?"

At that point counsel for GL objected, arguing that the question called for speculation as to "other parties other than his own," obviously referring to GL.

The trial judge then voiced (as he would again soon) the point that the documents spoke for themselves unless ambiguous. He added, however, that if Connor had "specific conversations" about GL's intent, Reiss could "ask about that."

Reiss asked "were there conversations on the issue of whether or not GL Huntington Beach and the guarantors could walk away from the sublease and leave your client exposed?" The trial judge immediately interjected by reiterating the thought that the documents spoke for themselves. "To the extent that there is a difference between what he [Connor] says and what the documents says, I go with the document . . . unless you can convince me there is an ambiguity in there in some fashion. So it really doesn't matter." That said, the judge told Connor he could "go ahead and answer the question."

By that time Connor needed to be reminded one more time what the question was, and the judge summarized: "It wasn't the intention of the parties that GL and its guarantors could walk away from the assignment of the sublease, right? That's what we're talking about?" Connor answered, "Yes, your honor."

The judge recapitulated again: “Yeah. Walk away from the assignment of the sublease in the event the landlord didn’t give permission.”

Connor then responded: “It wasn’t the intent. Nor was it the intent to ever ask the landlord for permission.”

“Got it,” replied the judge.

Reiss then asked this question: “So that provision, then, was never supposed to apply?” Connor answered “True.” Reiss then turned to the subject of the date of the sublease and continued with a line of questions establishing that the Hawk-to-WC sublease “was for the purposes of Nissan.”

Hunbeach’s argument that the parties never intended paragraph 8.1 to be effective, ergo Hunbeach never had to give its consent for the subleases to be effective, fails because of the standard of review. We must resolve the conflicts in the evidence and draw reasonable inferences from the evidence in favor of the judgment, not against it.

Connor’s acquiescence, under cross-examination, to the “never supposed to apply” question could mean two things: One, it might mean, as Hunbeach now argues, that the parties were dispensing with the need for Hunbeach’s approval as otherwise provided in the contract. But it could also mean that the Hawk-to-WC sublease was itself never intended to be an *effective* sublease *as far as Hunbeach was concerned*.

The latter interpretation is the better one for at least three reasons. First, it better accords with Connor’s earlier testimony about the Hawk-to-WC sublease, where he said there was no intention to ever obtain Hunbeach’s consent to it. Second, it is consistent with the overall circumstances of the transaction, which was focused on the need to obtain Nissan’s consent. And third, the interpretation fits with the trial court’s finding of no intent. We therefore adopt that interpretation: Paragraph 8.1 was never meant to be “applicable” in the sense that the Hawk-to-WC sublease was never meant to create a sublease *enforceable* by Hunbeach. As such, we may conclude that neither the

text of the relevant contracts nor the extrinsic evidence established third party rights in Hunbeach.

*iii. waiver of consent*

Hunbeach argues the fact it did not approve the Hawk-to-WC sublease and the WC-to-GL assignment does not defeat its third party beneficiary claims because it may waive the master lease provisions requiring its approval for a valid sublease or assignment. As explained above, however, Hunbeach's third party beneficiary theories fail not only based on the terms of the master lease but also the Hawk-to-WC sublease and the WC-to-GL assignment. Indeed, the fact Hawk, WC, and GL never intended to confer any enforceable rights on Hunbeach when they made the Hawk-to-WC sublease and the WC-to-GL assignment alone is sufficient to defeat Hunbeach's third party beneficiary claims regardless of whether Hunbeach waived the master lease's consent requirements.

Moreover, substantial evidence shows Hunbeach never in fact waived the consent requirements. Hunbeach points to nothing in the record to show it made any attempt to waive the consent requirements regarding the Hawk-to-WC sublease or the WC-to-GL assignment after it learned of those documents. The trial court also specifically found that Hunbeach unreasonably withheld its consent to the Hawk-to-GL proposed assignment. The whole story of the post April 28, 2008 submission of the Hawk-to-GL contract to Hunbeach and its attempt to extract concessions additional to those in the master lease wholly undercuts Hunbeach's argument.

Hunbeach attacks the trial court's finding that it unreasonably withheld consent. But substantial evidence readily supports that finding as well. Three Garff entities were willing to guarantee GL's performance. Yet Hunbeach's attorney still "indicated that, *in addition*, [Garff] needed to have a security deposit" worth nine months payments "or a letter of credit on top of the guarantors." (Italics added.) The trial court

could reasonably conclude that Hunbeach was trying to obtain a greater advantage from having GL as a tenant than it had accepted when it undertook Hawk as a tenant. That is, knowing that by withholding its consent it might be able to throw a monkey wrench into the dealership sale, Hunbeach tried to “hold up” the Spedding and Graff entities for more than it had in the original master lease.

Hunbeach also argues WC and GL waived the argument that the Hawk-to-WC sublease and the WC-to-GL assignment conferred no rights on Hunbeach because GL acted as though the documents were enforceable by paying rent to Hunbeach for several months after it purchased the Nissan dealership. Hunbeach is mistaken. Substantial evidence shows that Hawk, WC, and GL never intended to create an effective sublease enforceable against either WC or GL. The rent payments GL made were for its own benefit in anticipation of Nissan requiring GL to eventually occupy the vacant land which was the subject of the master lease. The parties continuing discussions regarding the proposed Hawk-to-GL assignment after the April 28, 2008 closing of the dealership sale demonstrates their belief that an enforceable assignment was not in place.

Finally, Hunbeach points to a cryptic comment in the statement of decision that Hawk and WC “had a claim against [GL] for breach of the agreement” as support for the idea that it could enforce the Hawk-to-WC sublease and WC-to-GL assignment. In context, however, the trial court’s comment only underscored its finding that Hunbeach withheld its consent from any assignment and could not thereafter, in litigation, conveniently change its mind. We quote the entirety of the trial court’s statement of decision on the fourth cause of action here, to illustrate what the trial court was really saying:

“Hunbeach also claims that Hawk (through [WC] ) assigned all of its rights under the main lease to [GL] and therefore Hunbeach is entitled to sue as third party beneficiary. Again, the main lease says that subleases and assignments without written permission of Hunbeach are ineffective. *Hunbeach never gave permission, so it cannot*

*now claim that it can enforce the agreement.* [¶] There was evidence that in June 2008 Hunbeach agreed in principle to the transfer, but that approval was never reduced to writing or memorialized in any fashion. Further, the evidence equally supports the conclusion that Hunbeach wanted to see the guaranties before agreeing to the transfer. [GL] never provided the signed guaranties and no one ever followed up on getting Hunbeach to commit in writing. [¶] While Hawk and Weston-Carol had a claim against [GL] for breach of the agreement, *Hunbeach never agreed to any sublease. It cannot decide now that it should have agreed and sue if it had agreed.* The court finds that it cannot sue for breach.” (Italics added.)

There is nothing here supporting any purported right in Hunbeach to blow hot or cold at its litigation convenience on the point of waiving – or not waiving – the consent requirement in the master lease. In context, the most that can be wrung from the cryptic comment about Hawk and GL’s “claim” is that they could hold GL responsible for not having tried hard enough to obtain the required consent from Hunbeach to the proposed Hawk-to-GL assignment. Furthermore, the court’s cryptic comment does not address the substantial evidence showing Hawk, WC, and GL never intended to confer any third party beneficiary rights on Hunbeach.

CONCLUSION

The judgment is affirmed. WC and GL will recover their costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.