

A real estate developer owned a 100-acre tract of land. Six years ago, the real estate developer leased a one-acre lot located in the northeasterly corner of the tract for a term of 30 years to a fast-food company. The fast-food company intended to, and did, construct a fast-food restaurant on the one-acre lot.

The lease provided that:

The fast-food company was to maintain the lot and improvements thereon, to maintain full insurance coverage on the lot, and to pay all taxes assessed against the lot.

The real estate developer was to maintain the access roads and the parking lot areas platted on those portions of the tract that adjoined the lot and to permit the company's customers to use them in common with the customers of the other commercial users of the remainder of the tract.

The fast-food company was to pay its share of the expenses for the off-site improvements according to a stated formula.

Five years ago, the real estate developer sold the one-acre lot to an investor; the conveyance was made subject to the lease to the fast-food company. However, the investor did not assume the obligations of the lease and the real estate developer retained the remainder of the 100-acre tract of land. Since that conveyance five years ago, the fast-food company has paid rent to the investor. However, the fast-food company refused to pay its formula share of the off-site improvement costs as provided in the lease.

The real estate developer brought an appropriate action against the fast-food company to recover such costs.

Is the real estate developer likely to prevail?

- A. No, because the conveyance of the one-acre lot to the investor terminated the privity of estate between the real estate developer and the fast-food company.
- B. No, because the investor, as the fast-food company's landlord, has the obligation to pay the maintenance costs by necessary implication.
- C. Yes, because the conveyance of the one-acre lot to the investor did not terminate the real estate developer's right to enforce the covenant to contribute.
- D. Yes, because the use of the improvements by the customers of the fast-food company imposes an implied obligation on the fast-food company.

Explanation:

A landlord may generally transfer his/her property interest to a **third party** (ie, assignee-landlord) without the tenant's consent. However, the assignee-landlord only has the **right to enforce a covenant** (ie, promise) in the lease if it **runs with the land**. Otherwise, the original landlord retains the right to enforce it. A covenant runs with the land when:

the original parties **intended to bind successors** in interest (eg, assignee-landlord)

the covenant **touches and concerns** (ie, affects the use or value of) the land *and*

the transfer brings the assignee-landlord into **privity of estate** (ie, a mutual or successive relationship in the same property interest) with the tenant.

Here, a lease covenant required that the fast-food company contribute to costs associated with off-site improvements on the real estate developer's adjoining property. This covenant did not touch and concern the one-acre lot because it only affected the adjoining property. Therefore, the covenant does not run with the land, and the conveyance to the investor did not terminate the developer's right to enforce that covenant.

(Choice A) Privity of estate between the real estate developer (landlord) and the fast-food company (tenant) terminated when the one-acre lot was sold to the investor. But the developer retains the right to enforce the covenant to contribute because the covenant does not run with the land.

(Choice B) The implied warranty of habitability obligates landlords to pay maintenance costs to keep property fit for *residential* purposes. But this obligation does not apply to *commercial* leases (as seen here). Even if it did, this would not affect the real estate developer's recovery of off-site improvement costs.

(Choice D) An implied obligation to contribute to *repair and maintenance* costs arises under an easement. But the use of the off-site improvements by the fast-food company's customers (easement) did not obligate the company to contribute to *improvement* costs.

Educational objective:

A lease covenant can only be enforced by an assignee-landlord if it runs with the land. This occurs when (1) the original parties intended to bind their successors, (2) the covenant touches and concerns the land, and (3) there is privity of estate.

References

Restatement (Second) of Prop.: Landlord & Tenant § 16.2 (Am. Law Inst. 1977) (landlord's right to enforce lease provision against former tenant after transfer of ownership).

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Assignee-landlord's right to enforce lease covenant that runs with land

