At a term of the Supreme Court held in and for the County of Wyoming, at the Courthouse in Warsaw, New York, on the 27th day of March, 2023.

PRESENT: HONORABLE MICHAEL M. MOHUN
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT: COUNTY OF WYOMING

FITCH FARMS, INC.,

Plaintiff,

v.

DECISION AND ORDER
Index No. 9000727

JOSEPH A. FITCH,

Defendant.

In this case arising from four fifty-year farm leases – of varying execution dates with none having less than 19 years remaining on its lease term – the defendant by notice of motion dated October 20, 2022, requests an Order: 1) dismissing the complaint; 2) granting the defendant summary judgment upon his counterclaims; 3) declaring the plaintiff to have irreparably breached all four leases by violating the clause in each which prohibited assignment of the lease without the defendant's authorization; 4) awarding possession of each of the leased properties to the defendant free and clear of the lease. In turn, by notice of motion dated October 21, 2022, the plaintiff requests an Order: 1) dismissing the defendant's counterclaims; 2) granting the plaintiff summary judgment upon the causes of action stated in the complaint; 3) declaring that the plaintiff is in compliance with the terms of all of the leases and that no breach of the assignment clause has occurred; and 4) permanently enjoining and restraining the defendant or his agents from acting to cancel the leases before the expiration of their terms, or otherwise interfering with the plaintiff's use and enjoyment of the leased premises.

NOW on reading and filing the defendant's notice of motion supported by the statement of material facts of Eric J. Mikols, Esq., attorney for the defendant, dated October 20,

2022, the affirmation of Eric J. Mikols, Esq., dated October 20, 2022, together with the annexed exhibits, statement of material facts and accompanying memorandum of law; the plaintiff's notice of motion dated October 21, 2022, supported by the affirmation of David M. Roach, Esq., attorney for the plaintiff, dated October 20, 2022, together with the annexed exhibits and the accompanying memorandum of law; the affidavit of Thomas J. Fitch, "President, Treasurer, Chairman, Director, and Stockholder of Fitch Farms, Inc.," sworn to on October 19, 2022, together with the annexed exhibit; the affidavit of Nathan Osborn, Manager of Highbanks Dairy, LLC, sworn to on October 20, 2022, together with the annexed exhibits; the memorandum of law in opposition to the plaintiff's motion, dated November 14, 2022, submitted by Eric J. Mikols, Esq.; the responding affirmation of David M. Roach, Esq., dated November 14, 2022; and after hearing Eric J. Mikols, Esq., for the defendant and David M. Roach, Esq., for the plaintiff, due deliberation having been had, the following decision is rendered upon the motions for summary judgment.

Initially, the Court notes that the parties are in agreement that no material questions of fact remain to be decided. Each contends that the documentary evidence supplied in the motion papers submitted is sufficient to permit the Court to determine the case as a matter of law. The Court is called upon to interpret the effect upon the assignment clause contained in each lease of a series of transactions carried out between plaintiff Fitch Farms, Inc., its shareholders, and Highbanks Diary, LLC ["Highbanks"]. The assignment clause in each lease, found under the heading of "Successors," reads as follows: "Unless otherwise stated, the lease is binding on all parties who lawfully succeed to the rights or take the place of the Landlord or you the tenant, this lease shall not be assigned without written consent of the Landlord." The defendant contends that the transactions violated the prohibition that "this lease shall not be assigned without written consent of the Landlord." The plaintiff contends that transactions in question did not violate the clause.

The transactions between Highbanks and Fitch Farms, Inc. ["Fitch Farms"] were conducted pursuant to a series of agreements entered into in 2014. The defendant was apparently not made aware of these agreements until recently, and among the agreements there is a confidentiality agreement which remains in effect upon the contracting parties. Mr. Osborn of Highbanks, in his affidavit, gives the following description of the full set of agreements: "[t]he 'Proposed Transaction' was comprised of multiple agreements, namely a triple net farmstead lease (for the lease and purchase of Fitch Farms' land and buildings, NOT Defendant's land); an

equipment lease (for the lease and purchase of Fitch Farms' farming equipment); a cattle purchase agreement; a Dairy Farmers of America stock/equity purchase agreement; and a young stock purchase agreement." In addition, it was agreed that Highbanks should received "the option" "to ultimately purchase all the shares of stock in Fitch Farms." Mr. Osborn reports that Highbanks did, in fact, complete the purchase of Fitch Farms on May 9, 2022. Fitch Farms, Inc., continues in existence as a wholly owned subsidiary of Highbanks Diary, LLC. In his statement of material facts, defendant's counsel asserts that "[a]t all times between June 19, 2014 and May 8, 2022, Thomas J. Fitch was the president and sole shareholder of Fitch Farms, Inc.," and that "[f]rom May 9, 2022 to present, Highbanks Dairy, LLC was and is the sole shareholder of Fitch Farms, Inc." Regarding the parties to the final sale of stock, Mr. Osborn's report is slightly different. He states that Highbanks completed its acquisition of Fitch Farms when the "Thomas J. Fitch Living Trust and William J. Fitch and Jane Fitch Family Trust, the sole stockholders of Fitch Farms, sold one hundred percent of their stock in Fitch Farms to Highbanks."

The Court notes that Thomas J. Fitch is the brother of Joseph A. Fitch, the defendant. William J. Fitch is the father of both men. In an affidavit submitted in a prior case – an affidavit that is attached to the complaint and extensively quoted therein – William J. Fitch provides the following account of how the defendant obtained title to the leased lands, and how the leases which are the subject of this lawsuit were created:

> "3. I have been a farmer for my entire adult life. I worked exhaustively for decades to build a large and thriving family farm spanning two counties, Livingston and Wyoming.
>
> "4. In the year 1986, I incorporated my entire family farming under the name Fitch Farms, Inc, and to this day I maintain a shareholder interest in it. My son, Thomas Fitch, is currently the only other shareholder.
>
> "5. Over the many years of building up my farm, I purchased hundreds of acres of land [. . .]
>
> "6. Respondent [Defendant Joseph A. Fitch] is my son. For a little more than 10 years in the 1990's and 2000's, Respondent worked for me on the farm. In the year 2006, Respondent quit working on the

farm and has not worked for me since.

"7. During the time period Respondent worked for me, and for some time before and after it, I and my wife, Jane Fitch, engaged an attorney to begin estate planning, including the distribution of land to Respondent during our lifetime.

"8. Between the years 1992 and 2007, Jane and I gave ('gifted') to Respondent a total of 573.18 acres of land with improvements thereon. We also gave him our house located at 7457 Sanford Rd., Perry, New York.

"9. The 573.18 acres of land consists of 'Coty Farm' and 'Lubanski Farm,' (a total of 331 acres), situated in Livingston County, and three other 'farms' situated in Wyoming County ('John Jacks Farm'; 'George Blodgett Farm'; and 'Wells Farm'– together 242.18 acres).

"10. We effectuated the gifts of land to Respondent in two ways. With respect to the 'Coty Farm' and 'Lubanski Farm,' we set it up such that the farm owners, Earl and Charlotte DeGraff, deeded the farms to Respondent on August 17, 1995. My wife and I loaned to Respondent $75,298 to be applied toward the down payment and closing costs. Then with each year that passed, we forgave a dollar amount equal to our gifting limits until there was no balance left on the loan. We also paid the mortgage against the farms over approximately ten years, at which time it was paid in full.

"11. With respect to all the other farms, Jane and I deeded them to Respondent and held mortgages against them. Then, just as with the 'Coty Farm' and 'Lubanski Farm,' we forgave a dollar amount under the mortgages equal to our gifting limits until there was no balance on the mortgages.

[. . .]

"14. In the end, Respondent received 573.18 acres of land with improvements, including two houses, without paying a dime.

> "15. Concurrent with those gifts of land to Respondent were lease agreements, whereby Respondent, having received hundreds of acres of land from me, leased back the land and one house (located on the "John Jack Farm" in Wyoming County) to my corporation, Fitch Farms, Inc. [. . .]
> "16. The term for each lease agreement is 50 years. There is far more than 5 years remaining on the balance of the terms under each lease."

Thus, the defendant received the leased lands as gifts from his father, William J. Fitch. William then prevailed upon his son – perhaps as a condition for the gifts – to immediately lease back each gifted parcel to Fitch Farms, the corporation through which William – with his son Thomas J. Fitch as fellow shareholder – carried on his dairy business. The executed leases had fifty-year terms, and the rent charged was fixed at $50.00 (or $100.00 for limited times under certain lease amendments) per acre per year. Defense counsel argues that this rental amount is extraordinarily low, perhaps four or five time less than the fair market rate. In essence, the defendant received from his father title to the land and a guaranteed income for fifty years from the corporate, family dairy business; while the corporation received through the leases the use of the land for diary farming at fixed, low rental rates. Since the value of the properties would obviously be far greater to the defendant if they were not encumbered by the leases, he can hardly be faulted for seeking ways to extinguish the leases before they expire pursuant to their terms. Similarly, the low rental rate leases are just as obviously assets of high value to Fitch Farms, which the corporation seeks to protect from interference through this lawsuit.

Indeed, William's estate planning seems to take for granted that his sons and whoever shall be running his corporation in the future will forever share a unity of interest. When he gifted the lands to the defendant, and had the defendant lease them back to the corporation, William presumably expected that the corporation would continue indefinitely to be family owned, and that his sons would continue the family business after he passed away. In 2014, however, William, with his son Thomas as fellow shareholder, decided to sell the corporation to Highbanks. They agreed to keep the agreements with Highbanks confidential, and they did not inform the defendant about what they were doing. Through equipment leases and stock leases, they arranged

for Highbanks to begin operating the business in 2014, pending the completion of the acquisition set to occur in 2022. Fully aware that the leases with the defendant contained anti-assignment clauses, they took care to have Fitch Farms remain the lessee for the leases. And in the end, now that the acquisition of Fitch Farms by Highbanks has been completed, Fitch Farms remains the lessee as a subsidiary of Highbanks. The defendant no doubt feels that it is unfair that he should remain bound by long term, low rate leases that he granted for the purpose of benefitting the family business, now that the family has sold the business.

The fact remains, however, that the defendant received the lands from his father as gifts. He then entered into fifty-year leases with the corporation, Fitch Farms, Inc. Family ties induced him to do this – his father desired it, and perhaps commanded it. But his obligations under the leases are to the corporation, not to his father. And the prohibition upon assignment of the lease applies to the corporation. Nothing in the leases makes them contingent upon the corporate ownership of Fitch Farms remaining the same. If the defendant had wanted to include in the anti-assignment clause a requirement that the corporation could not be sold "without written consent of the Landlord," he could have negotiated the inclusion of language similar to the language found in the lease at issue in Brentsun Realty Corp. v. D'Urso Supermarkets, Inc.: "Transfer or sale of fifty percent (50%) or more of the stock of the Corporation shall constitute an assignment of this Lease which must require Landlord's consent as set forth above" (182 AD2d 604, 604 [2d Dept 1992]; see also Zona, Inc. v. Soho Centrale LLC, 270 A.D.2d 12 [1st Dept., 2000]; compare Board of Directors of Big Deal Realty on Greene Street, Inc. v 60G 133 GREENE STREET OWNER, LLC, 2020 N.Y. Slip Op. 50885(U), 68 Misc.3d 1207(A) [Sup. Ct., N.Y. Co., August 2, 2020]). He did not do so. In arguing, nonetheless, that the transactions between Fitch Farms and Highbanks violated the anti-assignment clause, defendant's counsel essentially urges the Court to find that the requirement of consent to a change in corporate ownership is implied in the leases. The Court sees no basis for so finding.

"A landlord entering a lease with a corporate tenant should be presumed to know that it is an artificial entity with a life distinct from the individuals who may from time to time be its owners. If a landlord wished to protect itself against such vicissitude, it could easily write into the lease a condition subsequent. One can certainly not be implied, however" (Rubinstein Bros. v. Ole of 34th Street, Inc., 101 Misc.2d 563, 568-569 [Civ. Ct., N.Y. Co., 1979]). In addition, "[i]t is well

settled that a transfer of an interest in a tenant does not constitute an assignment of a lease absent a contractual provision which provides otherwise" (Board of Directors, supra; see also Dennis'Natural Mini-Meals, Inc. v. 91 Fifth Ave. Corp., 172 AD2d 331, 334 [1st Dept 1991], leave to appeal denied by 78 N.Y.2d 1124 [1991]; Sea Cliff Delicatessen, Inc. v. Skrepek, 199 AD2d 510, 511 [2d Dept 1993]); Brentsun Realty Corp. v. D'Urso Supermarkets, Inc., 182 AD2d 604 [2d Dept 1992]). Furthermore, "covenants seeking to limit the right to assign a lease are 'restraints which courts do not favor. They are construed with the utmost jealousy, and very easy modes have always been countenanced for defeating them'" (Rowe v. Great Atl. & Pac. Tea Co., 46 N.Y.2d 62, 69 [1978][quoting from Riggs v. Pursell, 66 NY 193, 201 [1876]). This is so "because they are restraints on the free alienation of land, and as such they tend to prevent full utilization of the land, which is contrary to the best interests of society" (id.). "Since such covenants are to be construed strictly even if expressly stated, it follows that a court should not recognize the existence of an implied limitation upon assignment unless the situation is such that the failure to do so would be to deprive a party of the benefit of his bargain" (id.).

Contrary to the arguments of defendant's counsel, Real Property Law §226-b does not provide a basis for the defendant's second counterclaim. That section is limited in its application to cases where "a tenant [is] renting a residence." Here, we are dealing with commercial farming leases.

Also unavailing is the defendant's reliance on the case of Mann Theatres Corp. of Cal. v Mid-Island Shopping Plaza Co. (94 A.D.2d 466 [2nd Dept., 1983]). The non-assignment clause in Mann is much more extensive than the clauses contained in the defendant's leases. The Mann lease prohibited not only assignment without consent – like the defendant's leases do – but also subleasing and "permit[ing] any part of the demised premises to be used by others." The Mann Court found that the broad lease prohibition on "use by others" without consent of the landlord was determinative in its ruling that the operating agreement in question in the case constituted a violation of the lease. The defendant's leases do not contain this broad prohibition. In fact, the defendant's leases do not even prohibit the plaintiff from subleasing the lands. The defendant's leases only require written consent of the landlord for the assignment of the leasehold, meaning the transfer to a third party of the tenant's entire remaining interest in the real property under the lease. Arguably, the agreements with Highbanks gave Highbanks a "license" to use the lands during the period from

2014 up to the completion of the sale of Fitch Farms in 2022. However, since the defendant's leases do not prohibit "use by others" like the lease in Mann did, the Court's reasoning in Mann leads to the conclusion that the license arguably granted to Highbanks between 2014 and 2022 did not violate the minimal language of the non-assignment clause contained in the defendant's leases.

For the foregoing reasons, the Court shall grant the plaintiff's motion for summary judgment, and deny the defendant's motion for summary judgment.

NOW, THEREFORE, it is hereby

ORDERED that the motion of the defendant for summary judgment is denied; and it is further

ORDERED that the motion of the plaintiff for summary judgment is partially granted to the extent that the defendant's counterclaims are dismissed and it is

ADJUDGED and **DECLARED** that the plaintiff has not violated the non-assignment clauses contained in the leases as more fully explained above; and it is further

ORDERED that the defendant is permanently enjoined from treating the purchase of Fitch Farms, Inc., by Highbanks Dairy, LLC, as a violation of the non-assignment clauses contained in the leases; and it is further

ORDERED that the motion of the plaintiff is in other respects denied.

Dated: March 27, 2023.

MICHAEL M. MOHUN
Acting Supreme Court Justice

GRANTED
MAR 27 2023
CHIEF CLERK
WYOMING COUNTY SUPREME COURT