DIRT DAILY DEVELOPMENT for September 24, 2012

This is from the California CEB Real Property Law Reporter of July, describing and commenting on a commercial lease dispute that involved two tangled up issues: 1) how many times could the tenant renew the lease, and 2) what remedies were available for breach of the landlord's covenant of quiet enjoyment. I'm not sure that other states would come up with the same result as California did. Any opinions?

Ginsberg v Gamson (2012) 205 CA4th 873, 141 CR3d 62

A commercial retail lease for a 5-year term contained an option to renew for additional 5-year periods. After one renewal, a dispute arose over repairs and the Tenant sued, alleging breach of the lease and intentional interference with use of the premises. The Landlord cross-complained for a declaration that the lease allowed only one renewal. The trial court construed the lease to give the Tenant the right to unlimited 5-year extensions for 99 years and a jury found the Landlord in breach and awarded the Tenant compensatory and punitive damages, although the trial court struck the punitive damages award. The court of appeal reversed the trial court's interpretation of the option to extend, concluding the the Tenant had a right to only one extension. It affirmed the striking of punitive damages.

Lease provisions allowing perpetual renewals are disfavored. Courts enforce such a provision only if the intention to create that perpetual renewal right is clear and explicit. If the provision is uncertain, the covenant is construed to provide only one renewal. There is no requirement for certain words to create the right to perpetual renewals, because requiring clear and unequivocal language appropriately protects landlords from inadvertently leasing away their property forever. Failure to set an express limit on the number of extensions is not an indication that the parties intended to grant the right to extend the lease forever, or as long as the law allows.

Here, the option provision did not unequivocally demonstrate an intent to create a right to unlimited extensions. Although it contained a rent escalation clause, it was not clear that the formula would apply to periods beyond one extension. The lease had many provisions that were more consistent with a short-term lease than a perpetual leasehold. For example, if the parties had intended the lease to potentially continue for multiple decades, they would have minimized Landlord's responsibility for the premises, allowed ther Tenant greater flexibility in modifying the property or transferring the lease, or ensured that the parties were able to negotiate to cover increased costs over time.

Punitive damages were not available for the Tenant's claimed "intentional interference with use of premises." That claim was in fact one for breach of the implied covenant of quiet enjoyment, which constitutes a breach of contract, not a tort. A tort claim does not arise out of breach of the covenant of quiet enjoyment when, as here, there has been no eviction and the tenant remains in possession.

Tort damages were not available for breach of the lease. Conduct constituting breach of contract becomes tortious only when it also violates an independent duty arising from tort law. The Tenant did not identify any duty the Landlord had breached that was independent of the contract.

Reporter's Comment: This case demonstrates the dilemma confronting a tenant when the landlord refuses to make the repairs that the lease requires, probably to coerce the tenant into leaving. This

tenant elected to stay and fight based on her belief that the lease gave her an indefinite number of options to renew, making quitting far too costly.

While it is possible to read the lease provision as the tenant did (the trial court also believed that the lease unambiguously so provided), that position ran afoul of an obscure judicial policy that dislikes such quasi-perpetuities and restricts lease renewals to only one, whenever that is possible.

In light of our contemporary shriveling of the old common law rule against perpetuities (see Prob C §§21200-21231), it is somewhat surprising to see a court stretching out to find such a policy in a commercial lease setting, where tenants with significant inventory or fixtures have an obvious need for maximum long-term stability. One could claim that the policy behind CC §718, dealing with municipal leases, argues as much for permitting a lease to run 100 years as it does for prohibiting it from running any longer than that.

If this lease could have been read to run lawfully for another 90 years or so, then it made sense for the tenant to opt not to quit and instead compel the landlord to make the required repairs, and pay damages for her past bad acts (decisions that did pay off at the trial).

But the strategy turned out to be disastrous at the appellate level. Not only was the lease held to be renewable only once (thus ending on its anniversary in 2006), but the tenant's decision to stay rather than quit turned out to cost her $385,000, by virtue of the court's invocation of another rule that eradicated the punitive damages the jury had awarded to her.

The tenant's remaining in possession put her on the wrong side of the appellate court's distinction between contractual causes of action (breach of the covenant of quiet enjoyment) and tortious ones (wrongful eviction). Not only had she failed to show any independent breach of a tort duty by the landlord (above and beyond nonperformance of her contractual repair obligations under the lease)-an omission that might have been corrected by better pleading and proof-but the tenant's remaining in possession also destroyed her wrongful eviction claim. California's policy is that a tenant cannot claim eviction-either actual or constructive-unless she actually leaves in reaction to the landlord's provocation.

I find the policy behind this rule even more obscure than the earlier policy against indefinite renewals. A tenant confronted by landlord misbehavior is forced to make a perilous decision: If she stays on after the landlord's dereliction, she may be held to have thereby waived her claim for wrongful action, but if she leaves instead-and then is held to have been wrong in her contentions about the landlord's breaches-she will be guilty of having abandoned her lease and will be liable for the consequences of that wrongful act. See CC §§1951.2, 1951.4. This is exactly the opposite of any policy encouraging mitigation of damages.

Talk about a double whammy!-*Roger Bernhardt*

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