LOSS MITIGATION IN COMMERCIAL LEASING

COUNSEL'S CORNER

In 1997 the Supremes – no not *those* Supremes but rather the Texas Supreme Court – gave all of us involved in commercial real estate law the landmark opinion of *Austin Hill Country v. Palisades Plaza*. That case imparted a duty upon commercial landlords to attempt to lessen their losses when a tenant vacates. Previous law allowed the Landlord to do nothing, wait for the end of the lease term, and then sue the Tenant and Guarantor. Not to be outdone, our own Texas legislature liked the case so much they wrote a law about it in 1997 and it is still found today in our Texas Property Code.

That section of the Property Code has been litigated. A lot. Tenants use it to claim that their Landlord didn't lessen their loss when the Tenant breached the lease. And then the Tenant inevitably claims that *if only the Landlord had mitigated, surely the Landlord would have found a replacement tenant who would have covered all of Landlord's losses.*

Which brings us to this month's case . . .

Mazin Zaid assumed a commercial lease from Weingarten Realty in 2005. In 2006 Zaid assigned the lease to new tenants, but Zaid was not released from his lease liability. The new tenants soon defaulted and were locked out. Weingarten sued Zaid for breach of the lease.

The jury agreed with Weingarten in the trial court, awarding Weingarten approximately $150,000 for unpaid rent, plus almost $50,000 in attorney's fees for the trial. The trial court converted the verdict to judgment. Zaid appealed.

On appeal Zaid claimed that Weingarten did not follow Texas law because Weingarten did not attempt to lessen its losses. Weingarten, however, had senior leasing executive John Wise describe his efforts to find a replacement tenant. According to Wise, Weingarten placed a 'for rent' sign in the window. Wise personally made cold calls and left flyers with retailers, attended broker meetings, sent out e-mail blasts and showed the property to several potential tenants, explaining that the rental pricing was negotiable.

Zaid argued that he, Mazin Zaid, was the perfect replacement tenant. Zaid stated that had Weingarten permitted him to reclaim the property, pay the back rent, operate the business and continue the lease, Weingarten would have lost no rental income.

Weingarten countered by introducing evidence that Zaid had re-entered the property and removed his equipment, Zaid never mentioned in written correspondence with Weingarten that he wanted to resume possession of the premises, and that Zaid took no action in preparation of resuming operations at the restaurant.

Judgment was affirmed for Weingarten.

See *Zaid v. Weingarten Realty Investors*; No. 09-10-00225-CV; Court of Appeals, Ninth District of Texas; August 31, 2011.

Lessons learned:

1. Landlords must attempt to lessen their losses after a tenant breaches the lease. Landlord's duty to mitigate may not be waived.

2. Landlords are not required to use extraordinary efforts to re-lease, unless the Lease states otherwise. Typically, reasonable efforts suffice.

3. Landlords should check their Lease forms to exclude an obligation to re-lease the premises to the same tenant (or any affiliate) who just defaulted.

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