

Sick of Paying Excess CAM Charges?



COUNSEL'S CORNER

In 1995, Garden Ridge leased space from Fiesta Mart. Fiesta Mart sold the shopping center to Clear Lake Center in 2003. Garden Ridge audited its allocated share of common area maintenance charges and sued its Landlord, Clear Lake Center.

This comprehensive commercial lease obligated the Landlord to operate, manage, maintain and repair the common areas, but Tenant was required to pay its prorated share of the expenses. The long list of allowable common area costs had virtually no limitations, although Landlord's fee for "supervision" of the common areas was capped at 7.5% of the total of all CAM charges.

Evidently Garden Ridge had no issue with the CAM computations made by Fiesta Mart. However – Clear Lake added the 7.5% "supervision" fee to its CAM management fee. As well, Garden Ridge wasn't pleased that both of such fees were paid to an affiliate of Clear Lake.

From 2003 to 2009 Garden Ridge paid \$470,000 to Clear Lake for both management and supervisory fees. In 2009 Garden Ridge's auditor concluded that Clear Lake charged an exorbitant amount.

So Garden Ridge sued Clear Lake in 2009 for breach of the Lease Agreement. The trial court awarded Garden Ridge \$470,000 in damages and \$530,000 in attorney's fees, for an even \$1 million dollar judgment. The judgment for \$470,000 represented the full return of all management fees and supervision charges during that six year period.

Clear Lake appealed and, hoping to overturn the judgment, attempted to delineate between management fees and supervision fees. As you would expect, Clear Lake mostly failed in that endeavor.

Clear Lake's backup position was that even if the supervision fees were duplicative of the management fees, surely Garden Ridge was obligated to pay one or the other or some portion of both. And that even if Clear Lakes had no right to upcharge the management fees with a 7.5% supervisory fee overlay, still Clear Lakes paid honest expenses to operate, manage, maintain and repair the common areas and Garden Ridge

should be responsible for its allocated share. Which share, if not \$470,000, should have been something fairly close to it.

The Texas Court of Appeals agreed with Clear Lake. Clear Lake was not prohibited from contracting with a third party (although affiliated) for management of the common areas and passing on to Garden Ridge a pro rata share of those expenses. And if “supervision” fees were indeed separate from management expenses, then presumably Clear Lake could recover those too.

The Appellate Court sent the case back to the trial court to start over. The trial court can then determine what part of “management” fees are the same as “supervision” fees, if any, subtract such amount from \$470,000 and enter a judgment accordingly.

Clear Lake wins, sort of. Garden Ridge also wins, sort of. I guess the lawyers in this litigation are the ones that really won.

See *Clear Lake Center, L.P. v. Garden Ridge, L.P.*; No. 14-12-00414-CV; Texas 14th Court of Appeals, July 18, 2013.

Lessons learned:

1. Garden Ridge, presumably a very sophisticated tenant, signed a Lease obligating it to pay both “*management*” and “*supervision*” fees. If those two terms are duplicative then Garden Ridge will win this case. Otherwise if Clear Lake can prove a meaningful distinction, then Clear Lake will win.
2. CAM provisions, allocations and prorata / sharing clauses are inherently difficult to comprehend and challenging to explain, particularly to 12 people sitting in a jury box or a judge who is unfamiliar with commercial leasing practices. From the Tenant’s perspective, capping controllable expenses (typically everything but taxes and insurance) and allowing only marginal annual increases will go a long way to preparing a meaningful expense budget. And keeping a Landlord from using CAM charges as a hidden profit center.
3. Even with all the right verbiage in place, placing limits on the Landlord’s CAM charges is only as good as the Tenant’s investigation abilities, due diligence and audit. Without a meaningful way to review the Landlord’s books a lawsuit will be required. So – be sure you have both appropriate caps and limits as well as the right of Tenant to easily peek into the books and records of the Landlord, and force the Landlord to pay for the audit too if the overcharges are excessive.

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