Hate it when This Happens

COUNSEL'S CORNER

In June 2004 AGF Spring Creek / Coit II, Ltd. leased office space in Richardson Texas to Atrium Executive Business Centers Richardson, LLC. The term commenced November 1, 2004, and continued for six years. Dawn Curtis signed the Lease for the tenant as its President.

Later there were three Lease Amendments. Each was signed by Curtis for the tenant, as its President or CEO. The last Amendment extended the lease term into 2015.

Atrium, however, was never formed. Instead, Curtis formed "AEBC-Richardson, Inc." After formation, AEBC occupied the leased premises and operated a business there for six years. Although AEBC offered executive suites at the leased premises to subtenants, it was Atrium that was shown as the tenant in the Lease and all Amendments, and Dawn Curtis signed each on behalf of Atrium, not AEBC.

In March 2010 Curtis sent an email to representatives of the Landlord stating that revenues were too low to continue in operations, and asking AGF to handle the details of the pending lease default. No further rent was paid and AGF terminated the Lease by written notice issued later that month.

In April 2010 AGF initiated a lawsuit against Dawn Curtis individually for breach of the 2004 Lease, as extended and amended. AGF contended that although Atrium was the named tenant, in fact (and in law) Atrium never existed as it was never formed. And consequently, Dawn Curtis was 100% liable as if she had signed an unconditional Guaranty.

The jury entered a verdict in favor of AGF in trial court, and the judge converted it into a Judgment. Curtis appealed.

On appeal Curtis acknowledged her mistake in failing to change the name of the tenant on the Lease, and her further mistakes in signing the Lease Amendments as President of an LLC that did not exist. She requested however that the Court overlook

these mistakes and instead impose a lease agreement between AGF and AEBC through the action and conduct of the parties.

To support her argument, Curtis provided evidence that reimbursement of the tenant's move-in expenses, all rental payments, fax transmissions, insurance policies, sales and use tax permits and subtenancy agreements with executive suite customers were all made in the name of AEBC rather than Atrium, and further – that Landlord was aware of these documents and payments.

However, Landlord refuted those arguments by stating that the Lease was unambiguous. Atrium Executive Business Centers Richardson, LLC was identified as the Tenant. Not AEBC-Richardson, Inc. The Lease also contained an "incorporation" clause providing that the Lease could not be altered, waived, amended or extended unless by written agreement.

Obviously changing the identity of one of the parties to the Lease is serious business and not easily accomplished without a written agreement between both parties.

Curtis' lawyers found an interesting case from Fort Worth. An Appeals Court decided in 1997 that, in a similar situation as this case, "a promoter is relieved of personal liability only when the corporation subsequently adopts the contract either expressly or by accepting its benefits."

But in our case the entity was never formed, and could not "subsequently adopt" the Lease. AEBC was ultimately formed. Not Atrium. And if Landlord had sued AEBC for breach of Lease, AEBC could have easily defended claiming it never signed the Lease or any of the modifications or anything else (such as a Lease Guaranty) leading to imposition of liability against AEBC.

Ultimately the Appeals Court overturned the lower court's judgment, but due to entirely other issues: the jury had miscalculated the proper amount of the award. So while I must truthfully tell you that Curtis won this round, I must also conclude that if this case isn't settled but instead is retried, Curtis will surely lose again.

See *Curtis v. AGF Spring Creek / Coit II, Ltd.*; No. 15-12-00429-CV; Texas 14th Court of Appeals, August 28, 2013.

Lessons learned:

1. Dawn Curtis made the cardinal mistake of signing an important legal document on behalf of an entity before the entity was formed. I see this problem daily. Ok daily is an exaggeration, but I see it very often.

2. If a document is signed for a non-existent entity, personal liability is typically imposed upon the person signing. There is a way to finesse this when you know the entity has not yet been formed. Write in a special provision eliminating all

personal liability once the entity has been formed and evidence of formation and adoption by the new entity is sent to the other parties who have signed the contract.

3. Practice Tip: When I encounter an entity (whether as a client, adverse party, service provider, vendor, etc.) I check to be sure it is formed in its state of organization, and qualified to do business in Texas. Typically I start here. It's a free search: https://ourcpa.cpa.state.tx.us/coa/Index.html. Then if it will be a client or adverse party, I'll dig farther, but be prepared to pay $1 per search: https://direct.sos.state.tx.us/acct/acct-login.asp.

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