BOO BRADBERRY AND THE SAN FRANCISCO ROSE

COUNSEL'S CORNER

Our Supremes (Texas Supreme Court, that is) never get involved in eviction cases. Certainly not in commercial evictions. Not that I can recall, anyway.

With one recent exception.

Shields Limited Partnership owns commercial property in Dallas, which was leased to Boo Bradberry and subleased to 40/40 Enterprises, Inc. Boo and 40 have operated the San Francisco Rose there, which has been a Dallas-area Greenville Ave fixture since the 1970s.

Boo was not timely with his rent payments, and regularly violated the Lease terms by paying late. Without fail, Shields accepted the rental when tendered without protest or assessment of late fees.

In May 2012 Boo was late again with the rental payment, which was not tendered until June 13. The late rent payment was, again, accepted without protest.

If Boo had properly exercised a lease option, his rate starting June 1 would have increased to $3,340 per month. Instead, Boo continued to pay $3,000 per month. And Shields continued to accept it.

In November 2012 Shields' broker sent Boo an email notice that Boo had incurred late charges, and declared that Boo was a month-to-month tenant.

Since no further rent payments were received, Shields' broker sent Boo a notice of default in December 2012.

Almost one full year later – October 2013 – Boo received additional default notices and Shields offered Boo a new lease with a rent rate of $9,700 per month. When Boo refused, Shields started an eviction lawsuit.

The JP Court ruled in Boo's favor, as did the Dallas County Court. The Texas Court of Appeals affirmed, finding essentially that Shields' actions in constantly accepting late rental payments without protest is inconsistent with the assertion that Boo had failed to fulfill the lease obligations.

The main point before the Supremes turned on the non-waiver provision in the Lease, which said exactly what you think it would say:

> "Landlord's failure to enforce any provisions of [the] Lease or its acceptance of late installments of Rent shall not be a waiver and shall not estop Landlord from enforcing that provision or any other provision of [the] Lease in the future."

So the issue is only whether Shields could, by its conduct in continually accepting late rent, waive the non-waiver provision of the Lease.

After pages of discussion and case citations from 1945 on (let's not forget this is the Texas Supreme Court), the Supremes held that Shields' constant acceptance of late rent payments does not waive the non-waiver clause. Meaning: Shields could still claim a Lease default and evict Boo.

Wow. Got to be honest with you – I did not see this coming although I should have. Since the Texas Supreme Court accepted review of the case, that meant that new laws were headed our way. Because, see above. Our Supreme Court never reviews commercial eviction cases.

See *Shields Limited Partnership v. Boo Nathaniel Bradberry and 40/40 Enterprises, Inc.;* Case No. 15-0803; Texas Supreme Court; May 12, 2017: http://docs.texasappellate.com/scotx/op/15-0803/2017-05-12.guzman.pdf.

Lessons learned:

1. If a Texas landlord has been accepting late rents without protest, perhaps there is still a means to evict a tenant for non-payment. Maybe.

2. But rather than litigate the case to the Supreme Court, a Texas landlord would be wiser to reject the late rental, or accept it "under protest" and consistently enforce late provisions. In that manner, appellate litigation should not be needed.

3. There's a procedural point I don't understand. Texas laws only allow residential evictions to be appealed past the county court level. See TPC 24.007: http://www.statutes.legis.state.tx.us/Docs/PR/htm/PR.24.htm. This has been our

laws since at least 1983. I need to read this case again and figure out how / why this commercial eviction was appealed, twice, past that level.

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