

# CONDITIONAL RENTAL PAYMENTS ARE A GOOD IDEA – NOT!



## *COUNSEL'S CORNER*

In September 2007, Llyasah Dupree dba 360 Degree Beauty Academy leased commercial property from Boniuk Interests, Ltd. in northwest Houston, to use as a beauty and cosmetology school. The Lease included a provision allowing Dupree an ample opportunity to tender monthly rental payments before Boniuk could consider the failure to be an event of default.

Dupree struggled to pay the rent installments which varied from \$700 to \$6,000 per month plus triple net expenses, making sporadic payments in 2010 but no payments in March, May, July, November and December. Some of Dupree's checks in that period included a note, asking Boniuk to hold the checks without deposit for several weeks and Dupree would call Boniuk when the checks would clear.

In January 2011 Boniuk had enough, and sent Dupree a notice of default. Boniuk changed the door locks in March 2011.

Dupree obtained a Writ of Re-Entry from the JP Court 10 days later. At the hearing convened two days after, the JP determined that Boniuk had permissibly locked Dupree out of the premises.

So Dupree sued Boniuk in 2013, asserting claims for breach of the Lease, wrongful eviction, retaliatory eviction, fraud and violations of the Texas Deceptive Trade Practices – Consumer Protection Act. Boniuk filed a counterclaim for breach of the Lease and other related matters.

The trial court awarded Boniuk almost \$120,000 in damages, interest, \$15,000 in attorney's fees and court costs. Dupree appealed.

On appeal, Dupree claimed that she had timely paid rental by tendering payment checks and Boniuk had the authority under the Lease to deposit the checks. Dupree further argued that Boniuk's failure to deposit the tendered checks meant that Boniuk lacked the evidence that the checks were not adequately funded.

And, consequently, no evidence of NSF checks meant Dupree was not in Lease default and Boniuk had no right to evict.

The Court of Appeals determined that the notes attached to each check converted an unconditional offer to pay an amount due on a specified debt to a conditional offer. As such, the rental payment funds were not made immediately available to Boniuk.

Rental payments, as stipulated in the Lease, must be unconditional.

The Court of Appeals further found that Boniuk was not required to undertake special efforts to acquire possession of the rent funds. Placing restrictive notes on the checks improperly burdened Boniuk, and was sufficient evidence of a Lease default.

Boniuk Interests, having proven various Lease defaults, wins again; Llyasah Dupree lost once more. See *Llyasah Dupree dba 360 Degree Beauty Academy v. Boniuk Interests, Ltd.*; No. 01-14-00864-CV; Texas Court of Appeals, 1<sup>st</sup> District; August 4, 2015.

Lesson learned: If you are a property owner or represent landlords as a property manager or agent, do not accept checks with restrictive endorsements or payment instructions. Although you may ultimately prevail, it may also take you two or three years of litigation to prove your point.

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