

LEASE GUARANTEES



COUNSEL'S CORNER

In 2003, L + C Unlimited Corp. received the assignment of the tenant's interest in a lease that permitted the Golden Isle Restaurant to operate in a strip mall. Xiao-Yan Cao, President of L + C, personally guaranteed the performance of L + C.

In 2006 the tenant's leasehold estate was again assigned, this time to Hong Lin. At the same time, the Lease term was extended five years to September 30, 2013. Both Cao and Lin signed new, personal Guarantees.

From 2008 to 2010 L + C and Lin failed to timely make rent payments, and owed ~ \$24,000. However, L + C, Lin and the Landlord PC Riverview, agreed to a repayment schedule to permit L + C and Lin to catch up by making five additional payments. Which Lin did.

In 2013, L + C and Lin defaulted again and failed to pay the last monthly installment of rent. PC Riverview sued both Lin and Cao for the rental deficiency. Cao defended, arguing that the 2010 repayment schedule materially modified the Lease and discharged Cao's Guaranty, since Cao did not agree to the repayment schedule, was not notified about its existence, and did not execute the repayment agreement.

The district court agreed and ruled in Cao's favor. PC Riverview appealed.

The court of appeals reversed, reasoning that merely extending the period within which a tenant may pay rent did not materially modify the Lease and consequently, all guarantors remain liable. Cao appealed to the Supreme Court.

The Supremes first turned to Cao's Guaranty Agreement, which provided that Cao ". . . *guarantees performance of all covenants, conditions and obligations and duties required of Tenant under said Lease.*" And here's what the Guaranty Agreement did not provide Cao: right to a notice before the Lease was amended or a prohibition against such amendments without Cao's consent.

We can guess where the Supremes are headed when they state that before the 2010 Modification was made, Cao was responsible for the payment of rent, interest and late fees. And after the 2010 Modification was signed, Cao was responsible for – *wait for it* – rent, interest and late fees.

The Supreme Court affirmed the Judgment of the court of appeals. Xiao-Yan Cao is obligated to pay PC Riverview. See *PC Riverview LLC v. Xiao-Yan Cao*; Case No. 20160781; Utah Supreme Court; August 23, 2017: <http://caselaw.findlaw.com/ut-supreme-court/1871913.html>.

Lessons learned:

1. Are you on the Guarantor-side of this issue? Then be sure the Guaranty Agreement does not obligate the Guarantor for future amendments and modifications to the Lease. Also provide that the Guarantor receives notice of all claims of the Landlord against the Tenant, and prohibit the Lease from being amended or extended without Guarantor's prior written consent.
2. Are you on the Landlord-side of this issue? Then be sure the Guaranty obligates the Guarantor for all amendments, without any requirement of notification or approval, and that the Guaranty continues until all obligations of the Tenant to the Landlord have been discharged as reported by Landlord.
3. On both sides of this? Be sure that the Guaranty Agreement is clear and unequivocal, and 12 people sitting in a jury box with average 11th grade educations can readily understand what you are trying to accomplish in both the Lease and Guaranty.

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