

ARBITRATION IN COMMERCIAL LEASING



COUNSEL'S CORNER

In May 2012 Premium Plastics Supply, Inc signed a two-year lease for commercial space owned by Thomas and Laura Howell. The Lease contained an arbitration provision, providing that all disputes related to it must be arbitrated.

The Lease term ended in May 2014, but Premium continued to occupy the space. In October 2014 the Howells sent a notice of default to Premium seeking payment under the holdover clause of the Lease. When Premium did not pay, the Howells started an arbitration proceeding.

After initiating arbitration, the Howells then changed the door locks on the leased space. Premium responded by claiming wrongful lockout under the Texas Property Code and several other claims, but ultimately all were voluntarily dismissed by Premium before the commencement of the arbitration.

The Howells were awarded \$33,000 in unpaid rental at the arbitration. So the Howells filed a lawsuit in Harris County to confirm the award.

Premium responded to the lawsuit by reasserting the counterclaims previously raised and withdrawn in the arbitration.

The Howells obtained a confirmation of the arbitration award from the Harris County court, now converted to a Judgment. In rendering the Judgment, the court found that Premium no longer had the right to assert its counterclaims, as those matters should have been asserted in the arbitration.

The failure of Premium to timely assert those counterclaims, the trial court held, is not so much a waiver of legal rights as *res judicata* – a legal theory that says judicial resources will not be used to rehash the same arguments over and over, that have already been heard and decided.

Or, should have been heard. And decided.

So Premium appealed, claiming it had claims that needed to be heard in the litigation forum.

The Appellate Court started by evaluating our Texas Rules of Civil Procedure, requiring counterclaims to be litigated in an initial arbitration or lawsuit when it arises out of the same transaction or occurrence, and does not need the presence of third parties of whom the court cannot acquire jurisdiction.

Next, it was time to consider the impact of arbitration awards. Basically, the Court concluded that there is not much difference between an arbitration award and a Court-ordered judgment. And an arbitration award is treated as a prior final judgment for purposes of *res judicata*.

Based on this, the Appellate Court had little trouble ruling for the Howells. It appears that Premium made a decision not to assert its claims in the arbitration, perhaps thinking those claims could be held for a later date. The Appellate Court did not agree that Premium could postpone the assertion of those claims, and found that the failure to assert such claims in the arbitration proceeding fatally impaired the ability of Premium to later assert them in Court.

So, Judgment is affirmed for the Howells. See *Premium Plastics Supply, Inc. v. Thomas Howell and Laura Howell*; Case No. 01-16-00481-CV; Texas Court of Appeals 1st District-Houston; September 28, 2017:
http://scholar.google.com/scholar_case?case=2032118509891223314&q=premium+plastics+v.+howell&hl=en&as_sdt=6,44.

Lessons learned:

1. Arbitration is unusual in a commercial leasing context. Commercial landlords want the unrestrained right to claim a lease default and start court eviction proceedings in JP Court, as opposed to waiting for an arbitration award and then confirming it in a following lawsuit to convert the award into a Judgment. Typically JP Court eviction trials occur in only a few weeks after the eviction lawsuits are filed, but it can take years to obtain both an arbitration award and a Court-ordered confirmation and conversion to Judgment.
2. This case is helpful to illustrate a sidebar point: Texas constables and sheriffs will not enforce an arbitration award. Only Judgments can be enforced. And Judgments only come from our courts – no arbitrator has the ability to issue a Judgment.
3. Now you should be seeing how cumbersome arbitration proceedings can be in the context of a commercial lease. Most landlords won't allow it; some power-tenants insist on it. In the latter situation, be sure to consider what happens when the

tenant fails to pay rent or commits some other obvious lease default. An arbitration procedure followed by litigation might delay justice for a year or more.

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