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Real Property: Landlord and Tenant

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REAL PROPERTY: LANDLORD AND TENANT

by

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A. Assignment

IN *Richey v. Stop N Go Markets*[1] the Texas Supreme Court considered whether a landlord who assigns his interest in the demised premises retains a previously existing cause of action against the tenant. In *Richey* the landlord leased two convenience store sites to the tenant under twenty-year leases. Both leases required that the tenant obtain the written consent of the landlord prior to making any structural alterations or material changes to the leased premises. Pursuant to the leases the landlord installed a walk-in cooler in each store.

The tenant in *Richey* closed the convenience stores when they proved unprofitable, but continued to pay rent and to seek subtenants. After finding a subtenant for each store the tenant removed the walk-in coolers from the premises. The tenant had requested the landlord's consent to such removal, at least with respect to one of the coolers, but the landlord had failed to respond to the request. The landlord filed suit to recover damages arising from the removal of the coolers. After the commencement of the litigation the landlord sold both sites to a third party. The transfer instruments did not contain an express assignment or reservation of the outstanding cause of action against the tenant.[2]

In rendering a judgment for the tenant, the trial court found that the removal of the walk-in coolers enhanced the value of the stores and that the alterations were necessary to the subletting of the stores.[3] The trial court also found that the tenant had not breached the lease agreements because the landlord had unreasonably withheld consent to the changes.[4] The trial court concluded that the landlord could not maintain the suit, on the ground that he failed to prove the removal of the coolers caused him any damage.[5] The court of appeals affirmed the trial court's holding based on a finding that the landlord had no standing to sue the tenant for his own

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1. 654 S.W.2d 430 (Tex. 1983).

2. The landlord transferred the property "together with all and singular the rights and appurtances [sic] thereto in anywise belonging unto the said [grantor]." *Id.* at 431.

3. *Id.*

4. *Id.*

5. *Id.*

benefit subsequent to the landlord's sale of his interest in the property.[6]

The Texas Supreme Court held that both the trial court and the court of appeals failed to distinguish between two separate issues concerning the landlord's cause of action.[7] The first issue, the court stated, was whether the landlord could maintain his cause of action after he sold the property. The second element was whether the landlord had proved that the tenant's wrongful act had caused him injury.

On the issue of the landlord's right to maintain the action subsequent to the conveyance the tenant argued that the landlord's action for breach of the lease was not personal, but was transferred with the property. The tenant based this argument on section 16.2(3) of the *Restatement (Second) of Property, Landlord and Tenant*. That section provides:

> The benefit of an express promissory obligation under the lease runs with the transfer of an interest in the leased property if:
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> (a) the promise touches and concerns the transferred interest;
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> (b) the promisor and promisee intend that the benefit is to run with the transferred interest;
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> (c) the transferor does not withhold the benefit of the promise from the transferee; and
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> (d) the transferor brings the transferee into privity of estate with the person obligated to perform the promise.[8]

In essence, the tenant asserted that his obligation to return the leased premises in as good a condition as when he received them was a covenant running with the land. The supreme court, however, held that section 16.2(3) was not applicable since it dealt with the transfer of a tenant's obligations under a lease from the landlord to a transferee, while the question in *Richey* was which landlord could sue the tenant for damages resulting from a breach by the tenant.[9] Whether a landlord who sells the leased premises subsequent to the accrual of a cause of action against the tenant retains that cause of action is an entirely separate question.[10] Relying on authority from other jurisdictions, the supreme court held that, in the absence of an express assignment of the cause of action, the original landlord retains the right to recover for a tenant's breach of the lease occurring prior to a conveyance of the property.[11] The court's rationale was simply

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6. Richey v. Stop N Go Mkts., 643 S.W.2d 505, 507 (Tex. App.—Houston [14th Dist.] 1982), *aff'd*, 654 S.W.2d 430 (Tex. 1983).

7. 654 S.W.2d at 431. The court stated that the lower courts apparently reasoned that because the landlord failed to prove that the tenant's removal of the coolers had caused him any damage, he lost his capacity to maintain the cause of action. *Id.*

8. RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT § 16.2(3) (1977), *cited in Richey*, 654 S.W.2d at 432.

9. 654 S.W.2d at 432.

10. *Id.*

11. *Id.* (citing Cote v. A.J. Bayless Mkts., Inc., 128 Ariz. 438, 626 P.2d 602 (Ct. App. 1981); Berman v. Sinclair Ref. Co., 168 Colo. 332, 451 P.2d 742 (1969); Michael v. Mitchell, 118 Ind. App. 18, 73 N.E.2d 363 (1947); Bailey v. Meade, 250 Mass. 46, 144 N.E. 110 (1924); First Nat'l Bank v. Kavorinos, 364 Mo. 947, 270 S.W.2d 23 (1954); Four-G Corp. v. Ruta, 25 N.J. 503, 138 A.2d 18 (1958); Guidetti v. Moroze, 102 Misc. 2d 158, 423 N.Y.S.2d 140 (Albany County Ct. 1979); Wallace v. Paulus Bros. Packing Co., 191 Or. 564, 231 P.2d 417

that the owner at the time of the breach, not a subsequent owner, is the one who actually suffers the damage resulting from the breach.[12] Although the supreme court held that the landlord had retained his cause of action against the tenant, the court affirmed the court of appeals holding because the landlord failed to prove that the tenant's removal of the coolers had caused him any injury.[13]

B. Constructive Eviction

In *Briargrove Shopping Center Joint Venture v. Vilar, Inc.*[14] the Houston court of appeals considered whether a landlord's three-month interference with a tenant's parking area constituted a permanent deprivation of use of the premises within the definition of constructive eviction.[15] In *Briargrove* the landlord leased a warehouse at the back of the Briargrove Shopping Center to the tenant for use as a automobile repair shop. The tenant used the vacant concrete area in front of the warehouse to store cars, although this area was not part of the leased premises. The parties did not discuss any restrictions concerning the tenant's use of the parking area, although the tenant agreed not to work on cars on the parking area outside the shop. The tenant testified that the profitable operation of his business required the use of the vacant concrete area for parking space and for the storage of automobiles. The lease contained a provision guaranteeing that the parking area would not decrease in size during the term of the lease.[16]

After the lease had been in effect for approximately a year, the landlord commenced construction of a theatre. The construction consumed all but ten feet of the concrete area in front of the shop and substantially interfered with the tenant's customer and employee access to the shop. During the construction of the theatre, the tenant received many complaints from customers concerning the inconvenience caused by the construction. Additionally, the shortage of parking space forced the tenant to store cars a substantially greater distance from his shop.[17] Approximately three months after construction of the theatre commenced, the tenant moved to

(1951); Barber v. Watch Hill Fire Dist., 36 R.I. 236, 89 A. 1056 (1914); 3 M. FRIEDMAN, FRIEDMAN ON LEASES § 36.2 (1978); R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 8.4 (1980)).

12. 654 S.W.2d at 432.

13. *Id.*

14. 647 S.W.2d 329 (Tex. App.—Houston [1st Dist.] 1982, no writ).

15. The trial court, in its charge to the jury, defined constructive eviction to comprise four distinct elements: First, an intention by the landlord that the tenant no longer enjoy the premises; second, a material act by the landlord substantially interfering with the tenant's use and enjoyment of the premises for the purposes for which they are let; third, an act that permanently deprives the tenant of the use and enjoyment of the premises; and fourth, an abandonment of the premises by the tenant within a reasonable time after the commission of the act. *Id.* at 334.

16. The lease provided that " 'said parking area or areas *shall at all times be equal or equivalent* . . .' to the area indicated on an attached exhibit." *Id.* at 332 (emphasis supplied by court).

17. The lack of available parking space forced the tenant to park cars in an area 300-400 feet from his shop. Due to the construction, the only available entrance consisted of a muddy shell driveway.

another location. The landlord then sued the tenant for breach of the lease. The tenant cross-claimed, alleging that the construction of the threatre constituted a constructive eviction.

The trial court held that the landlord's interference with the tenant's use of the concrete area constituted a constructive eviction.[18] The court of appeals affirmed the trial court's determination.[19] In considering the constructive eviction claim, the court of appeals noted that neither party presented testimony indicating whether parking for the shop would be available after the completion of the construction of the theatre.[20] In the absence of such evidence, the court limited its decision to whether the three months of construction was sufficient to constitute a permanent deprivation.[21] Relying on its earlier decision in *Richker v. Georgardis*,[22] the court concluded that the three-month loss of use of the parking area constituted a permanent deprivation.[23] The court concluded that since common knowledge dictated that the construction of the theatre would last for several more months, the tenant's subjection to the continued interference with the leased property by the landlord constituted a permanent deprivation, and thus a constructive eviction in light of the court's holding in *Richker*.[24]

C. Late Payments

In *Giller Industries, Inc. v. Hartley*[25] the Dallas court of appeals construed a common lease provision stating that the landlord's waiver of a default or breach by the tenant does not constitute a waiver as to future defaults or breaches. In *Giller* the landlord and tenant entered into a three-year lease containing such a provision.[26] The lease required payment of rental installments on the first day of each calendar month. The tenant paid the first installment timely but failed to pay the following six installments punctually. When the tenant tendered the eighth installment fourteen days after it was due, the landlord refused the tender and demanded immediate possession of the leased premises. The tenant vacated the property the following month. The landlord then sued the tenant for breach of the lease.

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18. 647 S.W.2d at 331.
19. *Id.* at 338.
20. *Id.* at 335.
21. *Id.* The court did not discuss the effect that evidence pertaining to the amount of the parking area that the tenant would recover upon the completion of the theater would have had upon the outcome of the present case.
22. 323 S.W.2d 90 (Tex. Civ. App.—Galveston 1959, writ ref'd n.r.e.) (nine-month interference with tenant's use of leased premises during six-year lease constituted permanent deprivation).
23. 647 S.W.2d at 335.
24. *Id.*
25. 644 S.W.2d 183 (Tex. App.—Dallas 1982, no writ).
26. *Id.* at 184. The lease provided: "No waiver by the parties hereto of any default or breach of any term, condition or covenant of this lease shall be deemed to be a waiver of any subsequent default or breach of the same or any other term, condition or covenant contained herein." *Id.*

In court the tenant contended that the landlord's prior acceptance of late rental payments established a custom and course of dealing whereby the landlord waived the right to declare a default upon the tenant's subsequent failure to timely pay rental installments. Although the landlord conceded that he could waive his right to declare a default for delinquent rental installments by the continuous acceptance of late payments,[27] the landlord argued that such a waiver cannot occur when the lease contains an express provision against such a waiver. The court of appeals, citing authority from other jurisdictions, held that the express provision in the lease constituted a valid contract preventing the occurrence of waiver of late payments through a custom and course of dealing of accepting rental installments.[28]

D. Option to Purchase

In *Blaschke v. Wiede*[29] the Texarkana court of appeals considered whether, in the absence of a provision indicating a contrary intent, the holdover of a tenant extends a purchase option contained in the lease beyond its original term. The landlord and tenant in *Blaschke* executed a one-year lease, that contained provisions granting the tenant an option to purchase the leased premises.[30] The lease did not provide for renewal of either the lease or the purchase provision. The tenant held over under the lease for a number of years. The landlord ultimately sued the tenant to remove the cloud on title that the purchase provisions created, and the tenant counterclaimed, seeking specific performance of the purchase provisions.

The court found that the purchase provisions constituted an option to purchase and, citing prior Texas authority, held that a holdover does not

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27. *Id.* (citing Wendlandt v. Sommers Drug Stores Co., 551 S.W.2d 488 (Tex. Civ. App.—Austin 1977, no writ); Fant v. Miller, 218 S.W.2d 901 (Tex. Civ. App.—Texarkana 1949, writ ref'd n.r.e.)).

28. 644 S.W.2d at 184 (citing 650 Madison Ave. Corp. v. Wil-low Cafeterias, Inc., 95 F.2d 306, 309 (2d Cir.), *cert. denied*, 304 U.S. 567 (1938); King v. Petroleum Servs. Corp., 536 P.2d 116, 119 (Alaska 1975); Cottonwood Plaza Assocs. v. Nordale, 132 Ariz. 228, 644 P.2d 1314, 1318-19 (Ct. App. 1982); Karbelnig v. Brothwell, 244 Cal. App. 2d 33, 53 Cal. Rptr. 335, 340 (Dist. Ct. App. 1966); Philpot v. Bouchelle, 411 So. 2d 1341, 1344 (Fla. Dist. Ct. App. 1982)).

29. 649 S.W.2d 749 (Tex. App.—Texarkana 1983, writ ref'd n.r.e.).

30. The purchase provisions stated:

> 3. the lessors have agreed to sell and do by these present agree to sell to the lessee the said land at a total consideration of Fourteen Thousand Dollars ($14,000.00), provided that they can make and deliver good title thereto.
>
> 4. In the event that such sale is consummated, the annual rental herein and heretofore paid shall be applied as a part of the sales price of said property and shall be deducted from the total cash payment required of the purchaser. Should the lessors enable themselves to make good title to said property, they hereby agree to convey the same by warranty deed to lessee herein, upon his payment, including these payments, the sum of Three Thousand Dollars ($3,000.00) or more, and his delivery to them of his vendor's lien note for the balance, with interest at 4-1/2, payable Six Hundred Dollars ($600.00) per year, but the maker of said note shall have the option to repay said note by increasing said payments, or by additional payments.

Id. at 750.

extend a purchase option beyond the original term of the lease unless a contrary intent appears from the lease as a whole.[31] Since neither party presented evidence indicating that the parties intended to extend the purchase option beyond the original one-year term of the lease, the court of appeals affirmed the trial court's refusal to grant specific performance of the purchase provisions.[32] The court also affirmed the lower court's award of the land to the landlord and thereby removed the cloud on the landlord's title.[33]

E. Rental Information Service

In *United Home Rentals, Inc. v. Texas Real Estate Commission*[34] a federal district court in Texas considered whether the Texas Real Estate License Act[35] applies to a rental information service. United Home, a rental information service, compiled, catalogued, and sold information concerning available rental properties to people who purchased a membership for a specified fee.[36] According to the Texas Real Estate Commission, the functions performed by the United Home employees could only be performed by persons licensed under the Texas Real Estate License Act.[37] The Commission rejected the license applications of three United Home employees on the ground that they had misrepresented their activities on their license applications.[38] The Commission also instituted administrative proceedings to revoke the licenses of an employee, a director, and the sole shareholder of United Home on the basis of their associations with unlicensed persons.[39]

United Home, an employee, and its sole shareholder filed suit[40] against

31. *Id.* (citing Kruegel v. Berry, 75 Tex. 230, 9 S.W. 863 (1888); Thermo Prods. Co. v. Chilton Indep. School Dist., 647 S.W.2d 726 (Tex. App.—Waco 1983, writ ref'd n.r.e.)).

32. 649 S.W.2d at 750.

33. *Id.*

34. 548 F. Supp. 566 (N.D. Tex. 1982).

35. TEX. REV. CIV. STAT. ANN. art. 6573a (Vernon Supp. 1984).

36. United Home provided the following types of services to its members: (1) The gathering of rental information from landlords, classified advertisements, and other sources; (2) periodic certification as to the accuracy of the information regarding catalogued property and its continued availability for rental; (3) handling incoming telephone calls in response to advertisements and conveying information to members concerning newly catalogued rental properties; and (4) explaining the company's services and the sale of policies to customers who visited the office. *Id.* at 568.

37. *Id.*; *see* TEX REV. CIV. STAT. ANN. art. 6573a (Vernon Supp. 1984).

38. The license application required an applicant to affirm under oath that he had not previously performed activities requiring a license. 548 F. Supp. at 568. Because the United Home employees had previously performed restricted activities, the Commission rejected their applications. The Commission stated that it was "not satisfied that [the United Home employees] would conduct [their] real estate business with honesty, trustworthiness and integrity as required by . . . [the Act]." *Id.* at 569.

39. Section 15(4)(F) of the Texas Real Estate License Act permits the Commission to suspend or revoke a license when the licensee has been guilty of "paying a commission or fees to or dividing a commission or fees with anyone not licensed as a real estate broker or salesman in this state or in any other state . . . for compensation for services as a real estate agent." TEX. REV. CIV. STAT. ANN. art. 6573a, § 15(4)(F) (Vernon Supp. 1984).

40. United Home filed suit under 42 U.S.C. § 1983 (1976 & Supp. V 1981) and 28 U.S.C. § 1331 (1976 & Supp. V 1981).

the Commission, claiming that the Commission violated their first and fourteenth amendment right to freedom of speech.[41] The court concluded that the United States Supreme Court's decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[42] governed the case.[43] The Court in *Central Hudson* established a test for deciding commercial speech cases which was comprised of four components: First, whether the speech in question is protected by the first amendment; second, whether the governmental interest asserted as a basis for regulating the speech is substantial; third, whether the regulation directly advances the governmental interest; and fourth, whether the regulation is more extensive than necessary to serve that interest.[44]

Comparing the information provided by United Home to classified advertising in a newspaper, the court held that the first amendment protects dissemination of the type of information United Home provided.[45] Although the court found that the consumer protection interest asserted by the government was substantial and that the Texas Real Estate License Act directly advanced the interest asserted, the court held that the regulation attempted by the Commission was more extensive than necessary.[46] In reaching its conclusion, the court distinguished between the services provided by apartment locator services and the services provided by United Home. The court indicated that the imposition of licensing requirements upon apartment locator services would be constitutional because knowledge of real estate law, marketing, and management is necessary to perform such service adequately. The court found that the services United Home provided constituted exchanges of information that did not involve or require knowledge of real estate law, marketing, or management. The court concluded that information provided by rental information services, such as United Home, is commercial speech protected by the first amendment.[47] The court therefore held that the Texas Real Estate License Act impermissibly restricted United Home's freedom of speech.[48]

F. Security Deposits

In *Kramek v. Stewart*[49] the San Antonio court of appeals considered whether the commencement of litigation by a tenant to recover his security deposit prior to the expiration of the thirty-day statutory period, during which a landlord may return a security deposit without being presumed to have acted in bad faith,[50] precludes recovery of statutory penalties and

41. U.S. CONST. amends. I, XIV.
42. 447 U.S. 557 (1980).
43. 548 F. Supp. at 571.
44. 447 U.S. at 566.
45. 548 F. Supp. at 571.
46. *Id.* at 574.
47. *Id.* at 575.
48. *Id.*
49. 648 S.W.2d 309 (Tex. App.—San Antonio 1983, no writ).
50. *See* TEX. PROP. CODE ANN. § 92.109(c)-(d) (Vernon Pam. 1983) (formerly codified

attorneys' fees by the tenant.[51] The tenant in *Kramek* mailed his forwarding address to his former landlord on September 11, 1980.[52] The tenant filed suit to recover the tenant's security deposit on October 7, 1980, prior to the expiration of the statutory thirty-day period. The court held that the premature filing of the suit limited the tenant's recovery to return of the security deposit with no award for penalties or attorneys' fees.[53]

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at TEX. REV. CIV. STAT. ANN. art. 5236e, § 4(c) (Vernon Pam. Supp. 1982-1983)). Section 92.109(c)-(d) provides:

> (c) In an action brought by a tenant under this subchapter, the landlord has the burden of proving that the retention of any portion of the security deposit was reasonable.
>
> (d) A landlord who fails either to return a security deposit or to provide a written description and itemization of deductions on or before the 30th day after the date the tenant surrenders possession is presumed to have acted in bad faith.

Id.

51. *See* TEX. PROP. CODE ANN. § 92.109(a)-(b) (Vernon Pam. 1983) (formerly codified at TEX. REV. CIV. STAT. ANN. art. 5236e, § 4(a)-(b) (Vernon Supp. 1982-1983)). Section 92.109(a)-(b) provides:

> (a) A landlord who in bad faith retains a security deposit in violation of this subchapter is liable for an amount equal to the sum of $100, three times the portion of the deposit wrongfully withheld, and the tenant's reasonable attorney's fees in a suit to recover the deposit.
>
> (b) A landlord who in bad faith does not provide a written description and itemized list of damages and charges in violation of this subchapter:
>
> (1) forfeits the right to withhold any portion of the security deposit or to bring suit against the tenant for damages to the premises; and
>
> (2) is liable for the tenant's reasonable attorney's fees in a suit to recover the security deposit.

Id.

52. The thirty-day period during which a landlord may refund a security deposit before the court presumes that the landlord has acted in bad faith does not commence until the tenant has furnished the landlord with the tenant's forwarding address for the purposes of security deposit refunding. TEX. PROP. CODE ANN. § 92.107(a) (Vernon Pam. 1983) (formerly codified at TEX. REV. CIV. STAT. ANN. art. 5236e, § 6(a) (Vernon Supp. 1982-1983)).

53. 648 S.W.2d at 402.