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Commercial Leasing

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When Actions Speak Louder Than Words

Written Agreements Are Not the Final Word

By Kelly M. Gorman

Recently, an Ohio appellate court held that the parties' actual conduct — and not the express written provisions in their lease to the contrary — controlled in interpreting the intentions of the parties in contracting. This case serves as a good reminder for legal practitioners that our written agreements are often not the final word.

Specifically at issue in *3637 Green Rd. Co. v. Specialized Component Sales Co.* was, among other matters not discussed in this article, whether the lease's no-oral-modification-provision and written-waiver provision precluded enforcement of the parties' subsequent oral agreement. *See* 2016 WL 4242239; 2016-Ohio-5324 (8th Dist. Cuyahoga No. 103599).

Contrary to the Writing

In 1981, the defendant/tenant and the plaintiff/landlord entered into a lease for certain warehouse and office space. The initial term of the lease was for three years, with an option to renew the lease for an additional term of three years. The lease included a holdover provision that stated if the tenant remained in possession of the premises after the term of the lease expired,

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Commercial Leases and the Law of Electronic Transactions

By David P. Resnick and Seth Corthell

Most commercial leases are forged by a deliberate, organic process that includes face-to-face meetings, telephone calls and written correspondence between the landlord, the tenant and their respective agents, culminating in a written contract that historically was required to be signed by hand by both parties. Over the past 20 years, the rise of email as a generally-accepted medium of business communication has prompted the law to allow certain contracts, including leases, to be entered into electronically, without a handwritten signature. Progress has been made in this respect, both by statute and the common law; however, tweaking a centuries-old legal axiom takes time. This article addresses recent developments and the present state of the law with respect to commercial leasing and electronic media.

The Historical Basics

Under the law, all leases are contracts. As such, leases require certain basic legal components to be enforceable.

Every contract must state definite terms and include a grant of consideration, and mutuality of agreement and obligation between competent parties. In order to be valid, contracts require offer and acceptance by the parties.

In addition, almost all leases are subject to the statute of frauds. Patterned after an English statute enacted in 1677, the statute of frauds is the legal doctrine that certain contracts — including leases and other contracts affecting any interest in land — be contained in a written, signed instrument. Certain exceptions commonly apply, notably to short-term (*i.e.*, less than one year) leases. But prior to recent developments, the law was relatively straightforward: Real estate contracts must be in writing to be enforceable.

The Culture Evolves

In light of this precedential legal backdrop, many questions arise from our increasing reliance on email in commercial leasing. For instance, can an email

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or series of emails constitute a written lease? Can an electronic signature on a lease bind a party in the same way as a handwritten signature? Short of an ink-signed paper document, what might constitute a binding lease?

In 1999, in response to questions like these and calls for clarity on the use of electronic media for business transactions, the Uniform Law Commissioners promulgated the Uniform Electronic Transactions Act (UETA). The UETA was the first effort to create a uniform set of laws with respect to electronic commerce, and 47 states have adopted it since its release.

Section 7 of the UETA contains the fundamental rules of the act:

(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record satisfies the law.

(d) If a law requires a signature, an electronic signature satisfies the law.

In short, the objective of the UETA is to establish that in the context of applicable transactions, electronic signatures are the equivalent of manual signatures and electronic records are the equivalent of hard copies. A stated "paradigm" of the UETA is that it applies only to parties to transactions who have each acquiesced by some means to be bound electronically. Moreover, under the UETA a party may always refuse to be bound by electronic correspondence.

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Application

While case law is plentiful with respect to electronic communications and application of the UETA, the common law is still evolving as to the application of these topics in the context of commercial leases and other real estate contracts. A few notable cases highlight the complexities and pitfalls inherent in adjudging the enforceability of contracts without historically reliable handwritten signatures.

Though not ultimately related to a lease, *St. Johns Holdings, LLC v. Two Electronics*, No. 16 MISC 000090, 2016 WL 1460477 at *3 (Mass. L.C. April 14, 2016), is an example of a court's willingness to expand its interpretation of the statute of frauds in the context of electronic communications. In that case, the plaintiff, St. John's Holdings (SJH), contacted the broker of defendant Two Electronics (T-E), first seeking to lease T-E's property and later seeking to purchase the property instead.

Following a period in which the parties exchanged and negotiated draft purchase agreements through their respective agents, T-E's broker sent a text message to SJH's real estate agent stating that T-E wanted SJH to sign the purchase agreement first and provide the deposit check before T-E would finalize it. At the end of the message, T-E's broker (bearing authority for T-E) wrote his name. The same day, SJH's agent went to the office of T-E's broker and delivered the check and the signed agreement. Unbeknownst to SJH or its agent, T-E had a competing offer from a third party, and had accepted the other offer the same day it received the signed agreement from SJH. T-E then refused to execute the agreement with SJH.

SJH subsequently brought an action for a declaratory judgment that the contract was executed, and for specific performance of the contract. T-E moved to dismiss, arguing that SJH could not allege that T-E ever provided a signed writing compliant with the statute of frauds grounds. SJH argued that the broker's name at the bottom of the text message

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In NY, New SEQRA Regulations Finally Appear on the Horizon

By Charlotte A. Biblow

In September 2012, the New York State Department of Environmental Conservation (NYSDEC) proposed the most significant changes to the regulations governing the State Environmental Quality Review Act (SEQRA) since the mid-1990s. It accepted comments, and the comment period closed. In the years that followed, however, the NYSDEC did not finalize the changes it proposed to the existing SEQRA regulations, available at 6 NYCRR Part 617. That now appears to be changing.

The NYSDEC recently issued a draft generic environmental impact statement (EIS), available at http://on.ny.gov/2ohWtAq, explaining its rationale and its objectives for the changes it proposed in 2012. The EIS discusses the comments the NYSDEC received in response to the 2012 proposal, and its proposed final regulations.

The NYSDEC believes that the regulations it is proposing to finalize now would "streamline" the SEQRA process without sacrificing "meaningful environmental review." It also suggests that, in many instances, costs for developers, property owners and local governments actually could decrease under the new rules. Whether these goals will be met in practice of course remains to be seen. Clearly, though, the NYSDEC's proposed final regulations, which now appear on the verge of being adopted, will affect SEQRA practice for many projects across the state.

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Type II Projects

SEQRA does not require certain actions — known as Type II actions — to undergo SEQRA review. The NYSDEC proposes to add over a dozen different specific actions to this category of those not subject to SEQRA review.

For example, in a city, town or village with an adopted zoning law or ordinance, reuse of a commercial or residential structure not requiring a change in zoning or a use variance would be a Type II action unless it meets or exceeds certain specified thresholds. The NYSDEC suggests that this would expedite redevelopment, for housing or commercial purposes, of the many structures in the state that currently are vacant.

Additionally, in cities, towns and villages with adopted subdivision regulations, a "minor" subdivision would be a Type II action provided that it does not involve the construction of new roads, water or sewer infrastructure, and provided further that it is not part of a larger tract subdivided within the previous 12 months. The NYSDEC supports this change based on its belief that the ability of municipalities to condition or deny approvals for these projects provides assurances that these actions would not have a significant effect on the environment.

The NYSDEC also would permit, under specified conditions, a sliding scale of development based on population levels on lots with previous construction that have existing road, sewer and water infrastructure. It reasons that the development of sites that have been previously disturbed and that have existing infrastructure results in less environmental impact than developing undisturbed sites, and it acknowledges that these impacts can be "readily addressed through the land use review process."

The NYSDEC also would classify as a Type II action a recommendation of a county or regional planning board issued pursuant to General Municipal Law §§ 239-m or 239-n.

Another proposed Type II change involves the replacement, rehabilitation or reconstruction of a structure or facility on the same site, including upgrading buildings to meet energy codes or to incorporate green building infrastructure techniques, within certain specified thresholds. The NYSDEC favors the installation of green roofs and other green infrastructure techniques because, it says, they can "substantially improve energy efficiency and reduce generation of runoff." It says that the specified thresholds would place appropriate limits on the size of the projects that would fall within the Type II category.

A futher "green"-related change would allow, as a Type II action, the installation of up to five megawatts of solar energy arrays on certain existing structures, including landfills, brownfield cleanup sites, and residential and commercial parking facilities. The NYSDEC's rationale for these changes is quite straightforward: They are meant to reduce both energy costs and the generation of greenhouse gases.

Next, the proposed final regulations would include as a Type II action the installation of cellular antennas or repeaters on certain existing structures. The NYSDEC says that it has received many questions about the SEQRA classification for installation of antennas and repeaters on existing structures, given the current rule, 6 NYCRR § 617.5(c)(7), that precludes the installation of radio communication and microwave transmission facilities as a Type II action. Perhaps as a consequence, the NYSDEC has decided that these antenna and repeaters can in many locations be installed on existing buildings as a Type II action, which also would avoid the need for construction of new towers. The proposed regulations also would classify installation of fiber-optic or other broadband cable technology in existing highway or utility rights-of-way as Type II actions.

The NYSDEC is proposing to include specified brownfield site clean-up agreements as Type II actions. Currently, the NYSDEC has

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SEQRA Regulations

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considered these types of agreements and clean-ups as civil or criminal enforcement proceedings under 6 NYCRR § 617.5(c) (29). It explains that, as more agencies start to enter into these agreements, its proposed change would clarify the correct SEQRA classification for these activities.

In addition, the acquisition, sale, lease, annexation, or transfer of any ownership of land to undertake any activity on the new list of Type II actions also would be a Type II action. The NYSDEC reasons that one of the basic concepts of SEQRA is the "whole action," and that having the land transaction of a proposed activity subject to review under SEQRA when the activity itself is listed as a Type II action violates this concept. According to the NYSDEC, this "quirk" has resulted in affordable housing projects such as those sponsored by not-for-profit agencies being subjected to SEQRA review for the transfer of land from the municipality to the not-for-profit when the activity involved the construction of a one-, two- or three-family residence that was a Type II action. Adding this item to the Type II list would remove a "potential stumbling block to the construction of affordable housing," according to the NYSDEC.

Another proposed change would add as a Type II action a municipal or state agency's disposition of land, by auction, where there is no discretion on its part on the outcome. The NYSDEC explains that a municipality or a state agency may acquire land through foreclosure or other means where the land reverts to the agency due to a failure of the owner to remain current on property taxes. State law requires that the municipality or agency dispose of this land through a public auction to the highest qualified bidder; the municipality or agency has no discretion but to abide by the results of the auction. Currently, agencies are required to perform a SEQRA review in these circumstances. The proposed final regulations recognize the NYSDEC's view that environmental assessments under these circumstances are fairly meaningless because the agency has no idea of what the ultimate use of the property will be by the new owner at the time of the auction.

Type I Actions

The NYSDEC's proposed final regulations also would change the rules for certain Type I actions, which are actions that trigger SEQRA review. The effect would be to increase the numbers of actions subject to Type I review. For instance, the proposed final regulations would reduce some of the thresholds for residential subdivisions, thereby increasing the number of projects subject to SEQRA review.

To trigger Type I review, the NYSDEC is proposing — depending on the population of a city, town or village — to reduce the number of units that the project proposes to connect to existing community or public water and sewage systems from 250 to 200; 1,000 to 500; and 2,500 to 1,000. The NYSDEC explains that its experience has shown that the higher thresholds were "rarely triggered because they were set too high."

Similarly, the proposed final regulations would categorize as Type I actions a project proposing to add at least 500 parking spaces in communities with a population smaller than 150,000 persons and at least 1,000 parking spaces for communities with a larger population.

Scoping

The proposed final regulations also address "scoping," which is the process that the government agency principally responsible for reviewing a proposed development may engage in if it determines that the proposed development has significant adverse impacts requiring the preparation of a full EIS. Scoping helps to focus the EIS on potentially significant adverse impacts while avoiding undue consideration of irrelevant or insignificant impacts.

Currently, neither SEQRA nor the NYSDEC regulations mandate scoping for any project, but the NYSDEC's proposed final regulations would change that. The NYSDEC is proposing to mandate scoping for every EIS, permitting it to be initiated by the lead government agency overseeing the proposed project or by the project sponsor.

Conclusion

There are other changes in the proposed final regulations that likely are of significance to developers, property owners and local governments, including changes that would more precisely define and tighten the acceptance procedures for a draft EIS. All interested parties should recognize that comments on the proposed final regulations are due May 19, 2017. The NYSDEC has indicated that the final regulations could take effect as early as Oct. 23, 2017, although it conceded that it could change that date to three months from the date of their adoption.

At last, it appears that the NYSDEC is on the verge of finalizing new SEQRA regulations.

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the tenant would become a month-to-month tenant, subject to all the terms and conditions of the lease. The lease also contained express provisions that: 1) prohibited the parties from orally modifying the terms of the lease; and 2) required any waiver of the landlord's to be made in writing and signed by the landlord in order for it to be valid.

After multiple written lease extensions, the extended lease term finally expired. Notwithstanding such expiration, and as the landlord and tenant stipulated to the court, the tenant continued to remain in possession of the leased space as a month-to-month tenant.

At the time the month-to-month tenancy commenced, monthly rent under the last lease extension was $1,824. However, the tenant alleged that, some time in late 2003

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Expanding the Scope of Good Guy Guarantees in NY

By Stewart E. Sterk

Good Guy Guarantees are designed to ensure that defaulting commercial tenants leave the premises promptly, avoiding loss of rental income to landlords. The guarantee provides an incentive for the guarantor (usually one of the tenant's principals) to make sure the tenant leaves promptly, because the guarantor remains on the hook for rent until tenant vacates the premises. However, in *Bri Jen Realty Corp. v. Altman*, NYLJ 1/13/17, p. 26., col. 2, the New York's Second Appellate Department construed a Good Guy Guarantee to hold a guarantor liable for rent for 11 months after the tenant surrendered the premises. *Bri Jen* counsels caution in drafting future "Good Guy" Guarantees.

The *Bri Jen* Case

Landlord and MK Warehouse, LLC, had entered into a 10-year commercial lease to begin on Feb. 1, 2010. The lease provided that the annual rent was due in advance, "adjusting on the anniversary date of the commencement of the lease." A rider to the lease provided that the annual rent was due in advance, but provided that for the convenience of the tenant, it could make payments in monthly installments on the first day of each month.

Benson Altman executed a Good Guy Guarantee of MK's obligations. Altman guaranteed "payment as and when due of the fixed annual rent," but his liability was limited to "the performance of those obligations and the payment of such fixed annual rent ... as accrue up to the [surrender] date." Tenant took possession, and made rent payments to cover the period through March 1, 2011, but vacated and surrendered before that date. The landlord then brought this action against both tenant and guarantor to recover the unpaid annual rent for the period ending Jan. 31, 2012 — a period covering more than 11 months after the date the tenant surrendered the premises to landlord. The trial court awarded summary judgment to landlord for $76,800 in unpaid rent, and also awarded $43,968.90 in attorney fees to landlord. The guarantor appealed.

The Second Department modified to vacate the award of attorney fees, but affirmed the award of unpaid rent. The court overturned the award of attorney fees because the landlord's submissions were wholly inadequate to support any fee award.

On the more critical issue — the guarantor's liability for rent — the court rejected his argument that the guarantor was liable only for the portion of rent attributable to the period before the tenant surrendered the premises. The court focused on the lease provision declaring that the fixed annual rent was due at the beginning of each year-long period. Because the lease obligated the guarantor to pay the fixed annual rent that had accrued by the surrender date, and the lease provided that the fixed annual rent accrued at the beginning of each yearlong period, the guarantor was liable for rent for the entire year beginning Feb. 1, 2011.

The Purpose of Good Guy Guarantees

Good Guy Guarantees are intended to protect landlords against defaulting and insolvent commercial tenants. Absent a guarantee, an insolvent tenant has little financial incentive to vacate the premises, and little incentive to maintain the premises in good condition before vacating. The Good Guy Guarantee alters incentives by obligating an individual (presumably solvent) to compensate the landlord for any losses that landlord might incur until the time tenant vacates. As a result, the guarantor, usually a principal in the corporate tenant, has a strong incentive to make sure the tenant vacates promptly, allowing the landlord to recover possession and re-let the premises.

The Good Guy Guarantee is a limited personal guarantee. Unlike a full personal guarantee, the good guy guarantor's obligation is satisfied when th tenant has met all obligations accruing by the time the tenant vacates the premises - even if the tenant vacates long before the end of the lease term. The tenant may be liable for rent for the balance of the lease term; the good guy guarantor is not.

In *Bri Jen*, the court grappled with how to construe the Good Guy Guarantee when the lease stipulates that the rent is due annually rather than monthly. The court took a literal approach to the problem: The lease stipulates that "annual" rent is due in advance, and the guarantee obligates the guarantor to pay "such fixed annual rent ... as accrue up to the [surrender] date." On the court's reasoning, because an annual period began before the tenant vacated, guarantor became liable for rent for the remainder of the year.

That literal reading, however, undermines the purpose of the Good Guy Guarantee, which is to incentivize the guarantor to ensure that the defaulting tenant vacates promptly. If the guarantor is liable for the remainder of the year whether or not the tenant leaves, the guarantor has limited incentive to ensure prompt surrender of the premises. As a result, the landlord may not be able to re-let the premises to a new tenant who might be able to use the premises and pay rent.

Moreover, the court's construction of the Good Guy clause has the potential to allow the landlord to recover double rent for the same period of time. Suppose, as in *Bri Jen*, a tenant surrenders the premises long before the end of the annual period. The holding in *Bri Jen* makes the guarantor liable for the remainder of the annual period. But, if the tenant has surrendered, nothing prevents the landlord from accepting the tenant's surrender and re-letting the premises to a new tenant,

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Good Guy Guarantee

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collecting new rent for the same period for which the guarantor is liable. Perhaps New York's Second Appellate Department would balk at that result, but the logic of the court's opinion would permit double dipping by the landlord.

The Drafting Issue

The *Bri Jen* case suggests that lawyers for potential guarantors should take precautions before agreeing to a Good Guy Guarantee. In particular, if the lease purports to make annual rent due in advance, the guarantor may want to limit the guarantee to a prorated percentage of the rent for the year during which surrender occurs. Alternatively, the guarantor may want to insist that the lease provide that rent for each month is due on the first day of that month, limiting guarantee liability to the last month of the tenant's occupancy. In any event, the *Bri Jen* decision is must reading for any lawyer contemplating a Good Guy Guarantee.

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or early 2004, the parties discussed the tenant's suffering business and, as a result of that discussion, orally agreed to reduce the monthly rent to $1,473.75. After this alleged oral agreement, the tenant made such reduced rent payments, which the landlord accepted. This continued until 2012, when the tenant vacated the premises. Thereafter, the landlord filed a complaint against the tenant alleging, among other things, that the tenant had breached its obligation to pay monthly rent by failing to pay the full amount: the $1,824 per month set out in the parties' last lease extension.

At trial, the landlord claimed that it was entitled to recover the difference between the rental amount specified in the last lease extension and the actual amount paid by the tenant. The tenant argued that the parties had agreed to a reduced rental amount and that the tenant's payment of that reduced amount constituted payment in full in accordance with the oral agreement.

In August 2015, the trial court held that the oral agreement was enforceable and, thus, did not award the landlord the claimed difference in the rental amounts.

No Oral Modification Provision

On appeal, the landlord argued that because the lease expressly prohibited oral modifications, the parties could not have orally agreed to reduce the rent and, similarly, that the provision requiring waivers be in writing "eviscerate[d]" any argument that the landlord had waived its right to the full rental payment by accepting the reduced rental amount.

The court, however, held that these provisions, like any other contract provisions, could be orally waived by a party through its actions. Here, the court noted that the landlord had acknowledged and accepted the reduced rent for at least eight years without objection. In addition, the landlord had indicated in its own records that rent had been paid in full after receiving each reduced rental payment. The court concluded that the parties' conduct demonstrated that they had "clearly, unequivocally and decisively acted upon their oral agreement to reduce rent" and that the no-oral-modification provision and the waiver provision in the lease would not preclude enforcement of such oral agreement.

Requirement of Consideration

The landlord also argued that the parties' oral agreement to reduce rent was unenforceable because it lacked "new and distinct" consideration. The court acknowledged that an oral agreement to modify a prior written agreement must generally be supported by new and separate consideration. However, it held that the tenant had provided sufficient "new and separate" consideration for the rent reduction: The court explained that the tenant, as a month-to-month tenant, was not required to continue leasing the space from landlord. Consequently, its decision to remain on the premises and continue paying rent was sufficient "new" consideration.

The court further noted that even if the continued leasing of the space was not adequate consideration, consideration would not be required if the court's refusal to enforce the oral modification would result in "fraud to the promissee." The court found that because there was "sufficient competent, credible evidence" supporting the existence of the oral agreement, the court's refusal to enforce the oral modification would result in fraud to the promisee (here, the tenant). It, therefore, held that the parties' oral agreement would not be deemed "unenforceable" due to lack of consideration.

Statute of Frauds

Finally, the landlord asserted that the oral agreement to reduce rent was barred by the statute of frauds, which requires certain kinds of agreements — including contracts concerning the sale of an interest in land and contracts that cannot be performed within one year of the contract being made — to be memorialized in writing.

The court agreed that the oral agreement fell under Ohio's statute of frauds, which requires leases, estates or interests in land to be in writing, and signed by the party assigning or granting it. Oh. Rev. Code § 1335.04. The court, however, explained that the equitable doctrine of partial performance can remove an oral agreement from the statute of frauds when the parties, by their conduct, unequivocally demonstrate their acceptance of new terms. In this instance, the tenant's payment of reduced rent and the landlord's acceptance of those reduced rental payments for at least eight years provided the necessary "partial performance" to except the oral agreement from

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Case Notes

Fraudulent Inducement

A tenant who allegedly lied about his retirement in order to be let out of his lease and to induce his landlord to forgo extra payments he was entitled to under the law was unsuccessful in having the suit against him dismissed. *1046 Madison Avenue Associates v. Bern*, 2017 N.Y. Misc. LEXIS 228 (Sup. Ct., N.Y. Cty. 1/20/17).

Defendant Fima Bern entered into a lease with the plaintiff landlord on March 11, 2012. The lease, to run through May 31, 2019, was for a basement space in a building on New York City's Madison Avenue in which the defendant would operate a shoe repair business. In November 2015, Bern and his son asked plaintiff's representative, Steven Leader, if Bern could terminate his lease early, because of Bern's advanced age and failing health. Bern told Leader that he had already found a subtenant, Lukure Inc., to take over the remainder of his lease term. He also informed Leader that Lukure had agreed to pay Bern $90,000 over and above the rent payments it would make to the landlord, as "key money."

When Leader informed Bern that New York law (Article 67(H)) gave the landlord the right to receive that $90,000 as "consideration received by Tenant from any subtenant in excess of the rent and additional rent." Bern asked Leader if the landlord would forgo accepting the key money, simply as a good deed — to help Bern because he was old and retiring from business. The landlord agreed to do this on the condition that Bern inform it in writing that he was retiring. Bern did so by a letter dated Dec. 16, 2015, witnessed by Leader.

However, in May 2016, the landlord discovered that Bern was working as an owner or employee of a business called Phil's Shoe Repair, which was run by Bern's son. The landlord brought suit for fraudulent inducement.

To prove a claim for fraudulent inducement in New York, a plaintiff must allege that there was a false representation, made for the purpose of inducing another to act on it, and that the party to whom the representation was made justifiably relied on it and was damaged. In denying Bern's motion to dismiss, Judge Carol Robinson Edmead found that the landlord had sufficiently alleged facts to state a cause of action against Bern: "[F]irst, [Bern] made a false representation, in that Fima [Bern] stated that he was not in good health and planned to retire from the business, both of which were untrue … . Second, Plaintiff alleges that [Bern's] misrepresentation was made for the purpose of inducing Plaintiff to enter into the Termination Agreement. Third, Plaintiff allegedly reasonably relied on [Bern's] representation that he was retiring from the business when it agreed to enter into the Termination Agreement. Finally, Plaintiff was damaged as a result of [Bern's] misrepresentation … ."

Counterfeit Goods

A Georgia jury has found for a high-end consumer goods brand trademark holder and against a commercial landlord that turned a blind eye to its tenant's sale of counterfeit knock-offs in the rented premises. *Luxottica Group v. Airport Mini Mall*, 2017 U.S. Dist. LEXIS 35018 (N.D. GA, 2/28/17).

The verdict rests on a rarely invoked 1992 federal court decision — *Mini Maid Services v. Maid Brigade Systems* — that found a landlord who was not the owner of a property on which a flea market was being operated was nevertheless guilty of contributory trademark liability when a tenant sold counterfeit goods there.

Similar to the *Mini Maid* case, in *Luxottica*, a flea market operated by Airport Mini Mall was raided in 2014, and about 20 vendors were arrested for selling counterfeit goods. Their goods were confiscated. Despite this, and despite receiving letters from three brand manufacturers informing it that specific mall tenants were breaking the law, the mall operator renewed these vendors' leases in January 2015, and they continued to sell counterfeit goods. The trademark owners sued, alleging that even if the landlord was not directly complicit in the tenants' actions, it turned a blind eye when they sold goods that would have been worth hundreds of dollars, if genuine, for $10 or $15. A jury found the flea market's landlord contributorily liable for the tenants' trademark infringement and imposed $100,000 fines for each of 19 counts of infringement, bringing the landlord's total fine to nearly $2 million.

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the statute of frauds. The court further noted that the tenant relied on the oral modification by remaining a tenant and not finding a less expensive place to rent, thus making it "impossible or impracticable" for the court to return the parties to the status quo. Accordingly, the statute of frauds did not preclude enforcement of the parties' oral agreement.

Conclusion

In *Specialized Component Sales*, the landlord tried to argue that the provisions in the written lease governed, notwithstanding at least eight years of inconsistent behavior. If the landlord had not intended for the reduced rent to constitute full payment, the landlord could have rejected the rental payments or could have notified the tenant that payment had not been made in full. In the alternative, if the landlord had intended to reduce the rent for only a certain period of time, the landlord should have provided the tenant with a notice indicating that its agreement to reduce rent

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from T-E's agent was sufficient to satisfy the statute of frauds.

The court ultimately agreed with SJH, finding that the text message in question, read in conjunction with the previous negotiation communications between the parties, satisfied the requirements of the statute of frauds. In coming to this conclusion, the court noted the evolution of business practices and the prevalence of electronic communications in business transactions. The court analogized the broker's name at the bottom of the text message to an electronic signature at the bottom of an email and deemed it sufficient to satisfy the statute of frauds' signature requirement.

Similarly, *Crestwood Shops, LLC v. Hikene*, 197 S.W.3d 641, 644 (Mo. Ct. App. 2006), demonstrates the significance courts will apply to email correspondence under the UETA in adjudicating the validity of contractual offer and acceptance. In that case, tenant Hikene sought to lease larger retail space in a shopping center from the landlord, Crestwood Shops, LLC. The parties entered into a five-year lease, but following commencement of the term, Hikene identified several problems with the new space, including mold on the premises, a defective HVAC system, and foundation issues. As Hikene made preparations to renovate the new space, she brought the issues with the property to Crestwood's attention.

Communications between Hikene and Crestwood became increasingly contentious, and both parties thereafter agreed to correspond in writing only. Following her continued dissatisfaction with Crestwood's response to the space issues, she stated in an email her desire to terminate the lease if the problems were not corrected by a date certain. The next day, Crestwood responded that they accepted Hikene's request to be released from the lease as of the stated date.

Hikene sought a declaratory judgment that the lease was not terminated, arguing that she did not agree to conduct her business transactions electronically and that she did not intend her email to be an offer to terminate the lease. The court disagreed, ruling that the parties consented to the conduct of business through email, and that Hikene's email constituted an offer to terminate that satisfied the statute of frauds. In coming to its decision, the court noted that the UETA instructs fact-finders to consider the "context and surrounding circumstances, including the parties' conduct." Following this directive, the court determined that Hikene's March 17 email insisting that the parties communicate through email demonstrated her willingness to transact business through email.

Clarity Is Key

As the legal regimes associated with electronic communications evolve, a variety of measures are available to parties to a lease in order to avoid being bound without intent. For instance, landlords and tenants transacting electronically may ensure that a lease proposal or draft lease document is not exploited as an offer by including the following common language in each cover transmittal: "Nothing herein shall be deemed or construed to be an offer by [sender], and [sender] shall not be bound unless and until such time as all parties have delivered fully-executed documents." And persons transmitting via email should always be aware that their electronic signature may be deemed to have the same legal effect as their handwritten signature.

As a general proposition, if a party wishes to confirm that it will not be bound by electronic correspondence, it is always wise to do so in writing. The requirement in the UETA that a party must agree to conduct business electronically need not be established by an explicit statement; rather, it may be satisfied by an interpretation of context and conduct. To be clear, parties to a lease are advised to reduce to writing their consent, or withdrawal of consent, to be bound in this manner.

Not long ago, commercial leases would take weeks to negotiate, draft and finalize. Like virtually every other area of commerce, technology has streamlined the leasing process such that today, leasing transactions are completed with lightning speed. Leasing professionals should be mindful of the hazards of doing business electronically and should consider the legal consequences of every email.

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Agreement Terms

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was only for such specified limited time.

This case reminds us that drafting a client "favorable" or "market" lease is not always enough. The lease in *Specialized Component Sales* was a typical commercial lease with customary provisions designed to protect the parties. The terms in the lease were not particular to the parties, but rather, boilerplate provisions we see in our everyday practice. These standard provisions, however, could not protect the landlord from its own subsequent conduct.

As practitioners, we should include in our counsel to clients the importance of acting in accordance with the terms of their agreements, and make clear to them that acting contrary to the terms of the agreement may have unintended adverse consequences.

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