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Developing Brownfields

By Paul M. Schmidt

This article examines some of the key aspects of desirability and viability that are working together to make Brownfield redevelopment increasingly attractive in today's real estate market.

Market Desires

A Brownfield is "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." Small Business Liability Relief and Brownfields Revitalization Act, 42 USC Section 9601 (39). These are often former industrial properties located in areas of high density within urban limits and along river corridors. In part, increased redevelopment and reuse of Brownfields is simply a product of the overall economic recovery, and a product of the greater comfort project participants have in using contaminated property. But beyond that, to satisfy the criteria of future users, there are some definite advantages to Brownfields over greenspace. For example, for manufacturers who have experienced increased production, relocating to a larger, moth-balled factory can have significant benefits over constructing a new facility in a greenspace. These include existing utilities, an available workforce (*i.e.*, cheaper labor than in a remote area), and perhaps

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'I Thought I'd Seen It All with Rights of First Refusal, But I Was Mistaken'

By Marisa L. Byram

This article shares an actual recent dispute in which a landlord claimed there was a mutual mistake in the material terms of a right of first refusal after the proper exercise of such right and acceptance of such material terms by its tenant.

Background

Earlier this year, a client ("Tenant") called our office asking for assistance in connection with a right of first refusal on certain property it leased. Tenant's lease included the following customary language:

> Tenant shall have the pre-emptive right during the term of this Lease to purchase said premises on the same terms and conditions as those of any bona fide offer received by and acceptable to Landlord, and Landlord, before making any sale or any agreement to sell, shall notify Tenant in writing of the amount of the proposed purchase price, a copy of the purchase contract and all other terms and conditions of such offer.

Tenant had received a letter from Landlord stating that Landlord had accepted an offer to sell the property, that the purchase agreement enclosed with such letter (the "Original Agreement") contained the material terms of the proposed acquisition, and that such letter satisfied Landlord's right-of-first-refusal notice requirements under the lease. The Original Agreement was signed by Landlord and the prospective purchaser, initialed by the parties on each page, and was contingent only on Tenant's waiver of its right of first refusal. The purchase price for the property set forth in the Original Agreement was $1,085,000.

Within the time period required by the lease, Tenant exercised the right of first refusal and accepted Landlord's offer on the same terms and conditions as contained in the Original Agreement. In the letter notifying Landlord of Tenant's acceptance, Tenant recited that the purchase price for the property was

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$1,085,000. Within a week following Tenant's exercise of the right of first refusal, Landlord prepared and delivered to Tenant its draft of the purchase agreement for the property. While Landlord's draft of the purchase agreement failed to include all of the same terms and conditions of the Original Agreement, it did state that the purchase price was $1,085,000. After exchanging multiple drafts of the purchase agreement, Tenant and Landlord finally agreed to the form of the agreement and executed a purchase agreement (the "New Agreement").

At all times during the parties' negotiations, the purchase price in the drafts of the purchase agreement remained $1,085,000. In the weeks that followed, Tenant completed its due diligence with respect to the property and prepared for closing.

With the closing date that the parties had agreed to less than two weeks away, Landlord contacted Tenant stating that it had "discovered a material error" and that the purchase price set forth in the Original Agreement should have been $100,000 more (*i.e.*, $1,185,000). Landlord explained that prior email communications between Landlord and the prospective purchaser were clear that Landlord would not have accepted a purchase price less than $1,185,000. Based on these communications between Landlord and the prospective purchaser, Landlord asserted that, at best, a mutual mistake between Landlord and the prospective purchaser had occurred or, at worst, the prospective purchaser had employed an underhanded tactic by changing the terms of the Original Agreement before signing and submitting such contract to Landlord and not highlighting such change to Landlord. In either event, claimed Landlord, the New Agreement should be reformed to include the higher purchase price.

We proceeded to send a formal demand that Landlord honor the terms of the New Agreement as written, and proceed to closing in accordance with the terms of the New Agreement or be subject to all remedies available to Tenant, including specific performance and attorneys' fees, as permitted by the New Agreement, but Landlord would not waver. Instead, Landlord continued to allege that there was a mutual mistake in the Original Agreement, that in exercising the right of first refusal, Tenant had "stepped into the shoes" of the prospective purchaser, and that the mutual mistake was a basis for rescinding the New Agreement. Landlord argued that if Tenant and Landlord could not come to a mutual agreement (*i.e.*, Tenant agreeing to pay a higher purchase price), then there was no agreement between the parties, and the parties were excused from performance under the New Agreement.

Mutual Mistake vs. Unilateral Mistake

A mutual mistake, when properly shown, may be a basis for rescission or reformation of an agreement. Here, we argued, there was no mutual mistake between Landlord and Tenant as to the purchase price set forth in the New Agreement. A mutual mistake is "one common to both parties or all parties, wherein each labors under the same misconception respecting a material fact, the terms of the agreement, or the provision of a written agreement designed to embody such an agreement." *Simpson v. Curtis*, 351 S.W. 3d 374, 378-379 (Tex.App.-Tyler 2010) (internal citations omitted). Because Tenant understood the purchase price stated in the original offer, the Original Agreement and the New Agreement to be correct, Tenant was not operating under any misconception.

In our research, we found a case directly on point. In *Vonada v. Long*,

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Marisa L. Byram, a member of this newsletter's Board of Editors, is a member of Lewis Rice LLC. She thanks firm colleagues **Andrea M. Patton** and **Matthew J. Haas**, for their assistance with this article.

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Surviving the Retail Shift

Landords' Duty to Mitigate Damages

Part Two of a Five-Part Series

By Kelly D. Stohs and David P. Vallas

In Part One of this five-part series (*see* http://bit.ly/2wDLmEF), we addressed managing the legal process to help commercial landlords achieve the most efficient results when dealing with defaulting retail tenant. But what happens once the shopping center owner or manager recovers possession of the lease premises?

A Landlord's Duty To Mitigate Its Damages

When a retail tenant vacates its leased premises early, the landlord's goal is generally two-fold: 1) to be compensated for the financial loss from the vacating tenant; and 2) to find a replacement tenant as soon as possible. While these two goals seem unrelated in practice, especially as the legal department may step in to handle collection and the leasing department begins its efforts to re-lease the space, a landlord's success in collecting future rent and other damages from the vacated tenant can be significantly affected by what efforts are (or are not) taken to re-lease the now vacant space.

When a commercial landlord recovers possession of its leased premises early, it generally has two options under typical lease terms: 1) sue for rent installments as they come due; or 2) terminate the lease and make due immediately all of the rent that would have otherwise become due though the end of the lease. In response to a landlord's demand for future rent — whether at the conference table or in a courtroom — the tenant typically challenges the extent of the landlord's efforts to re-lease the tenant's former space. The laws of most states require a landlord to make reasonable efforts to mitigate its damages when a tenant vacates its leased premises prior to the end of the lease term. If a landlord fails to undertake these reasonable efforts, or if a landlord has the opportunity — but fails — to re-lease the premises to a replacement tenant, the landlord's recovery will likely be reduced by the amount the landlord would have recovered from that replacement tenant.

Reasonable Efforts

General contract principles require a party to make reasonable efforts to minimize its damages when the other party breaches a contract. This requirement historically did not apply to leases because they were viewed as conveyances of real property interests. Over the past few decades, however, courts and lawmakers alike have started treating leases more like contracts, and the laws of at least 28 states now impose a duty on landlords to mitigate their damages. This trend is not uniform, however, and there are several important distinctions depending on which state's law applies.

The duty to mitigate damages generally requires only that a landlord take "reasonable" efforts to reduce its damages. The reasonableness of a landlord's efforts may depend on many factors. As the Kansas Court of Appeals remarked in *Leavenworth Plaza Associates, L.P. v. L.A.G. Enterprises*, 16 P.3d 314 (Kan. App. 2000), what may be considered commercially reasonable efforts to lease space in a brand-new shopping center in a growing area with national retailers competing for space is different from what may be commercially reasonable efforts to lease space in an older mall with minimal improvements. Regardless of the age or type of shopping center or the prevailing present economic conditions, decisions from around the country provide some guidance and suggest a landlord cannot be passive and simply post a "For Lease" sign or field incoming phone calls. The landlord must actively seek a replacement tenant, although there are certainly limits to the efforts that must be undertaken.

Many courts have looked beyond merely posting — or failing to post — a "For Lease" sign on the premises so long as the landlord's leasing efforts are consistent with its normal leasing activity and are supported by a legitimate business reason. For example, the Missouri Court of Appeals held that a landlord's failure to advertise the property or place "For Lease" signs on the premises did not make its leasing efforts unreasonable. *MRI Northwest Rentals Investments I, Inc. v. Schnucks-Twenty-Five, Inc.*, 807 S.W.2d 531 (Mo. Ct. App. 1991). The landlord testified in that case that it typically does not place "For Lease" signs on vacant retail properties because it gives the shopping center a negative image with potential lessees and customers. The Arizona Court of Appeals reached a similar result in *Wingate v. Gin*, 148 Ariz. 289, 291 (Ariz. Ct. App. 1985).

In contrast, the Colorado Court of Appeals held that a landlord failed to take reasonable efforts to re-lease vacant space because it failed to do anything other than accept calls from parties expressing an interest in the property. The landlord did not list the property with a real estate agent or a multi-listing directory, advertise the vacancy in a newspaper or other publication, or place a sign on the property. *Pomeranz v. McDonald's Corp.*, 821 P.2d 843 (Co. Ct. App. 1991). Likewise, the Iowa Supreme Court has held that doing nothing more than placing a "For

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Retail Shift

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Lease" sign showed insufficient evidence of reasonable efforts. *Vawter v. McKissick*, 159 N.W. 2d 538, 541 (Iowa 1968).

While these cases certainly do not canvass the entire landscape, they do provide some guidance that should be applied regardless of the jurisdiction. A landlord must actively and diligently seek a replacement tenant in the same manner as the landlord would try to lease other dark space in its shopping center.

Proving the Landlord's Case

Undertaking re-leasing efforts by itself is not enough, however. The landlord may be required to provide proof of these efforts, either with live testimony or documentary evidence. A landlord's failure or inability to provide such evidence could, in some jurisdictions, result in the landlord being denied any recovery for rent that accrued after the landlord recovered possession of the dark space.

Of the 28 states that impose a duty on landlords to mitigate their damages resulting from a defaulting tenant, about half put the burden of proof on the tenant, five of them put the burden of proof on the landlord, and eight are silent on the issue. In 13 states, a landlord's recovery will be reduced or barred altogether due to a landlord's failure to mitigate its damages only if the tenant proves that the landlord failed to take reasonable efforts to re-lease the vacant premises. In Illinois, Iowa, New Jersey, Oregon and Utah, however, the burden of proof falls squarely on the landlord. If a landlord in these states fails to prove that it took reasonable steps to mitigate its damages, the landlord will not able to recover any future rent from the defaulting tenant.

One of Illinois's appellate courts affirmed the reasonableness of a landlord's efforts to mitigate damages because the landlord provided evidence that it erected a sign and placed calls to brokers and developers seeking to re-leases property; the landlord obtained some short-term rentals from these efforts. Moreover, the landlord's expert opined that the rental price and marketing strategy were reasonable. *MXL Industries, Inc. v. Mulder*, 252 Ill. App. 3d 18 (Ill. Ct. App. 1993).

Connecticut is one of the eight states that is ostensibly silent on which party bears the burden of proof. However, one of its courts denied a landlord recovery because the landlord did not hire a real estate broker until almost four months after the tenant defaulted, and provided no explanation for this delay. Likewise, the landlord did not introduce any evidence by its broker to establish what efforts were made to lease the premises. *Rokalor, Inc. v. Connecticut Eating Enterprises, Inc.*, 18 Conn. App. 384 (Conn. Ct. App. 1989).

While most landlords of retail space are motivated to re-lease dark spaces regardless of the duty to mitigate damages, this motivation does not always lead to success, particularly in the current retail environment. It is not the landlord's success in mitigating its damages that matters, however; it's the efforts the landlord has undertaken. Therefore, it is critical that retail landlords document their marketing efforts and prepare to explain to a court precisely why those efforts are in line with the applicable market.

If a landlord is unsuccessful in leasing vacant space and cannot prove that its leasing efforts were reasonable, those efforts will surely have been wasted. After all, they will not have resulted in a replacement tenant or satisfied the landlord's duty to mitigate its damages, both of which will likely lower total recovery for the shopping center.

Is Mitigation Always Required?

In an effort to navigate or control their duty to mitigate damages, many retail landlords include boilerplate provisions in their leases, modifying or waiving this duty altogether. Before relying on these types of provisions, it is important to evaluate the enforceability of them in the particular state where the shopping center is located.

The Texas legislature, for example, has enacted a statute expressly prohibiting lease provisions that purport to waive a landlord's duty to mitigate its damages. *See* Tex. Prop Code 91.006(b). On the other hand, courts in New York, North Carolina and Ohio have enforced provisions that contractually excuse the landlord's duty to mitigate. *See Sylva Shops LP v. Hibbard*, 623 S.E.2d 785 (N.C. Ct. App. 2006); *New Towne LP v. Pier 1 Imports, Inc.*, 680 N.E.2d 644 (Ohio Ct. App. 1996). Explaining its rationale to enforce these types of waivers in a commercial lease, a New York court explained, "[a] commercial tenant which has negotiated a lease which provides that the landlord need not mitigate damages may take proper precautions against the possibility of default, may seek to assign or sublet, or may simply defer abandoning the lease." *29 Holding Corp. v. Diaz*, 775 N.Y.S.2d 807, 814 (Sup. Ct. Bronx County 2004).

Business As Usual

In practice, the duty imposed on landlords in many states to mitigate their damages is not extraordinary. It requires the same efforts that a typical landlord takes every day to fill empty spaces in its shopping center. Where some landlords go astray is by failing to recognize the importance of documenting and ultimately proving these efforts.

As landlords are faced with more dark spaces in their shopping centers, many are considering creative uses for these vacancies. While these efforts may satisfy a landlord's duty to mitigate its damages, alternative uses for dark space may create other problems for landlords. In Part Three, appearing in next month's issue, we will address some implications of creative uses on co-tenancy and excessive-vacancy provisions amid this retail storm.

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852 A.2d 331 (Pa. Super. 2004), landowners received an offer from a prospective buyer (the son of one of the landowners) to purchase certain real property, and such landowners subsequently offered the property to their neighbor pursuant to a right of first refusal held by such neighbor. The neighbor exercised its right of first refusal and accepted the offer. After such acceptance, the landowners realized they had made a mistake. They had failed to recognize that the express terms of the right of first refusal permitted a sale of the property to certain relatives of the landowners (which would have included the prospective buyer) without triggering the neighbor's right of first refusal. Once they recognized their mistake, the landowners attempted to rescind their offer to the neighbor. The neighbor then sued the landowners for specific performance. The landowners argued that there had been a mutual mistake subjecting the agreement to rescission.

In *Vonada*, the Superior Court of Pennsylvania rejected the landowners' argument, and found that no mutual mistake existed. Instead, the court, like the Texas court above, found that a "[m]utual mistake exists … only where both parties to a contract are mistaken as to existing facts at the time of execution." *Vonada*, 852 A.2d at 337 (internal citations omitted). The court explained that since the holder of the right of first refusal was unaware of the familial relationship between the prospective buyer and the landowners, any mistake was attributable to the landowners only, and thus the mistake was unilateral.

The court opined, "If a mistake is not mutual but unilateral and is not due to the fault of the party not mistaken, but to the negligence of the one who acted under the mistake, it affords no basis for relief in rescinding the contract." *Id*. at 338. The court continued: "Had [the landowners] made inquiry into the identity of the prospective buyer before offering the realty to [the neighbor], the present controversy could have been avoided. Nonetheless, we fail to detect how this nonfeasance by [the landowners] can be assigned to [the neighbor] to create a 'mutual' mistake invalidating the binding effect of the offer to purchase the reality [sic] in dispute." *Id*. Finally, "the error was attributable to the negligence of the party acting under the mistake, which underscores the integrity of the acceptance by [the neighbor], which bound the parties." *Id*.

Similar to the facts in *Vonada*, in our case, it was Landlord's negligence in failing to confirm the purchase price at any time before Landlord: 1) initialed the Original Agreement; or 2) signed the Original Agreement; or 3) offered the subject property to Tenant; or 4) sent the draft of the New Agreement to Tenant; or 5) signed the New Agreement, that created the issue.

These facts demonstrate that if there was any mistake, it was a unilateral mistake by Landlord. Since Tenant had not been a party to any discussions between Landlord and the prospective purchaser in arriving at the Original Agreement, Tenant could not have known that the purchase price offered by Landlord in the notice of right of first refusal or in the draft of the New Agreement was incorrect. Therefore, only one party — Landlord — labored under a misconception, and no mutual mistake between Landlord and Tenant existed.

Stepping into the Shoes of a Prospective Purchaser

Perhaps aware of its flawed argument that a mutual mistake could exist between Tenant and Landlord given the events described above, Landlord also argued that the prospective purchaser's knowledge should be attributed to Tenant because in exercising the right of first refusal, Tenant "stepped into the shoes" of the prospective purchaser.

However, an exercise of a right of first refusal is not an assignment. Instead, as described in one case, a right of first refusal is "merely a dormant set of rights" that does not entitle the holder of such rights to take any action until it receives a bona fide offer. *Urban Hotel Mgmt. Corp. v. Main & Washington Joint Venture*, 494 N.E.2d 334, 337 (Ind. Ct. App. 1986). In *Urban Hotel*, the holder of the right of first refusal properly exercised an option to lease a hotel, but subsequent to exercising the right, no lease was ever entered into between the owner and the exercising party because of the parties' disagreement over the interpretation of a particular term. The original prospective tenant then brought suit for either specific performance of the lease or damages. In upholding the lower court's award of summary judgment in favor of the owner and against the prospective tenant, the court explained that once the holder of a right of first refusal receives such offer, the right of first refusal is transformed into an option "which is distinctly different from a right of first refusal [in that it] is a continuing offer whose duration and method of exercise is strictly controlled by the agreement that created it." *Id*.

Once a right of first refusal becomes an option, the only question is whether the holder properly exercised such option by strict adherence to the agreement that created such right. *Id*. Upon the holder taking the action required by the agreement creating such right to exercise such option, the right of first refusal is properly exercised and the original offeror's rights to the property are "completely cut off." *Id*. (internal citations omitted).

Accordingly, once Tenant exercised its option pursuant to and in compliance with the terms of the right of first refusal, the right of first refusal was properly exercised (which proper exercise Landlord never disputed) and the rights of the prospective purchaser were cut off. In other words, there were no shoes to step into — tenant could not be viewed as an assignee of the prospective purchaser's rights in the subject property because such

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party no longer had any rights. Instead, Tenant and Landlord entered into their own agreement that contained the terms of such purchase, including the purchase price of $1,085,000.

Conclusion

Given the amount in controversy, you will not be surprised to learn that the parties ultimately settled their dispute out of court. In any event, the above facts and case law illustrate that, much to our clients dismay, even routine transactions can have unanticipated perils. Practitioners should take note that, given the number of articles on rights of first refusal published by this newsletter and similar publications over the years, it appears that rights of first refusal may have more opportunity for these perils than other transactions.

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Brownfield Sites

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even the ability to retain existing employees and avoid the costs of hiring and training new ones.

For residential and mixed-use development, as William A. White, principle at Endurance Real Estate Group, notes, "another valuable feature of 'infill' development (which applies to many Brownfields) is that the locations are already surrounded by lots of amenities, unlike locations on the fringe where the new users often have to wait for more development to fill in around them." Desirable amenities include stable school systems, public transportation, nearby shopping, and pedestrian-friendly infrastructure. Other favorable features include proximity to the workplace, scenic waterways and riverfront recreation, such as multi-use trails and entertainment facilities.

In short, residents desire a place where they can work, shop, play and sleep, without exhaustive commutes. That trend in lifestyle preference ultimately leads to an increased interest in properties that happen to be Brownfields.

Cleanup Programs

It's been a number of years since the watershed legislative changes at the federal and state levels that introduced the statutory liability defenses now available to lenders, bona fide prospective purchasers, contiguous property owners and others. *See, e.g.*, the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9607(q) and (r) (CERCLA or Cleanup Programs Superfund); the Hazardous Sites Cleanup Act, 35 P.S. Section 6020.701(b)(iv) (HSCA); the New Jersey Spill Compensation and Control Act (the Spill Act), N.J. Stat. Section 58:10-23.11g.d.2. Nonetheless, following these events, the regulatory arena has continued to become increasingly more favorable to developers. As most developers already know, "remediation" can often be accomplished not by removing contamination, but by creating physical and legal barriers to exposure (respectively, engineering controls and institutional controls, *i.e.*, deed restrictions).

Generally, developers experience improved (quicker) regulatory review of remediation plans and acceptance of these controls than they did in the past. In some states such as New Jersey, government oversight has been replaced with oversight by private site remediation professionals working directly for responsible parties, which has dramatically improved the process for developers. These factors have made the redevelopment of Brownfields significantly easier, faster and more predictable.

Funding Sources

Private funding for redevelopment on Brownfields has also increased. Just as users and developers are becoming more comfortable with Brownfields, so too are banks and private equity firms. These entities have become adept at obtaining their own site assessments, engaging counsel for advice and negotiations, and securing insurance products to add predictability to future costs and risks.

On the public funding side, available vehicles have not changed significantly in recent years. These still include products like grants for municipalities and quasi-governmental entities to assess Brownfields, develop cleanup plans, and conduct community outreach, and Brownfield and economic redevelopment loans for developers. But, again, the process and creativity of public funding organizations have improved. These funds often leverage private financing and other government funding, and involved agencies are adept at providing guidance and support.

As two examples, agencies are amenable to the creative segmentation of projects in order to use economic redevelopment loans on portions requiring little remediation, use Brownfield loans on portions requiring extensive remediation, and on identifying factors to improve an applicant's qualifications, such as being near an anticipated transportation terminal.

On the federal level, the U.S. Departments of Housing and Urban Development (HUD) and of Transportation, and the U.S. Environmental Protection Agency (EPA) have created the Partnership for Sustainable Communities, which offers a number of tools to help communities improve access to affordable housing, increase transportation options, lower transportation costs, and protect the environment.

Risk Management Tools

Other significant advancements in risk management at Brownfield sites are more favorable insurance products and easier liability transfer. With insurance, a growing smorgasbord

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CASE NOTES

When Tenants Clash

The Court of Appeals of Nevada recently affirmed in part and reversed in part a lower court's holding, reinstating a tenant's claim for breach of the covenant of quiet enjoyment stemming from the behavior of the claimant's co-tenants. *Pickett v. McCarran Mansion, LLC*, 2017 Nev. App. Unpub. LEXIS 525 (Court of Appeals of Nevada 8/8/17). Although the unpublished opinion is not to be cited as authority, the concurrence by Judge Jerome T. Tao is of interest, as he discusses the case's possibly erroneous assumption that a landlord can legitimately be held responsible for the non-tortious actions of its tenants toward one another.

The facts in *Pickett*, only minimally set forth by the court's opinion in this case, showcase the results of a largely unexplained quarrel among the tenants of a single commercial property. The tenants, including plaintiff Pickett, shared a reception area and a receptionist, who was provided by the landlord in accordance with the lease. According to psychologist Pickett's complaint, two co-tenants rained "verbal abuse complete with heckling, screaming and profanity" upon her, and berated her in the shared lobby space in front of her clients. Pickett also asserted that her co-tenants and/or the receptionist refused to direct her clients to the bathrooms when asked, posted a sign in the lobby telling her clients that their questions would not be answered, and ignored her clients in every way.

Due to these behaviors, Pickett claimed that her clients stayed away in droves and her business suffered. Because the landlord failed to intervene with the co-tenants and/or the receptionist on Pickett's behalf, she sued the landlord, seeking damages for breach of contract, breach of the covenant of quiet enjoyment, breach of the implied covenant of good faith and fair dealing, and attorney fees.

At the trial level, the landlord moved for summary judgment and was granted it on just one of Pickett's claims — breach of the covenant of quiet enjoyment. Pickett appealed.

A tenant proves a breach-of-the-covenant-of-quiet-enjoyment claim in Nevada by proving constructive eviction. *Winchell v. Schiff*, 124 Nev. 938, 947, 193 P.3d 946, 952 (2008). There are four elements of proof of constructive eviction for commercial tenants. These are, according to *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC*, 335 P.3d 211, 214 (2014): 1) that the landlord has acted or failed to act; 2) in a manner that rendered the whole or a substantial part of the premises unfit for occupancy for the purpose for which it was leased; 3) that the tenant therefore vacated the premises within a reasonable time; and 4) that the tenant gave the landlord notice of the defect(s) and a reasonable opportunity to cure the defect(s).

The trial court granted the landlord's motion for summary judgment on the breach-of-quiet-enjoyment claim on the ground that the plaintiff — if suffering due to a breach of the covenant of quiet enjoyment — lost the right to complain of it by not vacating the premises soon enough (element 3).

On appeal, the court agreed with the plaintiff that the question of whether the premises were vacated in a timely manner was one for the jury. Therefore, the grant of summary judgment in favor of the landlord on the claim of breach of the covenant of quiet enjoyment was reversed. The plaintiff's other claims were also allowed to go forward, so that at trial, the court on remand must decide whether the landlord breached the lease contract, the covenant of quiet enjoyment and the implied covenant of good faith and fair dealing, as well as whether the plaintiff is entitled to attorney fees.

Judge Tao concurred in the decision, but tempered his assent with a very large dose of skepticism as to the plaintiff's entire set of claims. "I join in the order of partial reversal," wrote Justice Tao, "but, on remand, would recommend the district court address a question that all parties have apparently overlooked and that might moot all of the other grounds raised in this appeal: Are Pickett's causes of action even cognizable? In reviewing the record, I have my doubts." Those doubts centered around the nature of Pickett's complaints, all of which boiled down to one contention: that landlords have a legal duty to police the relationships of tenants to one another, even when no tenant's behavior rises to the level of an actionable tort.

Where did this supposed duty spring from? A Nevada commercial landlord's statutory obligations are spelled out in Nevada Revised Statutes (NRS) Chapter 118C, and nothing in this chapter describes a landlord's duty to referee disputes between tenants. Nor is there any such common law duty in Nevada's case law, and Judge Tao opined that, unless the courts wanted to step into the the realm of judicial activism, there is no way Pickett can prevail on her claims as a matter of law.

Judge Tao found problems of proof — of causation, damages, etc. — in all of Pickett's claims and urged the trial court on remand to consider his many concerns. Among them was that, in Nevada, a claim for a breach of the implied covenant of quiet enjoyment requires that the landlord's actions cause the entirety of the premises, or a substantial part thereof, to be rendered "unfit for occupancy." The issues Picket complained of did not give rise to this level of injury.

Significantly, Judge Tao also observed that the issues Pickett complained of seemed to emanate not from the landlord but from the co-tenants, so that her complaints should probably have been

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Case Notes

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brought against those co-tenants as claims for tortious interference with contract or with business advantage. However, to prove those claims under Nevada law, the co-tenants' actions could only be proven tortious by a showing of unlawful or improper means of interference (*see Crockett v. Sahara Realty Corp.*, 95 Nev, 197, 200, 591 P.2d 1135, 1137 (1979)), along with proof that the co-tenants acted with the specific intent to damage Pickett's contract, rather than out of mere "malevolent spite." S*ee Las Vegas-Tonopah-Reno Stage Lines v. Gray Line Tours*, 106 Nev. 283 (1990). Thus, those claims, too, did not appear viable, in Tao's opinion. — **Janice G. Inman**

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of product lines is available, at lower rates for some lines of coverage. "Marketplace Realities 2017," Spring Update, Willis Towers Watson. According to Marcel Ricciardelli, Senior Vice President, Environmental Division at Allied World, the low-cost, widely available coverage is due in part to the entry into the marketplace of new carriers, agents, and underwriters. "Diggin' In: A look at the Environmental Market," Property Casualty 360, Phil Gusman, Feb. 23, 2016.

Fundamentally, policies may cover future pollution conditions as well as both unknown and disclosed pre-existing conditions. In real estate parlance, Phase 1 and Phase 2 Environmental Site assessments are performed to instill sufficient underwriter confidence.

Insurance policies, of course, cover third-party claims for bodily injury, cleanup, property damage and even natural resource damages. One especially helpful aspect of insurance is its application to voluntary first-party cleanups. This enables policyholders to remove the cloud of cleanup liability even where no government agency is likely to take an enforcement action.

Insurance can also cover contractual obligations to conduct cleanup or address third-party claims, such as if a seller defaults on its cleanup obligations, or where the obligated party never had any statutory liability. This latter aspect opens the door to an especially useful redevelopment tool — liability transfer to otherwise uninvolved parties.

Conclusion

Environmental liability transfer is a growing industry where a complete outsider guarantees to conduct necessary cleanup or to indemnify against future cleanup obligations and third-party claims. Like carriers, liability transfer entities are able to take on large environmental risks both due to a deep understanding of likely loss and an economy of scale unavailable to many developers. Some providers are also remediation companies that offer their services as "sweat equity" in a project, which can further improve its viability. For the developer or user seeking to place occupants on top of former industrial ground, the complete transfer of liability to a strong guarantor can provide great certainty in moving forward on a project. With this certainty, a developer, buyer or investor can get to the crux of a Brownfield property — its economic viability. ·

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