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Law of the Land - Real Estate Litigation Newsletter

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Trending Now

Landlord/Tenant Litigation in the Retail World

Is a liquidated damages clause enforceable? Is a change of control deemed an assignment in Hawaii? Did a landlord's purported termination of lease terminate an option to purchase? Real estate attorney Cristina Addy answers these questions in the context of landlord/tenant litigation matters in the retail sphere for the National Retail Tenants Association's Legal Corner blog.

Click here to read the article.

Cases of Note

Marie Baptiste et al v. Commonwealth of Massachusetts, et al.

In July, two residential landlords, Marie Baptiste and Mitchell Matorin ("Plaintiffs"), filed suit against the Commonwealth of Massachusetts, seeking an injunction to suspend enforcement of the statewide eviction moratorium, Chapter 65 of the Acts of 2020 (the "Act"), and accompanying regulations promulgated by the Executive Office of Housing and Economic Development (the "Regulations"), arguing that the Act and Regulations are unconstitutional.

Both Baptise and Matorin served notices to quit in early March 2020, prior to the passage of the Act, and were prevented from finalizing eviction and recovering possession of their premises due to the Act. They were later joined by another plaintiff, Jonathan DaPointe, a disabled Iraq War veteran. Collectively these three small landlords are owed more than $30,000 by tenants who refuse to pay rent or leave their premises. Plaintiffs allege that enforcement of the Act and Regulations are unconstitutional because they violate their rights under the United States Constitution in five ways, specifically: (1) the Act violates the Contracts Clause in Article I, § 10, which prohibits Massachusetts and other state from passing laws that impair the obligations under contracts; (2) the Act is a taking of their property without paying just compensation as required under the Fifth Amendment; (3) the Act denies them the right to petition through accessing the courts in violation of the First Amendment; (4) the Act and Regulations violate their First Amendment right to free speech by prohibiting them from sending notices to quit or termination notices; and (5) the Regulations violate their First Amendment right to freely communicate with

their tenants, as the Act requires that any notice informing tenants of how much they owe their landlords also requires landlords to provide contact information for groups that support tenants in fighting evictions. Plaintiffs moved for a declaratory judgment and preliminary injunction on all counts, to have the Act and regulations enjoined.

Judge Mark Wolf issued a comprehensive 102-page decision on September 25, 2020, ruling that the Plaintiffs failed to show a likelihood of success on the merits on Counts 1 through 4, and therefore denying Plaintiff's request for a preliminary injunction on those counts. However, the Court did find that Plaintiffs showed a likelihood of success on the merits with respect to their First Amendment claim regarding the requirement to provide tenants with contact information for advocacy groups when communicating how much they owed in back rent. Therefore that provision of the Regulations will be injoined.

Stay tuned for additional developments on constitutional challenges to the Massachusetts and other state's eviction moratoriums in future Law of the Land newsletters.

NFLSRE 51 Sleeper, LLC v. Hopster's LLC, et al., Civ. Action No. 2084cv01522-F (Mass. Super. Ct. Aug. 12, 2020)

In a recent decision, the Massachusetts Superior Court (Brieger, J.) denied a request by landlord NFLSRE 51 Sleeper, LLC ("Landlord") to enjoin its brewery/restaurant tenant, Hopsters, LLC ("Hopsters"), from using their liquor licenses but allowed it to attach Hopsters' assets.

Hopsters signed a lease in October of 2016, and opened in January 2018. Landlord purchased the building in January 2020 and assumed the Lease with Hopsters. Like nearly every bar or restaurant in Boston, Hopsters suffered major financial losses beginning in mid-March 2020, as a result of mandatory closure and limited operation procedures put into place due to the COVID-19 pandemic. Hopsters immediately reached out to negotiate with the Landlord, but was clear it was not able to pay rent during closure. In response, Landlord refused to negotiate and by April 13, sent a notice of default with a five-day cure period. Landlord made it clear that it did not want Hopsters to remain in the space, and would "be better off renting to a bank." By April 24, Landlord purported to terminate the Lease, claimed that the Lease required Hopsters to turn over their liquor licenses, and began charging holdover rent of 200%. On May 13, Landlord attempted to block Hopsters from accessing the Premises; Hopsters employees had to call the police to gain access to the Premises. By July, Landlord filed its lawsuit seeking: (1) injunctive relief to prevent Hopsters from using their liquor licenses and (2) equitable attachment to Hopsters' assets to ensure the recovery of lost rent.

The Superior Court all but chided Landlord for its behavior, stating that the record reflected that Landlord may have engaged in conduct "that can fairly be described as oppressive, particularly in light of the Moratorium." The Court held that Landlord failed to show a likelihood of success on the merits that Hopsters improperly failed to turn over its liquor license to Landlord; that it did not prove irreparable harm; and that the balance of equities tipped in favor of Hopsters. It held that equitable considerations potentially prohibited Landlord's ability to terminate the Lease, which is a prerequisite to requiring Hopsters to hand over its liquor licenses, and furthermore, that Landlord failed to prove it was actually allowed to take possession of the licenses (pursuant to liquor

licensing rules). However the Court did hold that Landlord should be allowed to attach the liquor licenses and other property of Hopsters, so that Landlord could protect itself against economic losses.

IL Bacco Restaurant Corp., v. Andrew M. Cuomo, et al.

In late August 2020, Il Bacco Restaurant Corp. ("IL Bacco") filed a class action civil rights lawsuit against Governor Andrew M. Cuomo ("Gov. Cuomo") and Mayor Bill de Blasio, challenging executive orders curtailing New York City restaurant operations since March 2020. The lawsuit includes over 300 restaurants standing with IL Bacco, alleging that the shutdown orders have unfairly prohibited them from conducting business.by barring indoor dining and limiting their services. The Plaintiffs seek over $2 billion dollars in damages, as well as a declaratory judgment that the executive orders violate the restaurants' constitutional rights, and a preliminary injunction enjoining Cuomo from enforcing the shutdown orders or issuing any further shutdowns.

Il Bacco is in a unique position--literally--as it is located in Queens, one block or approximately 500 feet from the edge of Nassau County. Unlike Queens County, Nassau County never barred indoor dining. Il Bacco supported its position with statistics—namely infection rates in New York City versus Long Island. The complaint states that infection rates in the City are either equal to or less than rates in the immediate suburban areas of Westchester and Nassau counties, and therefore there is no data to support restricting indoor dining in New York City. Il Bacco's primary contention is that New York City and its surrounding areas are on even footing insofar as the danger of COVID-19 and, therefore, they should be on even footing in terms of the range of restaurant services offered.

The Court has yet to make a ruling on the request for declaratory judgment and injunction given how recently it was filed, but it will definitely be a case to watch especially as we are headed into cooler months and restaurants continue to struggle to survive the COVID-19 crisis.

News Alerts:

Eviction Moratorium Extensions Update – MA

On July 21, 2020, the Baker administration announced that it was exercising its emergency powers to extend certain residential and small business eviction and foreclosure restrictions contained in Chapter 65 of the Acts of 2020 for an additional 60 days beyond July 21, 2020. Absent further action, these restrictions will expire at 11:59 p.m. on October 17, 2020. Of note, the restrictions do not relieve tenants and homeowners of their obligations to pay rent and make mortgage payments.

The administration's announcement coincided with the filing of House Docket 5166/Senate Bill 2831 (An Act to Guarantee Housing Stability During the COVID-19 Emergency and Recovery), which seeks to institute a blanket eviction moratorium for 12-months beyond the end of the state of emergency that is currently in effect. There will undoubtedly be more to report on this subject in the coming months.

If you have a real estate litigation question or business concern, we invite you to reach out directly to any member of our Real Estate Litigation Group.

This advisory should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer concerning your situation and any specific legal questions you may have.