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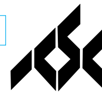

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Shopping Center Legal Update

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LEASES—CO-TENANCY
The United States District Court for the District of Connecticut granted summary judgment in favor of the tenant, allowing the tenant to pay abated monthly rent for the life of the lease after the closing of Borders. *Kleban Holding Co. v. Ann Taylor, Inc.*, No. 3:11-CV-01879 (VLB), 2013 WL 6191904 (D. Conn. Nov. 26, 2013).

This case is a good example of the need for careful lease drafting and construction. Ann Taylor leased retail premises in a shopping center in Fairfield, CT. The lease contained a co-tenancy clause containing two sections that provided:

(a) Opening: The delivery date did not occur until 80 percent of the retail area of the center was under construction and Borders and two specifically named major retailers executed leases, but the landlord was permitted to replace the other two specifically named major retailers with a suitable replacement tenant.
(b) Operating: In the event that Borders or 50 percent of the retail space, excluding the tenant, was not open and operating, the tenant was entitled to abate the rent and instead pay 5 percent of gross sales until the tenants meeting the foregoing requirements were again open and operating.

Although Borders timely opened and operated, it closed its store on May 16, 2011, in connection with its bankruptcy filing. The landlord replaced Borders with Book Warehouse, which was later replaced by a university bookstore. Two months after Borders vacated the space, Ann Taylor began paying the abated rent.

The landlord initiated the lawsuit seeking full rent under the lease. Ann Taylor contended that the lease entitled it to pay reduced rent so long as Borders did not occupy the shopping center. The landlord contended that the lease must be read to forbid Ann Taylor from continuing to pay reduced rent upon the replacement of Borders with another retailer.

The district court agreed with Ann Taylor finding that the co-tenancy unambiguously provided that Ann Taylor was permitted to pay abated rent under two conditions: (a) where Borders is not open and operating or (b) where 50 percent of the remaining retail space is not open and operating. The court further found that Borders could not be replaced by another tenant under section (a) because only the two specifically named major retailers were replaceable and the lease was silent about Borders, and that under section (b) Borders is specifically listed to mean that Borders, Inc., must be operating. In addition, even though the lease separately provided that the landlord does not warrant that any particular tenant will remain at the center, there was no conflict with the co-tenancy that provided for abated rent if the particular tenant vacated the property.

Therefore, the landlord was stuck with the abated rent because Borders went out of business.

LEASES—TAX PAYMENTS
The United States District Court for the Northern District of Illinois granted summary judgment in favor of the tenant because the landlord sought a proportionate share of taxes that included taxes paid by another tenant rather than directly by the landlord. *Payless ShoeSource, Inc. v. Dimucci Development Corp. of Cicero II*, No. 12 C 4159, 2013 WL 6069425 (N.D. Ill. Nov. 18, 2013).

Payless entered into a lease with Dimucci Development Corporation where Payless rented 4,000 square feet of space in the Cicero marketplace shopping center in Cicero, IL. In addition to rent, the lease also required Payless to pay a proportionate share of Dimucci's expenses, including real estate taxes.

Under § 7.02 of the lease, Payless was obligated to pay taxes in a proportionate share, which consisted of the space it leased divided by the gross leasable area of the shopping center (approximately 10.59 percent) and limited by a tax cap defined in the lease.

Payless paid the taxes under protest because it believed that Dimucci overcharged on the proportionate share of the taxes. Payless then filed the lawsuit, alleging that Dimucci overcharged for the pass-through expense. Dimucci claimed that it actually undercharged because it did not include the amount paid by another tenant, which paid 100 percent of the taxes on its portion instead of a proportionate share, and sought reimbursement for those taxes.

Relying on § 7.02 of the lease, Dimucci argued that Payless was required to pay its proportionate share based on the amount of space Payless leased divided by the shopping center's gross amount of floor space, regardless that another tenant paid all the taxes for all of the floor space it leased.

Based on the unambiguous provisions of the lease, the district court found that Payless was required to pay only for a proportionate share for taxes "paid by Landlord." Therefore, the taxes paid by the other tenant did not entitle the landlord to reimbursement because they were not paid by the landlord. In addition, the court found that the landlord's interpretation would be absurd:

> Were the Court to construe the Lease as Dimucci suggests, Dimucci would receive reimbursement from Payless for Taxes for which [the other tenant] had already reimbursed Dimucci. It is unfathomable that a reasonable party would enter into an agreement under which it would be required to reimburse another for costs for which the other party had already been reimbursed.

RECIPROCAL EASEMENTS

In overruling the trial court, the Indiana Court of Appeals ruled that one of the two adjoining business owners that held reciprocal easements for access to their establishments off the public highway cannot later grant use of easements to a nearby shopping center without the other's consent. *Pizza King of Elwood v. The Peniel Group, et al.*, No. 48A02-1302-PL-148, 2013 WL 6198240 (Ind. Ct. App. Nov. 27, 2013).

Easements are interpreted narrowly for the limited purpose that they are granted. A couple bought a bowling alley and the neighboring pizza restaurant. When they later divorced in 2003, the ex-wife became the owner of the pizza restaurant and the ex-husband became the owner of the bowling alley. In the deed for the bowling alley, the ex-wife conveyed "an easement for ingress and egress purposes over and along" the pizza restaurant portion of the drive.

The other side of the drive contained a strip mall. In 2004, the ex-husband signed a written agreement giving Elmwood Plaza—the owner of the strip mall—an easement along the entire drive, including the pizza restaurant's easement, for its own use. In exchange, Elmwood Plaza gave the ex-husband an easement for the bowling alley along a path that is part of the strip mall.

In 2005, Elwood Plaza sold the strip mall to Elmwood Holdings, which then enlarged the strip mall; a Dollar General store moved in, directly across the drive from the ex-wife's pizza restaurant's front entrance. Dollar General began using the pizza restaurant's easement, blocking access by the customers of the pizza restaurant and bowling alley. As a result, the ex-wife's pizza restaurant filed a complaint to prevent Elmwood Holdings and Dollar General's use of the easement, and to recover damages.

After a bench trial, the trial court determined that because the ex-wife granted the ex-husband the pizza restaurant's easement without explicitly restricting the ex-husband's ability to give it to others, his grant to Elmwood Holdings was valid. The trial court found that although the easement was valid for ingress and egress, the defendants were responsible for part of its upkeep and ordered the defendants to pay damages and to stop parking in the easement.

The Indiana court of appeals disagreed and found the grant of the easement to Elmwood Holdings to be invalid, holding that easements are limited to the purpose for which they are granted. The court found that an easement for ingress and egress confers only the right to pass over the land rather than conferring the more extensive right to partially control or alter the estate.

In interpreting the 2003 deed that granted the easement to the ex-husband, the court recognized that the deed conveyed "an easement for ingress and egress purposes only over and along" the portion of the drive owned by the pizza restaurant. The court found, based on the language that the intent was to give the ex-husband the bowling alley and a way to reach the bowling alley by passing the pizza restaurant.

The court of appeals concluded: "Because of the easement's limited purpose, [the ex-husband] did not have the authority to extend its use to Elmwood Holdings. Doing so clearly subjected [the pizza restaurant] to extra burdens."

SHOPPING CENTER DEVELOPMENT—SHAM LITIGATION

The fourth circuit court of appeals reversed the United States District Court for the District of Maryland and reinstated the lawsuit of a developer of a Gambrills shopping center to pursue its $25 million lawsuit against a union for using alleged "sham litigation" to attempt to keep the non-union supermarket chain Wegmans out of a shopping center. *Waugh Chapel South, LLC v. United Food and Commercial Workers Union Local* 27, 728 F.3d 354 (4th Cir. 2013).

The developer of commercial real estate to be used for a non-union supermarket filed suit against local unions and a labor management fund, alleging that they had orchestrated and filed 14 sham lawsuits and administrative challenges to force the developer to terminate their relation with Wegmans, in violation of the *Labor Management Relations Act* ("LMRA"). The United States district court for the district of Maryland granted the defendant unions and fund's motion to dismiss because (1) the *Noerr-Pennington* doctrine protected their First Amendment right to petition the courts and insulated their litigation activity from liability, and (2) the fund was not a labor organization under the NLRA.

The fourth U.S. circuit court of appeals agreed with the district court that the fund was not a "labor organization" under the NLRA, but concluded that the *Noerr-Pennington* doctrine, at the motion-to-dismiss stage, did not bar the claim. The court stated: "Although the courts are a medium by which citizens may exercise their First Amendment right to petition their government, the

act of petitioning those courts may not serve as the means to achieve illegal ends." The court therefore held that under the "sham litigation" exception to the *Noerr-Pennington* doctrine, the pleadings and evidence, if credited by a factfinder, would be sufficient to show that the unions abused their right to petition the courts beyond the point of constitutional protection.

When the purported sham litigation encompasses a series of legal proceeding rather than a singular legal action, the court of appeals found that the trial court should conduct a holistic evaluation on whether "the administrative and judicial processes have been abused." The fourth circuit court of appeals concluded:

> There remains a genuine issue of material fact as to whether the pattern of litigation alleged in [the] complaint derived from "a policy of starting legal proceedings without regard to the merits and for the purpose of" waging a secondary boycott. In light of the poor litigation record and the signs of bad-faith petitioning, a factfinder could reasonably conclude that the unions have abused their right to petition the courts and, as a result, have forfeited the protection of the First Amendment.

As a result of the reversal reinstating the developer's claim against the unions, on November 8, 2013, the parties entered a stipulation of dismissal, presumably because of a settlement, and dismissed with prejudice the claims asserted by the developer against the unions.

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