LANDLORD TENANT

Clarity in Second Department Regarding Commercial Lease Late Fees and Electric Charges

By Patrick McCormick

In 2010, the First Department, in dismissing a claim by commercial tenants that electric charges were unconscionable, held that the plaintiffs had failed to establish "a lack of meaningful choice, and noted that the commercial tenants were free to not rent from the defendant and go elsewhere."[1]

Thus, when I represented a commercial landlord in a non-payment proceeding against a law firm tenant earlier this year, it was unclear where a court within the Second Department — in this case, the First District Court in Nassau County — would fall on the issues of a five percent late charge and electric charges to which the tenant objected.[2] The landlord's rent demand sought $2,531.70, including a five percent late charge plus electric charges of $993.52, as well as taxes and attorneys' fees for an unrelated proceeding.

Turning first to the late charge, the tenant argued that the charge was "illegal" in that it was usurious and "does not in any way even remotely apply to damages actually sustained and is an unconscionable penalty." In response, we argued on behalf of the landlord that the late fees were not usurious, as the fees existed in connection with a commercial lease, not a loan or forbearance, nor were they unconscionable, as they were negotiated by sophisticated business people specifically for a commercial lease.

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Regarding the electric charges, the tenant argued that because it occupied only a small part of the commercial premises, the sum of $993.52, which was a fixed amount set forth in the lease, was "disproportionate" to their actual electricity consumption. The parties disagreed over whether the landlord was obligated to furnish an accounting of the actual electric usage and bills; the landlord pointed out that the tenant had paid the monthly electric charge – which the landlord did not dispute was not based on actual usage – for over a decade.

The tenant commenced an action in Nassau County Supreme Court seeking reimbursement of the "excess" electricity payments and a return of funds withheld from a security deposit as determined by a prior summary proceeding in District Court. The tenant argued that the Supreme Court had jurisdiction over the entire dispute (even that piece pending in District Court) as the tenant was seeking a declaratory judgment and equitable relief, for which the District Court lacks jurisdiction. Upon Landlord's motion, the Supreme Court dismissed the Complaint. The Supreme Court found that "[t]o the extent plaintiff claims that the electric charge is exorbitant, it is what he agreed to, and nothing more . . . The fact that a landlord may make a profit on the payments for electricity, is no defense to a tenant."[3] The court reached a similar conclusion regarding the late fee, noting that "[a]side from the fact that it constitutes a negotiated provision of a commercial lease between sophisticated parties, there [is] nothing exorbitant about such a provision calling for a 5% late fee."[4]

Ultimately, the District Court disagreed with the jurisdictional issue: "[T]his court can determine all issues in an expeditious manner," wrote Judge Fairgrieve. "The purpose of summary proceedings is to quickly resolve cases." The District Court then granted summary judgment to our client.

Citing the First Department's *Accurate Copy*, the court noted that a sophisticated party such as the law firm tenant in this case "had a meaningful choice to walk away and rent elsewhere." *Accurate Copy* had rejected an unconscionability claim on the grounds of the plaintiffs' failure to allege and prove a lack of meaningful choice, as well as claims that electric charges were illegal on the basis that the plaintiffs did not allege failure by the landlord to enforce a lease's electric charge provisions in conformance with their terms. The *Accurate Copy* court declined to upset the commercial leases at issue in that case for the "purpose of alleviating a hard or oppressive bargain." Looking to this First Department case, this District Court within the Second Department agreed.

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[1] *Accurate Copy Service of America, Inc. v. Fisk Bldg.,* 72 A.D.3d 456, 899 N.Y.S.2d 157 (1st Dep't 2010) (quotation from *Old Country Road Realty, LP v. Zisholtz & Zisholtz, LLP*, 53 Misc.3d 1203(A), 2016 WL 5396005).
[2] *Zisholtz, supra.*
[3] *Zisholtz & Zisholtz, LLP, v. Old Country Road Realty, L.P.,* Nassau County Index No. 602616-16 (Murphy, J.), entered September 13, 2016.
[4] *Id.*

Honoring Hofstra Interim Dean Hon. A. Gail Prudenti

The SCBA's Matrimonial & Family Law Committee, and the Suffolk County Matrimonial Bar Association will host a special reception honoring the Hon. A. Gail Prudenti, Executive Director of the Center for Children, Families and the Law and Interim Dean of Hofstra Law School on Thursday, Feb. 2 from 6 to 8 p.m. Interim Dean Prudenti will discuss two new pilot programs at Hofstra, which is sure to have tremendous potential for addressing family issues in an innovative and efficient manner — a mediation project and a guardianship project. The first initiative for the Center is to attempt to ease the separation and divorce condition through mediation. The second initiative involves guardianships for families caring for developmentally disabled or delayed children reaching the age of 18. Limited seating – call the Bar Center for reservations.

REAL ESTATE

Enforcing a Commercial Lease Against a Guarantor

By Andrew Lieb

Landlords cannot sue a guarantor in a Summary Proceeding because there is "no relationship of landlord and tenant … [where guarantor] was not a primary or joint obligor but assumed a secondary liability which accrued only upon default by the principal." *See Marburt Holding Corp. v. Picto Corp.,* (1st Dept., 1958). Therefore, to enforce a guarantee, a landlord must pursue a Plenary Action against the guarantor following the conclusion of the Summary Proceeding. Nonetheless, landlords need not fret about the difficulty and cost incident to instituting a Plenary Action against a guarantor because landlords can proceed pursuant to CPLR §3213 and utilize the Doctrine of Collateral Estoppel in order to avoid the protracted litigation that is typical of a Plenary Action.

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CPLR §3213 provides, *inter alia*, that "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." In fact, an unconditional guaranty is an instrument for the payment of "money only" within the meaning of CPLR §3213 and "may be the proper subject of a motion for summary judgment in lieu of complaint whether or not it recites a sum certain." *See Manufacturers Hanover Trust Co. v. Green,* (1st Dept., 1983). Consequently, a landlord can avoid the discovery stage, conference stage and trial stage of a Plenary Action by commencing suit by way of bringing a motion for summary judgment in lieu of complaint.

Furthermore, a guarantor's defenses to a summary judgment in lieu of complaint are greatly limited because such guarantor is in privity with the tenant. *See APF 286 Mad LLC v. Chittur & Associates P.C.,* 132 AD3d 610 (1st Dept., 2015). As a result, "the interests of the nonparty [guarantor] can be said to have been represented in the prior proceeding." *See Green v. Santa Fe Industries, Inc.,* 70 NY2d 244 (1987). Therefore, the Doctrine of Collateral Estoppel precludes relitigating the issue of whether the landlord is due damages incident to the lease. In fact, the Court of Appeals has explained that "[g]enerally, a nonparty to a prior litigation may be collateral-

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Trusts And Estates Update

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Accordingly, in light of the circumstances, the court denied the objectant's motion, without prejudice to renewal, should facts emerge that would shift the balance in favor of disqualification.

***In re Christopher,* NYLJ, Aug. 18, 2016, at p. 22 (Sur. Ct. New York County)(Anderson, S.)**

Timing of Motion for Summary Judgment

In *In re Rella,* the issue before the court was the timeliness of a motion for summary judgment, which had been made after the filing of a note of issue. The court observed that a motion for summary judgment must be made within 120 days after the filing of a note of issue, unless the court establishes a different deadline, or it is authorized by the court for good cause shown. The court opined that in order to establish good cause, the movant cannot simply rely on the merits of the motion or the absence of prejudice to the adversary, but also must proffer a satisfactory explanation for the untimeliness. Within this context, the court found that the movant had failed to establish good cause for the delay in filing his motion, particularly in view of the fact that the note of issue was filed in 2005, and he had to defend the timeliness of a prior motion for summary judgment. Moreover, the court noted that absent a showing of newly discovered evidence or other sufficient cause, the practice of successive summary judgment motions in the same case is to be strongly discouraged. Finally, the court noted that a denial of a summary judgment as unjustifiably late does not result in a forfeiture of the movant's position on the merits. Accordingly, the motion was dismissed.

***In re* Rella, NYLJ, Nov. 4, 2016, at p. 36 (Sur. Ct. New York County).**

Summary Judgment and joint bank account

In *In re Asch,* the court denied the petitioner's motion for summary judgment determining that she was entitled to 50 percent of a bank account titled in the joint name of the decedent and the respondent. The court found that the survivorship language on the bank documents triggered the statutory presumption that the account was a joint account with right of survivorship. Nevertheless, the court opined that the presumption could be rebutted by direct proof that no joint account was intended, or substantial circumstantial proof that the joint account was opened for convenience only. Further, the court noted that the validity of a joint account might be attacked for fraud, undue influence or lack of capacity, with the burden of proof resting on the party asserting such claims.

After reviewing the various factors to be considered in determining whether an account was opened for convenience, the court found that the petitioner had failed to support her contentions with documentary proof or testimony from a person with first-hand knowledge as to the circumstances surrounding the creation of the account. In reaching this result, the court found it significant that no proof had been offered as to how the respondent treated the subject account during the decedent's lifetime, or how, if at all, she characterized her interest in the account on her tax returns. As such, the court held that the petitioner had failed to submit the requisite proof to rebut the presumption that the account was a validly created joint account.

However, as to petitioner's claims of lack of capacity and undue influence, the court found, upon consideration of the medical records, and the disparity in the decedent's mental capacity at or about the time the subject account was created, an issue of fact as to whether the decedent had the capacity to convert the account in question into a joint survivorship account.

***In re* Asch, NYLJ, Sept. 28, 2016, at p. 28 (Sur. Ct. Richmond County).**

Note: Ilene S. Cooper is a partner with the law firm of Farrell Fritz, P.C. where she concentrates in the field of trusts and estates. In addition, she is past-Chair of the New York State Bar Association Trusts and Estates Law Section, and a past-President of the Suffolk County Bar Association.

Disclosure of Protected Health Information: It's Not All About HIPAA

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deceptive acts or practices in or affecting commerce. People often think of the FTC Act in terms of retail advertising or signs in brick-and-mortar stores, but it applies to the protection of health information as well. Just as retailers cannot mislead consumers about prices and products, healthcare providers and related entities must actively ensure that they are not misleading patients about where their personal information is going.

Covered entities and business associates are cautioned to go beyond the HIPAA authorization and consider all of their disclosures to consumers in context. Does the authorization refer to the disclosure of protected health information to an insurance company, while a page of a new patient packet says the information is going to the referring physician?

Another recommended practice is to put all key information up front. Be mindful that consumers may view your disclosures on devices including cell phones and iPads. A patient shouldn't have to scroll through 25 paragraphs on a small screen or navigate through five windows to find out where you're proposing to send their health information.

Covered entities and business associates should also conduct a review of their marketing materials to be sure that certain disclosures aren't being confusingly conveyed more prominently than others. Font choices, colors, images, and size all matter.

When it comes to advising consumers about disclosure of their protected health information, being crystal clear should always be the game plan.

Note: William McDonald, Esq. chairs the Healthcare department at Campolo, Middleton & McCormick, LLP, in Ronkonkoma and Bridgehampton. Bill's healthcare practice spans transactional and litigation work. He advises clients on myriad issues in the healthcare space including compliance with Stark, anti-kickback, and corporate practice of medicine statutes, consolidation of medical practices, investigations and proceedings before state and federal agencies, HIPAA and privacy compliance, and FDA enforcement actions. Contact Bill at wmcdonald@cmmllp.com.

Enforcing a Commercial Lease

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ly estopped by a determination in that litigation by having a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation." *See D'Arata v. New York Cent. Mut. Fire Ins. Co.,* 76 NY2d 659 (1990). In effect, the Doctrine of Collateral Estoppel transforms an undetermined obligation to pay into a sum certain by way of the prior Summary Proceeding's judgement or So Ordered stipulation of settlement, which, in turn, permits the utilizing of CPLR §3213.

Because of the Doctrine of Collateral Estoppel the only defenses available to a guarantor in opposing the summary judgment in lieu of complaint concern the validity of the guarantee agreement itself and not the underlying debt for rent, additional rent, attorneys' fees costs and the like. In fact, additional provisions in a guarantee referring to the guarantor's assumption of the tenant's obligations in a lease do not prevent summary judgment unless a guarantee has required "additional performance as a condition precedent to repayment, or otherwise alter the [guarantor's] promise of payment," which rarely is the case. *See Juste v. Niewdach*, 26 AD3d 416 (2d Dept., 2006). So, unless a guarantee adds conditions precedent to the enforcement of the lease as against the guarantor, no substantive defenses are available to the summary judgment motion in the Plenary Action.

In all, a cursory reading of the case law and relevant statutes may wrongfully embolden a guarantor in settlement negotiations to argue that their obligation is remote, but such guarantor should undertake a careful review of applicable precedent in order to avoid taking this erroneous position and undermining their credibility.

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Lieb is a past Co-chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property in The Suffolk Lawyer for several years.