LJN LAW JOURNAL NEWSLETTERS

Commercial Leasing LAW & STRATEGY®

An ALM Publication

Volume 31, Number 1 • July 2018

How the Tax Cuts And Jobs Act Affects Real Estate

Part One of a Two-Part Article

By Peter M. Fass

On Dec. 22, 2017, President Donald Trump signed the Tax Cuts and Jobs Act (Tax Act) (Pub. L. No: 115-97) (http://bit.ly/2Fm7o2K). This is the most sweeping change to the U.S. federal income tax laws since 1986. This and future articles will discuss the individual tax and business tax provisions that affect real estate investment and investors in real estate.

Corporate Tax Rates

The Tax Act changes the corporate tax rate from a graduated scale with a 35% maximum rate to a flat 21% corporate rate and repeals the corporate alternative minimum tax (AMT), effective for tax years beginning on Jan. 1, 2018. While most real estate businesses are organized as pass-throughs, large corporate real estate operating companies benefit greatly from this provision alone. Unlike many of the provisions of the Tax Act, the rate reduction is permanent.

Individual Tax Rates

The Tax Act reduced the top individual tax rate from 39.6% to 37%, effective Jan. 1, 2018 (there are some adjustments to the brackets as well). There are no changes to the current 20% maximum rate for net long-term

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Thinking Outside of the Big-Box: Understanding License Agreements

By Kelly D. Stohs and David P. Vallas

There is no denying that online shopping and changes in consumer spending habits have had a profound impact on brick-and-mortar shopping centers. Rapid advances in technology have changed how and where consumers shop, how they spend their money, and how they spend their time. The impact is evident to anyone who has visited a shopping mall in the last couple of years. For the past half-century, retail giants have been steadfast anchor tenants, driving foot traffic and sales at shopping centers. Amid the current so-called retail apocalypse, an unprecedented number of classic anchor tenants are now gating their big-box entrances and going dark. More than 20 retail chains have filed for bankruptcy in recent times, and others are liquidating, falling like dominoes.

Although permanent anchor and inline tenants are the backbone of a successful shopping center and are critical to a property's stability and ability to attract and retain institutional investors, versatility and flexibility are becoming more and more important. The International Conference of Shopping Centers (ICSC) has recently published a comprehensive analysis of the current retail environment in a report titled, "Envision 2020" (http://bit.ly/2LPYz3z). The ICSC distills various innovative themes in this report that are guiding retail real estate to a brighter future. One critical component to the successful evolution of a shopping center is creating a stronger connection with community through attractions, events and promotions that bring a fresh vibrancy to the centers. Many shopping centers are hosting community events, such as concerts, art shows or other performances, and forming partnerships with community organizations featuring activities such as yoga classes, health fairs or traveling expositions. These specialty relationships and other short-term relationships are generally memorialized in a license agreement rather than a traditional lease.

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License Agreements Help Achieve Versatility

License agreements are typically used for shared-space, shorter term arrangements or temporary occupancy. They are commonly used for kiosks, carts or RMUs (retail merchandising units), seasonal promotions, pop-up leasing and other specialty leasing arrangements. Shopping center owners also typically use license agreements to memorialize advertising and marketing deals, such as digital media, sponsorships, specialty or seasonal promotions, or vendors or businesses hosting events within a shopping center.

From a legal perspective, the distinction between a license agreement and a lease is significant. A lease conveys an interest in the real property, granting the tenant the exclusive possession and control of a specific, demised premises for a defined period of time. The right to occupy the premises to the exclusion of others is perhaps the most defining feature of a leasehold interest. In contrast, a license only grants temporary permission, or privilege, to access the shopping center for a limited purpose, and typically for a shorter duration than a lease. A license does not convey an interest in the real property, and the licensor (the shopping center owner) retains some degree of possession and control of the space. For instance, a lease defines the extent and bounds of the demised property, whereas a license agreement may provide that the licensor may, at its discretion, relocate licensee to another location in the shopping center.

Most significantly, a typical license may be revoked or terminated by the shopping center, at will, and without cause. A termination clause allowing the licensor to cancel, revoke, or terminate the agreement, without cause, is strongly indicative that the agreement is a license, whereas a lease is typically terminable only upon some specific events.

Because a license allows a shopping center to retain possession and control and terminate the agreement at any time, license agreements are a helpful tool when a shopping center owner wishes to have more flexibility.

License or Lease?

Many shopping center owners routinely use license agreements to memorialize any short-term occupancy of space, but they should be cautious to understand the true nature of the arrangement based on the underlying rights granted. Just because an agreement is titled a "lease" or a "license agreement" does not necessarily make it so. Likewise, the characterization of the parties as landlord and tenant or licensor and licensee, or other technical language in the agreement, may not be dispositive. Courts across the country typically look beyond the naming of the document and how the parties' roles are referred to, and more closely examine the rights and obligations of the parties to determine whether the agreement is a license or a lease.

The distinction is an important one. Because a lease is a conveyance of a property right, while a license does not convey any real property interest, there are different legal rights attached to each one. For instance, a leasehold interest may be subject to taxation, while a license might not be. A lease may be assumed or rejected in bankruptcy, while a license may not be. A lease

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Commercial Leasing
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Commercial Leasing Law & Strategy® (ISSN 0898-5634) is published by Law Journal Newsletters, a division of ALM.

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Editorial e-mail: ssalkin@alm.com
Circulation e-mail: customercare@alm.com
Reprints: www.almreprints.com

Commercial Leasing Law & Strategy P0000-227
Periodicals Postage Pending at Philadelphia, PA
POSTMASTER: Send address changes to:
ALM
120 Broadway, New York, NY 10271

Published Monthly by:
Law Journal Newsletters
1617 JFK Boulevard, Suite 1750, Philadelphia, PA 19103
www.ljnonline.com

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Trump Administration Bars SBA Loans to Cannabis Industry Support Businesses

By Steven Schain

In a policy notice effective April 3, the U.S. Small Business Administration (SBA) updated its standard operating procedures (SOP) to prohibit providing loans to both marijuana- and hemp-related businesses and businesses deriving any gross revenue from sales to marijuana-related businesses (MRBs), including those providing lighting, hydroponic equipment or testing services *See*, SBA Policy Notice, "Revised Guidance on Credit Elsewhere and Other Provisions in SOP 50 10 5(J)," No. 5000-17057 (http://bit.ly/2LOJJtX).

Beyond failing to define what a hemp-related business is and despite being nearly impossible to implement, the SBA Policy Notice will derail hundreds of cannabis-supporting businesses and defeat the SBA's core objective of providing financing opportunities to those precluded from attaining mainstream financing, including minorities and veterans. Further, although the SOP already bars leasing space to a tenant engaged in any activity violative of federal, state or local law (because SBA loan payments may be deemed as "derived from illegal activity," thereby subjecting the loan collateral to seizure), the SBA policy notice prohibits a borrower from leasing space to a direct marijuana business, indirect marijuana business or hemp-related business during an SBA-guaranteed loan's life. *See*, Leasing Part of a Building Acquired with Loan Proceeds (13 CFR Section 120.131). Chapter 2, Paragraph V.F.1.g (page 131). Therefore, landlords and their advisers need to understand what the SBA's updated SOP means, and to whom it applies.

The Small Business Loan

When seeking an SBA loan, the borrower is actually applying for a commercial loan structured pursuant to SBA requirements through an SBA-authorized lender. While not directly making the loan, the SBA provides a guarantee to the lending bank to repay a portion of the loan proceeds if the borrower defaults. By alleviating risks associated with lending to those falling short of traditional loan underwriting criteria, SBA loans provide financing opportunities to thousands of entrepreneurs, startups, growing businesses, minorities and veterans incapable of attaining mainstream financing.

In 2014, the SBA's flagship 7(a) loan program (the proceeds of which may be used for working capital, equipment purchases and refinance existing debt) approved 52,044 loans encompassing nearly $20 billion of loaned funds.

Financing Woes

Few industries more greatly fail to satisfy "traditional lending criteria," and more desperately need SBA loans, than legalized marijuana and industrial hemp.

First, because it is 100% violative of federal law, for "plant touching" MRBs obtaining a loan from a federally charted bank or credit union is almost impossible. Specifically, because the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. Sections 801, *et. seq.* (1970) (CSA) prohibits "manufacture, distribution and dispensation" and any transfer or deposit of monies yielded from cannabis sale may be deemed "money laundering" in violation of the Currency and Foreign Transactions Reporting Act, 31 U.S.C. Section 5311-5330, most banks and credit unions refuse to provide marijuana growers, processors or dispensers with financial services.

Second, even if able to traverse the CSA obstacle, most MRBs and hemp concerns lack sufficient assets to secure a loan. While all forms of security are subjective, like every other business a plant-touching MRBs worth can be best anchored by the value of its appraisable assets.

Liquid assets and cash flow are the easiest to value. How much cash does the MRB have in the bank and what other capitalization does it possess (*e.g.*, investments, lines of credit, loans, etc.)?

A leading valuation indicator is the MRBs "cash flow analysis," *i.e.*, an examination of its cash inflows and outflows during a specific period beginning with a starting balance and generating an ending balance after accounting for all cash receipts and expenses paid during the period. However, because most plant-touching MRBs are not particularly cash rich, well-funded, or capable of producing reliable historical cash flow information, liquidity is often lacking and any "cash flow analysis" will be based on "projected performance" rendering it more of an "estimation" than a "valuation."

Ownership of real estate and hard, transferable production assets is also used to secure a loan to plant-touching MRB. For example, having the deed to, and equity in, real estate used to grow, process and sell marijuana both helps define and enhance an MRB's value. Beyond commercial real estate's sheer worth, any parcel that is "built out" and correctly zoned for and capable of marijuana production and sales is distinctive, desirable and highly valued.

Another tangible asset is the value of the license based on the existing/estimated market. For example, Pennsylvania's Medical Marijuana Act authorizes 25 grow/processor licenses, and 50 dispensary licenses to serve its 12.8 million residents. Because estimates indicate that if only 1% of its population obtains medical marijuana cards, Pennsylvania's market will yield between $100 and $150 million annually — each licensee may be presumably valued

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Cannabis

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as a proportional fraction of this sum.

Further, as they may be grandfathered into, or receive most-favored-nations status regarding, adult-use licensure, medical marijuana licenses may have a secondary or dormant value in developing markets.

Intellectual property, ranging from branding, to ownership of a proprietary strain, to innovative cultivation or extraction methodologies, also may secure an MRB's loan. For example, some dispensaries lock up exclusivity to sell celebrity strains such as Marley Natural (promoting itself as the "official Bob Marley" cannabis brand) or Charlotte's Web (reputed to being particularly successful in treating seizures).

Breakdown of SBA Policy Notice

The SBA Policy Notice amends "SOP 50 10 5(J), Lender and Development Company Loan Programs," which became effective on Jan. 1, 2018, and provides that businesses engaged in any activity that is illegal under federal, state or local law are ineligible for SBA financial assistance.

The SBA Policy Notice provides that because the CSA prohibits marijuana's sale and distribution, financial transactions involving an MRB "would generally involve funds derived from illegal activity," and businesses deriving revenue from marijuana-related activities or that support marijuana's end-use" are also SBA financial assistance ineligible.

Specifically, the SBA Policy Notice provides that "business's specific operations" determines "SBA financial assistance eligibility" and deems "direct marijuana business," "indirect marijuana business" and "hemp-related business" as ineligible.

"Direct marijuana business" is defined as a business growing, producing, processing, distributing, or selling the marijuana flower, products, edibles or derivatives, regardless of the amount of such activity, whether for personal or medical use, or whether such business is legal under the loan applicant's state or local law.

"Indirect marijuana business" is defined as one deriving any of its existing or projected gross revenue from sales to direct marijuana businesses of products or services that could reasonably be determined to support marijuana's "use, growth, enhancement or other development," including testing services, grow lights or hydroponic equipment.

A person or entity engaged in a "hemp-related business" is defined as a grower, producer, processor, distributor or seller of products made from hemp, unless the loan applicant can demonstrate that "its business activities and products are legal under federal and state law."

SBA Policy Notice's Impact

Nearly impossible to implement, and derailing to hundreds of indirect marijuana businesses, the policy notice defeats the SBA's core objective to provide financing opportunities to those precluded from attaining mainstream financing.

First, although banning lending to hemp growers, processors or sellers unless the borrower can demonstrate the legality of its business and products, the SBA Policy Notice ignores the fact that hemp is already 100% legal under Section 7606 of the Agricultural Act of 2014 (Farm Bill). Specifically, the Farm Bill defines "industrial hemp" as a variety of cannabis sativa L. containing less than 0.3% THC that is legal to cultivate, transport, process, sell and use. Section 7606 pre-empts both the CSA and Drug Enforcement Agency's authority and confirms that where the Farm Bill applies, it supersedes or overrides any conflict with the CSA, as in *Hemp Industries Association v. Drug Enforcement Agency*, Case No. 17-70162 (9th Circuit April 30).

In enacting the Farm Bill, Congress' intent was to confirm that industrial hemp, or cannabinoids derived from industrial hemp, are not to be treated as controlled substances. See, amicus brief of members of U.S. Congress in support of petitioners with consent of all parties at 3, 26.

Contrary to how controlled substances are treated, the Farm Bill sought to specifically allow for many industrial hemp activities, including product development, exploring hemp-derived cannabinoids products' economic impact, and creating a retail marketplace. Further, not only does the CSA not prohibit the entire cannabis plant, it's "marijuana" definition only includes certain plant portions and excludes "industrial hemp" pursuant to the Farm Bill, and the exempted stalk, stem, fiber and nonviable seeds of the plant, which are still lawful even if containing naturally occurring cannabinoids such as THC.

Second, hundreds of businesses presently providing goods and services to MRBs in robust legalized marijuana states will be decimated regardless of what portion of their enterprise supports cannabis. For example, in states where marijuana is a substantial part of the economy, — Colorado, Washington, California and Nevada — many otherwise legal businesses may now be SBA-loan ineligible because they derive direct marijuana business revenue. Thus, a garden supply company selling bagged dirt, hydroponic equipment, potting supplies, fertilizer or grow lights primarily to garden and home centers and MRBs will get defrocked. Similarly, contractors, architects or engineers that help build a grow facility, or online marketing and website development services that market MRBs, are now rendered financially distressed due to SBA loan ineligibility.

Beyond imperiling prospective and existing businesses, because legalized marijuana programs seek to empower and provide licensure to minority- and veteran-owned enterprises (who are also among those who may not meet traditional loan underwriting criteria), the SBA policy notice will impair those whom the SBA is tasked with assisting.

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Tax Act

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capital gains (including qualified dividend income) and the 25% rate applicable to unrecaptured gain under §1250 of the Internal Revenue Code (Code) as well as the 28% rate on 28% rate gain. The 3.8% surtax on net investment income is also retained under the Tax Act.

The benefit of the reduction in rates has a cost, including the elimination of or limiting certain deductions and increasing the standard deduction. In states that impose a high income tax rate, one of the costliest limitations is the $10,000 cap on the itemized deduction of state and local income and property taxes. Apartment owners may benefit from the changes that no longer favor home ownership over renting because the deduction for mortgage interest was lowered, which is offset by the higher standard deduction. Moreover, in areas of high property taxes, rental apartments may be more attractive because of the $10,000 limit on the deduction of property taxes. However, property taxes that are incurred in the operation of a real estate business are not affected by this limitation.

The reduction in individual tax rates and the cap on the state and local tax deduction expire after Dec. 31, 2025.

The Tax Act retains the individual AMT, but increases the individual AMT exemption amount to $109,400 for married taxpayers ($70,300 for single taxpayers) from $84,500/$54,300 under prior law, and increases the AMT exemption phase-out to $1,000,000 (joint filers) and $500,000 (all other taxpayers) from $160,900 and $120,700, respectively.

Pass-Through Business Deduction (I.R.C. §199A)

Subject to limitations discussed below, the Tax Act provides for a maximum effective tax rate of 29.6% on an individual's domestic qualified business income (QBI) from a partnership, S corporation, or sole proprietorship. The reduced maximum rate arises from a 20% deduction ((100% – 20%) x 37% top individual marginal rate = 29.6%). Qualified business losses carry forward to the next tax year and reduce the amount of QBI included in determining the amount of the deduction for that year. The deductible amount is computed separately for each qualified trade or business and the amount of a particular qualifying trade or business may be negative (*i.e.*, a loss sustained).

QBI is net income and gain arising from a qualified trade or business. A qualified trade or business is generally any business other than certain service businesses, (Specified Service Trades or Businesses). Since most Specified Service Trades or Businesses do not include traditional real estate businesses, a qualified business should include a trade or business of the renting of real property and real estate development. Accordingly, rental income and ordinary income from real estate development should be subject to the new maximum 29.6% rate. However, rental income from the triple-net leasing of real estate is not generally considered a trade or business and is likely not entitled to the 29.6% pass-through rate, unless the real estate is held through a real estate investment trust (REIT).

QBI must be income that would be treated as effectively connected with a U.S. trade or business if earned by a non-U.S. person, and does not include certain forms of investment income (*e.g.*, capital gain, most dividends, and interest that is not allocable to a qualified trade or business). Thus, real estate rental income will qualify for the 29.6% rate; long-term capital gain income will continue to be taxable at 20%, and short-term capital gain will now be taxable at the maximum 37% individual rate.

The deduction for QBI is effective for taxable years beginning after Dec. 31, 2017 and sunsets after Dec. 31, 2025.

The amount of the deduction available to a taxpayer from a partnership, S corporation or sole proprietorship cannot exceed the greater of: 1) 50% of the taxpayer's share of the W-2 wages paid with respect to the qualified trade or business; or 2) the sum of 25% of the W-2 wages with respect to the qualified trade or business plus 2.5% of the unadjusted basis, immediately after acquisition, of all qualified property. Qualified property is defined as depreciable tangible property that is held by and available for use in a qualified trade or business at the close of the taxable year and is used in the production of QBI for the period beginning on the date the property is first placed in service by the taxpayer and ending on the later of: 1) the date 10 years after that date; or 2) the last day of the last full year of the applicable recovery period that will apply to the property under Code §168 (without regard to Code §168(g)). This period is the depreciable period.

Note that the W-2 wage/qualified property limitation will not apply to individuals with taxable incomes at or below $315,000 for married individuals filing jointly or $157,000 for single individuals, but phases-in completely over the next $100,000 or $50,000, as applicable, of taxable income. QBI earned through a publicly traded limited partnership (MLP) and otherwise eligible for the deduction, as well as REIT dividends, also will not be subject to the limitation.

By limiting the deduction in a manner that is connected to a pass-through entity's payment of W-2 wages and its acquisition of depreciable business assets, the Tax Act creates incentives for pass-through entities to hire employees and/or to purchase new business property as illustrated by the following example. Assume Partner A's share of the AB partnership's 2018 QBI is $1 million. The AB partnership pays wages of $600,000 in 2018 ($300,000

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Tax Act

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of which is allocable to A as a 50% partner) and owned qualified property with an unadjusted basis immediately after acquisition of $400,000 ($200,000 of which is allocable to A). In the example, A's deduction is limited to the lesser of $200,000 (20% of QBI allocated to A)), or the greater of 1) $150,000 (50% of W-2 wages allocated to A) or 2) $80,000, which is the sum of $75,000 (25% of the $300,000 of W-2 wages allocated to A) plus $5,000 (2.5% of the $200,000 of unadjusted basis of qualified property allocated to A). A's deduction is limited to $150,000, even though A's QBI was $200,000. Under the Tax Act, A pays federal income tax on only $850,000 of the $1 million of AB partnership income allocated to A. Under prior law, A would have paid tax on the entire $1 million of income allocated to A.

The 25% of the W-2 wages plus 2.5% of unadjusted basis test is beneficial to the owners of a pass-through business with no employees that is engaged in a qualified trade or business which can benefit from the deduction (and the 29.6% effective rate) with respect to its investments in depreciable tangible property. To illustrate, a taxpayer (T) with a $1,000,000 qualified property investment is eligible for a deduction of up to $25,000 (2.5% of $1,000,000). If T earned a 12.5% return on its capital investment, resulting in qualified business income of $125,000 (12.5% x $1,000,000), T could deduct 20% of the entire return (20% x $125,000 = $25,000) without exceeding the cap, thereby being taxed at a maximum effective rate of 29.6% on the $125,000.

In next month's issue of *Commercial Leasing Law & Strategy*, the author continues with his analysis of the new tax law and its effects on real estate practice.

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License Agreement

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may be subject to state landlord-tenant laws that may not apply to licenses. Moreover, where an occupant purports to assign, sublease, or otherwise transfer its interest to another, the validity of such transfer may be enforceable so long as the terms of a lease permit it, but is not enforceable if the agreement is only a license.

To determine the intent of the parties, the courts consider various factors, including, among other things, whether the possession granted was exclusive, the degree of control retained or exercised by the shopping center owner, and whether the agreement was terminable at will. Several cases offer some guidance.

In *In re Hyman Companies, Inc.*, 440 B.R. 390 (E.D. Penn. 2010), the tenant, a Chapter 11 bankruptcy debtor, sought to assume a "concession agreement" providing for the location of its retail sales kiosk in a hotel lobby. Applying Massachusetts law, the court held that the concession agreement was a lease because it included terms and limitations that were typical of leases for retail stores. The concession agreement provided that space was being leased, used the words "rent" or "rental" repeatedly, and referred to the premises being "reletted" and to one party as "tenant." The court further noted that the hotel operator did not refer to the concession agreement as a license until after litigation concerning the validity of the purported termination had already commenced, but instead referred to it as a lease.

In *Stevens v. Rosewell*, 523 N.E.2d 1098 (Ill. App. 1988), the owner and operator of a McDonald's restaurant located on a community college campus brought a declaratory judgment action against county officials seeking to enjoin the collection of back real estate taxes. Although the agreement itself stated that it was a license and not a lease, the appellate court found that it was a lease because the agreement was for a fixed term, at a fixed rent, there was a fixed location, and McDonald's had exclusive control of the kitchen facilities.

The case of *Z. Justin Management Co., Inc. v. Metro Outdoor, LLC*, 137 A.D.3d 577 (2016), involved a purported wrongful assignment of an outdoor advertising agreement between the plaintiff and advertiser. The plaintiff asserted that despite the title of the agreement as a "Sublease," it was actually a license agreement, which is not assignable as a matter of law. The Supreme Court of New York held that the advertising agreement was a lease, based upon language in the agreement that the property was granted exclusively to the advertiser and the agreement was not revocable at will. Likewise, in *Soltesz v. Rushmore Plaza Civic Center*, 863 F. Supp. 2d 861 (W.D. S.D. 2012), a District Court in Wisconsin held that a business owner's contract with a city to operate a pizza concession at the civic center was not a license, but was a lease, and therefore was subject to statutory eviction procedures. The court based its determination on language in the agreement that granted the property to the pizza concessionaire for its use for a five-year term and required that the concessionaire surrender the property back to the city in the same condition in which it was received.

In contrast, the Illinois Supreme court in *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill.2d 281 (Ill. 2010), considered whether a taxpayer's concession permit with the city park district that allowed the taxpayer to use certain portions of the city park to operate a food concession service was a lease or license, as the applicable tax code authorized a tax assessment on a leasehold interest in tax-exempt property, but not licensed property. The Supreme Court of Illinois held that the taxpayer's agreement with the city to use the park was a license, not a lease, and that the interest was therefore not taxable. The

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CASE NOTES

Bifurcation Is Not the Answer

A trial court erred in failing to transfer a commercial lease dispute to a new court after the defendant counterclaimed for an amount exceeding the court's jurisdiction. *New Asian Super Mkt. v. Jiahe Weng*, 2018 Ohio App. LEXIS 1354 (Court of Appeals of Ohio, Tenth Appellate District, Franklin County, 3/30/18).

Landlord New Asian Super Market sought restitution of a premises leased to tenants Jiahe Weng and Magnificent, LLC, by filing in Ohio's Franklin County Municipal Court alleging breach of the lease agreement. The tenants answered, and counterclaimed seeking damages that exceeded the court's jurisdictional limitation. To address the complication brought on by the counterclaim's amount in controversy, the magistrate bifurcated the case, ruling only on the landlord's claim and not on the counterclaim. The result was a recommendation for restitution, which the Franklin County Municipal Court adopted in full. The tenants appealed.

The appeals court determined that the bifurcation was made in error because the claims of landlord and tenants were intertwined, and they were capable of being heard in another court. Specifically, the tenants admitted that they had paid only one month's rent over the long period of time that they held possession of the premises, but they also claimed that the landlord had excused them from paying rent for various reasons, that they had been depositing the back rent into an escrow account, and that they had invested more than $400,000 in order to convert the property from a grocery store into a restaurant. They asserted that if they were forced to vacate the premises and later seek restitution in a second action, they would be irreparably harmed by the loss of their efforts, their business and their business reputation. Based on this set of circumstances, and on the fact that the claims and counterclaims could have been transferred in their entirety to the Franklin County Court of Common Pleas, which had no amount-in-controversy issues, the appeals court reversed and remanded with instructions for the trial court to transfer the action to the Franklin County Court of Common Pleas.

Zoning Board's Variance Not Extinguished Despite Lack of Standing

Pennsylvania's Commonwealth Court recently determined that a variance granted by the city of Philadelphia's Zoning Board of Adjustment (ZBA) should not be extinguished even though an objecter claimed the corporate entity that sought to develop the property in question lacked standing to petition for the variance, because the opposition could have objected to the petition on the issue of standing at the time of the hearing but did not do so. *Liberties Lofts v. Zoning Board of Adjustment*, 2018 Pa. Commw. LEXIS 106 (April 2).

RLDL Spruce LLC and Hightop Brown are two entities owned by the same single member. RLDL entered into an agreement to purchase a single-story building in a Philadelphia neighborhood known as Northern Liberties. The property purchaser wanted to build a mixed-use building on the property — a five story, 26-unit residential building with commercial space and a garage — that did not conform to the zoning of the neighborhood. Hightop, not official purchaser RLDL, applied for a zoning permit from the City of Philadelphia's Department of Licenses and Inspections (L&I) to demolish the existing building and replace it with the mixed-use building. When the permit was denied, Hightop appealed to the ZBA, which granted the variance needed to move the project forward. Neighboring property owner Liberties Lofts had opposed the development proposal in the variance hearing but did not challenge Hightop's standing to seek the variance there, even though the issue of standing was discussed before the ZBA. Liberties lofts appealed to the Philadelphia County Court of Common Pleas, which declined to set aside the ZBA's decision because Liberties Lofts had failed to raise the standing issue during the ZBA proceedings.

On further appeal, Liberties Lofts pointed out that the Philadelphia Zoning Code, Section 14-303(1)(c), states that a zoning permit application "may only be filed by a department or agency of the city or the property owner, except as provided in Section 14-303(1)(c) (equitable owners, authorized agents and conservators)" and Section 14-303(1)(c)(1) states that "[a]ny person or entity with written documentation of equitable ownership of that real property" may file a zoning permit application. Because RLDL was the real owner of the property, and Hightop did not present any written documentation to show that it was the equitable owner or authorized agent of RLDL, Liberties Lofts claimed that Hightop lacked the authority to file the zoning permit application or to appeal its denial to the ZBA, and therefore the ZBA's grant of the zoning variance must be deemed void ab initio.

Liberties Lofts further argued that Hightop was like the appellant in the Supreme Court of Pennsylvania's *Scott v. Zoning Board of Adjustment*, 126 A.3d 938 (Pa. 2015), a case in which an objector to a zoning variance who did not have a substantial, direct and immediate interest in the zoning matter in question was held not to have standing to appeal a ZBA decision.

The argument that the challenge to the objector's standing was untimely failed because the ZBA allows anyone — interested or not — to take part in any proceedings before it. Many people might be present at such proceedings, and it would be impossible for the people personally interested in a matter to ascertain whether each of them was a properly aggrieved person

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in the ZBA forum. Thus, as the court observed in *Scott*, "[T]he first time the applicant could challenge the objector's standing to appeal in this case was when the objector took the appeal to the trial court." The applicant's challenge to the objector's standing upon appeal, and not earlier at the ZBA proceedings, was therefore timely in the *Scott* case. In the present case, however, there was no reason Liberty Lofts could not have raised the issue of Hightop's standing in the ZBA proceeding, as Hightop's status as equitable owner of the subject property could certainly have been raised at that time. Consequently, Liberties Lofts' objection at the appellate court level to Hightop's filing of an appeal to the ZBA was untimely.

Delay Tactics Cost Tenant $24 Million

A Manhattan landlord has been awarded $24 million after a New York state judge found the restaurateur lessee dragged the legal proceedings out over 16 months by changing lawyers five times and filing for bankruptcy more than once.

The French restaurant tenant leased space in a Park Avenue building's ground floor and basement. Part of the agreed-upon rent was to be a fixed sum and another part was to be based upon sales. More than a year after the deal was signed, however, the restaurant had not opened as planned, and the landlord served the tenant with a notice to cure alleging missing back rent of $145,000. The tenant filed suit seeking a so-called *Yellowstone* injunction — a judicially granted stay in proceedings named after a 1968 New York high court decision, which prevents a commercial landlord from terminating a lease while a lease dispute is making its way through the courts. The injunction was granted, but the tenant then filed for bankruptcy, which halted the first court's jurisdiction over the case. The bankruptcy case was ultimately dismissed, leading the tenant to seek a *Yellowstone* injunction a second time. This request was denied, Manhattan Supreme Court Justice Shirley Werner Kornreich explaining that the tenant had breached the terms of the first injunction by employing "gamesmanship" that delayed the proceedings.

When Kornreich declined to reconsider, the tenant filed for bankruptcy once more. That petition was thrown out after the bankruptcy judge determined that the bankruptcy court was being used by the tenant as part of its litigation strategy in the lease dispute.

Following all these machinations, with the case back before Judge Kornreich, she dismissed the petition for a *Yellowstone* injunction and awarded the landlord $23.3 million to satisfy the balance of the lease term, along with more than $750,000 in unpaid rent, fees and costs for both the bankruptcy and lease dispute cases.

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License Agreement

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agreement did not permit the exclusive use of any portion of the city park, and it gave the park district extensive control over all aspects of the taxpayer's business. Employee conduct was controlled by the park district, as was trash placement and pickup; use, content and location of product price boards; and repair and maintenance activities.

In *Kmart Corp. v. Footstar, Inc.*, No. 09 C 3607, 2009 WL 4544700 (N.D. Ill. Dec. 1, 2009), the court considered the enforceability of an indemnity provision of a master agreement between Kmart and an operator of the footwear department in Kmart stores. As an affirmative defense to Kmart's claim for indemnity, the operator asserted that the agreement was a lease, to which the Landlord and Tenant Act would apply to make the indemnity provision unenforceable. The court concluded that the master agreement was a license because it did not specify the extent and bounds of any particular premises but instead left that decision to the discretion of Kmart's planning department. The master agreement also stated that the operator of the footwear department was an independent contractor, and that the location and size of the department could change at any time. Further, the master agreement was not assignable or transferable, and the fees due to Kmart were calculated based upon gross sales. Kmart also retained extensive control over the premises and the operator's business.

Conclusion

Whether a relationship is a lease or license is not always a simple determination. In order for shopping centers to ensure that their so-named license agreements will be recognized as such, and not treated as leases, it is important to comprehend the unique characteristics of each. By understanding the distinctions, a shopping center can carefully draft license agreements that contain terms giving each party the rights and obligations consistent with the legal relationship they desire.

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