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BURKE, WILLIAMS & SORENSEN, LLP

Real Estate and Business Law Update

January 2014

LANDLORD-TENANT

Notice of Inspection did not Breach Lease Provisions as Tenant's Counsel Instructed Landlord's Counsel not to Communicate Directly with Tenant

In *Eucasia Schools Worldwide, Inc. v. DW August Co.* (2013) 218 Cal.App.4th 176, defendant DW leased property to plaintiff Eucasia to operate a private elementary school. The relationship between Eucasia and DW became strained and in March 2010, Eucasia's attorney sent a letter to DW's counsel, stating: "Please have NO DIRECT CONTACT with our client without the express permission of this office." In April 2010, DW listed the premises for sale. DW's chief executive officer, Schoniger, decided to have the premises inspected by a building inspector. The lease provided that all notices to Eucasia Schools had to be in writing and delivered or mailed to the premises. That month, DW's counsel sent a letter to Eucasia's attorney asking about the contact person for the property inspection. Eucasia's counsel did not respond to the letter. DW's counsel later mailed a notice of inspection to Eucasia's counsel's office. In July 2010, Schoniger went to the premises accompanied by a locksmith and a building inspector. The locksmith opened the building door and activated the burglar alarm. The alarm company telephoned the gardener, who contacted Schoniger. The gardener knew that Schoniger was the owner, so he told the alarm company that there was no problem. Four days later, Eucasia filed a complaint for damages and injunctive relief. The jury returned a special verdict in favor of DW.

The appellate court noted that, read literally and in isolation, the lease notice provision required that the notice of inspection be mailed to Eucasia at the premises. However, emphatic written instructions to the contrary were given by Eucasia. Given the animosity between the parties, it was understandable that Eucasia wanted to interpose counsel in further dealings with DW. Eucasia's counsel knew that DW's counsel was acting as the property manager and, in effect, told the property manager to contact him instead of Eucasia in matters pertaining to the lease. It would be unfair to penalize DW because it had complied with the written instructions of Eucasia's counsel. Accordingly, DW's counsel was lawfully permitted to mail notice of the inspection to Eucasia's counsel. The judgment was affirmed.

FRANCHISES

Motorcycle Manufacturer Unreasonably Withholds Sale of Dealership and Franchise to Another Dealer

In *Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corporation* (2013) 221 Cal.App.4th 867, plaintiff Powerhouse and its owner Pilg closed the dealership which they had operated under a franchise agreement with defendant Yamaha so they could sell it to MDK. Without informing either Pilg or MDK, however, Yamaha initiated procedures to terminate the franchise agreement between Powerhouse and Yamaha pursuant to Vehicle Code § 3060. Powerhouse filed a protest to the notice of termination, which the New Motor Vehicle Board dismissed as untimely. The franchise agreement was terminated, which led MDK to cancel its purchase of the dealership. Powerhouse and Pilg filed a lawsuit alleging that Yamaha unreasonably withheld its consent to the sale of the dealership in violation of Vehicle Code § 11713.3. Powerhouse also alleged breach of contract, intentional interference with contractual relations, and breach of the implied covenant of good faith and fair dealing. Powerhouse prevailed at trial. Yamaha appealed.

The appellate court noted that under Vehicle Code § 11713.3 it is unlawful for a manufacturer or distributor "to prevent or require, or attempt to prevent or require" any dealer from selling or otherwise transferring its interest in a dealership franchise to another person. A manufacturer may require its approval of a franchise sale but such approval "shall not be unreasonably withheld." The court also noted that while the New Motor Vehicle Board retains jurisdiction to decide the timeliness of a dealer protest, such a determination does not preempt or limit a dealer's rights under § 11713.3 and common law. As such, the court held that Powerhouse's failure to timely comply with the § 3060 procedure for challenging Yamaha's termination of the franchise agreement did not prevent it from recovering damages for Yamaha's unreasonable refusal to approve the sale of the dealership. The appellate court held that substantial evidence supported the finding that Yamaha unreasonably withheld its consent to the sale of the franchise. The court also held that the closure of the dealership did not bar Powerhouse's claims for breach of contract and the implied covenant of good faith and fair dealing. The appellate court affirmed the judgment in favor of Powerhouse.

REAL ESTATE DEVELOPERS

Bank is Able to Recover on Loans Made to Developers' Entities Despite Claim that Developers Made "Sham Guaranties" that Violated Antideficiency Laws

In *California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, defendants Lawlor, Smith and his wife formed several entities which they used for different development projects, including Cartwright Properties, Heritage Orcas Partners, Heritage Orcas VL Partners, Covenant Management and Heritage Capital. Alliance Bank loaned $2 million to Cartwright in 2004 and another $1.4 million in 2006. Cartwright signed the business loan documents and gave Alliance trust deeds on its office building. Smith, his wife and Lawlor executed separate commercial guaranties for each loan, and Covenant executed a commercial guaranty for the second loan. In 2008, Alliance loaned the Heritage entities $10.5 million. The Heritage Orcas entities gave Alliance a trust deed on two parcels of property. Smith, Lawlor, Covenant and Heritage Capital executed a continuing guaranty. Plaintiff California Bank & Trust acquired Alliance's assets in 2009. Cartwright and the Heritage Orcas entities later defaulted on the loans and the developers refused to pay on their guaranties.

In 2010, California Bank & Trust filed actions to recover on the loans, judicially foreclose the properties used as security and enforce the guaranties. In 2011, nonjudicial foreclosure sales of the properties left a $2 million balance on the Cartwright loans and a $13 million balance on the Heritage Orcas entities loan. In 2012, California Bank & Trust sought summary adjudication on its breach of guaranty claims, which would entitle it to deficiency judgments against the developers on the loans. The developers argued that the guaranties were "sham guaranties" and therefore they were actually the primary obligors on the loans. This entitled them to the protection of California's antideficiency statutes, and California Bank & Trust thus could not obtain a judgment against them for the difference between the value of the security and the outstanding loan balances. The trial court granted California Bank & Trust's motion. The developers appealed.

The appellate court noted that the antideficiency laws (Code of Civ. Proc. §§ 580a-580d, 726) reflect a legislative policy that strictly limits the right to recover deficiency judgments for the amount the debt exceeds the value of the security. However, to be subject to a deficiency judgment a guarantor must be a true guarantor, not merely the principal obligor under a different name. Here, the individual developers failed to show a unity of interest between them and the primary obligors on the loans, Cartwright Properties and the Heritage Orcas entities. The developers were not the primary obligors on the loans because they did not enter into the business loan agreements or execute the promissory notes with Alliance. Moreover, the legal status of the borrowing entities as limited liability companies and limited partnerships provided legal

separation between those entities as the primary obligors and the developers as the guarantors. There was also no evidence to show that Alliance had a role in structuring the transactions to make the developers appear as guarantors rather than primary obligors. The judgments against the developers were affirmed.

CONTRACTS

Award of Damages for Interest on Late Invoice Payments Reversed as No Evidence that Merchants Agreed to Such Terms When Orders Were Placed Over Phone

In *Hebberd-Kulow Enterprises, Inc. v. Kelomar, Inc*. (2013) 218 Cal.App.4th 272, plaintiff HKE had sold agricultural supplies to defendant Kelomar for 20 years. Kelomar would routinely order products over the phone, discussing the type of item, its quantity and price. After delivery, HKE would send Kelomar an invoice that corresponded to its purchase order. Kelomar often paid late, but was never charged interest on the late payments. In 2007, HKE delivered about $250,000 worth of goods to Kelomar. The goods were shipped separately with 33 corresponding invoices. At the bottom of most invoices was printed: "Unpaid invoices beyond terms will be assessed a monthly service charge of 1-1/2%." Kelomar did not pay any of the 33 invoices because it claimed to have incurred damages due to certain nonconforming labels, which were shipped under a separate contract between the parties. HKE sued Kelomar, and Kelomar filed a cross-complaint. At trial, the jury awarded HKE damages, which included $180,672.49 in interest. The jury also awarded Kelomar $27,769.94 on its cross-complaint.

The appellate court held that, to the extent that the terms of a writing differ from the terms detailed in the parties' earlier discussions, proceeding with a contract after receiving the writing that purports to define the terms of the parties' contract is not sufficient to establish the party's consent to the terms of the writing. In the absence of a party's express assent to the different terms of the writing, there is a default rule (Uniform Commercial Code § 2207) that the parties intended, as the terms of their agreement, those terms to which both parties have agreed, along with any terms implied by the provisions of the Uniform Commercial Code. Here, while there was no evidence that Kelomar voiced any objection to the interest provision in the invoices, there was also no evidence that the parties agreed to an interest charge when Kelomar placed its orders with HKE. As such, there was nothing in the record that let the appellate court to believe that the jury (per §2207) found that the interest provision was part of the parties' contracts. The award of $180,672.49 in interest to HKE was thus in error. The judgment was reversed.

ABOUT OUR FIRM

For more than eighty years, Burke, Williams & Sorensen, LLP has been providing legal services in the fields of real estate and business law. With over ninety attorneys and eight offices throughout California, the firm can meet the legal needs of all emerging and established businesses. The firm's practice covers a wide range of businesses, including real estate, banking and financial services, health care, merchandising, food and grocery services, construction, and technology.

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