# II. What's New: Recent Cases Effecting Commercial Landlords and Tenants

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**Landlord and Tenant Law in Texas**

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### A. Default, Remedies and Damages

***Columbia/HCA of Houston, Inc.* v. *Tea Cake French Bakery and Tea Room***, 8 S.W.3d 18 (Tex.App.–Houston [14th Dist.] 1999, writ denied). Tea Cake leased space in a shopping center that HCA wanted to buy and tear down. HCA met with all of the tenants to discuss relocation. HCA's representative toured Tea Cake's space and made handwritten notes about various aspects of the space. After several weeks of obtaining bids and estimates, Tea Cake sent HCA a proposal, requesting $287,000 in moving costs for its relocation. This number was roughly ten times the amount of rent remaining due for the term of Tea Cake's lease, so HCA rejected it. Ultimately, HCA decided it didn't want to tear down the center and told Tea Cake it could stay there for the remainder of its term. Tea Cake preferred to move, however, so it sued HCA for breach fo contract, fraud, promissory estoppel, and constructive eviction.

A lease for a term of more than a year is subject to the Statute of Frauds, Texas Business and Commerce Code § 26.01 (oddly, the case doesn't mention the one-year aspect of the statute and merely states that any lease is subject to the Statute). Modifications to a document subject to the Statute of Frauds must also be in writing. The Court concluded that agreements relating to the payment of relocation costs were subject to the Statute and had to be in writing.

Which was, of course, a problem for Tea Cake because there wasn't a written agreement. It was relying on the handwritten notes made by HCA's representative, but those did not show that a specific agreement had been reached. In fact, the Court said, we know an agreement was not reached and evidenced in those notes because the parties each testified that no agreement had been reached at the time of the note-taking.

Tea Cake also raised the issue of constructive eviction, claiming it should not have had summary judgment entered against it on that issue. In order to prove constructive eviction, a tenant has to show (i) the landlord's intention that the tenant no longer enjoy the premises (this can be inferred), (ii) a material act by the landlord that substantially interferes with the tenant's use and enjoyment of the premises, (iii) the act permanently deprives the tenant of the use and enjoyment of the premises, and (iv) the tenant must abandon the premises within a reasonable time after the landlord's act is committed.

The Court found that a fact issue existed as to constructive eviction. First of all, the landlord wanted the tenants out and was paying them to leave the premises. Second, after a while, the center was devoid of other tenants. Before the other tenants were gone, Tea Cake's business was primarily walk-in. Afterward, that part of the business stopped and Tea Cake suffered loss of profits. Tea Cake left before the lease term was up, a few weeks before, and this raised a fact issue as to abandonment.

***Moon* v. *Spring Creek Apartments***, 11 S.W.3d 427 (Tex.App–Texarkana 2000). Moon had leased her federally subsidized apartment for sixteen years. Her lease provided that it could be terminated for material noncompliance, including repeated minor violations that disrupt the livability of the project or adversely affect anyone's safety or right of quiet enjoyment. Moon allowed her grandson to ride his bike in the

common areas, became verbally abusive when told she couldn't do that, parked on the grass and verbal tirades. Tiring of these offenses, the apartments sent a notice to vacate. A forcible detainer action was brought and an eviction ordered. Moon appealed and lost.

To terminate a tenancy in federally subsidized housing, federal regulations and due process both require adequate notice detailing the grounds for termination. The federal regulations require the landlord's notice to be in writing and in enough specificity to enable the tenant to prepare a defense. Termination notices have been held inadequate where they contain only one sentence, are framed in vague and conclusory language, or fail to set forth a factual statement to justify termination. Notices are defective if they merely point out that illegal acts have occurred, without saying what they are. The failure to specify dates of the occurrence of events has also been grounds for finding the notice inadequate.

In this case, the notice just said that Moon was in violation of a lease provision by endangering the welfare of other tenants. It was pretty vague and conclusory. It didn't specify the dates of the alleged events, and merely parrots the broad language of the regulations.

***Travis County v. Pelzel & Associates, Inc.***, 30 S.W.3d 662 (Tex. App. - Austin 2000, no writ). - A construction company sued the county for breach of contract seeking payment due under a contract for an office building plus interest and hindrance and delay damages. Court held county's sovereign immunity was waived by its acceptance, continuous use, possession and refusal to tender full payment for the office building.

## B. Assignments

***718 Associates, Ltd.* v. *Sunwest N.O.P., Inc.***, 1 S.W.3d 355 (Tex.App.–Waco 1999, no writ). Safeway leased property from the Landlord for a 20 year term. The lease contained several renewal options. The lease provided it was assignable, but the original tenant remained liable on the lease. Through a series of transactions, Sunwest became the "assignee" of the tenant's rights under the lease. The document pursuant to which Sunwest became assignee expressly assigned it the renewal option rights contained in the lease.

Sunwest sent the Landlord a notice that it intended to exercise all seven options to renew the lease for a total term of 35 years ( at very low rental rates). The Landlord then claimed that Sunwest was not entitled to exercise the options because it was entitled to be the assignee of the option rights under the lease.

The Landlord contended that Sunwest was a subtenant, not an assignee of the lease. It contended that the portion of the assignment provision in the lease, keeping the original tenant liable on the lease, meant that the original tenant had a reversionary interest in the leasehold estate. When a tenant assigns its interest in the lease but retains a reversionary interest, the assignment is construed to be a sublease.

The Court disagreed with this interpretation of the assignment provision. A reversionary interest is usually a right to reenter or repossess the property on default, much like what would occur on default under a security agreement. The Court held that the original tenant retained no reversionary interest in the leasehold estate. The provision for continuing liability of the original tenant did nothing more than restate the law of an assignors' liability.

The Landlord then argued that the assignment document did not constitute an assignment. It based its argument on much the same basis as its claim against the assignment provision. The assignment document stated that the assignor retained liability to the extent provided in the lease. Again, the Court held that this did not detract from the assignment of the entire leasehold estate, but was merely a restatement of applicable law of assignors' liability.

The Landlord then claimed that the assignment provision did not grant the right to assign the lease at all. TPC § 91.005 states that a lease is not assignable without the landlord's consent. Although the Landlord conceded that the parties may agree around this provision if their agreement clearly expresses and intent to do so, the Landlord claimed that the assignment provision wasn't such a clear expression. The Court noted that, had the lease said nothing about the assignability of the lease, the Property Code would have prevented the assignment; however, the assignment provision said their was a right to assign and no other provision of the lease dealt with assignment at all. The Court held that the provision expressed the clear intent needed to overcome the statutory restriction.

The Landlord then claimed that the option rights in the lease were personal to the original tenant, did not run with the land, and could only be exercised by the original tenant. In Texas, a covenant runs with the land if (i) it touches and concerns the land; (ii) relates to a thing in existence or specifically binds the parties and their assigns, (iii) is intended to run with the land, and (iv) the successor to the burden has notice. Covenants running with the land bind and the heirs and assigns of the parties to the covenant, which personal covenants do not. The Court looked to the document to determine the intent of the parties, and found that the covenant did run with the land. The lease did not contain the usual "successors and assigns" provision; however, it did provide the right to assign the lease and it did not exclude assignees from the definition of tenant under the lease. If there is an assignment, which the Court had held there was, then the assignee becomes the tenant as to all obligations under the lease and is, by the same token, entitled to all the tenant's benefits under the lease. An assignment carries with it all the rights, remedies, and benefits that are incidental to the thing assigned, and the effect of the assignment can be limited only by exceptions, reservations, conditions, or restrictions in the assignment.

## C. Construction

***Triad Home Renovators, Inc. v. Dickey***, 15 S. W. 3d 45 (Tex. App.-Eastland 1999, no writ). Dickey was the landlord and leased property to a restaurant tenant. The tenant had some improvements done to the property, then filed bankruptcy. In the contractor, Triad filed a mechanic's lien affidavit, claiming a lien on Dickey's fee interest in the property. In all of the litigation that ensued because of the bankruptcy, Dickey filed a declaratory judgment action to have Triad's lien declared invalid and removed from title.

Triad claimed it was entitled to lien that fee because the lease created a principal/agent relationship -- no evidence existed that Dickey ever held out to Triad that the tenant was his agent or ever permitted the tenant to hold itself out as the agent for the landlord. The only evidence Triad introduced was an affidavit that was merely conclusory.

## D. Brokers

***WesTex Abilene Associates, L.P.* v. *Franco***, 3 S.W.3d 45 (Tex.App.–Eastland 1999, no writ). Southard negotiated a lease of a large building between WesTex's predecessor as Landlord and General Dynamics as Tenant. The lease was for an initial 5-year term, with two five year renewal options. WesTex acquired the building, along with the General Dynamics lease, and amended the lease a couple of times to increase the space and the rent. WesTex signed a listing agreement with Southard that stated, among other things, that Southard would be entitled to a commission on any renewals of the General Dynamics lease. This agreement was later terminated by a written agreement in which Southard's right to a commission on the renewal of the General Dynamics lease was preserved.

General Dynamics expressed an interest in renewing the lease for the full five years, but the company was subsequently bought by Lockheed, which had a policy of not renewing for more than a year at a time. The lease was not renewed for the full five year term, but only for a year, initially, then on a month-to-month basis. WesTex refused to pay Southard's leasing commission. WesTex did pay commissions to Loeb, insiders related to WesTex and who had formed WesTex.

Southard sued WesTex for the commissions and sued Loeb for its "tortious interference" with the General Dynamics renewal option . The trial court found for Southard on both claims and awarded damages against both WesTex and Loeb.

A tortious interference with contract claim can be brought only against a third party who interferes with a contract. Here, Loeb was not really a third party. It owned the general partner of WesTex and was the managing agent for WesTex. Thus, it could not tortiously interfere with the contract with General Dynamics.

WesTex, however, was liable for the leasing commission on Lockheed's renewal of the General Dynamics lease. WesTex took the disingenuous position that the commission was due only if General Dynamics renewed the lease and that the lease was actually renewed, not by General Dynamics, but by Lockheed. The Court noted that Lockheed was clearly the successor in interest to General Dynamics under the lease, and that its status as tenant under the lease was confirmed by WesTex in an estoppel agreement it gave Lockheed.

## E. Lease Guaranties

***Petula Associates v. Dolco Packaging Corporation,*** 240 F. 3d 499, (5 Cir. 2001)- This case is about a dispute over a purchase option within a lease agreement on a property in Dallas, Texas. For a fifteen year lease term beginning December 1985, Petula Associates ("Petula") leased a commercial building to Dolco Packaging Corporation ("Dolco"). Both a renewal and a purchase option for Dolco were provided in the lease. The purchase option provided Dolco with the opportunity to purchase the property at a set price plus costs during the first five years of the lease, or for fair market value during the next five years of the lease. Five years later, due to Dolco's reorganization, the purchase option and rental payment provisions of the lease were altered. The period for purchasing the property at a set price was extended to August 1, 1996, however, the fair market value option was decreased from five years to five days once the first option expired. Additionally, Dolco's rental payments were graduated whereby Dolco would pay reduced rents the first five years and increased rents thereafter. Both the original and amended lease provided for a valuation procedure. First the

parties must attempt to reach agreement on the fair market value of the property. If those negotiations failed, each party would select an appraiser to value the property whereupon the average of the two appraiser's values would be considered the fair market value.. However, if the variance between the appraiser's valuations was more than 10%, a third appraiser would be selected by the appraisers.

Dolco sought to exercise his purchase option for fair market value. Dolco and Petula were unsuccessful in their negotiation attempts and consequently hired appraisers. Dolco's appraiser valued the property at $2.75 million, a value without regard to the lease. Petula's appraiser determined the value of the lease should be included and therefore appraised the property at $5.15 million. A third appraiser was selected but recused himself before valuing the property. Petula then refused to permit another appraiser to be appointed.

Petula filed a declaratory judgment in state court which was removed to federal court by Dolco. The questions before the court were whether Dolco caused the third appraiser to withdraw and whether to consider the lease in determining fair market value. The district court held that Dolco's actions did not constitute a breach of the lease, Dolco was entitled to specific performance of the lease and a new appraiser was ordered. The new appraiser valued the property at $3 million. In preparing for closing, Dolco advised Petula that the lease required a warranty deed free of liens or encumbrances. Petula disagreed. The District Court agreed with Dolco and granted Dolco's request for attorneys' fees.

Petula appeals the following three issues. Petula asserts the lease should not be included in determining the fair market value. Second, Petula contends it should be able to transfer the property subject to the existing first lien mortgage. Lastly, whether Petula may be held liable to Dolco for an equitable accounting and attorneys' fees. Dolco appeals the decision to begin the equitable accounting period on July 18, 1998 rather than December 1, 1996 as requested.

In Texas, "fair market value" is broadly defined and interpreted to include the value of the lease. The appellate court determined that absent explicit language indicating whether the lease should or should not be included in the fair market value, the definite and fixed meaning of "fair market value" in Texas contract law, which includes the value of the lease, should apply. On the issue of transferring subject to the first lien mortgage, the appellate court determined the language contained in the disputed paragraph was unambiguous. The language indicates that Petula could only transfer mortgage debt only if the debt does not exceed the purchase price. Lastly, the appellate court vacated the district's court's award of equitable accounting and attorneys' fees to Dolco and on remand ordered the district court to reinstate a portion of the award for attorneys' fees related solely to the cost of litigating the first lien mortgage issue. The court made this determination based on Dolco's ability to pursue an exclusive remedy for damages provided in the lease.

## F. Condemnation

***Lethy Inc. v. Houston***, 23 S.W.3d 482 (Tex. App. - Houston [1st Dist] 2000, no writ to date) - The City of Houston was sued by an apartment complex owner and convenience store owner for inverse condemnation and private nuisance resulting from the City's construction of a barricade which was placed across the only public street accessible to both parties. The court found the easement right of access to property is meant to protect the private owner's access to and from public roads as well as to protect access to and from the property. Therefore, the easement of access to property is not solely limited to the right of access to public roads. Regarding damages, the property owner is entitled to compensation for damages resulting from a material and substantial impairment of access including compensation for diminution in value of the property resulting from loss of access.

## G. Assignment of Rents

***Cadle Company* v. *Collin Creek Phase II Associates, Ltd.***, 998 S.W.2d 718 (Tex.App–Texarkana 1999, no writ history) Collin Creek executed some loan documents that included an assignment of rents. The document "absolutely and unconditionally" assigned rents to the lender. The borrower "reserved" the right, until the occurrence of a default, to collect the rents. Upon the occurrence of a default, the lender was entitled to enter and take possession of the real property and sue for or otherwise collect the rents. Discussion of assignments of rents always begin with the law propounded in ***Taylor* v. *Brennan***, 621 S.W.2d 592 (Tex. 1981), where the Texas Supreme Court told us there were two kinds of assignments – collateral assignments and absolute assignments. A collateral assignment is bound by the common law rule that the lender is not entitled to possession of the rents until it obtains possession of the property, impounds the rents, secures the appointment of a receiver, or takes some similar action. An absolute assignment operates to transfer the right to the rents automatically upon the happening of a specified condition, such as a default. This Court notes, as did ***Taylor* v. *Brennan***, that courts are reluctant to construe an assignment as absolute because public policy disfavors absolute assignments. (Actually, from the cases I've read, courts have been anything but reluctant.)

Cadle argued that the assignment was absolute. It's argument was founded almost entirely on the wording of the assignment provision which used the words "absolute" and "unconditional." The Court did not find that wording controlling. Considering the document as a whole, it concluded that what we have here is a collateral assignment. The "absolute" assignment was "under the following provisions." The only "following provisions" dealing with the lender's right to the rents was the right of the lender to enter the property, take possession, and begin collection of the rents. It did not provide that the assignment was "presently and immediately effective" like you see in effective absolute assignments. Entry on the property is the only authorized method for having rights to the rents after default.

Thus, finding the assignment unambiguously a collateral assignment, the Court said the lender was entitled only to those rents it collected after it took possession of the real property, and that the borrower was not obligated to turn over rents from the date of default until that time.

## H. It's True!

***Dickey* v. *Club Corporation of America***, 12 S.W.3d 172 (Tex.App.–Dallas 2000, no writ history to date). The Dickey's sued their country club because of a change of rules that prevented Mr. and Mrs. from teeing off together on Saturday mornings. Among other things, they alleged that their valuable property rights and

civil rights are at risk because of the unilateral actions of the club. The Court disagreed. Membership in a golf club is not a valuable property right.

***Hendrickson* v. *Swyers***, 9 S.W.3d 298 (Tex.App.–San Antonio 1999, no writ history to date). Fighting cocks are not included within the meaning of "poultry" or "agricultural products" as used in the Texas Agriculture Code, and thus landowners raising the fighting cocks were not entitled to the provisions of the Code restricting lawsuits against agricultural nuisances and entitling the farmer to attorneys fees in any action.

***Iacono* v. *Lyons***, Civ. No. 00-0517 (Tex.App.–Houston [1st Dist.] 2000, no writ history to date). Mary and Carolyn had been friends for years. Late in 1996, Carolyn invited Mary to go to Vegas on a gambling trip. The two women agreed to split their winnings 50-50. Carolyn paid all of the expenses. Mary thought that the reason Carolyn invited her on the trip was because Carolyn thought she was lucky. Sometime before the trip, Mary had a dream about winning big at the slots, so she decided to go.

So they went to Las Vegas in February 1997. They played the slot machines at Caesar's Palace. After losing $47, Carolyn decided she wanted to go see a show, but Mary begged her to stay. Carolyn stayed, but only on the condition that Carolyn would put the money into the slots because it took too long for Mary to do it. They took over a dollar machine that looked to Mary like the machine in her dreams. It missed on the first try. Then Mary said "Just one more time." Carolyn then said "This one's for you, Puddin'", pulled the lever, and the machine paid a million nine.

Carolyn then forgot her agreement to share the winnings and refused to split the money.

In the ensuing suit, Carolyn argued that there was no consideration for any agreement to split winnings. Mary argued that the intangibles she brought to Vegas with her, good luck and the realization of a dream, were good enough consideration. She also pointed out that she gave up her right to stay in Houston in exchange for the agreement to split winnings. The real consideration, however, was in the mutual promise to split winnings. Mary's agreement to split with Carolyn was consideration for Carolyn's agreement to split with Mary, and vice versa. There was plenty of consideration.

Carolyn also argued that the statute of frauds prevented enforcement of the contract because it could not be performed in one year. The two million payout was over a twenty year term. The statute, though, does not apply if the contract could possibly be performed in one year, however improbable that performance might be. This agreement could have been performed in a year. If all Carolyn had won was $200, it would have paid immediately, well within a year.

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