Finkelstein Newman LLP

The Real Estate Litigation Leaders

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Inside this issue

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WHEN'S A GUARANTY, NOT A GUARANTY?

Ever wonder why lawyers feel a need to paper a case to death, particularly when there's a landlord-tenant dispute? A recent appellate court case suggests that default notices (and eviction proceedings) are a necessary evil, particularly if landlords wish to avoid a "waiver" argument being made against them at a later time.

In *Madison Ave. Leasehold, LLC v. Madison Bentley Assoc. LLC.*, two of the dealership's principals, Arthur and Brian Miller, executed a guaranty wherein they each agreed to be personally responsible for the payment of Bentley's lease-related obligations for certain Madison Avenue space. This document provided, in part, as follows: "[I]n the event Tenant shall not have been in monetary default under the Lease at any time during the first three (3) years of the Lease, this Guaranty and Guarantor's [sic] obligations thereunder shall cease and terminate upon the third (3rd) anniversary of the Commencement Date."

On September 29, 2003, some three years and three months after the lease had commenced, Bentley stopped paying the rent and vacated the space. Madison later started a Supreme Court case seeking a money judgment against the Millers (as guarantors) for the balance of the rent due under the lease. Although the lease provided that rent was due "in advance on the first day of each calendar month," Bentley consistently paid the rent late, with the bulk of the payments made on or before the twentieth (20th) of each month. As a result of that delinquent payment pattern, the landlord argued that the guaranty's limitation of liability was never triggered.

The New York County Supreme Court dismissed the case against the guarantors finding that the landlord had waived its objection to the tenant's defaults by repeatedly accepting the late-rent tenders "without protest and without taking any action," like issuing a default notice or otherwise declaring the tenant in default of the governing lease. On appeal, the Appellate Division, First Department, affirmed the dismissal, noting, in part, as follows:

> Once waived, the default in timely payment of rent is extinguished and cannot later be revived, like a phoenix, into a material default for the purpose of extending the period of the collateral guaranty. Thus, the loss sought to be recouped in this action, resulting from a default (vacatur of the premises) that occurred three years and three months after the commencement of the lease, is not recoverable from the individual defendants.

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FINKELSTEIN NEWMAN LLP—AROUND TOWN

Lucas Ferrara with Senator Hillary R. Clinton and Leecia Eve, former counsel to the Senator

Hon. Mario Cuomo with Dan Finkelstein

Andrew Cuomo with Lucas Ferrara

Jon Newman, Georgette Mosbacher and Robert Finkelstein

Robert Finkelstein, Lewis Eisenberg, Jonathan Newman and Hon. Tom Kean, Sr., former Governor of New Jersey

U.S. Senate candidate Tom Kean, Jr. (New Jersey) with Jonathan Newman

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ADVERSE POSSESSION: DEBATE RAGES ON

Adverse possession--staking claim to a property owned by another--is a topic we addressed in the June 2006 issue of our newsletter.

On June 13, the New York State Court of Appeals released its decision in *Walling v. Przybylo*, and resolved the open question as to whether an occupier's knowledge (that someone else actually owned the property in dispute) impacted the occupier's "claim of right" to the parcel. According to that decision, the answer is a resounding, "No." The Court of Appeals clarified that "conduct will prevail over knowledge," and reiterated what it viewed as the "'recognized"' law: That a party's "subjective knowledge" was not relevant to the analysis.

Ms. Denise Przybylo, one of the defendants in the case heard by the state's highest court, contacted our office and reacted to the decision as follows:

> This is a sad day for the people of New York. We were outlawyered by our next door neighbor, who happens to be an attorney. He had a survey. He knew this land wasn't his. So, as far as my husband and I are concerned, this decision is a "license to steal." It just opened the floodgates for more litigation, rather than less. This was an opportunity for the Judges of the Court of Appeals to say "enough is enough" and bring this 200-year old law up to date. But they refused to do it.

Kathleen Walling, one of the named plaintiffs, responded as follows:

> I am afraid that Denise Przybylo has mislead you about the survey. We paid for a survey because the bank that handled our building and loan mortgage required a survey to show that our house was located on our lot within the required setbacks. The house was under construction at the time, and so we didn't even know when the survey was done. You should also be aware that this survey showed no pin or other monumentation at the disputed corner. As a result, it would have provided us with no useful information even if we had seen it. The filed subdivision map describes the disputed corner as a "fence corner." The point that both we and the Przybylos' believed to be the subject corner is at the intersection of a clearly defined stone wall and a perpendicular barbed wire fence. There is absolutely nothing resembling a "fence corner" in the vicinity of what proved to be the actual corner. This survey that she insists that we had was sent directly to the bank attorney who kept it in his files along with the abstract of title. Some years later they were sent to us. Denise is well aware of these facts, but chooses to mislead you.
>
> You should also be aware that the developer of this subdivision, who obviously was in the best position to know the true location of the corner, continued to own the Przybylo lot for the first couple years of our adverse possession. He showed it to potential buyers during this time and apparently didn't know the true location either. She is accurate about one thing, though. They were outlawyered. :)

Denise Przybylo replied:

> We were so hoping that the Court of Appeals would look at this case from a moral standpoint. Obviously not. I keep asking the question, "Why did we have to know our property line, but our neighbor did not?"
>
> Thank you for helping us educate everyone about this very old law. We are all "sitting ducks" when purchasing a new home if a survey is not performed before closing.

If you have any questions or comments about this topic, please contact partner Lucas A. Ferrara at 212-619-5400 x 211 or email him at LFerrara@FinkelsteinNewman.com. To join the debate, visit us at www.nyreblog.com.

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Many believe that this outcome runs contrary to the plain and unambiguous terms of the parties' agreement. The Millers agreed to an "absolute and unconditional Guaranty of payment and performance," which was enforceable "without the necessity for any suit or proceedings on Landlord's part of any kind or nature whatsoever against Tenant, without the necessity of any notice of non-payment, non-performance or non-observance (except as expressly required under the terms of this Guaranty), or ... of any other notice or demand to which the Guarantor might otherwise be entitled, all of which the Guarantor expressly waives...." Additionally, the guaranty specified that it would not be "terminated, affected, diminished or impaired" by a "waiver" or other failure to enforce any provisions of the parties' lease agreement.

Despite that pretty clear language, the appellate court was troubled by what it perceived as the landlord's selective enforcement of the lease and guaranty. In other words, since the landlord did not hold the tenant to the literal terms of the lease, the court was bent on disallowing the stringent enforcement of the guaranty.

Associate Justice James M. McGuire, in a dissenting opinion, correctly observed that the majority's application of the "waiver" doctrine to guarantees would force landlords to jump through needless procedural hoops and foster an adversarial relationship. As the dissenter noted:

> "Rather than induce contracting parties to travel down the less than sunny path to litigation at the drop of a hat, the law should encourage accommodation and reasonable forbearance."

Unfortunately, "accommodation" and "forbearance" were not the standards being espoused by the appellate court in this particular instance.

If you have any questions or comments about this analysis, please contact partner Jonathan H. Newman at 212-619-5400 x 205 or email him at JNewman@FinkelsteinNewman.com. To join the debate, visit us at www.nyreblog.com.

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