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CASES OF NOTE

CHANGING LANDSCAPE FOR ACCELERATED RENT CLAUSES IN COMMERCIAL LEASES

Cummings Properties, LLC v. Hines, 21-P-1153 (Mass. App. Ct. Sept. 9, 2022)

The Massachusetts Appeals Court recently considered whether a rent acceleration clause found in a commercial lease was enforceable as a liquidated damages provision, or unenforceable as a penalty clause. The Court concluded that the acceleration clause was *unenforceable* as a penalty clause.

In *Cummings*, the owner of a company specializing in service of legal documents (Hines) entered into a five-year commercial lease for office space in Woburn, Massachusetts, at annual base rent of about $16,000. The plaintiff (Cummings) was the landlord. Hines signed the lease on behalf of his company (named MCO), as well as a personal guaranty. Under the terms of the lease, in the event of a payment default (and failure to cure within 10 days), Cummings had the power to terminate the lease and accelerate collection of rent for the entire lease term.

In July 2016, only three months after the lease was executed, MCO lost a major contract. Although Hines and Cummings initially negotiated an alternative payment plan for the security deposit, MCO soon failed to remit rent payments and Cummings declared default. In subsequent litigation, after a bench trial, the trial court judge held that Hines was “sufficiently sophisticated” to be held to the terms of the lease, specifically the rent acceleration clause. Judgment was entered against Hines in the amount of $82,143.01 (about five years of rent under the lease), representing “damages, prejudgment interest, and costs.” The Court entered this judgment notwithstanding the fact that, in the spring of 2017 (about one year into the original five-year lease term), Cummings successfully re-

let the premises through a four-year commercial lease.

The Appeals Court reversed. The Court started from the premise that a rent acceleration clause, in which a defaulting lessee is required to pay the lessor the entire amount of the remaining rent due under the lease, may constitute an enforceable liquidated damages provision so long as it is not a penalty – and courts will initially presume that such a clause is *not* a penalty. Indeed, a liquidated damages provision will generally be enforced if (1) "at the time the agreement was made, potential damages were difficult to determine," and (2) "the clause was a reasonable forecast of damages expected to occur in the event of a breach." However, the clause is likely to be interpreted as a penalty clause where the liquidated damages are "grossly disproportionate to a reasonable estimate of actual damages' made at the time of contract formation."

In this case, the Court determined that the clause was a penalty because it would allow Cummings to collect a sum of money differing so greatly from the actual damages arising out of the breach. In Cummings' view, the acceleration clause allowed it to retake possession of the premises, relet it, and collect rent from a new tenant without having to account for the rent received from the new tenant. The Court held that this operation of the clause would have no reasonable relationship to expected damages.

Cummings arguably changes the landscape when it comes to the enforcement of rent acceleration clauses in commercial leases in Massachusetts. Time will tell how stringently it will be followed in future cases.

SJC CLARIFIES AMENDMENT TO ZONING ACT SECTION 17

Marengi v. 6 Forest Road LLC, SJC-13316 (Mass. Dec. 14, 2022)

In *Marengi*, the Supreme Judicial Court clarified a recent amendment to G.L. c. 40A § 17, which permits courts, in their discretion, to require a plaintiff challenging a decision approving a special permit to post a surety or cash bond (in an amount not to exceed $50,000). At issue was (1) whether the bond provision set out in Section 17 applies to comprehensive permits issued under G.L. c.40B, § 21, (2) what costs are recoverable under the bond provision, and (3) whether, in this case, the trial court's imposition of a $35,000 surety or cash bond was reasonable.

In November 2020, a developer (6 Forest Road LLC) applied to the Zoning Board of Appeals of Salisbury for a comprehensive permit to build seventy-six condominium units. In late July 2021, the Board granted the comprehensive permit, subject to 96 conditions.

In mid-September 2021, plaintiffs Terrence Marengi, Jr. and others challenged the Board's decision in Superior Court. Among plaintiffs' concerns were the validity of 6 Forest Road's purchase of the site, the economic justification for the number of units being constructed, and the project's impacts on water quality and quantity to the plaintiffs' properties. 6 Forest Road asked the trial court to order plaintiffs to post a $50,000 surety or cash bond, citing increased project costs that would arise from the delay caused by Plaintiffs' appeal. According to 6 Forest Street, the maximum bond was necessary to counterbalance the costs, estimated at $250,000, including "price increases for lumber and framing materials; attorney's fees . . . the costs of traffic, engineering, and environmental experts that could easily exceed $50,000; and interest rate increases raising the cost of financing . . ." Plaintiffs opposed the motion arguing, among other things, that Section 17's bond provision does not apply to appeals of comprehensive permits and, even if it did, plaintiffs did not bring the appeal in bad faith or with malice (which according to them was a pre-requisite for such a bond). In the alternative,

the plaintiffs argued that the $50,000 bond was unreasonable on its fact. The trial court judge granted 6 Forest Road's motion in part, requiring plaintiffs to post a $35,000 bond. After plaintiffs appealed the decision to a single justice of the Appeals Court, the SJC transferred the case *sua sponte*.

The SJC first concluded that the bond provision applies to appeals of comprehensive permits. This is because an appeal of a decision issued under G.L. c. 40B § 21 is taken pursuant to G.L. c. 40A § 17. The SJC also reasoned that the legislative history and purpose of the bond provision is served by this interpretation because the main purpose of the comprehensive permitting process is to streamline the construction of affordable housing and the bond provision discourages frivolous or bad faith appeals.

Next, the SJC clarified that a bond is generally appropriate only where a plaintiff's appeal appears so devoid of merit that it may be reasonably inferred to have been brought in bad faith. The SJC explained that the stated purpose of the bond provision is "to secure the payment of costs," and costs are to be awarded only in exceptional circumstances – such as where an appeal is brought in bad faith.

Finally, the SJC offered some clarity as to what "costs" may be considered in setting a bond. Notably, the Court determined that the costs for which a litigant may seek a bond under Section 17 are the same as "costs" recoverable under G.L. c. 93A (Massachusetts' Unfair Competition Statute). According to the Court, by that measure, recoverable costs include the "actual, reasonable costs" directly incurred by litigating the appeal. In *Marengi*, those costs would be the additional consultant fees (engineering, traffic, environmental) that 6 Forest Road had to pay in order to provide testimony during the course of the appeal. However, "costs" do *not* include attorneys' fees or costs incidental to the appeal – such as losses from delayed construction. The SJC did not rule on the reasonableness of the trial court's decision to impose a $35,000 bond, due to a limited record.

In light of this decision, commercial real estate developers should be mindful that a court will only issue a bond upon a preliminary determination that a plaintiff's claim is so devoid of merit as to constitute bad faith or malice. Further, even if a court is willing to order a bond, the scope of costs that that bond may cover is limited to only costs directly resulting from the appeal.

MULLIGAN FOR GOLF COURSE IN EASEMENT CASE

Erik Tenczar & another v. Indian Pond Country Club, Inc., SJC-13297 (Mass. Dec. 20, 2022)

In late-April 2017, plaintiffs, Erik and Athina Tenczar purchased a home next to a golf course (called Indian Pond). The home was constructed within a subdivision subject to certain covenants and restrictions related to the golf course which were reflected in a recorded declaration of covenants and restrictions. One provision of the declaration (which was amended to apply to the Tenczars' lot long before they purchased their home) provided Indian Pond a "perpetual right and easement" for golfers to retrieve errant golf balls on unimproved areas of neighboring residential lots. Another provision (as amended) provided that Indian Pond retained the right to "reserve or grant easements for [its] benefit for . . . the reasonable and efficient operation and maintenance of the golf course and its facilities in a customary and usual manner," over the Tenczars' lot.

After their home was allegedly hit by numerous errant golf balls, the Tenczars sued Indian Pond for trespass. The Tenczars testified that over 600 golf balls had hit their property, leading to the breaking of nearly ten windows and damaging both the railing and siding of the house.

At trial, the Tenczars sought to exclude Indian Pond from asserting that it had an easement for the

intrusion of golf balls. The judge ruled in the Tenczars' favor, but, in doing so, focused only on the ball retrieval provision of the declaration, and not the provision that allowed Indian Pond to maintain a golf course "in a customary and usual manner." The Tenczars were ultimately awarded $100,000 for property damage, $3.4 million in emotional distress damages, and an injunction which prohibiting Indian Pond form operating in such a way that golf balls would hit the Tenczars' house or yard.

On appeal, the Supreme Judicial Court reversed, concluding that the trial judge erred in his interpretation of the easements because he interpreted only the ball retrieval provision without consideration of the other provision which allowed Indian Pond to operate and maintain a golf course on the Tenczars' lot. A proper interpretation, the SJC reasoned, would involve consideration of the context and attendant circumstances, which would have to include the natural consequences of golf course operation, and, more specifically, the intrusion of golf balls onto the property. Intrusion of the golf balls was, according to the SJC, the maintenance of a golf course in the customary and usual manner. The case was remanded for another trial.

Tenczar provides a reminder to both developers and buyers that easement and covenants are often interpreted as a whole – and where their requirements clearly permit the ongoing function of nearby business activity, challengers may not find much sympathy from Massachusetts courts.

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