Landlord & Tenant

A plaintiff may not maintain an action against a lessor who does not retain control over the premises leased to the lessee, even if the lease permits a right of re-entry by the lessor for certain maintenance and emergencies. *Gardner v. Ralph and Rich's*, 385057, Superior Court of Connecticut, Judicial District of Fairfield, at Bridgeport, July 19, 2004.

Gardner was injured when she slipped in Ralph & Rich's restaurant (R&R). Gardner commenced an action against R&R and the lessor of the premises, Subway, Inc. The defendants (R&R and Subway) moved for summary judgment in favor of Subway. The court granted the motion. It held that although Subway retained a right of entry into the R&R premises for emergencies and other repair work such as running telephone wires, it was not responsible for any hazardous conditions on the premises once they were transferred for use by R&R. The lease between R&R and Subway did not provide for any other type of control over the premises by Subway, and the limited right of re-entry did not make the lessor liable for injuries caused by dangerous conditions.

Tort Liability

Where a lease unambiguously requires the landlord to be responsible for security in the common areas of a shopping center, the tenant may not be found liable for premises liability, even where the landlord specifically does not guarantee against acts of vandalism or other criminal acts. *Alarcon v. Bed, Bath & Beyond, Inc.*, No. 04-03-00551-CV, Court of Appeals of Texas, Fourth District, San Antonio, June 30, 2004.

Alarcon was assaulted on a sidewalk outside a Bed, Bath and Beyond (BBB) store located in a shopping center. She brought an action against BBB and BBB moved for summary judgment; the trial court granted the motion. The appellate court affirmed. It held that the sidewalk where Alarcon was attacked was not the responsibility of BBB but of the landlord. The lease between BBB and the landlord provided that the landlord would be responsible for all security, and would be in control of all of the common areas of the shopping center, which included the sidewalk outside the store. The appellate court concluded that the plain and unambiguous language of the lease released BBB from any liability from Alarcon's attack. Although the portion of the lease containing the security requirement also stated that the landlord did not guarantee against acts of vandalism or other criminal activity, the court did not hold that waiver of guaranty was actually a warning to BBB to provide further security beyond that of the landlord.

Asked & Answered

Continued from page 1

The ICSC Library provided the names of two bollard manufacturers from Cisco's Directory of Products and Services: Marlin Furniture Systems, Ltd., in Woodstock, Ontario, Canada, as well as O'Brien and Sons in Medford, Mass.

Asked: A member in Oregon requested a definition of "regional shopping center."

Answered: The ICSC Legal Department sent the member a copy of *ICSC Shopping Center Definitions, Basic Configurations and Types*. The basic configurations include "mall" and "strip center." The types include "neighborhood center," "community center," "regional center," "super regional center," "fashion/specialty center," "power center," "theme/festival center" and "outlet center." Each one is described and defined according to the concept, square footage, acreage anchor ratio and primary trade area. For example, a regional center "provides general merchandise (a large percentage of which is apparel) and services in full depth and variety. Its main attractions are its anchors: traditional, mass merchant, or discount department stores or fashion specialty stores. A typical regional center is usually enclosed with an inward orientation of the stores connected by a common walkway and parking surrounds the outside perimeter." The square footage ranges from 400,000 to 800,000 square feet; the acreage is between 40 and 100; the anchor ratio is 50% to 70% and the primary trade area extends 5 to 15 miles.

Asked: A member needed a sample provision for use by a large grocery chain to sublease space to a pharmacy.

Answered: The Legal Department sent the member an extract from the 2003 U.S. Law Conference. At one of the sessions, Robert Divide and Alan Salle discussed the implementation of a long-term sublease of significant space in a shopping center. The speakers examined provisions from the prime lease, the sublease and a subtenant Non-Disturbance (or Recognition) Agreement. The agreement included samples of various clauses: conditioning the landlord's consent on additional compensation, recapture provisions, subtenant recognition provisions and a subtenant adornment provision. In addition, there were specific clauses to include in the sublease, e.g., a continuous operating covenant, a clause requiring the subtenant to report its gross sales and sample provisions addressing the various consents and approvals to be requested by or obtained from the prime landlord. The panel also discussed indemnification, insurance coverage and casualty/condemnation provisions. A basic form of a recognition agreement was attached, and specific provisions, such as the mortgagee non-disturbance, were discussed at the session.

Asked: What are the major problem areas in commercial loan negotiation and closings? How can lenders solve those problems?

Answered: In a recent interview, Joshua Stein answered these questions. He stated that the top three problem areas are the negotiation process, opinions of counsel, and non-disturbance agreements. He said that all take more time and money, and create more excitement, than they justify. He further advised:

- Keep the loan documents simple and at least somewhat balanced, so the documents achieve what they need to without raising issues that will cost more to negotiate than their likely value.
- After a deal closes, think about updating the "standard" documents to reflect reasonable changes the borrower got, within limits. This will speed things up next time.
- Both the borrower and lender should control their counsel. Limit opinions of counsel to a few issues, e.g., having the right people sign.
- Non-disturbance agreements raise some relatively minor and unlikely but complex issues. If a lender wants to simplify the closing process, it might consider dropping these agreements entirely. This assumes the right wording in the leases and some creativity about handling issues.

JOSHUA STEIN, *a real estate and finance partner in the New York office of Latham & Watkins LLP, has recently written a book published by the Mortgage Bankers Association:* Lender's Guide to Structuring and Closing Commercial Mortgage Loans. *The book covers the mortgage loan closing and documentation process from beginning to end — with payoffs and defaulted loans after that.*