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DEFAULTER'S JUDGEMENT

Rent Acceleration Clauses Alive and Well After SJC Decision

Court Backs Acceleration Clauses

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SPECIAL TO BANKER & TRADESMAN



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The Massachusetts Supreme Judicial Court overruled the Appeals Court in *Cummings Properties, LLC v. Hines* last September, and upheld the validity of a rent acceleration clause in a commercial lease.

Rent acceleration clauses allow landlords to demand that evicted tenants immediately pay as liquidated damages all remaining unpaid rent through the end of the lease term, even if the lease term expires years after the tenant's default. The defaulting tenant's liability is not offset by the rental value of the vacated premises or by rents paid by replacement tenants.

Many landlords refrain from adding these clauses in their leases, and sophisticated tenants generally refuse to accept them. However, Cummings Properties, which often rents to smaller tenants, includes rent acceleration clauses in its standard lease form. Cummings is not shy about enforcing the clause against defaulting tenants, as Darryl Hines recently learned.

Hines founded Massachusetts Constable's Office Inc. (MCO), a civil process service firm that earned a reputation for using



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questionable tactics to serve process and make arrests. In 2016, MCO secured a contract with the Massachusetts Department of Revenue, and signed a five-year lease with Cummings for space in Woburn. Hines personally guaranteed the lease, which included a rent acceleration clause.

Less than a month into the lease, the Department of Revenue suspended its contract with MCO, and MCO defaulted on the lease.

Cummings evicted MCO, and a year later signed a four-year lease with a new tenant for the space formerly occupied by MCO.

\$69K Judgement

Despite securing the replacement tenant, Cummings sued Hines under the lease guaranty for the entire accelerated rent through the end of the five-year term of MCO's tenancy.

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minated lease. A Superior Court judge upheld the rent acceleration clause, and found that Hines had sufficient sophistication to understand the consequences of his personal guaranty. It entered judgment against Hines for \$69,000, the balance of the accelerated rent owed after deducting prior payments made by MCO.

Many landlords don't use these clauses, and most sophisticated tenants refuse to accept them.

The Appeals Court reversed that judgment. It noted that rent acceleration clauses may be enforceable as liquidated damages provisions if they are not punitive. In the case of Cummings's lease, the acceleration clause allowed Cummings to evict the tenant, relet the premises to a new tenant, collect rent from that tenant, and still claim accelerated rent from MCO without deducting rent received from the new tenant. The Appeals Court ruled that the clause bore no reasonable relationship to Cummings's expected damages, rendering it an unenforceable penalty.

The Supreme Judicial Court granted Cummings's application for further appellate review. The SJC first considered whether the rent acceleration clause was enforceable as a liquidated damages clause. The SJC noted that liquidated damages clauses are generally enforceable, if they are not so disproportionate to anticipated damages that they constitute a penalty.

When Massachusetts courts consider whether to enforce liquidated damages clauses, they analyze the circumstances at the time the contract was entered into, without considering other circumstances that may arise later by the time of the breach.

Court's 'Single Look' Approach

Under this "single look" approach, rent acceleration clauses are enforceable if the actual damages from a breach were difficult to ascertain when the lease was signed, and the accelerated rent is a "reasonable forecast" of damages expected to result from a breach. Courts are not required to consider rents that landlords might collect from replacement tenants after breaches occur.

The SJC noted that Hines had the burden of proving facts that would render the clause unenforceable, and that he failed to meet that burden. According to the SJC, Hines did not

present evidence supporting his claim that Cummings's anticipated damages upon default were ascertainable when Hines signed his guaranty. Hines also failed to show that the rent acceleration clause was an unreasonable forecast of the damages that Cummings might sustain if MCO breached the lease. The SJC found that the rent acceleration clause was not an unenforceable penalty.

The SJC also rejected Hines's argument that he should be relieved from the burdens of the rent acceleration clause because he was not a sophisticated party. The SJC noted that Hines's level of sophistication was a question of fact, not law, which the superior court properly determined based on Hines's business experience. Therefore, the rent acceleration clause was enforceable against Hines. The SJC affirmed the superior court's \$69,000 judgment against him.

The SJC's decision may encourage other commercial landlords to add rent acceleration clauses to their leases. Tenants should be on the lookout for these clauses, and should be wary about entering into leases with landlords who utilize them. ◀

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