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THE DOLAN COMPANY

Uninsured landlord prevails in fire suit

Tenant is responsible under lease

By Douglas Levy

A strip mall landlord who wanted to sue a tenant for causing extensive fire damage faced a big challenge: the company did not have insurance.

But an Oakland County judge ruled that based on the terms of the lease, the landlord's lack of coverage would not matter.

The landlord filed a claim in Oakland County Circuit Court, citing negligence and breach of contract. The tenant argued that the landlord was the one who breached the lease, in that the agreement stated that the landlord needed to obtain coverage.

Michael S. Hale, who represented the landlord, said that even with insurance, a landlord would not be able to sue a tenant for property damage.

"The theory in Michigan law implies that the landlord is insuring the building, and the courts said in some of the published decisions that the rent being paid is implied to include coverage for that contingency," he said.

But Hale said that in his case, *Starbatt Inc. v. OPW Decks*, the lease had specific indemnification language that would hold the tenant responsible.

"The court went along with that argument," said Hale, of Michael S. Hale & Associates PLC in Northville. "That indemnity provision was another big lease agreement lesson because it was so broad in saying, 'any and all liability for any property damage occurring on or about the premises.' That went a long way."

A Verdicts & Settlements report on the case can be found above.

'Benefit of the Landlord'

Hale, who represents policy holders and specializes in risk management, said that the lease language must be specific as to liability for fire or other damage. Otherwise, the landlord cannot sue a tenant for negligence.

He said that the rule comes from a 1986 Michigan Court of Appeals decision, *New Hampshire Insurance v. Labombard*, which he said has blocked many landlords' carriers from subrogating in negligence against the tenant.

"It had to be a very unequivocal reference to that in the lease. It has to actually say that the tenant hereby agrees that it will responsible for fire damage to the premises," Hale said. "My [client's lease] didn't say that. … So that was a very forward point, and a lesson to practitioners."

Judge Leo Bowman in February 2014 dismissed the landlord's negligence claim, but let the breach of contract claim stand.

Hale cited the Court of Appeals' 2007 decision, L*aurel Woods Apartments v. Roumayah*, in which an apartment complex tenant who caused a kitchen fire.

In arguing his client's case, Hale said that the Laurel Woods panel, in differentiating Labombard, looked to the lease agreement language: "'Tenant shall keep the Premises and all appliances in good condition and repair, and shall allow no waste of the Premises or any utilities. Tenant shall also be liable for any damage to the Premises or to Landlord's other property (i.e., other units, common facilities and equipment) that is caused by the acts or omissions of Tenant or Tenant's guests.' …"

Bowman also ruled that the landlord's lacking an insurance policy, pursuant to the lease agreement, was not a substantial breach. Bowman said that the tenant's indemnification language — which appeared 26 paragraphs prior — stated that the tenant would need to obtain property damage insurance "for the benefit of the Landlord."

The case settled July 1, 2014, for a confidential amount. L. Neal Kennedy, the Detroit-based attorney who represented the defendants, did not respond to a request for comment.

Keeping safeguards

Hale said that attorneys and law firms who lease office space should make sure that their lease agreements include insurance requirements and indemnity provisions.

He added that such provisions can say specifically that if the tenant causes a fire, the tenant agrees that it will be responsible for that.

"Most people miss that," Hale said. "If there's a fire, it's great to have your own insurance, but what if that insurance doesn't pay? Is there something the landlord should have as a safeguard in the lease that will actually say the tenant will then be paying, and the insurance company will back that up?"

Hale said he handles approximately 50 under-coverage cases each year, where the clients end up suing the insurance agent for not insuring the client for the right amount.

"Even in this case if my guy did buy insurance on the building and that coverage was deemed inadequate for whatever reason — either there's a high deductible they're stuck with or they said it's not a covered cause of loss, or there was not adequate limits on the building and it was only insured for 50 percent — the landlord could be out of luck in terms of recovery, unless the lease is written properly," Hale said. "That's really the sum and substance of the issue."

Verdicts & Settlements

Uninsured landlord sued over tenant's fire

Contract language OK for breach claim

Confidential

Plaintiff Starbatt Inc. owns a strip mall in Rochester Hills, where defendant OPW Decks LLC was a tenant. On March 7, 2013, a fire started in defendant's leased unit, with fire damage spreading to the adjoining units.

Plaintiff argued that a provision in the lease provided that defendant would indemnify plaintiff for any damages to any property in, on or about the leased property for any cause. Plaintiff, who did not have insurance, asked defendant to indemnify it and hold it harmless, but defendant refused.

Plaintiff filed suit against defendant alleging negligence and breach of contract.

Defendant filed a counter-complaint, contending that the lease required plaintiff to obtain insurance, and that insurance would have protected plaintiff against any loss.

Oakland County Circuit Judge Leo Bowman ruled that the language in the lease was not broad enough to constitute a negligence claim, but added that the breach of contract claim could go forward.

Bowman also ruled that plaintiff's failure to obtain an insurance policy pursuant to the lease agreement was not a substantial breach, because defendant obtained the benefit through the contractually required procurement of insurance.

The matter settled for an undisclosed amount.

MICHAEL S. HALE

Type of action: Breach of contract, negligence

Type of injuries: Damage to unit and adjoining units

Name of case: *Starbatt Inc. v. OPW Decks LLC*

Court/Case no./Date: Oakland County Circuit Court; 2013-134140-ND; July 1, 2014

Name of judge: Leo Bowman

Settlement amount: Confidential

Attorney for plaintiff: Michael S. Hale

Attorney for defendant: L. Neal Kennedy