WHAT YOU NEED TO KNOW ABOUT COMMERCIAL LEASING:

ANALYSIS FROM A LEGAL AND BUSINESS PERSPECTIVE

Stuart A. Lautin, Esq.
Higier Allen & Lautin, P.C.

February 6, 2015
Stuart specializes in real estate law. He is Board Certified in Commercial (1989) and Residential (1988) Real Estate Law, Texas Board of Legal Specialization, and is a frequent lecturer on real estate topics.

Practice Areas
- Commercial and residential real estate law
- Mortgage lending and finance
- Real property acquisition, disposition and leasing
- Foreclosures and workouts
- Conduit / securitized and traditional finance
- Zoning and property development
- Raw acreage / farm and ranch transactions
- Office, warehouse and shopping center leasing
- Office and residential condominiums
- IRS 1031 and 1033 tax-deferred exchanges
- Corporate and business law, and general business transactions
- Partnership matters and agency relationships
- Real estate brokerage and agency licensing
- Secured transactions

Representative Experience
- Represented New York (Manhattan) based entity in the $245 million acquisition of nine portfolio multi-family properties in Houston, Texas
- Represented New York (Brooklyn) based entity in the purchase and subsequent sale of 20 multi-family properties throughout Texas with a FMV of ~ $200 million
- Assisted NASDAQ tenant with negotiation of new multi-floor, multi-year corporate headquarters lease in Richardson, Texas
- Represented internationally-recognized physicians in the sale of a mixed-use medical building adjacent to Presbyterian Hospital in Dallas, Texas
- Assisted client in ongoing raw land sales transactions to national shopping center developer in Allen, Texas
- Represented provider of medical services and products in the purchase of land, development and construction, as well as the subsequent sale of its assets and leaseback of its prime facility in McKinney, Texas
Education
- B.B.A degree from Southern Methodist University, Dallas Texas (1976)
- J.D. degree from Southern Methodist University, Dallas Texas (1982)

Bar Admissions
- Texas (1982)
- New York (2013)

Awards & Recognitions
- Selected as a 2009 Texas Super Lawyer
- Certified as an instructor by the Texas Real Estate Commission
- Board Certified in Commercial (1989) and Residential (1988) Real Estate Law, Texas Board of Legal Specialization
- AV 5.0 out of 5.0 Preeminent Overall Peer Rating (1988-2015), Martindale- Hubbell

Recent Publications, Articles & Presentations
- Counsel’s Corner column for NTCAR (2010 – Present)
- Briefcase column for AAGD (1994 – Present)
- Insight Into Commercial Leases for NTCAR and TAR (2008 – Present)
- Insight Into Commercial Contracts for NTCAR (2007 – Present)
- Commercial Leases for CEI (2004 – 2007)
- How to Buy or Sell Real Property for DBA (2005)
- Let me Speak to the Attorney! Prepared for NAA (2001)
- Review of Statutes and Rules; TREC’s Views of Your Duties for IREM (1999)
- Broker Disclosures and Liabilities for SBOT (1996)

Legal Associations, Professional Affiliations, and Community Leadership
- North Texas Commercial Association of REALTORS®
- Texas Association of REALTORS®
- National Association of Real Property Managers
- State Bar of Texas
- State Bar of New York
- Dallas Bar Association

Previous Professional Experience
- Shareholder at Tobolowsky, Prager & Schlinger, PC (1982 – 1993)
- Shareholder at Higier Allen & Lautin, PC, and its merger predecessors (1993 – Present)
Chapter 1 – An Overview of Lease Laws

I. Overview

A. Definition of Contract and Lease. A contract or lease is an agreement, supported by legal consideration, entered into voluntarily by legally competent parties to perform or refrain from performing a legal act. A lease is a legally enforceable agreement. If there is a breach of lease, the law provides remedies and/or consequences.

II. Lease Formation

The first step to any real estate transaction is the formation of a valid and enforceable contract. Additionally, because leases are a special subset of contracts, it is important to know the additional requirements for a valid lease, as well as situations that can make a lease voidable.

A. Elements of the Lease. The elements of a valid and enforceable lease are: (1) an offer; (2) an acceptance; (3) mutual assent; (4) execution and delivery of the lease with the intent that it be mutual and binding; and (5) consideration (mutuality of obligations) supporting the lease.

1. Offer. To prove a valid offer, a party must show: (1) the offeror intended to make an offer; (2) the terms of the offer were clear and definite; and (3) the offeror communicated the essential terms of the offer to the offeror.

2. Acceptance. Once there is a valid offer, the offeree may accept or reject it. To prove valid acceptance, the party must show the following: (1) the acceptance was made before the offer lapsed or was revoked by the offeror; (2) the manner in which the acceptance was made strictly complied with the terms of the offer or was implicitly authorized under the circumstances; (3) the acceptance was communicated to the offeree; and (4) the form of the acceptance was clear and definite.

3. Mutual Assent. Mutual assent means that there has been a “meeting of the minds.” For this “meeting” to occur, the terms of the agreement must be reasonably definite, understood, and agreed upon by the parties. The parties must be acting voluntarily, of their own free will, without duress or menace. Any fraud or misrepresentation involved in a real estate transaction could make the lease voidable by a court or by the injured party because such fraud or misrepresentation indicates a meeting of the minds never existed.

4. Execution and Delivery of the Lease with the Intent that It be Mutual and Binding. A binding lease is formed when the lease is delivered to the appropriate party. Delivery occurs when the party parts with possession or custody of an instrument with the intent that it become operative.

5. Consideration. To be enforceable, a lease must be based on consideration, also known as mutuality of obligation. Webster defines consideration in a contract as “something of value given or done in exchange for something of value given or done by another in order to make a binding contract; inducement in a contract.”

In spite of the simple definition, what actually constitutes consideration in a particular contract has been the focus of countless court cases over hundreds of years in the United States and abroad. In reality, consideration is a complex legal concept that has created a pitfall in too many real estate transactions. Fortunately, real estate practitioners in Texas can draw on recent case law and the wisdom of the Broker-Lawyer Committee to make reasoned judgments about the type of consideration that is practical in most transactions.

A security deposit is not lease consideration unless the agreement specifically states that all or a portion of the security deposit is designated as lease consideration. Leasing consideration is a promise in exchange for a promise. A security deposit is not required to make a lease enforceable.
B. Statute of Frauds and Real Estate Transactions

1. Statute of Frauds. A lease subject to the statute of frauds is enforceable against a party only if the lease is in writing and is signed by that party with limited exceptions. Pursuant to the Texas Business and Commerce Code § 26.01, et seq., a lease involving a real estate transaction is subject to the statute of frauds. Accordingly, oral leases are not illegal but they may be unenforceable in the court system.

Beware of the critical Statute of Frauds exception for oral leases of real estate with a term of one year or less. See Texas Business and Commerce Code § 26.01(b)(5) and (6).

Additionally, Texas statutes also require: (1) signature of the parties; (2) spouse’s signature when community rights or community property is involved; (3) an agent may sign for a principal with proper written authority; and (4) all co-owners must sign when lessors are co-owners.

2. Accurate Property Description. An enforceable real estate lease must include an accurate description of the property being conveyed. Failure to identify the property with reasonable certainty may make the lease unenforceable.

C. Situations that May Invalidate the Formation of a Lease. A lease may be valid, void, voidable, or unenforceable. A valid lease includes all the essential elements of a contract and is binding on all parties to the agreement. A void lease does not include all essential elements of a contract and has no legal effect because the law does not recognize it as a contract. A voidable lease may be rescinded by a party who might experience injury if the lease was enforced. For example, a lease entered into with a minor is voidable by the minor. An unenforceable lease may include the essential elements of a contract, but the law does not allow the parties to sue one another to enforce performance. For example, an oral lease for a term in excess of one year is an unenforceable lease. The following provide circumstances in which a lease may be voidable.

1. Lack of Capacity. The landlord and tenant must be legally competent for a lease to be valid and enforceable. In Texas, an individual is deemed legally competent when he or she reaches age 18, is married, or has had his or her “disabilities of minority” removed by a court. Furthermore, in Texas, once an individual reaches the age 18 or gets married, the court presumes that the person is competent, unless they have been declared incompetent by a court of law.

   a. Minority. A lease made by a minor is voidable at the minor’s election. A minor may set aside the entire lease at his or her option, but the minor cannot enforce provisions that are favorable to him or her and void other provisions that are burdensome. A lease voided by a minor is deemed to have been void for both parties from the beginning.

   Additionally, a minor cannot void a lease if he or she ratified the lease after reaching majority. In other words, the lease is no longer voidable if the former minor is now 18 years of age or older, knows that the lease is not binding because of the minority when made, and decides to waive the defect and “adopt” the lease.

   b. Mental Incapacity. A lease made with a person who lacks mental capacity is voidable. Examples of persons who lack mental capacity include the following: (1) a person under guardianship after adjudication of mental illness or defect; (2) a person who is insane; (3) a person who is so intoxicated that he or she is incapable of exercising judgment; or (4) a person who suffers from a mental disease or order, such as manic depression.

   However, individuals can appoint another party to act as a legally competent party on their behalf with a power of attorney. The person acting on behalf of another is known as the attorney-in-fact. If a transaction involves a power of attorney, it is good business for the real estate professionals involved to contact the title company closing the transaction to clarify the procedures and documents required well ahead of the scheduled closing date.

   c. Illegality. A lease may also be voidable if the agreement is to perform an illegal act or an act which is contrary to public policy.
III. Breach of Lease

To prove an action for breach of lease, the plaintiff must establish the defendant defaulted on the lease. “Breach” means the failure, without legal excuse, to perform any promise that forms all or part of an agreement, the refusal to recognize the existence of an agreement, or the doing of something inconsistent with its existence. If either party defaults, the defaulting party is subject to penalties provided by the law and the lease, and the non-defaulting party has statutory and contractual remedies or rights.

IV. Remedies

A. Tenant’s Default. If the tenant defaults, the landlord has three alternatives provided by law:

1. Declare the lease terminated. When the landlord declares the lease terminated, the lease might provide that the landlord may retain the security deposit as liquidated damages. This may not be lawful, as in Texas the landlord must mitigate its damages to lessen its losses.

2. Rescind the lease. In response to a breach of lease, the landlord might sue for rescission of the lease. When a lease is rescinded, it is cancelled or terminated as if it never existed. Additionally, the landlord would be required to return any security deposit to the tenant. This would be an unusual and burdensome remedy.

3. Sue for compensatory damages. Compensatory damages are designed to compensate the landlord for the damages accrued due to the tenant’s default. For example, if the lease allows, an injured landlord may sue the tenant for compensatory damages and retain the security deposit (which may not be lawful – see above). However, a landlord who rescinds the lease or declares it terminated has no additional remedies.

B. Landlord’s Default. If the landlord defaults, the tenant has two alternatives.

1. Rescind the lease. When a lease is rescinded, it is cancelled or terminated as if it never existed. In this case, the landlord is required to return any security deposit to the tenant.

2. Sue for compensatory damages. Compensatory damages are designed to compensate the tenant for the damages accrued due to the landlord’s default. Compensatory damages will be discussed in further detail below.

C. Calculation of Damages. The Texas rule for measuring damages for contractual injuries is “just compensation” for the loss or damage actually sustained. Damages for contractual injuries are designed to protect three interests: (1) an expectation interest; (2) a reliance interest; and (3) a restitution interest.

1. Expectancy Damages. Expectancy damages give the injured party the benefit of the bargain by putting the injured party in as good a position as it would have been in if the lease had been performed. The measure of expectancy damages is: (1) the loss in value of the defaulting party’s performance, plus (2) any consequential losses suffered because of the breach, minus (3) any cost or loss the injured party avoided by not having to perform its duties under the lease.

The actual calculation of the benefit-of-the-bargain damages can be tricky in practical application. Nonetheless, it is important to understand that the purpose of the calculation is to put the injured party in the same position it would have been in had the lease been performed. Additional damages that arise from frustration and mental anguish associated with the breach are not recoverable absent extraordinary circumstances.

2. Reliance Damages. An injured party can also recover its reliance interest in the lease. Reliance damages are awarded to the injured party for changing its position in reliance on the lease. The purpose is to restore the status quo at the time before the lease.
The measure of reliance damages is equal to the expenditures made by the injured party in reliance on the lease. As examples, a party that incurs costs for labor and material or spends money for advertising, equipment, or employees in preparation for performance of the lease can recover those costs as reliance damages.

3. **Restitution Damages.** The injured party can also obtain restitution as a remedy to put the injured party in as good a position as it would have been if no lease had been made. Restitution damages restore to the injured party the value of what it parted with in performing the lease. Unlike expectancy and reliance damages, restitution damages focus on forcing the defaulting party to disgorge benefits that it would be unjust to keep, rather than compensating the injured party.

   Restitution is measured by the reasonable value of the services rendered or supplied. The reasonable value of the services is equal to the reasonable price paid for the services in the community where they were rendered.

4. **Attorney’s Fees.** In a breach of lease case, if the injured party prevails at trial, the injured party is additionally entitled to recover its attorney’s fees. However, the injured party cannot recover punitive damages (or damages that punish the breaching party) in a breach of lease lawsuit.
Chapter 2 – Interesting Texas Statutory Provisions

I. Chapter 537.11: Professional Agreements and Standard Contracts

A. Texas Administrative Code §537.11 – Use of Standard Contract Forms

1. When negotiating contracts binding the sale, exchange, option, lease or rental of any interest in real property, a real estate licensee shall use only those contract forms promulgated by the Texas Real Estate Commission for that kind of transaction with the following exceptions:
   a. transactions in which the licensee is functioning solely as a principal, not as an agent;
   b. transactions in which an agency of the United States government requires a different form to be used;
   c. transactions for which a contract form has been prepared by the property owner or prepared by an attorney and required by the property owner; or
   d. transactions for which no standard contract form has been promulgated by the Texas Real Estate Commission, and the licensee uses a form prepared by an attorney at law licensed by this state and approved by the attorney for the particular kind of transactions involved or prepared by the Texas Real Estate Broker-Lawyer Committee and made available for trial use by licensees with the consent of the Texas Real Estate Commission.

2. A licensee may not (1) practice law; (2) offer, give or attempt to give legal advice, directly or indirectly; (3) give advice or opinions as to the legal effect of any contracts or other such instruments which may affect the title to real estate; (4) give advice or opinions concerning the status or validity of title to real estate; or (5) attempt to prevent or in any manner whatsoever discourage any principal to a real estate transaction from employing a lawyer.

3. However, nothing limits the licensee’s fiduciary obligation to disclose to the licensee’s principals all pertinent facts which are within the knowledge of the licensee, including such facts which might affect the status of or title to real estate.

4. A licensee may not undertake to draw or prepare documents fixing and defining the legal rights of the principals to a transaction.

5. In negotiating real estate transactions, the licensee may fill in forms for such transactions, using exclusively forms which have been approved and promulgated by the Texas Real Estate Commission or such forms as are otherwise permitted by the rules.

6. When filling in such a form, the licensee may only fill in the blanks provided and may not add to or strike matter from such form, except that licensees shall add factual statements and business details desired by the principals and shall strike only such matter as is desired by the principals and as is necessary to conform the instrument to the intent of the parties.

7. A licensee may not add to a promulgated earnest money contract form factual statements or business details for which a contract addendum, lease or other form has been promulgated by the Commission for mandatory use.

8. Nothing prevents the licensee from explaining to the principals the meaning of the factual statements and business details contained in the said instrument so long as the licensee does not offer or give legal advice.

9. Where it appears that, prior to the execution of any instrument, there are unusual matters involved in the transaction which should be resolved by legal counsel before the instrument is executed or that the instrument is to be
acknowledged and filed for record, the licensee shall advise the principals that each should consult a lawyer of the principal’s choice before executing same.

10. A licensee may not employ, directly or indirectly, a lawyer nor pay for the services of a lawyer to represent any principal to a real estate transaction in which the licensee is acting as an agent. The licensee may employ and pay for the services of a lawyer to represent only the licensee in a real estate transaction, including preparation of the contract, agreement, or other legal instruments to be executed by the principals to the transactions.

11. A licensee shall advise the principals that the instrument they are about to execute is binding on them.

II. TEXAS PROPERTY CODE
Chapter 62: Broker’s Liens

A. General Provisions

1. Applicability of Chapter (TEX. PROP. CODE § 62.002). Chapter 62 of the Texas Property Code applies only to real estate that is commercial real estate on the date the notice of lien is filed. The law does not apply to: (1) a transaction involving a claim for a commission of $2,500 or less in the aggregate; or (2) a transaction for the sale of commercial real estate involving a claim for a commission of $5,000 or less in the aggregate if the commercial real estate: (A) is the principal place of business of the record title owner; (B) is occupied by more than one and fewer than five tenants; and (C) is improved with 7,500 square feet or less of total gross building area.

2. Payable and Earned Commission (TEX. PROP. CODE § 62.004). A commission is payable at the time provided in the commission agreement. If payment of the commission is conditioned on the occurrence of an event and that event does not occur, the person obligated to pay the commission is not required to pay the commission.

B. Broker’s Lien

1. Person Entitled to a Lien (TEX. PROP. CODE § 62.021). A broker has a lien on a seller’s or lessor’s commercial real estate interest in the amount specified by the commission agreement if: (1) the broker has earned a commission under a commission agreement signed by the seller or lessor of the commercial real estate interest or the seller’s or lessor’s authorized agent; and (2) a notice of lien is recorded and indexed as provided by Section 62.024. The broker’s right to claim a lien based on the commission agreement must be disclosed in the commission agreement.

2. Filing of Notice of Lien (TEX. PROP. CODE § 62.024). A broker claiming a lien under this chapter may not file a notice of lien unless the commission on which the lien is based is earned. A broker claiming a lien under this chapter must file a notice of lien as provided with the county clerk of the county in which the commercial real estate is located. The county clerk shall record the notice of lien in records kept for that purpose and shall index and cross-index the notice of lien in the names of the broker, each person obligated to pay the commission under the commission agreement, and each person who owns an interest in the commercial real estate if the broker claims a lien on that interest.

3. Contents of Notice of Lien (TEX. PROP. CODE § 62.025). The notice of lien must be signed by the broker or by a person authorized to sign on behalf of the broker and must contain the following:

   a. a sworn statement of the nature and amount of the claim, including:
      i. the commission amount or the formula used to determine the commission;
      ii. the type of commission at issue, including a deferred commission; and
      iii. the month and year in which the commission was earned;

   b. the name of the broker and the real estate license number of the broker;

   c. the name as reflected in the broker’s records of any person who the broker believes is obligated to pay the commission under the commission agreement;
d. the name as reflected in the broker’s records of any person the broker believes to be an owner of the commercial real estate interest on which the lien is claimed;

e. a description legally sufficient for identification of the commercial real estate interest sought to be charged with the lien;

f. the name of any cooperating broker or principal in the transaction with whom the broker intends to share the commission and the dollar or percentage amount to be shared; and

g. a copy of the commission agreement on which the lien is based.

4. Notice of Filing (TEX. PROP. CODE § 62.026). Not later than one business day after the date the broker files a notice of lien, the broker must mail a copy of the notice of lien by certified mail, return receipt requested, or registered mail to:

a. the owner of record of the commercial real estate interest on which the lien is claimed or the owner’s authorized agent; and

b. the prospective buyer or tenant and any escrow agent named in a contract for the sale or lease of the commercial real estate interest on which the lien is claimed if:

   i. a binding written contract for the sale or lease of the commercial real estate interest is in effect between the owner and the prospective buyer or tenant in a transaction that is the basis for the commission; and

   ii. the binding written contract was executed by the owner and the prospective buyer or tenant before the date the notice of lien is filed.

If the broker has actual knowledge of the identity of the escrow agent named in the contract for the sale or lease of the commercial real estate interest on which the broker claims a lien or of the escrow agent otherwise closing the sale or lease of the commercial real estate interest, the broker, before the first business day before the date that the sale or lease is closed on commercial real estate for which a notice of lien is filed, must deliver a file-stamped copy or transmit a facsimile of a file-stamped copy of the notice of lien to each escrow agent at the office in which the closing of the sale or lease will occur for use during the closing of the sale or lease. The broker shall deliver the copy or transmit the facsimile directly to the individual escrow agent responsible for closing the sale or lease if the broker knows that person’s name.

If the escrow agent receives the notice of lien, the escrow agent and other parties to the sale or lease may not close the transaction unless the lien is released, the prospective buyer or tenant purchases or leases the property subject to the lien, the funds are held in escrow or a bond is filed. If the broker fails to comply with this section, the notice of lien is void.

5. Inception of Broker’s Lien (TEX. PROP. CODE § 62.027). A broker’s lien attaches to the commercial real estate interest owned by the person obligated to pay the commission on the date the notice of lien is recorded as provided by this chapter. The lien does not relate back to the date of the commission agreement.

6. Priority (TEX. PROP. CODE § 62.028). A recorded lien, mortgage, or other encumbrance on commercial real estate recorded before the date a broker’s lien is recorded has priority over the broker’s lien.

A broker’s lien on the commercial real estate interest of a person obligated to pay a commission is not valid or enforceable against a grantee, buyer, lessee, or transferee of the interest of the person obligated to pay the commission if the deed, lease, or instrument transferring the interest is recorded before the notice of the broker’s lien is recorded.
A purchase-money mortgage lien executed by the buyer of the commercial real estate interest has priority over a broker’s lien claimed for the commission owed by the buyer against the commercial real estate interest purchased by the buyer.

A mechanic’s lien that is recorded after a broker’s lien and that relates back to a date before the date the broker’s lien is recorded has priority over the broker’s lien.

C. Time for Filing Notice of Lien

1. Time to File (TEX. PROP. CODE § 62.041). If a broker has earned a commission under a commission agreement signed by a seller or the seller’s authorized agent, a broker must record a notice of lien:

   a. after the commission is earned; and
   b. before the conveyance of the commercial real estate interest on which the broker is claiming a lien.

If a broker has earned a commission under a commission agreement signed by a prospective buyer or a prospective buyer’s authorized agent, the broker must record a notice of lien:

   a. after the buyer acquires legal title to the commercial real estate interest on which the broker is claiming a lien; and
   b. before the buyer conveys the buyer’s commercial real estate interest on which the broker is claiming a lien.

If the lien is based on a lease transaction, the broker must record a notice of lien after the commission is earned and before the earlier of:

   a. the 91st day after the date the event for which the commission becomes payable occurs;
   or
   b. the date the person obligated to pay the commission records a subsequent conveyance of that person’s commercial real estate interest after executing the lease agreement relating to the lease transaction for which the lien is claimed.

If a notice of lien is not filed within the time required by this section, the lien is void.

D. Enforcement of Lien

1. Suit to Enforce Lien (TEX. PROP. CODE § 62.061). A broker may not bring a suit to foreclose a lien under this chapter unless the commission is earned and payable. A broker may bring a suit to foreclose a lien in any district court for the county in which the commercial real estate is located by filing a sworn complaint stating that the notice of lien has been recorded.

2. Statute of Limitations (TEX. PROP. CODE § 62.062). With certain exceptions, a broker claiming a lien under this chapter must bring a suit to foreclose the lien on or before the second anniversary of the date the notice of lien is recorded.

E. Release of Lien

1. Release of Lien (TEX. PROP. CODE § 62.081). Not later than the fifth day after the date a broker receives a written request from the owner of a commercial real estate interest on which a lien is claimed, the broker shall furnish to the owner a release of indebtedness and any lien claimed if: (1) the debt that is the basis for the lien is satisfied; or (2) the lien is discharged, rendered void, or extinguished.
When a condition occurs that would preclude the broker from receiving a commission under the terms of the commission agreement that is the basis for the lien, the broker shall, not later than the 10th day after the date the broker receives a written request from the owner of the commercial real estate interest on which the lien is claimed, furnish to the owner a release of indebtedness and any lien claimed.

A release of lien must be in a form that permits the instrument to be filed of record.

**F. Remedies**

1. **Owner’s or Tenant’s Remedies (TEX. PROP. CODE § 62.141).** An owner or tenant may file suit against a broker. In an action filed against the broker, the court shall discharge a broker’s lien if the broker:
   a. failed to mail a copy of the notice of lien within the prescribed period;
   b. failed to execute, acknowledge, and return a subordination agreement;
   c. failed to record the notice of lien within the prescribed period; or
   d. failed to release a lien within the prescribed period.

   If the court finds that a broker is liable to an owner or tenant under this section, the court may award the owner or tenant: (1) actual damages, including attorney’s fees and court costs, incurred by the owner or tenant that are proximately caused by the broker’s failure to execute, acknowledge, and return the subordination agreement or release the lien; and (2) a civil penalty in an amount not to exceed three times the amount of the claimed commission if the court finds that the broker acted with gross negligence or acted in bad faith in violation of Chapter 1101, Occupations Code.

   A person may also file a complaint with the Texas Real Estate Commission against a broker who fails to comply with this chapter.

2. **Broker’s Remedies (TEX. PROP. CODE § 62.142).** A broker may file suit against an owner or tenant to enforce a commission agreement. If the court finds that the broker waived the right to file a lien and that the owner or tenant violated the commission agreement, the court may award to the broker: (1) actual damages, including attorney’s fees and court costs, that are proximately caused by the owner’s or tenant’s failure to comply with the commission agreement; and (2) a civil penalty in an amount not to exceed three times the amount of the claimed commission if the court finds that the owner or tenant acted with gross negligence or in bad faith.

**III. TEXAS PROPERTY CODE**

**Chapter 91 and 93: Commercial Tenancies**

A. **Texas Property Code Chapter 91: Provisions Generally Applicable to Landlords and Tenants**

1. **Landlord’s Breach of Lease; Lien (TEX. PROP. CODE § 91.004).** If the landlord of a tenant who is not in default under a lease fails to comply in any respect with the lease agreement, the landlord is liable to the tenant for damages resulting from the failure. To secure payment of the damages, the tenant has a lien on the landlord’s nonexempt property in the tenant’s possession and on the rent due to the landlord under the lease.

2. **Subletting Prohibited (TEX. PROP. CODE § 91.005).** During the term of a lease, the tenant may not rent the leasehold to any other person without the prior consent of the landlord.

3. **Landlord’s Duty to Mitigate Damages (TEX. PROP. CODE § 91.006).** A landlord has a duty to mitigate damages if a tenant abandons the leased premises in violation of the lease. A provision of a lease that purports to waive a right or to exempt a landlord from a liability or duty to mitigate is void.
B. General Provisions of Texas Property Code Chapter 93

1. Applicability of Chapter. Chapter 93 of the Texas Property Code applies only to the relationship between landlords and tenants of commercial rental property.

2. Interruption of Utilities, Removal of Property (TEX. PROP. CODE § 93.002)

   a. Interruption of Utilities. A landlord or a landlord’s agent may not interrupt or cause the interruption of utility service paid for directly to the utility company by a tenant unless the interruption results from repairs, construction, or an emergency. TEX. PROP. CODE § 93.002(a).

   b. Removal of Personal Property. A landlord may not remove a door, window, furniture, fixtures, or appliances furnished by the landlord from the premises leased to a tenant unless the landlord removes the item for repair or replacement. If a landlord removes any of the items listed for repair or replacement, the repair or replacement must be promptly performed. TEX. PROP. CODE § 93.002(b).

   c. Tenant’s Right to Access to the Premises. A landlord may not intentionally prevent a tenant from entering the leased premises except by a legal proceeding unless the exclusion results from: (1) repairs, construction, or an emergency; (2) removing the contents of premises abandoned by a tenant; or (3) changing the door locks of a tenant who is delinquent in paying at least part of the rent. TEX. PROP. CODE § 93.002(c).

   d. Tenant’s Abandonment of the Premises. A tenant is presumed to have abandoned the premises if goods, equipment, or other property, in an amount substantial enough to indicate a probable intent to abandon the premises, is being or has been removed from the premises and the removal is not within the normal course of the tenant’s business. TEX. PROP. CODE § 93.002(d). A landlord may remove and store any property of a tenant that remains on premises that are abandoned. In addition to the landlord’s other rights, the landlord may dispose of the stored property if the tenant does not claim the property within sixty days after the date the property is stored. The landlord shall deliver by certified mail to the tenant at the tenant’s last known address a notice stating that the landlord may dispose of the tenant’s property if the tenant does not claim the property within sixty days after the date the property is stored. TEX. PROP. CODE § 93.002(e).

   e. Notice that the Door Locks have been Changed. If a landlord or landlord’s agent changes the door locks of a tenant who is delinquent in paying rent, the landlord or agent must place a written notice on the tenant’s front door stating the name and the address or telephone number of the individual or company from which the new key may be obtained. The new key is required to be provided only during tenant’s regular business hours and only if the tenant pays the delinquent rent.

   f. Tenant’s Remedies. If a landlord or a landlord’s agent violates Section 93.002 of the Texas Property Code, the tenant may: (1) either recover possession of the premises or terminate the lease; and (2) recover from the landlord an amount equal to the sum of the tenant’s actual damages, one month’s rent or $500, whichever is greater, reasonable attorney’s fees, and court costs, less any delinquent rents or other sums for which the tenant is liable to the landlord. TEX. PROP. CODE § 93.002(g).

   If there is a conflict between the lease and the statute, the lease prevails. TEX. PROP. CODE § 93.002(h).

C. Security Deposit

1. Definition of Security Deposit (TEX. PROP. CODE § 93.004). Pursuant to the Texas Property Code, a security deposit is defined as “any advance of money, other than a rental application deposit or an advance payment of rent, that is intended primarily to secure performance under a lease of commercial rental property.”

2. Landlord’s Obligation to Refund the Security Deposit (TEX. PROP. CODE § 93.005 and 93.006). The landlord is obligated to refund the security deposit to the tenant not later than the 60th day after the date the tenant surrenders the premises and provides notice to the landlord or the landlord’s agent of the tenant’s forwarding address.
Before returning a security deposit, the landlord may deduct from the deposit damages and charges for which the tenant is legally liable under the lease or damages and charges that result from a breach of the lease. The landlord may not retain any portion of a security deposit to cover normal wear and tear. “Normal wear and tear” is defined as “deterioration that results from the intended use of the commercial premises, including breakage or malfunction due to age or deteriorated condition, but the term does not include deterioration that results from negligence, carelessness, accident, or abuse of the premises, equipment, or chattels by the tenant or by a guest or invitee of the tenant.”

If the landlord retains all or part of a security deposit under this section, the landlord must give to the tenant the balance of the security deposit, if any, together with a written description and itemized list of all deductions. The landlord is not required to give the tenant a description and itemized list of deductions if: (1) the tenant owes rent when the tenant surrenders possession of the premises; and (2) no controversy exists concerning the amount of rent owed.

3. **New Owner’s Liability for the Security Deposit.** If the owner / landlord’s interest in the premises is terminated by sale, assignment, death, appointment of a receiver, bankruptcy, or otherwise, the new owner is liable for the return of the security deposit from the date title to the premises is acquired, regardless of whether an acknowledgement is given to the tenant under Texas Property Code Section 93.007(b). TEX. PROP. CODE § 93.007(a).

The former owner / landlord remains liable for a security deposit received while the person was the owner until the new owner delivers to the tenant a signed statement acknowledging that the new owner has received and is responsible for the tenant’s security deposit and specifying the exact dollar amount of the deposit. The amount of the security deposit is the greater of: (1) the amount provided in the tenant’s lease; or (2) the amount provided in an estoppel certificate prepared by the owner at the time the lease was executed or prepared by the new owner at the time the commercial property is transferred. TEX. PROP. CODE § 93.007(b).

4. **Landlord’s Records (Tex. Prop. Code § 93.008).** The landlord is required to keep accurate records of all security deposits.

5. **Tenant’s Forwarding Address (Tex. Prop. Code § 93.009).** The landlord is not obligated to return a tenant’s security deposit or give the tenant a written description of damages and charges until the tenant gives the landlord a written statement of the tenant’s forwarding address for the purpose of refunding the security deposit. Nonetheless, the tenant does not forfeit the right to a refund of the security deposit or the right to receive a description of damages and charges for failing to give a forwarding address to the landlord.

6. **Tenant’s Liability for Withholding Rent (Tex. Prop. Code § 93.010).** The tenant may not withhold payment of any portion of the last month’s rent on grounds that the security deposit is security for unpaid rent. A tenant who violates this section is presumed to have acted in bad faith. A tenant who in bad faith violates this section is liable to the landlord for the amount equal to three times the rent wrongfully withheld and the landlord’s reasonable attorney’s fees in a suit to recover the rent.

7. **Liability of Landlord (Tex. Prop. Code § 93.011).** A landlord who in bad faith retains a security deposit is liable for an amount equal to the sum of $100, three times the portion of the deposit wrongfully withheld, and the tenant’s reasonable attorney’s fees incurred in a suit to recover the deposit after the period prescribed for returning the deposit expires.

A landlord who in bad faith does not provide a written description and itemized list of damages and charges in violation of this chapter: (1) forfeits the right to withhold any portion of the security deposit or to bring suit against the tenant for damages to the premises; and (2) is liable for the tenant’s reasonable attorney’s fees in a suit to recover the deposit.

A landlord who fails to return a security deposit or to provide a written description and itemized list of deductions on or before the sixtieth day after the date the tenant surrenders possession is presumed to have acted in bad faith.

8. **No Assessment of Charges (Tex. Prop. Code § 93.012).** A landlord may not assess a charge, excluding a charge for rent or physical damage to the leased premises, to a tenant unless the amount of the charge or the
method by which the charge is to be computed is stated in the lease, an exhibit or attachment that is part of the lease, or an amendment to the lease.
Chapter 3 – Interesting Texas Cases


Jeff Carpenter owned a 15-acre parcel of raw land in Charlotte, North Carolina. In 2006 Jeff transferred two acres to an entity he controlled, Pavilion, and Pavilion leased the two acres to CVS Pharmacy. Jeff agreed to place a restriction in the CVS Lease on the future use of Jeff’s remaining tract, to entice CVS to sign the Lease by granting CVS an exclusive pharmacy use.

Pavilion sold the CVS tract in 2008 to Sonny Boy. At that time Jeff implemented the exclusive restriction on the remainder of the 15-acre tract with a restrictive covenant, as Jeff and CVS previously agreed two years prior. The balance of Jeff’s larger tract had not yet been developed.

The recorded covenant essentially stated that during the term of the CVS Lease, no portion of the balance of the 15-acre parcel could be leased or used as a drug store or pharmacy.

In 2012 Jeff contracted to sell the restricted remainder parcel to Charlotte Pavilion Road Retail Investment, LLC and WLA Enterprises, Inc. Charlotte Pavilion and WLA simultaneously contracted to purchase an adjacent, unrestricted tract of land from Charter Properties. The developers planned to lease the Charter parcel to Wal-Mart, for construction of a retail store that would sell, among other items, drugs and pharmaceuticals. The developers intended to use Jeff’s 13-acre tract for parking and access for customers to the Wal-Mart and other retail stores.

So, although Wal-Mart would share the parking lot with other retail businesses, Wal-Mart customers would be expected to park on Jeff’s parcel to access the Wal-Mart store. In which, again, the customers could purchase items in direct competition with CVS.

When CVS learned that the developers intended to construct a parking lot on the restricted tract for use by Wal-Mart, CVS informed the developers that such use would violate the restrictive covenant. So the developers sued CVS and Sonny Boy, asking the Court for an Order to the effect that their proposed parking lot development plans did not violate the restriction.

In January 2014 the trial court granted the developers’ request, and entered Judgment holding that the proposed construction of a parking lot and use for Wal-Mart customers would not violate the terms of the restrictive covenant.

CVS and Sonny Boy appealed.

CVS and Sonny Boy likely knew they were in trouble when the Appellate Court immediately took the position that North Carolina courts use a strict construction rule to interpret restrictive covenants, and that such covenants are not favored in North Carolina law. It was of no help to CVS that the Court stated that covenants are not enforceable unless clear and unambiguous.

Then, it was time to closely examine the language of the restriction. The restrictive covenant prohibited the construction of a building that is used for the sale of drugs, vitamins, health and beauty aids, or as a pharmacy. The covenant banned various business activities, but not incidental purposes (such as parking for a restricted use).

The North Carolina Appellate Court concluded that construction of a parking lot and access easement on Jeff’s parcel, to serve Wal-Mart’s customers on an adjacent and non-restricted tract, was not violative of Jeff’s restriction although such customers would be purchasing from Wal-Mart at least some items that were directly described in the CVS restriction.

The Appellate Court agreed with the developers Charlotte Pavilion Road and WLA Enterprises. The developers won and CVS lost. See Charlotte Pavilion Road Retail Investment vs. North Carolina CVS; No. COA14-658; North Carolina Court of Appeals; December 16, 2014.
B. Transcontinental Realty Investors v. Sidney Wicks. Effective Date Maneuvering.

Pursuant to a Lease of September 3, 2004, Sidney Wicks leased various commercial properties in Addison Texas to Transcontinental Realty Investors. On May 17, 2006, Sidney formed the Sidney Wicks Revocable Trust and assigned all of his properties to the Trust. The assignment was not made in the traditional form of Deed, but rather in a more general form of “Assignment and Declaration,” which presumably was not recorded with the Dallas County Clerk.

TRI began making rental payments to the Trust on receipt of the Assignment and Declaration.

On December 2, 2010, Sidney filed a lawsuit against TRI for breach of the Lease, then later amended it to substitute the Trust as the Plaintiff instead of Sidney. TRI answered the lawsuit by contending that the Trust lacked standing to assert claims, stating that Sidney should have been the correct party – not his Trust – as Sidney failed to convey his property interests by Deed.

TRI’s point was that the 2006 Assignment and Declaration is not effective in Texas to transfer ownership in real estate. Only Deeds in Texas would suffice for that purpose. And, if the Assignment and Declaration is ineffective, then the Trust lacked standing or capacity to sue TRI as only Sidney would have that right.

On July 1, 2011, the trial court granted the Trust’s Motion for Judgment, finding that there were no material issues of fact in controversy, and that the Trust was entitled to Judgment by operation of Texas law.

The trial court did not deal with damages though, and reserved that issue for a jury trial to be conducted more than one year later.

On September 6, 2011, Sidney executed and recorded a General Warranty Deed which transferred his real estate to the Trust. On the same date Sidney also executed an “Assignment and Assumption of Lease.” Both the Assignment and the Deed stated that although the documents were signed on September 6, 2011, they each had an “effective date” of May 17, 2006. Over five years prior to the date that each was executed and the Deed recorded.

Having already won Round One, the issue of damages owed by TRI to the Trust proceeded to a jury trial. In October 2012 the jury determined in Round Two that TRI owed the Trust $1 million plus interest, attorney’s fees and expenses.

The trial court converted the jury’s award to Final Judgment. TRI appealed.

TRI again claimed that the Trust lacked standing in Court. That Sidney failed to timely sign and record a Deed to the Trust. That using an artificial “effective date” was not lawful. And that Sidney would have been the proper party in interest at the time of the lawsuit. Not the Trust.

The Trust countered by arguing that there was no provision in Sidney’s Lease with TRI requiring that an assignment would only be effective upon execution. And, consequently, Sidney was not prevented from executing the docs in 2011, with a 2006 “effective date.”

The Appellate Court agreed with the Trust. Sidney’s Trust won and Transcontinental Realty Investors lost. See Transcontinental Realty Investors, Inc. v. Sidney Wicks, Trustee of the Sidney Wicks Revocable Trust; No. 05-13-00362-CV; Texas Court of Appeals; 5th District; August 5, 2014.


On March 15, 2001, 175 Broad Street LLC (landlord) entered into a five-year lease with The Nead Organization, Inc. (tenant) for 12,017 SF in a commercial building. The lease was amended and extended in September 2005.

The holdover provision stated that if Nead continued occupancy after March 31, 2011 without the Landlord’s consent, then Nead would pay double the amount of base rent.
Nead was evidently not ready to vacate by the end of the stated lease term. Nead actually paid double rent from April through July 2011, but then stopped paying rental altogether. Nead ultimately vacated the premises on August 16, 2011.

175 Broad sued Nead for breach of the lease. 175 Broad alleged that Nead vacated the premises without proper notice, failed to pay rental and other charges, neglected to remove fixtures and failed to restore the premises to its original condition. 175 Broad alleged total damages of $224,468.

Shortly after 175 Broad filed its lawsuit, Nead asked the court to dismiss the complaint, citing a mandatory arbitration provision contained in the lease. 175 Broad defended by claiming that the arbitration provision was not intended to cover money disputes.

The court agreed with Nead and dismissed the lawsuit. 175 Broad appealed.

The Court of Appeals reviewed the arbitration section closely, which stated: “All disputes under this Lease, other than those relating to the payment of rent or other charges by Tenant, must be submitted to arbitration.”

Concluding that a part of the dispute related to rent but other claims did not, the Court of Appeals agreed that, regardless, the case must be dismissed to allow the parties to pursue arbitration.

The tenant Nead won and the lawsuit was dismissed. See 175 Broad Street, LLC v. The Nead Organization, Inc.; Docket No. A-3600-11T4; Superior Court of New Jersey – Appellate Division; January 10, 2013.

The results of the arbitration were not publicized.


N. Providence LLC leased property to The Great Atlantic & Pacific Tea Company, Inc. Some of you will recognize the tenant as “A&P.” In the Lease, A&P promised to construct a new grocery store for itself in the shopping center, and Providence agreed to pay A&P a construction allowance of $1.9 million within 90 days following the date that A&P opened its store.

A&P opened for business on September 24, 2010, thereby giving Providence 90 days or until December 23, 2010 to pay the construction allowance. Providence secured a loan from UBS and advised A&P that it was ready to fund the $1.9 million allowance.

All was proceeding well. Until A&P filed bankruptcy on December 21, 2010. UBS informed A&P it was prepared to fund the construction allowance as soon as A&P assumed the Lease in the context of the bankruptcy proceeding.

A&P then assumed the Lease. Six months later. On June 22, 2011.

The first obvious result was that the construction allowance wasn’t funded within the 90-day window. The second not-so-obvious result was that A&P withheld all rent and other charges from December 23, 2010 (the last day to properly fund the construction allowance) until September 29, 2011 – being the date the allowance was finally paid.

Providence filed a lawsuit against A&P, claiming that the $1.9 million allowance must be reduced by the amount of rent withheld. The court ruled for A&P in holding that the Lease plainly stated no rental was due until the construction allowance was paid.

Providence appealed.

It took 20 pages for the appellate court to decide that indeed A&P had the right to withhold rent payment to Providence. And that, by inference, A&P’s bankruptcy filing and delayed receipt of the construction allowance had saved A&P a substantial sum. See The Great Atlantic & Pacific Tea Company, Inc. v. N. Providence, LLC; Case No. 13-CV-5588 (CS); United States District Court – Southern District of New York; April 28, 2014.
And this makes me wonder if the A&P bankruptcy filing was followed by Providence’s bankruptcy filing. How many landlords can survive without rental payments for nine months relative to a ‘big box’ lease?

**E. Curtis v. AGF Spring Creek / Coit II. Failure to form or use the proper entity.**

In June 2004 AGF Spring Creek / Coit II, Ltd. leased office space in Richardson Texas to Atrium Executive Business Centers Richardson, LLC. The term commenced November 1, 2004, and continued for six years. Dawn Curtis signed the Lease for the tenant as its President.

Later there were three Lease Amendments. Each was signed by Curtis for the tenant, as its President or CEO. The last Amendment extended the lease term into 2015.

Atrium, however, was never formed. Instead, Curtis formed “AEBC-Richardson, Inc.” After formation, AEBC occupied the leased premises and operated a business there for six years. Although AEBC offered executive suites at the leased premises to subtenants, it was Atrium that was shown as the tenant in the Lease and all Amendments, and Dawn Curtis signed each on behalf of Atrium, not AEBC.

In March 2010 Curtis sent an email to representatives of the Landlord stating that revenues were too low to continue in operations, and asking AGF to handle the details of the pending lease default. No further rent was paid and AGF terminated the Lease by written notice issued later that month.

In April 2010 AGF initiated a lawsuit against Dawn Curtis individually for breach of the 2004 Lease, as extended and amended. AGF contended that although Atrium was the named tenant, in fact (and in law) Atrium never existed as it was never formed. And consequently, Dawn Curtis was 100% liable as if she had signed an unconditional Guaranty.

The jury entered a verdict in favor of AGF in trial court, and the judge converted it into a Judgment. Curtis appealed.

On appeal Curtis acknowledged her mistake in failing to change the name of the tenant on the Lease, and her further mistakes in signing the Lease Amendments as President of an LLC that did not exist. She requested however that the Court overlook these mistakes and instead impose a lease agreement between AGF and AEBC through the action and conduct of the parties.

To support her argument, Curtis provided evidence that reimbursement of the tenant’s move-in expenses, all rental payments, fax transmissions, insurance policies, sales and use tax permits and subtenancy agreements with executive suite customers were all made in the name of AEBC rather than Atrium, and further – that Landlord was aware of these documents and payments.

However, Landlord refuted those arguments by stating that the Lease was unambiguous. Atrium Executive Business Centers Richardson, LLC was identified as the Tenant. Not AEBG-Richardson, Inc. The Lease also contained an “incorporation” clause providing that the Lease could not be altered, waived, amended or extended unless by written agreement.

Obviously changing the identity of one of the parties to the Lease is serious business and not easily accomplished without a written agreement between both parties.

Curtis’ lawyers found an interesting case from Fort Worth. An Appeals Court decided in 1997 that, in a similar situation as this case, “a promoter is relieved of personal liability only when the corporation subsequently adopts the contract either expressly or by accepting its benefits.”

But in our case the entity was never formed, and could not “subsequently adopt” the Lease. AEBC was ultimately formed. Not Atrium. And if Landlord had sued AEBC for breach of Lease, AEBC could have easily defended claiming it never signed the Lease or any of the modifications or anything else (such as a Lease Guaranty) leading to imposition of liability against AEBC.

Ultimately the Appeals Court overturned the lower court’s judgment, but due to entirely other issues: the jury had miscalculated the proper amount of the award. So while I must truthfully tell you that Curtis won this round, I must also conclude that if this case isn’t settled but instead is retried, Curtis will surely lose again.
F. Clear Lake Center v. Garden Ridge. CAM charge challenge.

In 1995, Garden Ridge leased space from Fiesta Mart. Fiesta Mart sold the shopping center to Clear Lake Center in 2003. Garden Ridge audited its allocated share of common area maintenance charges and sued its Landlord, Clear Lake Center.

This comprehensive commercial lease obligated the Landlord to operate, manage, maintain and repair the common areas, but Tenant was required to pay its prorate share of the expenses. The long list of allowable common area costs had virtually no limitations, although Landlord’s fee for “supervision” of the common areas was capped at 7.5% of the total of all CAM charges.

Evidently Garden Ridge had no issue with the CAM computations made by Fiesta Mart. However – Clear Lake added the 7.5% “supervision” fee to its CAM management fee. As well, Garden Ridge wasn’t pleased that both of such fees were paid to an affiliate of Clear Lake.

From 2003 to 2009 Garden Ridge paid $470,000 to Clear Lake for both management and supervisory fees. In 2009 Garden Ridge’s auditor concluded that Clear Lake charged an exorbitant amount.

So Garden Ridge sued Clear Lake in 2009 for breach of the Lease Agreement. The trial court awarded Garden Ridge $470,000 in damages and $530,000 in attorney’s fees, for an even $1 million dollar judgment. The judgment for $470,000 represented the full return of all management fees and supervision charges during that six year period.

Clear Lake appealed and, hoping to overturn the judgment, attempted to delineate between management fees and supervision fees. As you would expect, Clear Lake mostly failed in that endeavor.

Clear Lake’s backup position was that even if the supervision fees were duplicative of the management fees, surely Garden Ridge was obligated to pay one or the other or some portion of both. And that even if Clear Lakes had no right to upcharge the management fees with a 7.5% supervisory fee overlay, still Clear Lakes paid honest expenses to operate, manage, maintain and repair the common areas and Garden Ridge should be responsible for its allocated share. Which share, if not $470,000, should have been something fairly close to it.

The Texas Court of Appeals agreed with Clear Lake. Clear Lake was not prohibited from contracting with a third party (although affiliated) for management of the common areas and passing on to Garden Ridge a pro rata share of those expenses. And if “supervision” fees were indeed separate from management expenses, then presumably Clear Lake could recover those too.

The Appellate Court sent the case back to the trial court to start over. The trial court can then determine what part of “management” fees are the same as “supervision” fees, if any, subtract such amount from $470,000 and enter a judgment accordingly.

Clear Lake wins, sort of. Garden Ridge also wins, sort of. I guess the lawyers in this litigation are the ones that really won.


In 2006 Jim and Jeneane Cremer formed Jumpin’ Jack’s Party Shack, Inc., to operate a children’s party center. The Cremers found a warehouse in Tyler owned by Morris Hallman, and signed a four year lease.

The leased premises consisted of a 20 x 20 foot sheet metal over steel frame air-conditioned office, with an attached 50 x 80 foot warehouse structure. The warehouse portion was not air conditioned, and contained only a bare concrete floor and open-air roof extension. It had been previously used as a car wash bay.
The Cremers spent $36,950 for dirt work, concrete and materials to make a 50 x 50 foot warehouse extension and enclose it. Also the Cremers expended another $115,000 to install six air conditioning units, HVAC duct work, lighting, plumbing, toilets, cabinets, party rooms and more offices.

In December 2010 – the end of the lease term – the Cremers removed the six air conditioning units, HVAC ducts, lighting, kitchen and bathroom fixtures, doors, door jambs, insulation, electrical wiring and sheetrock as they vacated the buildings. All of those components had been installed by the Cremers after the beginning of the lease term.

Morris Hallman was not pleased and sued the Cremers. Hallman’s position was that the Cremers had no right to remove valuable improvements, and by doing so, Hallman was substantially damaged.

The trial court ruled for Hallman, finding that in the lease agreement “… the parties expressly agreed that at the expiration of the lease, improvements to the property made by lessees … belonged to lessor, Morris L. Hallman, and were to be returned to the lessor by the lessees in good operation condition.”

The trial court awarded Hallman damages of $67,339. Cremers appealed.

The Appellate Court took a hard look at the 2006 lease, particularly focusing on the obligation of the tenants to repair everything the tenants installed, modified, replaced or added. Otherwise, if the landlord had installed it (meaning: it was in the buildings when the Cremers received the keys), then it was the landlord’s obligation to repair and maintain.

Due to procedural issues, the argument that Cremers installed trade fixtures into the buildings which became permanently annexed and incorporated into the real estate, was not litigated. Presumably the outcome might have been different.

But – based on the pleadings before the Court of Appeals – Cremers win; Hallman loses. Cremers had the right to remove the improvements they installed, much to Hallman’s disappointment and financial loss, as the Court of Appeals concluded that the trial court had not properly analyzed the 2006 lease agreement.


H. Ashford Partners v. ECO Resources. Leasehold construction.

More than 10 years ago ECO Resources, Inc., entered into a build-to-suit lease with its landlord TA / Sugar Land-ECO, Ltd. for the construction of a 32,000 SF office and lab. TASL then agreed to sell the property to Ashford Partners, Ltd. Closing was within 30 days after the commencement date of the ECO lease.

Construction was completed in about six months. ECO accepted the building as “substantially complete,” but submitted to TASL an 8-page punch list of items in need of repair. As required by the lease, ECO then executed an Estoppel Certificate (verifying the validity of the lease and other similar matters). TASL doubtless submitted the Estoppel to Ashford. Then TASL sold the building to Ashford two weeks later.

ECO’s building problems started two years later. Water collected under the foundation, evidently caused by the failure to caulk between the tilt wall panels below grade.

Ashford spent more than $313,000 to repair the problem, and then sued the construction contractor TASL had used and ECO. The claim against the contractor was settled. However, ECO filed a counterclaim against Ashford for breach of lease, and ECO did not abandon its claim.

At trial the jury found that ECO had been damaged because the value of its lease was diminished. The trial court rendered judgment for ECO against Ashford for almost $1.5 million.

Ashford appealed. The Court of Appeals concurred with the trial court, and accordingly affirmed the trial court’s judgment.

So Ashford appealed again, essentially claiming that since ECO complained of construction issues, Ashford had the building repaired and consequently ECO suffered no damages.
The Texas Supreme Court determined that the trial court and court of appeals had applied an improper damages test of the difference between rent and the value of the leasehold. Instead, the Supremes determined that the landlord’s obligations in the lease – to repair construction defects – had been adequately satisfied. Consequently, ECO had not been damaged and should not have prevailed in either the trial court or court of appeals.

The lower court judgment was reversed. Ashford wins. ECO loses.

See *Ashford Partners Ltd. v ECO Resources Inc.*; No. 10-0615; Supreme Court of the State of Texas; April 23, 2012.

**I. Zaid v. Weingarten Realty Investors. Loss mitigation.**

In 1997 the Supremes – no not *those* Supremes but rather the Texas Supreme Court – gave all of us involved in commercial real estate law the landmark opinion of *Austin Hill Country v. Palisades Plaza*. That case imparted a duty upon commercial landlords to attempt to lessen their losses when a tenant vacates. Previous law allowed the Landlord to do nothing, wait for the end of the lease term, and then sue the Tenant and Guarantor. Not to be outdone, our own Texas legislature liked the case so much they wrote a law about it in 1997 and it is still found today in our Texas Property Code.

That section of the Property Code has been litigated. A lot. Tenants use it to claim that their Landlord didn’t lessen their loss when the Tenant breached the lease. And then the Tenant inevitably claims that *if only the Landlord had mitigated, surely the Landlord would have found a replacement tenant who would have covered all of Landlord’s losses.*

Mazin Zaid assumed a commercial lease from Weingarten Realty in 2005. In 2006 Zaid assigned the lease to new tenants, but Zaid was not released from his lease liability. The new tenants soon defaulted and were locked out. Weingarten sued Zaid for breach of the lease.

The jury agreed with Weingarten in the trial court, awarding Weingarten approximately $150,000 for unpaid rent, plus almost $50,000 in attorney’s fees for the trial. The trial court converted the verdict to judgment. Zaid appealed.

On appeal Zaid claimed that Weingarten did not follow Texas law because Weingarten did not attempt to lessen its losses. Weingarten, however, had senior leasing executive John Wise describe his efforts to find a replacement tenant. According to Wise, Weingarten placed a ‘for rent’ sign in the window. Wise personally made cold calls and left flyers with retailers, attended broker meetings, sent out e-mail blasts and showed the property to several potential tenants, explaining that the rental pricing was negotiable.

Zaid argued that he, Mazin Zaid, was the perfect replacement tenant. Zaid stated that had Weingarten permitted him to reclaim the property, pay the back rent, operate the business and continue the lease, Weingarten would have lost no rental income.

Weingarten countered by introducing evidence that Zaid had re-entered the property and removed his equipment, Zaid never mentioned in written correspondence with Weingarten that he wanted to resume possession of the premises, and that Zaid took no action in preparation of resuming operations at the restaurant.

Judgment was affirmed for Weingarten.

See *Zaid v. Weingarten Realty Investors*; No. 09-10-00225-CV; Court of Appeals, Ninth District of Texas; August 31, 2011.

**J. Thomas J. Sibley PC v. Brentwood Investment Development Company. Is an unsigned Lease binding?**

Tom Sibley is a Beaumont real estate lawyer, first licensed in Texas in 1964. Mr. Sibley formed a professional corporation in 1981, and he signed a commercial office Lease in 2001 for space in Beaumont on behalf of his PC. The Landlord – Brentwood Investment Development Company, LP, did not sign it. The appellate opinion does not give us any guidance as to why Brentwood failed to do so.
The Lease was for 4,072 square feet, 10 year term, $13.50 PSF for the first five years, $14.50 for the second five years, plus some ‘net’ expenses of approximately $1,272 per month.

Sibley PC moved in before October 1, 2001 – just about 10 years ago as I write this. For unstated reasons, Sibley did not make full rent payments for 38 months, to November 2005. In that period, Sibley only made partial rental payments in July, August and September 2005, according to Brentwood’s records.

Brentwood filed a lawsuit against Sibley PC in March 2008. Brentwood alleged that Sibley PC owed $214,993 in unpaid rent, plus other expenses. Brentwood won at trial; Sibley PC appealed.

Predictably, Sibley PC claimed at trial on appeal that there was no enforceable contract. The facts were clear and undisputed: Sibley signed the Lease; Brentwood did not.

The Appellate Court determined that the parties proceeded with the Lease as if it had been signed. Sibley PC occupied the space and operated a law firm from the premises. Sibley PC made a few rent payments. Brentwood maintained the building and common areas.

The Beaumont Court of Appeals then stated that “. . . the absence of a party’s signature does not necessarily destroy an otherwise valid contract [citation omitted]. A party may accept a contract, and indicate its intent to be bound to the terms by acts and conduct in accordance with the terms.”

Hmmm you say? Sounds logical you said? Well, do a Google search on Texas “black-letter” law on this point. Check out 26.01(b)(4) and (5) of the Texas Business & Commerce Code: [Link](http://www.statutes.legis.state.tx.us/Docs/BC/htm/BC.26.htm).

The Sibley PC Lease had a 10-year term, so it is not excluded from the Statute of Frauds exception of 26.01(b)(5) or (6), regarding agreements with a term that is one year or less.

Texas law seems clear that for all leases with a term longer than one year, it must be in writing and signed to be enforceable. The Beaumont Court of Appeals is equally clear – no writing and no signature required in situations where the failure to sign appears to be inadvertent, and the parties performed as if there were an executed lease.


Mitchell Rudder Properties, LP sued GKG.Net, Inc. for breach of a commercial lease agreement. The jury awarded judgment to Rudder, and GKG appealed to the Houston Court of Appeals.

GKG had extended its lease until March 31, 2013. In 2006 GKG defaulted and Rudder took possession. At the time of the default GKG was paying $13.56 PSF per year.

Rudder quickly signed a replacement lease with World Savings Bank. World was later acquired by Wachovia. The replacement lease had a term through 2011, but World also reserved for itself a ‘kick-out’ or ‘knockout’ clause, where World could buy out of the last two years. Also, World reserved a five-year extension option.

Litigation was asserted by Rudder against GKG in 2006 for past due rents, diminished rents relative to the World lease, future rents for the unexpired original lease term (2011 World lease vs. 2013 GKG lease), and costs. Rudder was awarded damages in all categories requested, in addition to $314,123 for the two-year period of time after expiration of the World Lease.

GKG appealed only the $314k component, claiming that the jury improperly failed to grant an offset for the value of the lease during the two year period. Rudder’s property manager had testified in court that “. . . nobody that I know as an investor that would buy that tenth year – or year 11 and the last 3 months of 12 as an income stream for anything when they’d [World Savings] had already vacated the building. So we didn’t assign any value to that.”
The Houston Court of Appeals reviewed a pivotal 1997 Texas Supreme Court ruling, and more current case authority, and concluded that “. . . the reasonable cash market value of a lease for its unexpired term means the reasonable cash market value of the property – not the reasonable cash market value of the lease that has been breached.” Really the Court had little choice, because to do otherwise would mean that breaching tenants would never be entitled a fair market value offset for the balance of the lease term – that the remaining lease term is always worth zero.

In a further erosion of jury decisions, the Houston Court of Appeals therefore held that there is no evidence to support the jury’s decision that the reasonable cash market value for the remainder of GKG’s term is zero, and that Rudder was entitled to the full rental value of $314,123. The trial court’s judgment was reversed and the case returned to court for a new trial.


In September 2005, MOB 90 of Texas, LP, leased commercial property to Nejemie Alter MD’s professional association. The property was in the Corpus Christi area, intended to be used as a medical office for five years. Alter personally guaranteed the lease obligation. Virtually no rent was paid during 2006, so MOB filed an eviction lawsuit against Alter.

Alter vacated in January 2007, and claimed that he only owed rental through that date. MOB had a different theory in mind, and claimed that Alter owed rental through the date of trial. The monthly rent was $4,677. Rental owing through the date that Alter vacated was $36,782, and that amount was not in dispute.

MOB requested judgment for $93,220. Alter contested that amount, claiming that MOB failed to properly mitigate damages, as required by the Texas law.

Alter testified that as he passed by the MOB property there were no signs posted that the property was available to lease. To his knowledge, there were no visible efforts undertaken by MOB to re-lease the premises. Alter further testified that after he defaulted he attempted to negotiate a deal with MOB involving lesser space. Alter claimed that he was willing to pay weekly amounts.

At trial MOB’s counsel called the property manager as a witness. Jean Shivers testified that typically for-lease signage was not used in medical office building settings. Shivers stated she had shown the premises three times since Alter was evicted, and that she had not leased any space in MOB’s building since January 2007 – the date that Alter vacated.

Shivers also testified that she listed the premises on both Loopnet and Costar, kept in contact with personnel at Doctor’s Regional Hospital, and that it was hardly unusual for it to take an extended period of time to re-lease commercial premises.

In any event, the Nueces County trial court entered judgment for MOB, but only for $36,782. MOB appealed.

The Corpus Christi Court of Appeals, citing a landmark 1997 Texas Supreme Court decision, discussed the duty of a Texas landlord to take objectively reasonable efforts to mitigate damages and find a suitable replacement tenant, when the tenant breaches a lease and abandons the property. A Texas landlord is not required to take all known efforts or accept an unsuitable tenant.

The trial court was of the view that MOB failed to adequately mitigate because MOB refused to work with Alter, who had defaulted on the Lease. The trial court also concluded that MOB’s efforts to mitigate by online listings, showing the property to those who expressed an interest and contacting the hospital administrators were insufficient.

The Court of Appeals disagreed, finding that since Alter did not prove that MOB’s failure to mitigate damaged Alter in any way, the trial court made a mistake and MOB was owed $93,220 in back rent through the date of trial. The Court of Appeals also saw no duty of a Texas landlord to renegotiate its lease with a defaulting tenant. See MOB 90 of Texas, LP v. Nejemie Alter MD, PA (Texas Court of Appeals – Corpus Christi-Edinburg 2009).

MOB wins, Dr. Alter loses.
M. Chi Hung Luu vs. Merry Homes, Inc. Unenforceable use clause.

May a Landlord enforce a lease obligating the tenant to operate a nightclub or bar, when the tenant cannot obtain a liquor license? Merry Homes, Inc. thought so. Chi Hung Luu thought differently.

The Houston trial court entered a judgment declaring the commercial lease void for illegality, since Luu could not obtain a liquor license. Evidently the Bellaire site was too close to a school and hospital. The Houston trial court awarded Luu $6,000 for the security deposit, and $25,300 in attorneys fees. Merry Homes – the landlord – appealed.

In June 2005 Luu signed a 5-year Lease. The use clause provided that Luu may only use the premises to operate a nightclub or bar, and “for no other purpose.” The Lease also stated that Luu could not use the premises for any activity that violates laws.

Luu promptly submitted his liquor application to the City of Houston after the Lease was signed. The application was denied. The site was within 300 feet from a public school and a public hospital, and consequently, no nightclub / bar license would be issued. The City suggested that Luu might qualify under the “restaurant exception” rules, but Luu chose not to do so because of the expense of installing a full kitchen.

Luu requested the return of his deposit and termination of the Lease. Merry Homes refused.

Luu never occupied the premises. Instead he sued Merry Homes, requesting a judicial determination that the purpose of the Lease was impossibly frustrated, and therefore the Lease must be terminated.

The Houston Court of Appeals decided on February 19, 2010, that both the Houston trial court and Chi Hung Luu were correct. Mr. Luu could not legally perform his obligations in the Lease. A contract to fulfill an obligation which cannot be performed without violating law is void. The Lease was terminated by the Court.

N. Dick’s Last Resort v. Market / Ross. When using / forming an entity is not helpful.

Typically forming a new entity to serve as a commercial tenant or buyer is a good idea. But not always.

In 1986 Dick’s Last Resort, as tenant, signed a Lease for Dallas property located in the West End District. In 1999 the Landlord allowed Dick’s Last Resort to use a newly formed, related entity (Dick’s West End) to replace the old one and serve as the new tenant.

Presumably the Landlord did not recognize the Tenant’s intentions.

In 2005 the restaurant relocated without the Landlord’s consent and rent payments ceased. The Landlord sued Dick’s West End for breach of the lease, but also alleged that Dick’s Last Resort was liable under a little-used legal theory called “piercing the corporate veil.” That theory imposes liability by ignoring the corporate structure, when the corporate form has been used as part of an unfair device to achieve an inequitable result. Typical allegations include fraud and evasion of existing legal obligations.

The 44th Judicial District Court of Dallas, in a jury trial, awarded Judgment to the Landlord against all defendants. Dick’s Last Resort, Dick’s West End and various other defendants appealed.

Testimony from a Dick’s principal indicated that Dick’s West End was purposefully formed as a no-asset company, so that it could close the restaurant and leave the Landlord with the remedy of pursuing an insolvent tenant. The jury, after receiving evidence that Dick’s: (i) moved the restaurant only three blocks away, (ii) was paying rent at half the cost of the initial Lease, and (iii) was in continual operation with the same employees, equipment and operating company from the date of the relocation through the date of trial, concluded that Dick’s Last Resort had perpetrated a fraud. The jury would not let Dick’s Last Resort escape liability by forming a shell entity and transferring to it the tenant’s interest in the Lease.

The Judgment of the trial court was upheld in a recent appellate decision.