Kimball, Tirey & St. John LLP

Protecting Commercial Landlords with Exculpatory Lease Clauses

Jamie Sternberg, Esq.

February 2005

Commercial landlords should be aware of a recent California case involving an exculpatory clause in a commercial lease. In *Burnett v. Chimney Sweep* (2004) 123 Cal. App. 4th 1057, the tenant claimed that the landlord was negligent in dealing with a mold problem at the property. The landlord argued that even if it had been negligent, the landlord was protected by (1) a requirement in the lease that the tenant maintain insurance to cover losses and (2) an exculpatory clause in the lease. The lease clause read, "Lessor shall not be liable for injury or damage to the person or goods, wares, merchandise, or other property of Lessee…whether such damage or injury is caused by or results from fire, steam, electricity, gas, water or rain, or from the breakage, leakage, obstruction or other defects of pipes, fire sprinklers, wires, appliances, plumbing, air conditioning or lighting fixtures, or from any other cause, whether said injury or damage results from conditions arising upon the Premises or upon other portions of the Building of which the Premises are a part, from other sources or places, and regardless of whether the cause of such damage or injury or the means of repairing the same is accessible or not…Notwithstanding Lessor's negligence or breach of this Lease, Lessor shall under no circumstances be liable for injury to Lessee's business or for any loss of income or profit therefrom." While the court didn't explicitly identify the lease, this is the language in paragraph 8.8 of the American Industrial Real Estate lease forms.

The California Court of Appeal, Second Appellate District, Division Six ruled that the clause did not provide complete protection for the landlord from all negligence claims. The court distinguished between different types of negligence. The court ruled that "passive negligence" claims against the landlord were barred, but the tenant could pursue claims against the landlord for "active negligence." The court found that the landlord was not protected from claims of "active" negligence because "active negligence" was not specifically mentioned in the lease provision. The court explained that "the law does not look with favor upon attempts to avoid liability or secure exemptions for one's own negligence, and such provisions are strictly construed against the person relying upon them." Additionally, "an agreement which seeks to limit generally without mentioning negligence is construed to shield a party only for passive negligence, not for active negligence." "Active" negligence in this type of case would be the landlord's refusal to make repairs despite knowledge of the problem. "Passive" negligence would involve a lesser level of negligence, such as failing to make repairs because it was unaware of the problem, but where a reasonable landlord would have known of the problem and made repairs.

The court ruled that the landlord was not protected by a lease provision requiring that the tenant pursue claims against its insurance company. The court also ruled that the landlord was not protected by a lease provision requiring the tenant to maintain the premises because the maintenance problem could have begun in a common area under the landlord's control.

The property manager's liability was also an issue in the case. The lease did not specifically mention a waiver of claims against the property manager. Therefore, the court ruled that the lease did not provide protection to the property manager from the tenant's tort claims. However,

because the property manager was not a party to the lease, the tenant could not bring a claim for breach of the lease against the property manager.

Landlords can strengthen their leases to provide additional protection by specifically stating that the tenant is waiving both active and passive negligence claims, and by specifically mentioning the Landlord's agents. Kimball, Tirey & St. John can assist you in drafting this lease provision and others.

Even after adding exculpatory language to a lease, commercial landlords and their agents (including property managers) aren't completely protected. Courts will not enforce lease provisions that bar claims for intentional, reckless, or criminal acts. [Reckless acts are sometimes referred to as "gross" negligence.] Additionally, although the language can be added to a lease to increase the likelihood that a court would absolve landlords of liability for active negligence, landlords must recognize that courts may invalidate an exculpatory clause if they feel that it is not fair to enforce it in any specific situation, or if enforcement would be against public policy.

There is one favorable aspect of this case for landlords. The tenant contended that mold claims involved a matter of "public interest" thereby rendering all exculpatory clauses invalid as they relate to mold claims. The court disagreed, finding that commercial property mold claims did not meet the six part test used to determine if a matter is of "public interest." As a result, in some situations exculpatory clauses can provide protection to commercial landlords against mold claims.