MASSACHUSETTS LAWYERS WEEKLY

Email from commercial tenant deemed sufficient notice not to extend lease

Judge also nixes $1.7M in liquidated damages as unreasonable

By: Eric T. Berkman May 17, 2018

An email from a commercial tenant communicating its desire to find different office space, followed by the tenant's verbal expression of its need to leave the premises, was sufficient written notice of its intent not to renew its lease, a Superior Court judge has found.

Under plaintiff SpineFrontier's lease with defendant Cummings Properties, SpineFrontier had to provide six to 12 months' written notice of its intent not to extend the lease. Otherwise, the lease would extend automatically for five years.

Nine months before the lease expired, SpineFrontier told Cummings via email it was looking at properties closer to Boston to rent or buy for the following year. Two days later, SpineFrontier's CFO told a Cummings representative in person that the company could not stay in Beverly and that employees had been informed of plans to move.

Cummings contended that that did not constitute written notice of termination. Thus, Cummings argued, the automatic extension kicked in at the end of the lease term, leaving SpineFrontier in default of the extended lease and entitling Cummings to immediate payment of five years' rent — approximately $1.7 million — as liquidated damages.

Judge Peter M. Lauriat disagreed.

"At no point following the [email or follow-up meeting] did Cummings notify SpineFrontier that its notice failed to comply with the requirements of SpineFrontier's lease," Lauriat wrote after a bench trial. "Moreover, in the several months that followed, Cummings acted as if proper notice had been provided, repeatedly attempting to strike a deal with SpineFrontier on different terms for office space in one of its non-Beverly properties."

Lauriat also found that should an appellate court reverse his determination regarding notice, the liquidated damages provision was still unenforceable as unreasonably disproportionate to the actual damages it was likely to incur.

The 21-page decision is *SpineFrontier, Inc. v. Cummings Properties, LLC*, Lawyers Weekly No. 12-019-18. The full text of the ruling can be ordered here.

'Actual notice is good notice'

Plaintiff's counsel Daniel J. Dwyer of Boston said the case represents the maxim that "actual notice is good notice."

Dwyer also said he suspected that the situation his client found itself in was a fairly common result of Cummings' practice — and possibly that of other large commercial landlords — of putting automatic extension provisions in leases.

"Even if the tenant strikes it in a prior lease, they'll put it back in a [new] lease without telling the tenant," he said. "So if the tenant signs a lease extension, Cummings whacks them with this extension they never agreed to."

Once that trap is sprung and liquidated damages are threatened, the landlord is in a position to offer a deal to get the tenant to stay or be put up somewhere else, said Dwyer's colleague and co-counsel, Steven M. Veenema.

"There's no way of knowing how many tenants have knuckled under in that scenario," Veenema said.

"I hope this is the beginning of commercial tenants not getting forced into new leases on the basis of legal threats that shouldn't have so much force," Dwyer added.

A Cummings spokesperson said in a prepared statement that the company thinks Lauriat's rulings on both notice and liquidated damages were "inconsistent with the evidence presented and with controlling Massachusetts law" and that the company has already filed an appeal.

Meanwhile Vincent J. Pisegna, a Boston attorney who handles commercial lease disputes, said most real estate practitioners would be surprised that the court found sufficient notice in the case.

"The email — the writing, if you will — is equivocal," Pisegna said. "It says, 'We're looking at other properties, give me a call.' It doesn't say, 'Please be notified we're leaving.'"

SpineFrontier could be a case of tough facts making tough law, Pisegna said.

"The liquidated damages penalty was fairly draconian, and that could have influenced the court in concluding the notice was sufficient," he said. "I think the result is very defensible, but it's still surprising."

Daniel P. Dain, a real estate litigator in Boston, said he does not see the decision as forging new law. Rather, he said, it articulates the standard for determining the enforceability of liquidated damages set out in earlier decisions.

"What appears fresh … is the scrutiny [Lauriat] gives to the 'reasonableness of the forecast of damages from the time of contracting' standard," Dain said. "He is definitely more skeptical than has been typical."

Accordingly, Dain said, the case should serve as a warning to landlords to examine the form liquidated damages provisions in their leases to make sure they meet the standard. Otherwise, they risk the provision being deemed unenforceable, leaving them without an acceleration remedy.

Bruce E. Falby of Boston, who handles leasing disputes, said the case sends a message to landlords that, absent a different outcome on appeal, they will not be able to rely on a tenant's lack of strict compliance with an automatic extension provision if they have actual notice of the tenant's intent to vacate within the notice period.

"Tenants are still well advised to comply strictly with automatic extension periods to avoid exactly this type of dispute. But this decision shows they may still prevail even if they forget to dot the i's and cross the t's," he said.

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>
> *— Daniel J. Dwyer, Boston*

Time to vacate?

SpineFrontier, a medical technology company, rented office space in a Cummings-owned complex in Beverly in May 2006 with a lease through April 2007.

The lease contained a provision stating that it would automatically extend for five years unless either party gave written notice of its intent not to extend within six to 12 months of its end date.

The parties extended the lease by agreement multiple times over the next several years.

In August 2013, the parties amended the lease so that SpineFrontier would pay more rent in exchange for Cummings making certain modifications to the space, which the plaintiff was apparently outgrowing.

On Oct. 22, 2014, approximately nine months before the lease's July 30, 2015, termination date, SpineFrontier CFO Aditya Humad emailed Cummings account manager Justin D'Aveta, telling him: "We have been looking at properties

to buy/lease for SpineFrontier for 2015."

He further stated that they were looking to move closer to Boston and provided links to two Cummings-managed properties in Woburn in which they might be interested.

Two days later, Humad and D'Aveta met in person and Humad told D'Aveta that while SpineFrontier's plans continued to "evolve," he was positive that they could not continue to operate in the Beverly space and that he had told his employees the company would be out of Beverly no later than July 2015.

Cummings never notified SpineFrontier that such notice of termination was insufficient under the lease, and in July 2015 SpineFrontier began moving out. It paid its rent for July but did not fully vacate or return the keys until early August.

On Aug. 5, 2015, Cummings notified SpineFrontier that it was in default of an automatically extended lease. SpineFrontier then filed an action in Superior Court seeking a declaration that it was not in default.

Cummings filed a counterclaim asserting that not only was SpineFrontier in default, it owed Cummings five years of rent as liquidated damages per an acceleration clause in the lease.

Lauriat held a bench trial in February 2018.

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Sufficient notice

In his finding of facts, Lauriat determined that the email indeed constituted contractually sufficient notice of SpineFrontier's intent not to extend the lease beyond July 2015.

"To the extent Cummings was confused about the thrust of the email, any such confusion was remedied during the subsequent conversation between Humad and D'Aveta a mere two days later," the judge said, adding that Cummings waived the right to insist on strict compliance with the lease's written notice requirements by acting in the ensuing months as though proper notice had been provided.

In the event that an appellate court reversed his finding on notice, Lauriat determined that the $1.7 million in liquidated damages sought by Cummings pursuant to the rent acceleration clause was unenforceable because Cummings knew when it entered the lease that any vacancy was "highly unlikely" to last beyond six to 12 months and that nine months' rent would be a more appropriate measure of damages.

SpineFrontier, Inc. v. Cummings Properties, LLC

THE ISSUE: Was an email from a commercial tenant communicating its desire to find different office space, followed by the tenant's verbal expression of its need to leave the premises, sufficient written notice of its intent not to renew its lease?

DECISION: Yes (Superior Court)

LAWYERS: Daniel J. Dwyer and Steven M. Veenema, of Murphy & King, Boston (plaintiff)

Jonathan D.H. Lamb and Craig J. Ziady, of Cummings Properties, Woburn (defense)