Plaintiff Majestic Honda had planned to operate a car dealership on property it leased from the defendants.

Limitation of liability clause void for willful 93A violation

SJC abandons distinction between tort and contract

EGAN MCDONOUGH
Springfield lawyers prevail at SJC

By Eric T. Berkman
Lawyers Weekly Correspondent

The Supreme Judicial Court has ruled that a limitation of liability provision in a commercial lease did not shield the landlord from liability for a willful and knowing violation of G.L.c. 93A.

The tenant, plaintiff Majestic Honda, leased property from the defendants, a pair of LLCs owned by businessman Alfredo Dos Anjos. Majestic planned to develop and operate a car dealership on the premises.

When Majestic bought a neighboring lot that Dos Anjos coveted, the defendants sought in bad faith to terminate the lease and obstructed Majestic's permitting process in order to extract concessions they were not entitled to, including purchase of the neighboring lot for a dollar.

Superior Court Judge Mark D. Mason found the defendants liable for willful violations of Chapter 93A, §11, and awarded Majestic lost profits, doubled them under

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the statute, and ordered specific performance of the contract. The defendants continued to obstruct, resulting in additional Chapter 93A damages.

The defendants argued on appeal that a limitation of liability provision in the lease shielding them from "any speculative or consequential damages" as a result of nonperformance of lease obligations barred Majestic's recovery.

But the SJC disagreed.

Writing for the court, Justice Scott L. Kafker said that because multiple damages under Chapter 93A serve both to punish and deter, "enforcement of a limitation of liability provision that would allow a defendant in a c. 93A, §11, action to immunize itself in advance from liability for unfair or deceptive conduct that is done willfully or knowingly would do violence to the public policy protected by the statute."

The SJC also rejected the distinction between contract-based claims and tort-based claims that the Appeals Court had long adhered to in determining whether a limitation of liability provision protected a defendant from Chapter 93A liability, emphasizing that 93A creates causes of action that "blur the distinction" between the two.

The 37-page decision is *H1 Lincoln, Inc. v. South Washington Street, LLC, et al.*, Lawyers Weekly No. 10-006-22. The full text of the ruling can be found at masslawyersweekly.com.

H1 Lincoln, Inc. v. South Washington Street, LLC, et al.

THE ISSUE Did a limitation of liability provision in a commercial lease preclude the tenant from holding the landlord liable for a willful and knowing violation of G.L.c. 93A?

DECISION No (Supreme Judicial Court)

LAWYERS John J. Egan and Michael G. McDonough, of Egan, Flanagan & Cohen, Springfield (plaintiff)
Robert J. Cordy and Annabel Rodriguez, of McDermott, Will & Emery, Boston (defense)

'Consequential change'

Plaintiff's counsel John J. Egan of Springfield said until the opinion was issued, it was unclear to him why the SJC took the case. Then it became obvious that the court wanted to do away with the notion that while a party could not contract its way out of Chapter 93A, §11, liability for tort-based violations, it could for contract-based ones, he said.

"Now we see that's the piece they wanted to clear up," he said. "That's a consequential change in the law."

Egan's partner and co-counsel, Michael J. McDonough, emphasized that the case involved more than a regular breach of contract, describing the defendants' attempts to extract concessions from their client as "extortionate and coercive."

"When you're in a business transaction and you want the deal to go forward, you're in an impossible position if the other side gives you the Hobson's choice between throwing out your entire plan or just giving them everything they demand," he said. "That's why the court said you can't draft away protections the Legislature created against that in Chapter 93A."

Retired SJC Justice Robert J. Cordy of Boston, who represented the defendants on appeal, said that while the outcome was disappointing, the decision clarified several important issues, including that the intentional breach of a contract alone is insufficient to constitute an unfair actor practice under Chapter 93A, §11.

Daniel A. Ford of Pittsfield, who authored an amicus brief for the Retailers Association of Massachusetts, said the case is an important one for retailers.

"Oftentimes, small- to medium-sized retailers have very little bargaining power with wholesalers, manufacturers and other huge conglomerates," Ford said. "This really helps level the playing field. It's now clear that a person can't immunize themselves from bad conduct by inserting a poison pill into a contract exculpating them from any harm caused by his unfair or deceptive practice."

Michael C. Gilleran of Boston, author of an amicus brief for the National Retail Tenants Association, called the case a "momentous change" and speculated that the SJC's finding that willful or knowing Chapter 93A violations defeat limitation of liability clauses would apply even to those expressly limiting Chapter 93A liability.

"There will now be a storm of new 93A claims based on alleged willful contract breaches," Gilleran said.

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— Michael C. Gilleran, Boston

Boston's Patricia B. Gary, co-author of an amicus brief filed on behalf of a pair of industry associations for engineering and design professionals, said the decision reinforces the use of limitation of liability provisions to limit the risk of professional liability exposure.

"Typically, standard LOL provisions, by their terms, do not apply to willful or intentional wrongdoing, as distinct from simple breaches of contract or warranty, or professional negligence," Gary said. "As such, the SJC's holding that a LOL provision will not apply in the specific context of adjudicated willful and knowing violations of Chapter 93A, §11, is entirely consistent with standard contractual practices for design professionals."

According to Boston business litigator Robert W. Stetson III, *Lincoln* is the most significant business-to-business Chapter 93A opinion since the SJC decided *Anthony's Pier Four, Inc. v. HBC Assocs.* in 1991.

"It provides a necessary update to the law in Massachusetts and, in particular, on bad-faith business practices like commercial extortion and stringing along another party," he said.

Meanwhile, Daniel P. Dain of Boston, who represents real estate developers, thought it was significant that the LOL provision served as a limitation on damages, not a limitation on the types of conduct that could give rise to liability.

"The lease purported to waive consequential damages, those thought to be one step removed from the direct result of the contact at issue, such as lost profits," he said. "I think that the SJC believed that upholding the limitation on damages would so limit the punishing and deterring effect of 93A liability as to be against public policy."

To Boston commercial litigator Kurt B. Fliegauf, the case reflects a "renaissance" in Chapter 93A jurisprudence.

"In recent decisions, including this one, the court has demonstrated a willingness to revisit assumptions about what the law is and charted its own course," he said.

Knowing, willful behavior

In October 2016, plaintiff H1 Lincoln, doing business as Majestic Honda, executed a 23-year lease for two adjacent parcels on "Auto Road" in North Attleboro. The plaintiff's principal, James Balise, planned to develop and operate a car dealership on the site.

The lease, which named the De Anjos LLCs as landlords, represented that the LLCs had fee simple ownership of the premises.

Additionally, the lease obligated the LLCs to cooperate with Majestic in the permitting process to develop the property. It also contained the limitation on liability clause at issue.

In 2017, Balise purchased for $800,000 a nearby parcel that, unbeknownst to him, De Anjos had tried to buy for 15 years in an attempt to "own everything around him."

Meanwhile, as part of the permitting process, Majestic discovered that while the LLCs were listed as record titleholders, four realty trusts associated with De Anjos actually held title — a discrepancy Balise at the time thought could be easily "cleaned up."

Majestic submitted its site plan to the defendants that May. The plan showed Majestic intended to use its newly acquired land to park inventory and display vehicles. That is apparently when De Anjos first learned of Balise's purchase.

Over the next few months, De Anjos did not respond to Majestic's attempts to discuss the site plan and conduct a site walk. A month later, De Anjos, who operated car dealerships of his own in the area, told Majestic that a site walk would be unnecessary if Majestic agreed to amend the lease to limit premises use to a Honda dealership only.

Anxious to secure approval for its site plan, Majestic agreed.

Dos Anjos, apparently looking for further leverage, sent Majestic a lease termination letter in August 2017, providing what were later determined to be pretextual reasons, and offered to reinstate the lease if Balise agreed to sell him the coveted parcel for $1 — a concession not required by the lease.

Majestic agreed to the conditions, but the defendants subsequently confirmed the termination, leading to Majestic's lawsuit.

A Superior Court jury found the defendants liable for breach of contract and bad faith. After a bench trial on the Chapter 93A issue, Mason found that the defendants knowingly and willfully committed their breach by terminating the lease for invalid and unreasonable motivations after attempting to squeeze out benefits to which they were not entitled.

Mason awarded more than $4 million in "delay damages," which he doubled under Chapter 93A, and ordered specific performance of the contract, finding the limitation on liability provision unenforceable for violations sounding in tort.

Majestic's subsequent attempts to secure permits became complicated by the fact that the owners of record were not those named in the lease, despite the defendants' representations that the discrepancy had been resolved.

Meanwhile, the defendants did nothing to correct the ownership discrepancies, seeking instead to leverage more concessions.

Finally, after a 2019 hearing at which the defendants acknowledged the LLCs did not own the property, Mason reopened the Chapter 93A proceeding and, after a fall 2019 trial, awarded an additional $1.5 million in delay damages and doubled the award under the statute.

The SJC took up the defendants' subsequent appeal on its own initiative.

Commercial extortion

The SJC upheld Mason's factual findings and his finding that the LOL provision did not insulate the defendants from liability for willful and knowing violations.

However, the court departed from Mason's reliance on the contract-versus-tort distinction that the Appeals Court had long articulated, ruling that the focus instead should be on the language of the particular provision and the various liability standards set out in Chapter 93A itself.

"[E]ven in the fiercely competitive business-to-business marketplace, there are standards of conduct to be enforced," Kafker wrote. "[W]illful or knowing engagement in unfair or deceptive acts, exemplified by the defendants' extortionate conduct at issue in this case, must be deterred and punished." MLW