Spring 2011

Legal Update......

HORACK·TALLEY

BEWARE!
LANDLORDS' DUTY TO COMPLY WITH THE AMERICANS WITH DISABILITIES ACT

By Henry N. Pharr III

Henry N. Pharr III
hpharr3@horacktalley.com
direct: 704.716.0835

As many commercial landlords may have already discovered, there is a new moneymaking plot that has reared its ugly head in North and South Carolina. Unlike securities fraud, Ponzi schemes, financial misrepresentations or other unfair or deceptive trade practices that we are used to seeing, commercial shopping centers, industrial parks and office buildings are being targeted by a small group of attorneys who employ a straw plaintiff (most likely an out of state resident) to "visit" the location along with a so-called "expert" and document dozens of instances of alleged non-compliance with the Americans With Disabilities Act ("ADA"). Unlike many legitimate organizations and individuals who encounter physical barriers to their access and use of commercial facilities and want to rectify the situation, these individuals do not write a letter or otherwise contact the landlord in question in order to try to remedy the situation informally. On the contrary, they immediately file a federal lawsuit in the appropriate jurisdiction with just enough factual evidence to state an alleged claim for non-compliance with the ADA. The lawsuit is then served on the landlord. When the landlord and/or the landlord's attorney contact counsel for the plaintiff they are routinely told that there will be no negotiations, and unless the landlord allows their expert to prepare a report, construct substantial modifications to the premises and pay hefty attorneys' and experts' fees up front, the federal suit will be prosecuted vigorously by the alleged disabled and aggrieved plaintiff(s).

Several states have banned the filing of these lawsuits by straw plaintiffs and their mocked-up organizations, known from time to time as "Disabled *Patriots* of America," "Access For All" and other straw non-profits.

This situation presents a unique dilemma for landlords in that if an owner strongly challenges the plaintiff in court, they will be required to pay attorney's fees and expert fees if any material noncompliance with the ADA has occurred. On the other hand, it is certainly unfair, for owners to pay the individuals associated with these scam lawsuits costs and fees simply to avoid lengthy litigation.

In this issue...

3 Landlord Lenders on the Move

5 Tax Revaluations Appeals

6 Case Opinions Summary

8 Changes in Tax Accounting Rules by the IRS

Horack Talley
2600 One Wells Fargo Center
301 South College Street
Charlotte, NC 28202

Phone: (704) 377-2500
Fax: (704) 372-2619

Landlord's Duty to Comply...
(continued)

The good news is that there are a growing number of attorneys throughout the country who have created a niche practice of defending these lawsuits and developing specific tactics for early dismissal of these lawsuits at the least amount of cost and wasted time and effort for the landlord.

The most common and effective way to resolve these cases quickly is to challenge the legal standing of the plaintiff to bring the action. This involves an analysis of where the plaintiff resides, why the plaintiff chose to visit the location, whether the plaintiff intends to return to the location, and an overall review of what logical or functional reason there may be for the aggrieved party(s) to be concerned with any alleged ADA non-compliance at the office building, retail center or industrial park.

In addition, there are also a number of other ways to combat the lawsuits or force the plaintiffs to settle them for a much smaller amount of money than has been requested. One is to provide plaintiff's counsel with proof that the owner/property has no assets, stream of income or is in some other type of precarious financial condition. Another method is to show there is a technical problem with the allegations in the Complaint (i.e., the plaintiff has not named the proper owner of the real estate, the real estate has not been properly identified, etc.). Often these Complaints are completely form-driven except for the specifics of the parties and the property in question, so the attorneys who file them are often sloppy in researching title and geographical certainty.

"The most common and effective way to resolve these cases quickly is to challenge the legal standing of the plaintiff to bring the action."

If you or your client are served with a lawsuit such as this, you should immediately seek advice and counsel of a lawyer who is familiar with litigating these matters in order to begin the process of quickly disposing or resolving the case before it becomes a truly sticky situation.

GOTCHA!
LANDLORD LENDERS' INCREASING AND VIGOROUS PURSUIT OF TECHNICAL DEFAULTS IN TRADITIONAL AND CMBS LOANS

By William B. Hamel

William B. Hamel
bhamel@horacktalley.com
direct: 704.716.0811

Increasingly, commercial landlords are being approached by their lenders with alarming frequency concerning small or technical defaults associated with their loans. These may even be defaults that the lender has been aware of for years or has never pursued on any regular basis with its commercial real estate clients. The reasons for the increased vigilance in this area by banks and other financial institutions comes from a variety of sources including greater government scrutiny (most often by the FDIC), anxious underwriters, or a lender's desire to shed itself of portfolios of bad loans that were perhaps purchased in haste or without sufficient due diligence prior to the 2008 crash. Although no two lenders are the same, most loan documents give these companies and institutions a broad spectrum of ways to default their longtime clients and pursue very draconian remedies. Here are a number of tips to navigate these situations if you are presented with a default notice:

> "...landlords are being approached by their lenders with alarming frequency concerning small or technical defaults associated with their loan."

A. Know what your documents say: Make certain there is a clear understanding as to what language in the loan documents that lender is referencing to support its allegation of default. Ambiguities in documents will be construed in favor of the non-drafting party. Accordingly, owners will typically have the advantage when constructing the meaning of ambiguous terms in loan documents.

GOTCHA!
(continued)

B. Seek professional advice from individuals and firms who have worked in this area: Accountants, appraisers, attorneys, and even other financial institutions/lenders can be a valuable resource for assessing the situation and providing advice, counsel and alternatives to the current status with the loan that is in default. This is especially true where the loan may have been bundled with other loans and sold at a discount to a special servicer who may have little or no interest in negotiating with the customer and has no personal or business ties to that customer as well.

C. Respond quickly and thoroughly: Perhaps the most important and effective way of dealing with the technical default situations is to reach out to the lender immediately to determine as much information as possible regarding who is involved in the process, what is the scope of the default, what remedies does the bank truly wish to pursue and are there any personal relationships that you may have with representatives of the lender.

D. Know how the lenders think: The lender is likely interested in owner's cash flow and general financial health. It will also be interested in ways to increase its security by either forcing the owner to pay down the loan balance or to provide additional security.

E. Weigh every available option carefully: Whether a determination is made to attempt to negotiate a workout with the lender, investment/refinancing alternatives are pursued, or litigation commences, commercial landlords, their principals and investors should be aware of their alternatives in order to make informed choices as to how to react to and address notice of a technical default from a lender.

F. Remain Diligent: The lender is not likely to notice a technical default and then go away. Don't be lulled to sleep by a period of lender silence after reaching out to the lender. In the interim, continue working on plan B litigation options and plan C sale, payoff or refinance options. These issues should be taken seriously, and every effort should be maintained to address the issue head on with the lender. Failure to respond or slow response to the lender will likely be seen as a discouraging sign by the lender and will likely further polarize the parties.

Keith B. Nichols
knichols@horacktalley.com
direct: 704.716.0963

REAL ESTATE TAX REVALUATIONS
SHOULD I CONTEST OR APPEAL?
By Keith B. Nichols

By the time you are reading this Legal Update, you most likely have received your 2011 Mecklenburg County Property Tax Revaluation Statement, including a form to fill out if you wish to contest or challenge the assessed value of a particular piece of property. The deadline for submitting the written challenge is thirty (30) days after receipt of the Revaluation Statement. Is it worth the time and effort to challenge the County appraiser's results? What will it cost me? What are my chances of obtaining any meaningful recovery/relief from this process? These are all good questions, and the answers to each will vary depending on the size of the property, the condition of the improvements to the property, any damage, destruction or depreciation and location.

There are also a number of levels of appeal, beginning with the informal meeting at the County level. From that point, appeals can be taken to the local Board of Examiners and the State Board of Examiners in Raleigh. The key issue is what is the true fair market value of the property. One factor is fairly clear: general economic conditions will not be sufficient grounds for a modification of the tax value of any parcel of property. Second, as government funding has shrunk, so has the number of County appraisers and staff dealing with the over 350,000 parcels of real property located within the County. In addition, you will likely need a private appraiser to provide a formal opinion, as well as legal counsel if you appeal beyond the first level. Appraisers and attorneys can give valuable advice regarding the economic and legal aspects of this process for the ultimate decision of whether to pursue a challenge to the revaluation.

"...the answers to each will vary depending on the size of the property, the condition of the improvements to the property, any damage, destruction or depreciation and location."

Horack Talley
2600 One Wells Fargo Center
301 South College Street
Charlotte, NC 28202

Phone: (704) 377-2500
Fax: (704) 372-2619

CASE OPINION SUMMARY

By Henry N. Pharr III

- ***(Gayatri Maa, Inc. v. Terrible T. LLC)***—In this case, the landlord and tenant entered into a five-year lease that provided for rental payments that escalated after the first three years of the lease for the remainder of the term. The lease had a renewal provision for five (5) years at an additional $500.00 per month minimum rent requirement. The tenant timely exercised the right to renew but accidentally submitted rental payments for the first four months of the renewal period at the initial lease term amount (without rent escalation). Although the landlord did not cash the checks, they did not send them back to the tenant or otherwise notify the tenant that they were insufficient. When the landlord discovered what was going on, it sought to evict the tenant and also brought an action for payment of all accrued back rent. The Court of Appeals upheld the trial court's ruling, awarding the landlord the difference in the lower rent paid during the extension term by the tenant, but denied the landlord's request to evict the tenant based upon the fact that the landlord had accepted the checks and did not timely notify the tenant they were inadequate; therefore waiving their right to ejectment.

"...the North Carolina Court of Appeals affirmatively approved of the remedy of 'reverse piercing of the corporate veil.'"

- ***(Fischer Investment Capital, Inc. v. Catawba Development Corp.)***—In this matter, the North Carolina Court of Appeals affirmatively approved of the remedy of "reverse piercing of the corporate veil." Specifically, a creditor was allowed to undo a fraudulent transfer of real property in Buncombe County that was owned by a corporation in order to satisfy a debt owed by one of the corporation's owners. The individual debtor personally guaranteed a loan that the creditor had made to another business entity that the debtor owned. As alleged in the Complaint, when the obligor defaulted on the loan given by the plaintiff it also transferred title to the property to another corporation wholly owned by the debtor's wife and used the proceeds of that sale to pay most but not all of the obligation owned to the plaintiff. According to the opinion, the Court

Case Opinion Summary
(continued)

agreed that the defendant in this case had the ability and the intent to use or transfer the corporation to hold the bank's security and shield the real estate from any foreclosure or other legal action brought by the plaintiff.

- ***(McDonald's Corporation v. Five Stars, Inc.)***—In this lawsuit, a landlord and tenant had entered into a lease agreement and a separate Joint Development Addendum for the premises. Under the terms of the lease, the defendant was given a specific right to cure any defaults and payment of rent for a period of ten (10) days after written notice was sent by the landlord. However, the parties had also agreed that the Joint Development Addendum (which gave a thirty (30) day right to cure all defaults) was controlling over the lease agreement and other matters between the parties; i.e., it was the "master agreement" between the parties. During the term of the lease, the defendant failed to pay its year-end taxes as part of additional rent due in January. The landlord gave ten (10) days written notice to the tenant and the tenant did not properly cure the default under the terms of the lease agreement. Once the case was brought to court, the tenant argued that based upon the parties' agreement, the thirty-day right to cure controlled and it should have been allowed an additional twenty (20) days to make payment of the past-due taxes. However, the Court of Appeals disagreed and said that despite the written agreement of the parties that the thirty-day cure period in the Joint Development Addendum would control, the lease contained more specific and particular language relating to non-payment defaults, and therefore it would control despite the apparent intent of all parties involved.

Despite the intent of the parties to the contrary, the Court held that the specific language of the lease would control the outcome.

Horack Talley
2600 One Wells Fargo Center
301 South College Street
Charlotte, NC 28202

Phone: (704) 377-2500
Fax: (704) 372-2619

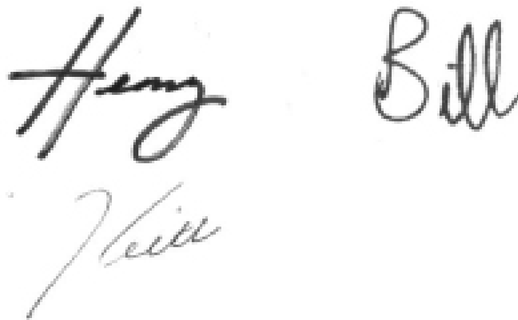
Case Opinion Summary
(continued)

- ***(Nesbit v. Cribbs)***—In the *Nesbit* case, the parties had entered into a purchase and sale agreement with a leaseback provision. In the leaseback portion of the agreement, the term of the lease was described only as "indefinitely" (no specific time period was specified). When the landlord/seller sought to evict the tenant/purchaser, the tenant argued that the term indefinitely meant at a minimum a life tenancy for the defendant. The plaintiff, on the other hand, argued that the term converted that portion of the agreement into a tenancy at will allowing them to evict the defendant at their sole discretion. The Court of Appeals upheld the entry of summary judgment in favor of the landlord-plaintiff on the grounds that the term "indefinitely" was not ambiguous and should be given its ordinary dictionary meaning; that is to say "lacking in precise limits. Not decided. Uncertain." The Court also ruled that the Statute of Frauds requires that a lease for an indefinite term is a lease terminable at will and does not create a periodic tenancy for a certain number of weeks, months or years. Therefore, it was proper for the landlord to evict the tenant at will and not forbear from invoking this remedy until the death of the individual tenant.

(FASB CONSIDERS NEW ACCOUNTING RULES)

For a very astute analysis of the changes being considered by FASB relating to leases, please go to the Landlord/Tenant page of our website and click on the "FASB Article" link
http://www.horacktalley.com/litigation/landlord-dispute.aspx

That's all for now,



Horack Talley
2600 One Wells Fargo Center
301 South College Street
Charlotte, NC 28202

Phone: (704) 377-2500
Fax: (704) 372-2619