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LEASES AND NOTICES AND EMAILS – OH, MY! Avoiding Pitfalls in the Eviction Process and Making Notice by Email Work

Like the yellow brick road for Dorothy and her friends, the eviction process can be full of scary results for both landlords and tenants. In *Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village*, 185 Cal. App. 4th 744 (2010), the court found that the landlord in a commercial lease had failed to give proper notice of rent default to its tenant even though the tenant's leasing manager admitted receiving actual notice of default from the landlord by email. As a consequence, the landlord was forced to start the whole eviction process over again and, worse yet, was required to pay over \$30,000 in legal fees and costs to the tenant as the prevailing party in the action. This outcome could have been avoided twice – at the time the lease was drafted and at the outset of the eviction process.

Like many things, it seemed like a good idea at the time. The lease in this case provided for the usual notice by personal delivery, regular mail, and fax. In an apparent effort to be current and facilitate more rapid communication, the lease also allowed for notice by electronic transmission (email). When the tenant defaulted, the landlord sent notice to pay rent or quit to the tenant's agent by certified mail, fax, and email. However, the landlord did not send any of these notices (including the email notice) to the tenant's physical address set forth in the lease. In an effort to avoid forfeiture of its lease in the landlord's unlawful detainer action, the tenant asserted that despite its actual receipt of the landlord's notice, the notice was not validly served and was thus ineffective. The trial court agreed with the tenant, granted summary judgment in favor of the tenant and awarded the tenant its fees and costs. The appellate court affirmed the trial court's decision finding that the landlord had failed to prove that the email notice received by the tenant was provided in strict compliance with the notice provision of the lease.

Good Idea – Poor Execution

The notice provision in the lease, Paragraph 31, contained the usual boilerplate stating that all notices must be in writing, setting forth the parties' mailing addresses and providing a mechanism for address changes. Paragraph 31 also provided that notices would be deemed delivered when deposited in the U.S. mail, delivered in person or transmitted by telegraphic or electronic means, *in any event to the parties' addresses set forth in the lease*. The landlord sent rent default notices to the tenant's agent at her office address and to her business email account, but not to the physical address set forth in the lease. No specific email address for service was specified in Paragraph 31 or elsewhere in the lease.

The appellate court recited the well-known maxim that because unlawful detainer is a summary proceeding to determine a party's right to possession of real property, notice must strictly comply with applicable notice requirements. The court also acknowledged that parties to commercial leases may provide for notice procedures which differ from those required under the California Civil Code. Interpreting the specific language of Paragraph 31, the appellate court found that for the email notice to be effective, it must have been delivered to the physical address designated in the lease.

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“While this focus on the physical location of receipt (or delivery) of an email has some artificiality (technological naiveté) in this age of laptop computers and smart phones, the fault, if there be any, lies in the language of the lease itself, which while apparently contemplating ‘electronic service,’ nonetheless omits any reference to an electronic notification address to accomplish that service.”

As the tenant’s leasing manager received the email at a physical location different from that specified in the lease, the appellate court found that the email notice was not properly served.

Avoiding Pitfalls

Because the landlord failed to properly serve notice at the outset of the eviction process, the landlord lost significant time and money and found itself back at square one after a visit to the trial court and the court of appeals. In retrospect, the landlord had two opportunities to avoid this result. First, as implied by the appellate court, had the lease contained a more thoroughly drafted notice provision, the landlord’s notice would likely have been properly served and the entire litigation avoided. The most obvious fix would have been to include a specific email address in the notice provision. In addition, a well drafted email notice provision should specify that such email notice, and all attachments thereto, shall for all purposes be deemed received and effective upon receipt at the email address provided. It may also have been prudent to include a further provision making clear that such notice is effective irrespective of whether the addressee shall actually open or read the email notice and/or attachments. Second, the landlord could have carefully and strictly abided by the notice provisions in the lease and sent notices to the proper physical address.

Take Away Lessons

The devil is (along with some lions, tigers and bears) in the details. This case reminds us that California courts are extremely vigilant when adjudicating possessory rights in real property and will not stray from the letter of the law or lease. It also demonstrates that depending on how it is drafted, an email notice option in any contract can facilitate timely business dealings or create untold confusion, delay and expense. Accordingly, it is important for landlords and tenants to have competent, experienced legal counsel in drafting the lease and through all steps in the eviction process. As with so many things in life, if something is worth doing at all – it is worth doing correctly.

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