



No Double Dipping: Putting the Brakes on Acceleration Clauses In Commercial Leases

A term in a contract, even if clearly stated, does not guarantee that a court will enforce it when a dispute arises between the parties. A recent decision by the Appeals Court on the issue of rent acceleration clauses may substantially affect commercial landlords and tenants.

In *Cummings Properties, LLC v. Darryl C. Hines*, a landlord and a corporate tenant entered into a five-year commercial lease with annual base rent of \$16,374, payable in monthly installments of \$1,364.50. Tenant's principal, Darryl Hines, personally guaranteed the tenant's obligations under the lease. The lease unambiguously obligated the tenant to make timely payments or be subject to a rent acceleration clause. Acceleration clauses typically kick-in when a tenant defaults on rent payments, and mandate that the full balance of the rent due for the remainder of the term be paid immediately upon breach.

“A recent decision by the Appeals Court on the issue of rent acceleration clauses may substantially affect commercial landlords and tenants.”

In the *Cummings* case, barely two months into the lease, the tenant lost one of its major clients and defaulted on the rent payment. When the tenant failed to cure the default, the landlord took steps towards eviction through a summary process in the district court. The district court case was resolved by an agreement for judgment awarding the landlord possession of the property

(continued on other side)

NEWSLETTER • FEBRUARY 2023

Firm News



Matthew Kane

Matt Kane is appointed to the Case Comments sub-committee of the Boston Bar Association's Business and Commercial Litigation Section Steering Committee.



Payal Salsburg

Matt Kane and Payal Salsburg are appointed for a second term as hearing officers for the Massachusetts Board of Bar Overseers.



Marc Laredo

Marc Laredo is serving on Massachusetts' Attorney General Andrea Campbell's transition team as she takes office in January 2023.



Mark Smith

Mark Smith is serving his second term as Chair of Court Management Advisory Board.



Darshana Indira

Darshana Indira is accepted into the WBA's Women's Leadership Initiative and the BBA's Public Interest Leadership Program.

(continued from other side)

plus \$74,076.24 in damages against the tenant, comprising the full amount of rent for the five-year lease.

One year later, after the landlord relet the same space to a new tenant, the landlord brought suit in Superior Court seeking the \$74,076.24 from the personal guarantor. The Superior Court determined that the amount was a “reasonable estimate of [landlord’s] anticipated damages” and that the tenant was “sufficiently sophisticated” at the time of signing of the lease to understand the term. The court entered judgment in the landlord’s favor, awarding \$82,143.01 comprising damages, prejudgment interest, and costs.

Upon appeal by the tenant, the Appeals Court reversed stating that, generally, rent acceleration clauses may constitute an enforceable liquidated damages provision so long as it is not a penalty. A court will enforce such a provision if damages are difficult to determine at the time the contract is executed and the provision reflects “a reasonable forecast of damages.” In the Cummings case, however, the landlord could potentially collect the remaining rent under the lease but also relet the premises, therefore the provision did not provide a reasonable estimate of actual damages borne by the landlord.

The court further noted that it was significant that the landlord actually did relet the property – whether or not a duty to mitigate damages existed in the circumstance, the landlord could not double dip by recovering a large financial penalty from the defaulting tenant and collecting rent from a new

tenant. The court also noted that as a matter of public policy, terms fixing liquidated damages that are “out of proportion to any reasonable approximation of anticipated harm” will not be enforced.

Courts in Massachusetts are taking note of acceleration clauses in commercial leases. To the extent that a given commercial lease agreement contains one of these standard rent acceleration clauses, landlords may not rest assured that a court will enforce it against a defaulting tenant. Ideally, the rent acceleration clause should have some form of a pressure release valve, like credit for fair market rent received from any subsequent tenant during the original term, for the liquidated damages provision to have a chance in court.

