

Resources

No Standing to Sue for Past Due Rents

September 14, 2018

In a June 2018 decision, *1002 E. 87th St. LLC v. Midway Broad. Corp.*, an Illinois Appellate Court upheld a lower court's decision holding that a landlord has no standing to sue a tenant for past due rent accruing before the landlord purchased the property. The court stated that as a general rule, the conveyance of property by warranty deed conveys any lease for the property, as well as the right to receive unaccrued rent (giving the new landlord standing to sue for unpaid rent that accrues while acting as landlord); however, a new landlord has no right to recover rent due from before the landlord owned the property, as such right remains with the original landlord.

In *Midway*, the defendant Midway operated a radio station at 1002 E. 87th Street, Chicago, Illinois. The owner of the space, Jeff BV Commercial, LLC ("Jeff BV"), required a guaranty under the lease to Midway. Jeff BV subsequently sold the property to Glass Management Services, Inc., which then sold it to 1002 E. 87th Street, LLC ("87th Street").

The lease provided in pertinent part that Midway will pay rent "without abatement, demand, deduction or offset whatsoever..." and contained a non-waiver provision, which stated that "[n]o failure of landlord to exercise any power... or to insist upon strict compliance... and no custom or practice of the parties... shall constitute a waiver of Landlord's right to demand exact compliance with the terms...."

In January of 2015, 87th Street filed a complaint for eviction based on \$72,810 of past due rent, which Midway owed the original owner, Jeff BV, before Jeff BV sold the property. Midway filed a Motion to Dismiss the Complaint under Section 2-619 of the Illinois Code of Civil Procedure (which admits the legal sufficiency of the plaintiff's allegations but asserts affirmative matter that avoids or defeats the claim), claiming 87th Street lacked standing to claim the past due rent. The trial court granted Midway's motion to dismiss.

On appeal, 87th Street argued that the non-waiver lease provision demanding exact compliance by the tenant (regardless of the original landlord's failure to exercise its right to collect unpaid rent) allowed for 87th Street to sue for past due rent. However, the court stated that "a demand for exact compliance with the lease does not include a nonexistent right to collect rent due before it owned the property..." and that there is no precedent "stating that a new owner can use a non-waiver clause to enforce a tenant's obligations to a previous owner."

87th Street additionally argued that past due accrued rent is a "chose in action" and therefore freely assignable. A chose in action is a proprietary right, such as a debt owed by another person. The court stated that a chose in action is freely assignable in part, because an owner may transfer its legal interest in the action, retaining an equitable or beneficial interest (i.e. the assignee obtains the right to bring legal action, while the assignor retains the right to collect), but that Illinois has not addressed the issue of whether an owner of a debt may transfer the entire chose in action outright to a third party, retaining no ownership interest in it.

The court, however, stated that this case did not present a chose in action because the conveyance represented a "lease transfer after conveyance of property, not a debt assignment..." and that "[e]ven so, 87th Street present[ed] no evidence to show Jeff BV intended to assign its debts to a third party and give 87th Street the right to bring suit to collect..." and that "[i]t is doubtful that 87th Street would go through the trouble of litigation and have the amount collected go to Jeff BV." The court additionally cited other Illinois cases which have held that past due rent is not freely assignable, including *Dasenbrock v. Interstate Restaurant Corp.*, 7 Ill. App. 3d at 302; and *Kennedy v. Kennedy*, 66 Ill. 190, 196 (1872) (stating that "rents in arrear are not assignable...").

Lastly, 87th Street sued the guarantor of the lease for breach of the guaranty. However, for the same reasons as above, the court held that 87th Street had no standing to sue the guarantors under the lease guaranty.

In the context of a commercial real estate transactions, *Midway* should serve as a baseline and general rule that a purchaser of commercial real estate: (1) cannot sue for unpaid rent accruing prior to the date the purchaser takes title to the property;

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(2) cannot evict a tenant based upon the tenant's failure to pay rent accruing before the purchaser takes title to the property; and (3) has no recourse against the guarantor of a lease for rent accruing prior to the date the purchaser takes ownership of the property.

For more information about this case, or if you have any questions, please contact the authors of this alert, Michael Rothstein (mrothstein@dykema.com) and Chuma Offor (coffor@dykema.com), or your Dykema relationship attorney.

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