MASSACHUSETTS Lawyers Weekly

Part of the BRIDGETOWER MEDIA network JUNE 12, 2023

Email to landlord was sufficient written notice of nonrenewal

Despite commercial lease provision barring electronic notice ■ **Eric T. Berkman**

The Appeals Court has ruled that an email from a tenant to its landlord constituted effective notice to invoke a non-renewal option that would prevent an automatic five-year extension of the commercial lease.

The automatic extension provision in the lease stated that any notice from the lessee to the lessor must be in writing and either served by constable, sent by certified or registered mail, or delivered by recognized courier service.

The notice provision also stated that "no oral, facsimile or electronic notice" would have any force.

Plaintiff Sourcing Unlimited, doing business as "Jumpsource," emailed the landlord, defendant Cummings Properties, to announce it was shutting down operations at the Beverly office space it had been renting and would not be renewing the lease.

Cummings argued that Jumpsource's failure to strictly comply with the notice provision — despite Cummings' reminders of the requirements in response to the emails — meant that its notice was insufficient as a matter of law.

Pisegna

> *All the cases cited in this decision used materiality and significance standards to analyze difficult cases that came before the court, instead of blindly enforcing real estate doctrine that option agreements are to be strictly construed*
>
> —VINCENT J. PISEGNA

But the Appeals Court disagreed.

"[T]he gravamen of the option provision in the lease … is to require the party exercising the option to timely inform the other party, in writing, that it is not renewing the lease," Judge Eric Neyman wrote, emphasizing that Jumpsource's emails served that purpose. "Indeed, despite Cummings's argument that settled law and public policy demand, to ensure commercial certainty, that parties to a contract be strictly held to the language they chose, Cummings provides no persuasive argument that Jumpsource's multiple communications within the opt-out period created any uncertainty for Cummings."

The 18-page decision is *Sourcing Unlimited, Inc. v. Cummings Properties, LLC*, Lawyers Weekly No. 11-056-23.

SUBSTANCE OVER FORM

Jumpsource's attorney, Orestes G. Brown of Danvers, called the ruling a triumph of substance over form.

Commercial parties in particular should be free to contract however they choose, but a reasonable standard must be applied to the resolution of conflicts, Brown said.

"The courts already made clear in past cases that where notice was admittedly received by the landlord and receipt wasn't in dispute, that they weren't going to allow parties to argue over the form," he said. "This was fundamentally a non-material violation."

Cummings said through a spokesperson that the decision disregarded the express agreement of specific parties and overlooked that Cummings twice expressly informed the tenant what was required to provide binding notice.

"By allowing the tenant to exercise an option by a prohibited method, the court has undermined commercial certainty and the settled expectations of business parties by selectively rewriting settled contract terms," the company continued.

But Vincent J. Pisegna of Boston, who handles commercial lease disputes, said the case illustrates the reluctance of courts to enforce a "gotcha" result where someone relies on a technicality to enforce a result that is neither fair nor within the intention of both parties.

Pisegna said the case further illustrates how real estate jurisprudence is getting away from some of the old-line strict principles and approaching a lease as a transactional document to be enforced consistently with Massachusetts contract doctrines.

"All the cases cited in this decision used materiality and significance standards to analyze difficult cases that came before the court, instead of blindly enforcing real estate doctrine that option agreements are to be strictly construed," he said.

Boston attorney Steven M. Veenema said the ultimate message from the case is the same as what the Appeals Court articulated in its 1974 *Gerson Realty Inc. v. Casaly* decision: that actual notice is good notice.

"As a landlord, you can't bury your head in the sand to what you in fact know is the tenant's intent, and then spring that on them after the notice period has expired to say, 'Gotcha! The lease is extended,'" he said.

Daniel J. Dwyer of Boston, together with Veenema, won a Superior Court bench trial against Cummings on behalf of a different tenant in a similar case several years ago. Dwyer suspects based on this decision that the Appeals Court has "had it" with Cummings' treatment of tenants.

"It knows that the automatic extension cases it sees represent just a fraction of the times that, according to the trial judge in this case [as quoted by the Appeals Court in the decision], Cummings 'covers its ears like a child unwilling to listen to a piece of unwelcome information' in order to deliver a devastating financial shock to one of its tenants," said Dwyer, who has another trial against Cummings coming up in August.

SOURCING UNLIMITED, INC. V. CUMMINGS PROPERTIES, LLC

THE ISSUE: Did an email from a tenant to its landlord constitute effective notice to invoke a non-renewal option that would prevent an automatic five-year extension of its commercial lease?

DECISION: Yes (Appeals Court)

LAWYERS: Orestes G. Brown and Bailey Buchanan, of Metaxas, Brown, Pidgeon, Danvers (plaintiff)

Jonathan D.H. Lamb of Cummings Properties, Woburn (defense)

NOTICE BY EMAIL

In mid-April 2010, Jumpsource executed a commercial lease with Cummings for office space in Beverly.

The parties extended the lease by agreement through Nov. 30, 2016.

Section 30 of the lease contained a provision stating that it would be extended automatically for successive five-year periods unless either party served timely written notice to the other of its option not to extend.

Such notice had to be given at least six months but no more than 12 months before the current lease expired.

Section 21 of the lease stated that any notice from Jump-

source to Cummings had to be in writing and would be deemed duly served only with service by constable, delivered by certified or registered mail, or delivered by recognized courier service. It also expressly stated that oral, fax or electronic notice would have no effect.

On Jan. 12, 2016, Jumpsource's vice president of sales emailed Cummings' account manager that it was closing its Beverly office at the end of its lease term and was relocating its employees to Florida.

In an emailed response, the account manager advised Jumpsource to consult the lease for more information, "as many of our leases contain extension, renewal, and/or cancellation options," adding that such provisions "may alter the lease end date or otherwise result in the lease not terminating on the date referenced above."

On April 21, 2016, Cummings sent Jumpsource a letter informing the tenant it was in default of the lease because it did not have adequate insurance on file.

Jumpsource emailed back saying the lease was to expire in November 2016 and asked how it should proceed if it only needed office insurance for another six months, adding: "As you know, we will not be renewing our Cummings Center lease."

Cummings responded by citing the notice provision in the lease and stating that it was unable to accept emailed non-renewal notices and reiterated that notice had to be sent via certified mail or recognized overnight courier.

That August, Jumpsource emailed to inquire about the move-out process, reiterating that it was not renewing its lease.

Cummings emailed in response that it never received timely written notice as required by the notice provision and thus the lease was automatically extended through Nov. 30, 2021.

Regardless, Jumpsource vacated the premises on Nov. 30, 2016, and two months later filed suit in Superior Court seeking a declaratory judgment that it had provided sufficient and proper notice of its option not to renew the lease and alleging Chapter 93A violations.

Judge Janice W. Howe ruled that Jumpsource's email communications constituted effective and timely notice to opt out of the automatic extension.

Cummings appealed.

IMMATERIAL NONCOMPLIANCE

The Appeals Court conceded that conditions for exercise of an option require stricter adherence than in a bilateral contract and thus the court typically does not look to claims of materiality regarding their enforcement.

Still, Neyman said, prior case law "has distinguished material flaws in the exercise of an option from 'immaterial,' or 'inconsequential,' deviations, particularly those involving the method of delivery of notice where neither the timeliness nor fact of delivery of notice were disputed" — conditions present here.

Meanwhile, the court disagreed with Cummings' assertion that the case could be distinguished from prior ones because the notice provision expressly prohibited electronic notice.

"Our cases have held nonconforming notice to be effective even where the notice provision's language provided exclusive methods of delivery," Neyman wrote. "In these circumstances, where Jumpsource provided actual written notice of its decision not to extend the lease within the time prescribed by the lease, the nonrenewal option was not exclusive to Jumpsource, and there is no dispute that Cummings received and acknowledged the e-mail notice, the distinction proffered by Cummings does not alter the analysis or the result we reach."