## LANDLORD TENANT

### TENANT IS ENTITLED TO THREE TIMES SECURITY DEPOSIT WHEN LANDLORD ACTS IN BAD FAITH

### CURRENT AND FORMER OWNER OF PROPERTY ARE JOINTLY AND SEVERALLY LIABLE

Hardy v. 11702 Memorial, Ltd., ____ S.W.3d ____ (Tex. App. Houston—[1st Dist.] 2004).

FACTS: Plaintiff, Hardy, leased a residence from landlord, British American Properties, Inc. Plaintiff signed a lease agreement and provided a $20,250 security deposit, but never occupied the dwelling nor paid the first month's rent. The landlord leased the residence to another tenant within a few days of appellant's breach and recovered rental payments from the new tenant. The landlord declined to return the $20,250 security deposit to tenant and claimed additional damages of $14,017.

The plaintiff sued the landlord for the $20,250 security deposit and the landlord counterclaimed for the entire security deposit plus $14,017 in additional damages for the tenant's breach of the lease. The trial court entered a take nothing judgment against both landlord and tenant. The tenant appealed, contending that she should have been awarded statutory damages because the landlord acted in bad faith by failing to refund the security deposit. The tenant also asserted that both the landlord and its agent were jointly and severally liable to her for return of the security deposit because the landlord sold the property to its agent.

HOLDING: Reversed and remanded.

REASONING: The Property Code provides that before returning a security deposit, a landlord may deduct from the deposit damages and charges for which the tenant is legally liable under the lease or as a result of breaching the lease. Prop. Code Ann. § 92.104(a) (Vernon 1995). If the landlord retains all or part of the deposit, it must give the tenant any balance due, together with a written description and itemized list of all deductions. Prop. Code Ann. § 92.104(c). In a suit to recover a security deposit, a landlord who retains a deposit in bad faith is liable to the tenant for $100, plus three times the portion of the deposit wrongfully withheld. Prop. Code Ann. § 92.109(a). To defeat the bad faith presumption, the landlord must prove his good faith. Wilson v. O'Connor, 555 S.W.2d 776, 780-781 (Tex. Civ. App.—Dallas 1977). In this case, the evidence that the landlord neither returned the deposit nor sent the tenant an itemized list of deductions within 30 days of surrender established the presumption of the landlord's bad faith under the Property Code. The burden, therefore, shifted to the landlord to prove its good faith in withholding the deposit. The question was thus whether the landlord proved that the security deposit was withheld in good faith.

In its analysis the court noted, first, the only loss to the landlord was the one day's lost rent at $113.50 due to the time difference between October 2, 2000, when tenant's lease was set to begin, and October 3, 2000, when the replacement tenant's lease began. Second, no evidence established that the landlord incurred any loss of rent due to replacement tenant's lease not covering the original tenant's period of January 5, 2002 to February 28, 2002. The replacement tenant could automatically renew on a month to month basis after January 5, 2002, so this was still undecided. Third, no evidence showed that the landlord incurred any debts for utilities and "make ready" fees due to original tenant's breach since the tenant never took possession of the property. Fourth, no evidence existed that the landlord suffered actual expenses for re-letting to the replacement tenant. In sum, there was no more than a scintilla of evidence by the landlord to establish his good faith as required under the Property Code.

In addition, the Property Code provides that if the owner sells its interest in the premises, the new owner is liable for the return of security deposits from the date it acquires title to the premises. Tex. Prop. Code Ann. § 92.105. The previous owner remains liable for a security deposit it received while it was the owner up to the time the new owner delivers to the tenant a signed statement acknowledging its responsibility for the deposit. On December 1, 2000, the general partner of the landlord sold the premises to himself. The record contained no evidence that the general partner sent the tenant a signed statement acknowledging his responsibility for the deposit. Therefore, both the general partner and the landlord were liable to the tenant for any judgment entered in her favor on the security deposit.

The tenant established as a matter of law that the landlord acted in bad faith by failing to return her security deposit and by failing to give her an itemization of deductions within 30 days of her surrender of the property. The landlord and general partner were jointly and severally liable for statutory damages, including three times the security deposit.

### TENANT IS ENTITLED TO NAME OF OWNER

McBeath v. Estrada Oaks Apartments, 135 S.W.3d 694 (Tex. App.—Dallas 2003).

FACTS: Nancy McBeath filed an action against her landlord, Estrada Oaks Apartments ("Estrada"), for failure to disclose the name and address of the owner of her apartment, and for failure to disclose the headquarters of her apartment's management company. McBeath sent three letters in late 2001 and early 2002, all of which requested the name and address of the apartment complex owner. McBeath stated in her letters, that if she did not receive the information within seven days she may take legal action. McBeath did not receive the information she required so she initiated legal action in early 2002, and requested remedies as set forth under Section 92.205 of the Texas Property Code. Estrada argued that McBeath had not performed the conditions precedent for recovery under the Property Code. The court agreed and entered summary judgment for Estrada. McBeath appealed the grant of summary judgment.

HOLDING: Reversed.

REASONING: The court stated that when a tenant requests in writing a disclosure of ownership and management under the

Property Code, a landlord must comply within seven days or the tenant "may exercise his remedies under [the] subchapter." Tex. Prop. Code Ann. § 92.202(a)(2). Using this section of the Texas Property Code, the court reasoned that McBeath did not have to direct Estrada to a specific section of the Code which gave her the right of action and the specific section of Code requiring Estrada to provide the information. The court further held that McBeath's letter notifying Estrada that the consequences of failure to act would result in legal action was enough to comply with the Property Code. Therefore, the court reversed the judgment and granted summary judgment in favor of McBeath.

**PROPERTY CODE SECTION 24.007 IS NOT INTENDED TO PRECLUDE APPELLATE REVIEW OF ALL ISSUES ARISING FROM AN EVICTION PROCEEDING INVOLVING COMMERCIAL PROPERTY**

Gibson v. Dynegy Midstream Services, 138 S.W.3d 518 (Tex. App.—Fort Worth 2004).

FACTS: Hattie Lucille Gibson filed suit against Dynegy Midstream Services, L.P. ("Dynegy") for forcible entry, detainer, and forcible detainer. In filing her suit, she asserted her right to immediate possession of a two-acre tract of land in Young County, Texas. Dynegy filed a plea asserting that the justice court lacked subject matter jurisdiction over Gibson's claim because the claim was an effort to have the court determine ownership or title of the property. After hearing arguments from both sides, the court dismissed Gibson's suit and she appealed the ruling to the county court. After a hearing, the county court also dismissed Gibson's suit for want of jurisdiction. Gibson appealed the trial court's dismissal of her eviction claiming that the Texas Court of Appeals had jurisdiction over her appeal despite the limitation of Section 24.007 of the Texas Property Code
HOLDING: Affirmed.
REASONING: The Texas Constitution and Legislature have vested the courts of appeals with jurisdiction over civil appeals from final judgments of district and county courts in which the amount in controversy or the judgment exceeds $100. In eviction proceedings, the grant of appellate jurisdiction is restricted by section 24.007, which provides, in pertinent part: "A final judgment of a county court in an eviction suit may not be appealed on the issue of possession unless the premises in question are being used for residential purposes only." The property in this case was being used for commercial purposes.

The court held that the plain and ordinary language of section 24.007 was not intended to preclude appellate review of all issues arising from an eviction proceeding involving commercial property, but only to limit review over appeals raising the issue of possession. In this case possession was not an issue on appeal, therefore, section 24.007 did not prevent Gibson from appealing the propriety of the justice and the county courts' orders dismissing her suit for want of subject matter jurisdiction and the court did have appellate jurisdiction over this appeal.

## MISCELLANEOUS

**LANGUAGE IN DEED RESTRICTIONS PREVAILS OVER CHAPTER 204 OF THE PROPERTY CODE**

Brooks v. Northglen Ass'n, ____ S.W.3d ____ (Tex. 2004.)

FACTS: Northglen Association ("Northglen") is the homeowners association for six Harris County subdivisions encompassing more than 1600 single-family residences. Each of the six Sections has and is governed by a separate set of deed restrictions. In 1994, Northglen's Board of Directors ("Board") amended the deed restrictions to expand the Board, to assess late fees on unpaid assessments, and to determine and adjust rates. Plaintiff Brooks organized a committee called the "Committee to Remove the Board" ("Committee") to remove Board members that the Committee deemed to be acting outside the bounds of the deed restrictions by adopting the amendments. Northglen sued for injunctive and declaratory relief, seeking an order to enjoin the eight-member Committee from conveying the false impression that the Committee was formed according to Northglen's bylaws and to refrain from other activities designed to disrupt the Board's business. Brooks counterclaimed for a declaratory judgment that Northglen had no authority to raise assessments or charge late fees without a vote of the property owners.

The trial court granted summary judgment for Northglen holding that chapter 204 of the Texas Property Code authorized the Board to raise assessments and charge late fees unilaterally. The court of appeals reversed in part, holding that Sections 1 through 3 had deed restrictions disallowing annual assessments exceeding $120, however Sections 4 through 6 had no language disallowing annual assessments, so accumulation of assessments was allowed for those Sections. The court also held that section 204.010(10) of the Property Code gave Northglen the right to assess a $35 late fee in addition to the interest charge permitted by the deed restrictions, however, because the property owners did not have prior notice of the late fee, the court held that Northglen could not foreclose on any homesteads to collect those fees. Both parties appealed.
HOLDING: Affirmed in part, reversed in part.
REASONING: The Northglen deed restrictions for Sections One and Two subjected each property owner to "an annual maintenance charge and assessment not to exceed $10 per month or $120 per annum, for the purpose of creating … the 'maintenance fund'…" The restrictions further provided that the rate at which each Lot would be assessed would be determined annually by Northglen and that the rate and the date the assessment must be paid could be adjusted from year to year by Northglen as the needs of the Subdivision may