THE JOURNAL
The Magazine For Manufactured & Modular Housing Professionals
October 2016
As Printed In THE JOURNAL

Leases and Contractual Indemnity

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Rental agreements (both commercial and residential) constitute the major contractual relationship between a landlord and a tenant. And that contract is more than simply the amount of rent and the term (length) of the agreement. As such, it is important to be clear as to the parties respective duties when crafting a lease agreement or negotiating the terms of such an agreement. As a recent California case, *Morlin Asset Management L.P. v. Edward M. Murachanian,* demonstrates in the context of an indemnity clause in a commercial lease, an ounce of prevention is worth a pound of cure.

An indemnity clause is "[a] contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that might occur." (Black's Law Dictionary, 3d. Pocket Edition, 2006, West Publishing Co.)

The *Morlin Asset Management* case involved a commercial Tenant, a dental office, and a landlord. The tenant hired a cleaning service to clean the suite, but one of the employees of the cleaning service spilled water on the stairs in the common area of the building, and then slipped and fell on those same wet stairs, and was injured. The employee of the cleaning service sued the landlord on a theory of premises liability. The landlord then sued the tenant based on an indemnity clause contained in the lease. The contractual clause at issue read as follows:

"Except for Lessor's gross negligence or willful misconduct, Lessee shall indemnify, protect, defend and hold harmless the Premises, Lessor and its agents, Lessor's master or ground lessor, partners and Lenders, from and against any and all claims, loss of rents and/or damages, liens, judgments, penalties, attorneys' and consultants' fees expenses and/or liabilities arising out of, involving or in connection with, the use and/or occupancy of the Premises by Lessee. If any action or proceeding is brought against Lessor by reason of any of the foregoing matters, Lessee shall upon notice defend the same at Lessee's expense by counsel reasonably satisfactory to Lessor and Lessor shall cooperate with Lessee in such defense. Lessor need not have first paid any such claim in order to be defended or indemnified."

The Landlord's argument was that the Tenant had hired the cleaning service in connection with the use of the premises at issue. The Tenant argued the accident happened in a common area and thus was not covered by the indemnity clause. The Tenant moved for summary judgment which, was granted because the Court found that the lease obligated the tenant to indemnify the landlords only against claims involving the Premises, which had a specific definition in the lease at issue and did not include stairwells (a common area). Because it was undisputed that plaintiff was injured on the stairwell, which was within a common area which was undisputedly under the control of the landlord, the trial court found the tenant had no indemnification obligation as a matter of law under the rental contract.

The appellate court upheld the trial court's judgment on that basis. Furthermore, because there was a written contract addressing the obligations to indemnify, the Landlord could not rely on an equitable indemnity argument under California law because when there is an indemnity clause in a written contract, the contract controls.

It is important to note that this was a motion for summary judgment, because the judges did not merely weigh evidence and happen to find for the Tenant. Rather the appellate court held that the law required judgment for the Tenant. That is to say, despite all the capable arguments of the Landlord that the Tenant caused the litigation by bringing the Plaintiff to the property to clean the Premises (which were the subject of the indemnity clause) the landlord was unable to overcome the terms of the lease that was drafted years before the incident at issue.

Here are at least three lessons to be learned from this case:

1) Pay close attention to the defined terms in your lease agreements (or any agreements). Those definitions will likely be used to interpret every instance of that word being used in your lease. Make sure that every incidence of the defined terms in every paragraph of your lease conforms with your intent. Here, the court used the definition of "Premises" in the lease to interpret the indemnity clause (which included that defined term). That caused the court to exclude activity in the common areas of the building. The implication is that had the Landlord in this case used a different defined term in the indemnity clause ("building" for example) that encompassed both the suite leased by the Tenant and the common areas, the result may well have been different.

2) Be as specific as possible. Some clients request shorter, simpler leases for ease of understanding. And there is something to be said for simplicity. But it is important to understand the risks of simplicity. In the above case a defined term was used to interpret the indemnity clause in a way that limited the Landlord's ability to obtain indemnity. Words were surely saved, but the point of having contractual indemnity was lost. As such, a cost-benefit analysis must always be undertaken. This case demonstrates the benefit of a detailed lease that incorporates years, if not decades, of revisions based on the experience of the drafter. Indeed, if one had to guess, it is not difficult to imagine that the lease at issue in this case has already been modified to protect the Landlord in the same factual situation as arose in the subject case.

3) Have a professional review your lease agreement. There is no indication that the lease at issue in this case was not reviewed or prepared by a professional. But a real estate professional will, as a result of his or her experience and expertise, be able to protect you from many scenarios that you may not have considered. That should include the scenario of this case, whether or not this decision had been made.

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