

## Tenant can't use lis pendens to enforce option to purchase

Special motion to dismiss sends warning, lawyers say

By Eric T. Berkman

A landlord should be entitled to the dismissal of a memorandum of lis pendens filed by a commercial tenant seeking to enforce an option to purchase under a lease, where the tenant failed to mention in its ex parte application that it was in default of other lease provisions, a Superior Court judge has ruled.

The landlord's lawyers say this decision allowing their client's special motion to dismiss under G.L.c.184, §15(c) sends a "cautionary message" to parties thinking of filing lis pendens actions solely to put a cloud on a disputed piece of property.

The landlord argued that the tenant's lis pendens, filed as part of an attempt to enforce the option to purchase under the lease, should be removed under the statutory special motion to dismiss, since the tenant knew it had defaulted on another provision of the lease requiring notice of environmental violations.

Noting the lack of appellate cases on the issue, Judge Ralph D. Gants agreed and granted the special motion to dismiss, awarding attorneys' fees in the process.

"[I]f there were any reasonable factual support for [the tenant's] contention that it was not in default or any arguable basis in law for [its] contention that its default had been waived or was so immaterial that it did not bar its exercise of the option to purchase, then the special motion

to dismiss must not be granted," wrote Gants.

"Here, however, it should have been absolutely clear to [the tenant] that its failure to furnish the landlord promptly with the DEP Notice of Non-compliance constituted a default," the judge wrote.

The 12-page decision is *Danvers-DCH, Inc. v. Hill*, Lawyers Weekly No. 12-059-07.

### A 'powerful tool'

Howard M. Cooper of Boston, who represented the landlord, said the ruling "makes it clear that [the statute] is a powerful tool for property owners whose real estate has been improperly encumbered by the grant of a lis pendens."

According to Cooper, for many years tenants were able to go into the court and if — within the four corners of the complaint — there was any dispute about land ownership, the tenant could obtain a lis pendens. "Many tenants would do this strategically, knowing there was either about to be a sale or refinancing or the like."

Section 15(c), providing for a special motion to dismiss, was the Legislature's response to this practice, said Cooper, explaining that the amendment created an opportunity for a landowner to undo a lis pendens quickly and impose attorneys' fees if it had been obtained without a reasonable basis in law.

"So this raises the stakes significantly for anyone who thinks they're simply going to



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landlord

put a cloud on a property owner's title and then litigate a case for an extended period of time," he said.

In this particular case, while the tenant claimed it had never been in default, the court found that it had not been forthcoming with all the facts that might have established otherwise, said Cooper's co-counsel, Julie E. Green of Boston. "So this case serves as a cautionary tale about

the dangers of pursuing a lis pendens without a full and complete disclosure of all relevant facts in court."

The tenant's counsel, James L. Rudolph of Boston, said he was disappointed that the court failed to address his client's allegations that the landlord breached its duty of good faith and fair dealing and committed a G.L.c. 93A violation.

According to Rudolph, the tenant's option to purchase the property would only become available if his client extended the lease, and the landlord made a number of statements inducing his client to do so.

"Then all of a sudden, the landlord said, 'That's great. You've extended the lease, but there are a number of defaults that will prevent you from exercising the option to purchase,'" said Rudolph. "If the landlord hadn't misled the tenant into thinking there would be a waiver of the defaults, the tenant wouldn't have extended the lease."

Rudolph also criticized the dismissal under §15(c) while downplaying any po-

tential wider impact that could emerge from the ruling.

"We never thought [the *lis pendens* action] was a frivolous claim," he said. "And the ruling is very fact-specific. Had there been more of a paper trail relative to the breach of good faith and fair dealing, I don't think

the judge could have ignored that argument or the Chapter 93A violations."

Rudolph said he does not know whether the tenant will appeal.

### Property dispute

On Dec. 20, 1999, plaintiff Danvers-DCH, Inc. was assigned the final five years of a 10-year lease on a building and 79,000 feet of land in Medford. The tenant would be operating a car dealership on the property.

The tenant and defendant Kathleen Hill, trustee of A&P Realty Trust, the landlord, amended the lease to create a new five-year lease to replace the original 10-year lease.

The amended lease also provided the tenant with, among other provisions, an option to purchase the property.

At the time of the original lease in 1993, oil had been found in the groundwater on the property. The landlord spent significant money to remediate environmental damage. The lease required the tenant to inform the landlord of any notices or orders from government agencies as to any potential environmental violations.

On March 1, 2004, DEP formally notified the tenant that an inspection of the property had turned up 11 environmental violations. Despite its obligation to

**CASE:** *Danvers-DCH, Inc. v. Hill*, Lawyers Weekly No. 12-059-07

**COURT:** Superior Court

**ISSUE:** Could a commercial tenant who had defaulted under the lease proceed with a *lis pendens* action to enforce an option to purchase?

**DECISION:** No, because the action was "devoid of any reasonable factual support or arguable basis in law" and thus subject to a special motion to dismiss under G.L.c.184, §15(c)

promptly inform the landlord of DEP's citations, the tenant failed to do so.

On May 9, 2005, the tenant attempted to exercise its option to purchase the property. The landlord, citing the tenant's failure to restore a spire on the property or to inform the landlord of the DEP citations, refused to sell the property.

The tenant subsequently filed a *lis pendens* action in Superior Court seeking specific performance of the sale.

The landlord filed a special motion to dismiss the complaint pursuant to §15(c).

### 'Crystal clear default'

Addressing the landlord's motion, Gants noted that there was "virtually no appellate guidance" on how to interpret §15(c).

But in the 2005 *Galipault v. Wash Rock Investments, LLC* case — the Appeals Court's only published decision on the issue — the court focused primarily on the plaintiff's omission of material facts from its complaint, despite the *lis pendens* statute's requirement that complainant affirm that no material facts have been omitted, the judge observed.

"That precedent, by itself, is sufficient here to allow the special motion to dismiss because [the tenant's] verified complaint, while it noted that DEP had issued a Notice of Noncompliance to [the tenant] on

March 1, 2004, omitted the fact that [the tenant] had failed to furnish this Notice to the [l]andlord, as required under Section 5.2.3 of the Amended lease," said Gants.

This omission was even more serious in light of an affidavit where the tenant's

company president stated that the tenant had at no time been in default under the lease, the judge continued.

"This assertion was plainly in error, because there can be no doubt that, as of June 15, 2004, [the tenant] had received the DEP Notice of Noncompliance and had failed to furnish it to the [l]andlord, and [the president] knew or should have known of this crystal clear default," Gants wrote.

Meanwhile, Gants found the tenant's complaint "devoid of any reasonable factual support or arguable basis in law," another basis for dismissal under §15(c).

First, it should have been clear to the tenant that its failure to notify the landlord of the DEP citations was a default, said the judge. "It should have been equally clear that ... the presence of such a default would bar judicial enforcement of its option to purchase."

Second, the tenant's claim that the landlord had waived the environmental default by allowing extension of the lease could not possibly succeed given that, due to the tenant's own omission, the landlord did not even know of the environmental default at the time, said Gants. **MLW**

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