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Commercial Leases and square footage approximations-Is the Lessor safe?

A commercial lease in California stated that the premises contained approximately x square feet. It also stated that the parties agreed that it was a reasonable approximation and payments based on the size are not subject to revision if the actual size is found to be different.

The tenant paid rent based on the square footage, and common area maintenance (CAM) charges based on their percentage of the total shopping center square footage. Two years into the term, the tenant obtained a copy of the lessor's application for earthquake insurance, which disclosed that the tenant's premises had a smaller square footage than indicated in the lease, and that the shopping center was larger than the lease indicated, which would reduce the percentage of CAM charges the tenant was liable for. The total overcharge for the term of the lease would be \$90,000.

The tenant filed suit for misrepresentation and fraud, claiming that prior to entering the lease, the lessor repeatedly affirmed the accuracy of the square footage and actively discouraged confirming measurements; they acted offended at the suggestion! The tenant's position was that the lessor knew the actual square footage at the time they entered the lease. The trial court ruled for the lessor, finding that the terms of the lease (that the footage was agreed to be reasonable approximation and the rent would not be revised), barred the tenant's claims.

The California Appeals Court disagreed, finding that the lease did not bar the fraud and misrepresentation claims. It started with the Civil Code, which provides that contracts which have for their object "directly or indirectly, to exempt anyone from responsibility for their own fraud...whether willful or negligent, are against the policy of the law."

Accordingly, a lessor to a contract who has been guilty of fraud in its inducement cannot absolve himself or herself from the effects of their fraud by any stipulation in the contract. This allows the court to ignore contract provisions that absolve a

party from fraud. Here, the court applied this policy to the provision asserting that the tenant had an adequate opportunity to examine the leased unit.

This appeal sent the case back to the trial court where the tenant now has to prove to a judge or jury that they relied on the lessor's misrepresentations in entering the contract. The lessor may be held liable regardless of the as-is provisions.

The key here may be when the Lessor learned of the correct measurements. If they knew before entering the lease, the misrepresentation is clear. If they learned of it later (unlikely that the lessor measured the space after it had been leased), this case raises the question whether the lessor can rely on the lease representations, or needs to notify the tenant and adjust the rent. It also begs the question- how did this wily tenant get the Earthquake Insurance application?

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