

REAL ESTATE

Landlord Attempt to Terminate Option Contract 'Invalid'

BY ALAN NOCHUMSON

Special to the Legal

Drifting a lease agreement is no easy task. Although most landlords possess an upper hand in lease negotiations, they do not always protect themselves from a defaulting tenant.

In *Jones v. Battista*, a landlord recently found himself relying upon a lease that had more holes in it than a piece of Swiss cheese.

In *Jones*, Sherry Mennett sold a property located near Rittenhouse Square to Anthony Battista. As part of the transaction, Battista leased the property to Mennett. Under the lease, Mennett was obligated to pay monthly rent in an amount equal to the monthly mortgage payment due on the property. The lease also contained a clause giving Mennett the option to purchase back half of the property.

Although Mennett made some rental payments initially, she eventually ceased to do so. Soon thereafter, Battista informed Mennett in writing that he was terminating the lease due to her nonpayment of rent and her failure to maintain liability insurance as required under the lease. Several months later, Mennett exercised her option to purchase half of the property.

Mennett then filed an action in the Philadelphia County Court of Common Pleas, requesting, among other things, specific performance of the option provision contained in the lease. In response, Battista filed

date of this agreement, or upon the delivery of a deed conveying one-half interest in the premises pursuant to the option to purchase set forth in paragraph."

The trial court emphasized that "nowhere does the lease state that Battista has the right to call a default, terminate the lease, or otherwise extinguish Mennett's rights under the lease due to her failure to fulfill her obligations under the lease. At most, the lease provides that Mennett covenants and agrees with Battista that in consideration of Battista paying rent when due, she shall peaceably and quietly use, occupy and possess the premises for the full term of this lease."

Since the lease did not expressly provide a remedy to Battista in the event of Mennett's failure to pay rent, the trial court stated that he was "left with only those remedies provided at law."

In a commercial lease situation, Pennsylvania courts have consistently followed the strict common law rule that, unless a demand for rent is expressly waived by the terms of the lease, a demand by the landlord is absolutely essential to terminate the lease as a result of nonpayment of rent.

The trial court noted that "Battista ... professed no evidence that he made any demand upon Mennett to cure her alleged breach in payment of the rent, or that she expressly waived her right to receive a demand to cure before her rights under the lease were forfeited."

As a result, the trial court reasoned that "[u]ntil Battista made such a demand (and Mennett failed to comply with it), Battista was not entitled to terminate the lease. Therefore, his attempt to do so was invalid."

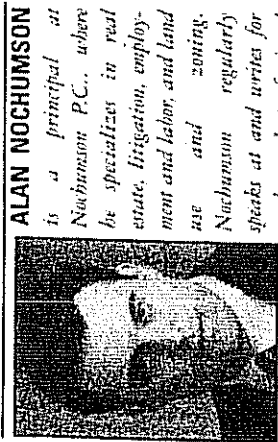
The trial court was also not persuaded by the following lease provision: rent "shall be payable without demand on the 15th day of each month." The trial court reasoned that "this waiver of demand before the rent comes due does not act as a waiver of a subsequent demand to cure a default in payment of rent, which is required before a forfeiture can be had."

In dicta, the trial court also discussed Battista's failure to properly terminate the lease based upon the lack of liability insurance. The trial court pointed out that the lease required Battista to first request that the Mennett cure the default prior to terminating the lease. Since Battista failed to do so, the trial court obviously believed that the lease was not terminated on these grounds as well.

OPTION PROPERLY EXERCISED

The trial court next discussed whether Mennett's option rights were contingent upon the performance of her contractual obligations.

The option provision of the lease specifically provided that: "[Battista] hereby gives and grants to [Mennett] the exclusive option of purchasing a one-half fee simple interest



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counterclaims for the amount allegedly due by Mennett under the lease.

Since Mennett did not dispute her failure to make the rental payments, Battista moved for summary judgment arguing that she no longer has any right to exercise the option provision due to her admitted default in payment of the rent. Mennett then filed a cross-motion for summary judgment on her claim for specific performance of the option provision.

FAILURE TO TERMINATE LEASE

The trial court first concluded that Battista did not properly terminate the lease. The trial court relied upon the lease provision entitled "Term of Lease," which provides that: "The lease term shall expire in 10 years from the

Real Estate

continued from 7

in the [property] for the payment of \$1 and the assumption of one-half of the balance of principal and interest remaining on the mortgage and mortgage note with Worlds Savings dated June 14, 2000, as of the time [Battista], at his cost and expense, delivers to [Mennett] a duly executed and acknowledged fee simple deed as tenants in common in proper statutory form for recording."

Pennsylvania courts generally treat an option to purchase leased premises as an entirely separate agreement. Unless the lease contains language extinguishing the tenant's right to exercise the option upon a lease default, the tenant will not be barred from exercising the option. In fact, "[w]here an act or event mentioned in a contract is not expressly made a condition precedent, it will not be so construed unless such clearly appears to be the intention of the parties."

After reviewing the option provision contained in the lease, the trial court concluded that, since the lease was not validly terminated by Battista, Mennett was in a position to exercise the provision to repurchase half of the property.

The trial court rejected Battista's reliance of *Gateway Trading Co. Inc. v. Children's Hospital of Pittsburgh*. In *Gateway*, the lease expressly stated that the tenant's right of first refusal could be exercised only "if the tenant be not in default under the terms of this lease."

The trial court found the Pennsylvania Supreme Court's ruling in *Gateway* was not applicable because the lease in *Jones* did not contain any such condition precedent. Unlike *Gateway*, there was no express language in the lease making Mennett's option rights

AREA MORTGAGE RATES

Lender	Fixed Rates		Adjustable Rates		Jumbo Rates* 30 yr. fixed	Commercial Yes/No**
	30 yr.	15 yr.	1 yr.	5 yr.		
AA E. Mortgage 877-793-1400	5.75/0	5.38/0	N/A	N/A	6.13/0	No
Absolute Mortgage Company 988-904-6637	5.75/0	5.38/0	4.50/0	4.50/0	6.13/0	No
Home Finance of America 800-358-5626	5.75/0	5.38/0	N/A	N/A	6.13/0	No
Lighthouse Mortgage 800-784-1331	5.75/0	5.38/0	N/A	N/A	6.13/0	No
American Home Finance 888-429-1940	5.75/0	5.38/0	4.13/0	4.13/0	6.25/0	No
N.E. Mortgage Lender 877-559-3621	5.88/0	5.50/0	4.50/0	4.50/0	5.88/1	No
Stepping Stone Lending 800-638-2659	5.88/0	5.50/0	N/A	N/A	6.25/0	No
Wilmington Mortgage 610-558-3099	6.00/0	5.50/0	N/A	N/A	6.25/0	No
East Coast Financial 800-353-9440	6.00/0	5.63/0	N/A	N/A	6.25/0	No
America's Best Mortgage 215-968-4444	6.00/0	5.63/0	N/A	N/A	6.38/0	No
3rd Federal Bank 800-235-7071	6.25/0	5.75/0	N/A	N/A	6.38/1	No
1st Metropolitan Mortgage 800-328-0557	6.25/0	5.88/0	N/A	N/A	6.50/0	No

* A "jumbo" or non-conforming mortgage is a loan amount in excess of \$370,000.
** Indicates if a lender offers mortgage loans for commercial properties. Call to discuss rates and terms.

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contingent upon her performance of her obligations as tenant under the lease.

LESSONS LEARNED

Jones illustrates the importance of drafting a lease that adequately protects landlords from defaulting tenants. The landlord in *Jones* did not properly terminate the lease most likely because he assumed the lease

contained a clause waiving his obligation to demand rent from the tenant.

Even worse, the lease did not prevent the defaulting tenant from otherwise purchasing an interest in the property. If the lease contained such restrictive language, the tenant in *Jones* would have been foreclosed from repurchasing the property back from the landlord.