

Texas Case Affirms Fraud Finding Despite Contract

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The Texas Supreme Court's ruling, in *Italian Cowboy Partners, LTD. v. The Prudential Insurance Company of America*, 2011 Tex. LEXIS 291, demonstrates that there are limits to the protections that even the best lease can provide. It also demonstrates that when renting a premises, candor in describing the condition of and potential risks associated with the premises provides greater protection than contract provisions designed to protect the landlord. The court ruled that credible allegations of fraud in the inducement can overcome lease provisions that state the lease contract represents the entire agreement between the parties and that the landlord and landlord's agents and employees made no representations not stated in the lease.

The suit arose when the owners of Italian Cowboy rented a shopping center space for their restaurant. Italian Cowboy terminated the lease because of persistent sewer gas odor in the area of the rented premises. The landlord maintained that the lease should be enforced by its terms and sought to recover for breach of contract. The lease contained the following relevant paragraphs:

14.18 Representations. Tenant acknowledges that neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises with respect to the Site, the Shopping Center or this Lease except as expressly set forth herein.

14.21 Entire Agreement. This lease constitutes the entire agreement between the parties hereto with respect to the subject matter hereof, and no subsequent amendment or agreement shall be binding upon either party unless it is signed by each party. . . .

During the remodeling of the restaurant space, the owners became aware of the odor problem that had plagued the prior tenant. The odor problem was apparently well known and may have contributed to the demise of the prior restaurant. During lease negotiations the odor was never mentioned by the lessor and the lessor claimed to know nothing about the odor problem when asked after

remodeling began. Italian Cowboy brought suit against Prudential seeking to rescind the lease and recover damages. Italian Cowboy was granted rescission and over \$600,000 in damages. The verdict was appealed and the court of appeals reversed.

Oral Representations Admissible

The Texas Supreme Court disagreed and reinstated the trial court verdict. The issue before the court was whether a contract provision that states that the lease embodies the parties' entire agreement and a provision that states the tenant acknowledges that neither landlord nor landlord's agents or employees made any representation concerning the property not in the lease bar a claim based upon fraudulent inducement. Fraudulent inducement is the allegation that the tenant was induced to enter into the contract because of fraudulent statements made by the landlord and but for these statements would not have rented the premises. In a 6–3 decision, the Texas Supreme Court held that such contract provisions do not bar the fraud claim. This does not mean such provisions should not be in leases. The plaintiff must be able to prove fraud, which is a more difficult task than proving other theories of liability. In this case there was ample evidence that the landlord knew about the odor problem, and that it could not be remediated, and concealed this information from the tenant.

The court's ruling is consistent with the law in most jurisdictions concerning fraud claims during contract negotiations. Fraud in the inducement allegations against self storage operators have been a plaintiff's litigation ploy to avoid the impact of the contractual release of liability in many self storage rental agreements. Site personnel should always be candid with potential renters when asked direct questions concerning the facility. For example, it is probably a mistake to suggest that the facility has a great security system if it is known that it goes out during every thunderstorm. Be factual and do not be evasive. ❖

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