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CONN KAVANAUGH ROSENTHAL PEISCH & FORD, LLP
COUNSELORS AT LAW
Ten Post Office Square, Boston, Massachusetts 02109
Tel: (617) 482-8200
Fax: (617) 482-6444
www.connkavanaugh.com

COMMERCIAL LANDLORDS CAN BE HELD LIABLE FOR UNSAFE CONDITIONS WITHIN TENANT RENTAL SPACES

What You Need to Know

A Massachusetts commercial property owner can be held liable for an injury sustained in a tenant's leased space – even if the lease requires the tenant to repair the condition that caused the injury.

In Bishop v. TES Realty Trust, 459 Mass. 9 (2011), the Massachusetts Supreme Judicial Court (SJC) decided that Chapter 186, Section 19 of the Massachusetts General Law applies to commercial landlords. The statute generally requires landlords "to exercise reasonable care to correct an unsafe condition described in a written notice from a tenant." This advisory explains the court's decision and its practical impact upon commercial property owners and managers and their liability insurers.

M.G.L. c. 186 § 19

Paraphrased, this 1972 statute imposes civil-lawsuit liability upon a "landlord or lessor of any real estate" in the following situation: (1) there was an unsafe condition within a tenant's leasehold; (2) the tenant did not cause the condition; (3) the tenant notified the landlord/lessor of the condition by certified or registered mail; (4) the landlord/lessor failed to repair the unsafe condition in a reasonable manner and within a reasonable time after receiving the notice; and (5) the plaintiff was injured by the unsafe condition while lawfully at the leasehold. Liability will attach even if the tenant's lease required it to repair the unsafe condition. (The statute also reinforces that – written notice or not – landlord/lessors are liable for injuries caused by unsafe conditions in common areas.)

Statutes relating to property conditions often apply to residential properties alone. For instance, M.G.L. c. 239 § 8A permits a residential tenant, but not a commercial tenant, to withhold rent if his property is in poor condition. M.G.L. c. 186 §19 makes no obvious distinction between residential and commercial properties; but, in the nearly 40 years between the statute's enactment and the Bishop case, the SJC never had occasion to confirm whether the statute applies to commercial properties; and, in the meantime, commercial landlords took the position that the statute applies to residential properties alone.

The Bishop Decision

The Bishop case involved a plaintiff-tenant who was injured by an unsafe condition (a) that was in her own leasehold and (b) that her lease required her to repair. Despite the lease, the tenant sued the defendant-landlord because she fruitlessly had given the landlord written notice of the unsafe condition before she was injured by it. Finding that M.G.L. c. 186 §19 does not apply to commercial properties, the trial court dismissed the lawsuit. The tenant appealed to the Massachusetts Appeals Court and the SJC later assumed jurisdiction over the appeal.

The SJC vacated the dismissal and remanded the case back to the trial court for a new trial consistent with the SJC's finding that M.G.L. c. 186 §19 does apply to commercial properties (as well as residential properties). Essentially, the SJC concluded, because the statute fails to distinguish between commercial and residential properties, the Legislature must have intended to apply the statute to both kinds of properties, particularly when so many other statutes draw this distinction.

In its decision, the SJC endeavored to assuage the inevitable concerns of commercial property owners that the decision unfairly imposes upon them the financial and other burdens of repairing an unsafe condition even when the operative lease requires the tenant to make the repair. Although this did not occur in the Bishop case, the SJC opined that a tenant who contractually is

required to repair an unsafe condition is "likely to repair the condition herself"; and, even if the tenant requires the landlord to repair the condition, the landlord can repair the condition and then seek reimbursement from the tenant. (It appears that the SJC did not intend to mandate reimbursement in all such cases but, rather, merely was pointing out that commercial leases typically require it.)

What the Bishop Decision Means to Commercial Property Owners/Managers and their Insurers

The Bishop decision means that an owner or manager of commercial property who unreasonably fails to repair an unsafe condition within a tenant leasehold (of which the tenant provided notice by certified or registered mail) will be held liable for any injury caused by the condition and suffered by a person lawfully at the leasehold. The rule applies despite any lease provision requiring the tenant to repair the unsafe condition. The only exception is for an unsafe condition caused by a tenant.

The decision leaves open certain issues that may be the subject of future litigation. First, who decides whether the tenant caused the unsafe condition? Future juries likely will do so, and they presumably will err in favor of injured plaintiffs rather than defendant-landlords who refused to repair conditions they believed to be caused by tenants. Therefore, the best course of action for a landlord may be to correct any unsafe condition that clearly was not caused by the tenant and then seek reimbursement from the tenant. Meanwhile, landlords should ensure that future leases require tenants to (a) repair unsafe conditions within their leased spaces, and (b) reimburse the landlord for any leasehold repairs it may undertake.

Second, what is a "reasonable" repair and what is a "reasonable" period of time? Here, again, future juries likely will construe the statute in favor of injured plaintiffs. Therefore, landlords would be wise to attend to unsafe conditions as soon as practicable, using qualified workers and quality materials. If a repair somehow fails, then it probably will be deemed unreasonable.

Third, will anything less than certified or registered mail suffice to put a landlord on proper legal notice of its duty to repair an unsafe condition? Probably not. The statute is clear, and the court reiterated, that either form of notice must be given. However, if any form of notice is provided to a landlord, especially provable notice, such as regular mail or e-mail, then the landlord again should consider making the repair. It seems conceivable that a future trial or appellate court will perceive this procedural/notice requirement to be insubstantial and impose landlord liability in a case where neither form of statutorily-required notice was provided (so long as some form of notice clearly was provided).

*This client advisory was written by **Michael T. Sullivan**. If you wish to inquire further about our real estate or litigation practices, please contact Michael or your attorney at **Conn Kavanaugh Rosenthal Peisch & Ford, LLP**.*