

## Massachusetts Appeals Court Strikes Down Commercial Landlord's Right to Collect Accelerated Rent Upon a Tenant Default

In the December 5, 2022 opinion (*Cummings Properties, LLC v. Darryl C. Hines*, No. 21-P-1153), the Massachusetts Appeals Court considered whether a commercial landlord can collect accelerated rent upon a tenant default, specifically when the landlord is also collecting rent from a new tenant for the same premises. Surprising many commercial real estate professionals, the Court found that the generally accepted principal which allows “[landlords] to retake possession of the premises, relet it and collect rent from the new tenant, and recover all the remaining rent owed by [defaulting tenant], without having to account for the rent received from the new tenant during the term of the original lease” is “unreasonably and grossly disproportionate to the real damages from a breach.”

The facts of this case were uncontested – Massachusetts Constable's Office, Inc. (“MCO”) entered into a 5-year lease (the “Lease”) with Cummings Properties, LLC (“Landlord”), which lease was guaranteed by Darryl Hines. MCO defaulted on its rent payment during the second month of the 5-year lease term. The Lease included the following remedies provision, which allowed for Landlord to “both terminate the lease and accelerate the rent” upon MCO's default:

“In the event that . . . LESSEE defaults in the observance or performance of any term herein, and such default is not corrected within 10 days after written notice thereof, then LESSOR shall have the right thereafter, without demand or further notice, to declare the term of the lease ended, and/or to remove LESSEE's effects, without liability, including for trespass or conversion, and without prejudice to any other remedies. If LESSEE defaults in the payment of any rent, and such default continues for 10 days after written notice thereof, and, because both parties agree that nonpayment of said sums is a substantial breach of the lease, and, because the payment of rent in monthly installments is for the sole benefit and convenience of LESSEE, then, in addition to any other remedies, the net present value of the entire balance of rent due herein as of the date of LESSOR's notice, using the published prime rate then in effect, shall immediately become due and payable as liquidated damages, since both parties agree that such amount is a reasonable estimate of the actual damages likely to result from such breach.”

Following MCO's breach, Landlord filed a summary process action, which was subsequently resolved through an agreement for judgment. In the judgment, Landlord regained possession of the premises and was awarded \$74,076.24 in damages. Less than a year after the judgment was entered, Landlord signed a new lease with a different tenant to relet the same premises. Despite reletting the premises, Landlord commenced a new action in Superior Court more than three (3) years later, seeking to recover all of the rent due under the remainder of the 5-year Lease term against Hines, as guarantor. The Superior Court held that the acceleration clause in the Lease was an “enforceable liquidated damages provision because the stipulated sum was a reasonable estimate of [Landlord's] anticipated damages.” The Appeals Court disagreed and reversed.

The Appeals Court noted that the turning factor in determining the enforceability of a liquidated damages provision is whether or not the remedy constitutes a penalty. In the case at hand, the Court held that awarding the liquidated damages to Landlord would amount to a penalty, as Landlord would be permitted to “retake possession of the premises, relet it and collect rent from the new tenant, and recover all the remaining rent owed by MCO, without having to account for the rent received from the new tenant”. In essence, the Court was unwilling to permit Landlord to ‘double-dip’ and recoup the benefit of the liquidated damages *in addition to* collecting rent under its new lease. The Court held that Landlord was only entitled to its actual damages, not liquidated damages.

Commercial landlords should consider updating the rent acceleration clauses in their leases in order to ensure that the liquidated damages provisions are not “out of proportion to any reasonable approximation of anticipated harm”. If such liquidated damages provisions are found to be out of proportion based on this standard, there is a chance the remedy will be found unenforceable.

The [Real Estate Practice Group](#) at [Partridge Snow & Hahn](#) is fully updated on the issues and available to answer your questions.

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