

KAHN, DEES, DONOVAN & KAHN, LLP
ATTORNEYS & COUNSELORS AT LAW

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COMMERCIAL LEASE GUARANTIES

By Michael E. DiRienzo

Earlier this year in *Noble Romans, Inc. v. Ward*, the Indiana Court of Appeals held that a landlord's claim for rent due from a tenant was within the scope of a Guaranty executed by the tenant's parent corporation even though the terms of the Guaranty did not reference the lease agreement itself.

In the case, the original tenant wanted to assign the lease to NR Dayton, a subsidiary of Noble Roman's, Inc. At the closing, the parties executed an agreement entitled "Assignment, Assumption Undertaking and Consent to Assignment" which contained: (1) an Assignment of the original lease to NR Dayton; (2) an Assumption Undertaking whereby NR Dayton accepted the assignment and agreed to hold the prior tenants and certain individuals harmless from liability; (3) a Guaranty executed by Noble Roman's which merely stated that it would guaranty NR Dayton's performance of "all obligations assumed under the Assumption Undertaking"; and, (4) a Consent to Assignment, which stated that the landlord's consent was in consideration of Noble Roman's guaranty of performance. Also, NR Dayton and the landlord executed the Amendment of the lease which granted NR Dayton an option to renew the Lease.

When NR Dayton failed to pay rent and abandoned the real estate, the landlord sued NR Dayton and Noble Roman's. Noble Roman's argued that the Guaranty served only as an indemnification agreement because it only mentioned the obligations of the tenant under the Assumption Undertaking and did not mention the Assignment or the lease.

The Court found that this ambiguous Guaranty should be interpreted in light of the surrounding circumstances and that the intent underlying the Guaranty should be determined by looking at the other writings executed at the same time and relating to the same transaction. In doing this, the Court held that despite the language in the Guaranty, the parent corporation was responsible for payment of the rent due under the lease agreement.

The holding in this case stresses the importance of document review whenever an individual, corporation or other entity is guarantying the performance of a contract. This review is especially important during negotiations of a commercial lease, an assignment or renewal thereof. Often, tenants will negotiate a lease with the landlord based on a promise that another party will guaranty full performance of all of their obligations. The actual guaranty document executed by the other party should be examined closely prior to closing to ensure that it covers the performance of all of the tenant's obligations under the lease, including payment of maintenance charges, property taxes, liability insurance and damage to the premises. It is important that the documents executed at closing clearly express the actual intent of all of the parties involved in the transaction.

With the ever present volatility in retail and restaurant businesses, it is important for commercial landlords to have an alternative source of recovery should the tenant default. Whether you are a landlord or a tenant, this case stresses the need for clear document drafting and critical legal review.

Kahn, Dees, Donovan & Kahn, LLP has substantial experience drafting and negotiating commercial leases for both landlords and tenants, and we understand the intricacies of dealing with the various documents involved in such a transaction. If you are interested in commercial real estate as an investment, ar

considering entering into a commercial lease agreement, or if you have questions regarding the status of your current lease agreement, please call us at (812) 423-3183.

KDDK AGAIN SUCCESSFUL IN APPEALS

KDDK has recently been involved in successful appeals in areas of estate taxation and post-adoption visitation.

Estate Taxation

The beneficiary of a remainder interest in real property was pursued for reimbursement of estate taxes. A dispute arose on whether the decedent intended our client, the beneficiary, to pay the tax personally or whether the executor should pay the taxes. The trial court relieved our client from the payment. The executor appealed. KDDK successfully argued to the Indiana Court of Appeals that the decedent intended to absolve our client from the tax payment.

Post-Adoption Visitation

The adoptive parents of a minor child had agreed after the adoption was decreed to allow the child's biological grandmother to visit with the child monthly. The visits became difficult and detrimental to the child, so the adoptive parents, in the best interests of their son, elected to terminate the arrangement. The biological grandmother sued to enforce the agreement, but the Indiana Court of Appeals agreed with us that our client could unilaterally terminate the arrangement to protect their child.