



Case Law Update

Mortgage Lending Institute

September 29, 2017

J. Richard White
Amanda R. Grainger

Austin | Charlotte | Dallas | Fort Worth | Houston | San Antonio | The Woodlands

WINSTEAD PC | ATTORNEYS



Landlord/Tenant/Leases

FP Stores, Inc. v. Tramontina US, Inc.

- Houston CA - first time ***any*** court addressed the “bad faith element” of § 93.011 of the Texas Property Code.
- 6th time a court addressed § 93.011.
- § 93.011 imposes liability on ***commercial LL*** who retains security deposit in bad faith.
- T to receive an amount = \$100 + 3x the deposit + attorney’s fees
- Rebuttable presumption LL acted in bad faith if not returned in 60 days.
- Burden on LL to present evidence of good faith.
- Court relied on cases interpreting § 92.109 (residential leases).



If you represent commercial LLs make sure they have procedures for returning deposits within 60 days and document reasons if LL will exceed 60 days.

WINSTEAD PC | ATTORNEYS

Landlord/Tenant/Leases

Shields Limited Partnership v. Bradberry

- TX SC case addressing inconsistent treatment of waiver cases by CAs.
- T frequently paid late and LL accepted. Lease provided:
 - Acceptance of late payments **shall not** be a waiver;
 - Waivers must be **in writing** signed by waiving party; and
 - Forbearance of enforcement **could not** constitute a waiver.
- TX strong public policy favoring freedom of contract.
- Waiver requires **intentional** relinquishment of a known right or **intentional** conduct inconsistent with claiming that right.
- Rights under a nonwaiver provision may be expressly/implicitly waived **but** a **general** or **absolute** non-waiver clause **may** be ineffective...



However, parties can expressly agree (as in this case) that specific conduct will not result in waiver.

Seller/Purchaser

Tregallas v. Carol M. Archer Trust No. Three

- Amarillo CA – Mineral Interest ROFR granted to Archer Trust was sold to Tregallas without notice and Archer Trust filed suit.
- Tregallas argued claim barred by Statute of Limitations - § 16.004(a)(1) of the Tex. Civ. Prac. & Rem. Code requires suits for specific performance for conveyance of real property to be brought within 4 years.
- Archer Trust argued:
 - ROFR rights “dormant” until notice of potential sale; and
 - discovery rule tolls cause of action until the party learns of injury.
- Court relied on TX SC holding in **Cosgrove v. Cade** to limit application of discovery rule to injuries inherently undiscoverable.

Seller/Purchaser

Tregallas

- Well settled in Texas that owners of property are under no duty to routinely search the deed records for later-filed documents impugning their title.
- CA distinguished case because a ROFR is a contract right and not a property right.
- Interesting to see if the Texas Supreme Court takes the case.

Construction

Certificate of Merit Statute

Sec. 150.002. Certificate of Merit.

(a) In any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who:

- (1) is competent to testify;
- (2) holds the same professional license or registration as the defendant; and
- (3) is knowledgeable in the area of practice of the defendant and offers testimony based on the person's: (A) knowledge; (B) skill; (C) experience; (D) education; (E) training; and (F) practice.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Case Law Update

Also available as part of the eCourse

[2017 William W. Gibson, Jr. Mortgage Lending eConference](#)

First appeared as part of the conference materials for the
51st Annual William W. Gibson, Jr. Mortgage Lending Institute session
"Texas Case Law Update"