Landlord Temporarily Enjoined From Evicting Disabled Tenant

Under the guise of the Fair Housing Amendments Act of 1988, or FHAA, the U.S. District Court for the Western District of Pennsylvania in *Milan v. Pyros* recently decided whether to temporarily enjoin a landlord from evicting tenants who suffered from physical disabilities.

The George Washington Hotel is a multi-unit apartment complex in Washington, Pa. Late last year, Robert Milan, a quadriplegic man, sought to rent an apartment unit at the hotel with the assistance of Kathleen Kleinmann, a disabled woman herself, an existing tenant at the hotel, and the chief executive officer of a non-profit organization which promotes independent living through direct services to disabled persons. Her non-profit organization also leased an apartment unit at the hotel for use as a transitional living space for disabled persons moving from institutional care to independent living.

With Kleinmann’s assistance, the hotel eventually agreed to enter into a six-month lease with Milan. Milan moved into his unit without first executing a written lease agreement with the hotel.

Independent of these lease negotiations, Kleinmann requested from the hotel that her friend, who was suffering from cancer at the time, be allowed to temporarily stay in her apartment unit so she could serve as his caregiver.

All hell broke loose when Milan moved into his apartment unit with his service dog, Daisy.

Within days of his arrival, the hotel, which had a no pet policy, in no uncertain terms, expressed its unwillingness to continue the lease arrangement with Milan if the dog remained

there. Kleinmann then received a letter from the hotel stating that she would be evicted from her apartment unit if her cancer-stricken friend did not leave the unit within a stated period of time.

After the hotel apparently began receiving complaints about Milan's dog, the hotel summoned the police in an attempt to forcibly evict Milan from the hotel as a squatter (as he had not signed the lease agreement). The police explained to the hotel that they could not take any action against Milan without a court order.

The hotel then issued separate letters to Milan and Kleinmann. In its letter to Milan, the hotel directed him to leave voluntarily or face eviction proceedings as he was an unauthorized tenant. No mention was made in the letter about his dog.

In the letter to Kleinmann, the hotel claimed that she brought Milan into the hotel under the false pretense that her non-profit organization would execute a lease for him. The hotel then expressed its dissatisfaction that Milan was unable to care for his dog.

Although Kleinmann's friend left her apartment unit within the time prescribed by the hotel, the hotel nevertheless filed a landlord-tenant complaint against her in district justice court based upon the friend's alleged illegal occupancy of the unit. The hotel also filed a landlord-tenant complaint against Milan because of his alleged violation of the hotel's no pet policy.

Milan and Kleinmann then removed their cases to federal district court, consolidated the cases together, filed a counterclaim against the hotel under the FHAA, and sought a preliminary injunction preventing the hotel from evicting them from their respective apartment units while the litigation was pending.

The federal district court's ruling in *Milan* centered upon whether Milan and Kleinmann should be allowed to remain in their respective apartment units in the meantime.

Four factors govern whether to issue a preliminary injunction: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

The federal district court first focused on whether Milan and Kleinmann established a reasonable probability of success on the merits of their FHAA claim. Under the FHAA, it is illegal, in housing practices, to discriminate on the basis of a tenant's disability.

In order to make out a claim for a FHAA violation, the tenant must show: (i) that he is suffering from a disability as defined under the statute; (ii) that the landlord knew or reasonably should have been expected to know of the disability; (iii) that reasonable accommodation of the tenant's disability might be necessary to afford him an equal opportunity to use and enjoy his apartment unit; and (iv) that the landlord refused to make a reasonable accommodation.

The federal district court reasoned that both Milan and Kleinmann established a reasonable likelihood of success on the merits that the hotel violated the FHAA.

With respect to Milan, the federal district court noted that Milan was clearly disabled within the meaning of the FHAA and that Milan's dog was a service animal allowed under the statute. While acknowledging the existence of the hotel's no pet policy, the federal district court concluded that the hotel violated the FHAA by nonetheless refusing to accommodate his disability.

As for Kleinmann, the federal district court pointed out that her FHAA claim was based upon retaliatory discrimination because she was the person who referred Milan to the hotel. In essence, the federal district court concluded that Kleinmann's alleged lease violation regarding her friend's temporary presence in her apartment unit was nothing than a pretext for the hotel's initial discriminatory decision.

The federal district court next decided whether Milan and Kleinmann would suffer irreparable harm if their requested injunctive relief was denied.

Unlike Kleinmann, the federal district court did not believe that Milan would suffer such harm if the injunctive relief was denied. The federal district court emphasized that Milan resided at the hotel only for a short period of time, had only a six-month lease to begin with, and was actively seeking new housing and did not desire to remain at the hotel for obvious reasons. The federal district court thus elected to summarily deny the injunctive relief requested by him on these grounds alone.

In contrast, the federal district court highlighted that Kleinmann had invested significant funds to modify her apartment unit in order to accommodate her disability and to promote independent living. The federal district court was also swayed by the strong likelihood that her unit would no longer be available if she ultimately succeeded through litigation.

On the flip side, the federal district court was unconvinced that the hotel would suffer greater harm by granting the injunctive relief sought by Kleinmann. The hotel explained its intention to convert her apartment unit to a hotel room. The federal district court pointed out that, if the hotel's early termination fell victim to the FHAA, Kleinmann would be able to remain in the unit until early 2009 and the hotel would thus be prohibited from converting the unit into a hotel

room until then.

Finally, the federal district court stated the public interest favored the issuance of a preliminary injunction because the enforcement of the FHAA was at issue and since maintaining the status quo for Kleinmann promoted independent living for persons with disabilities.

LESSONS LEARNED

The federal district court's ruling in *Milan* illustrates the fine line between a court granting and denying preliminary relief in the real estate context. In contrast to Kleinmann, the federal district court refused to allow Milan to remain in his apartment unit until the underlying litigation concluded because he could not establish that he would suffer irreparable harm if he was evicted from the unit. Milan, unlike Kleinmann, had only resided in the hotel for a short period of time prior to the attempted eviction, had entered into a short-term lease, had not invested any of his own financial resources in the apartment unit, and was content to seek alternative living arrangements.

Alan Nochumson

Vertical Position 100%

Condominium Unit Owner Not Defamed By Association Board Member

“The inmates are running the asylum”. Many times that is how condominium associations are viewed and described by disgruntled unit owners. Most unit owners, who take time out of their busy lives to serve on the board of directors of a condominium association, do so to make sure that their building is managed smoothly and efficiently. However, which is the case in all walks of life, there are those who have agendas which go beyond the call of duty.

In *Pacitti v. Durr*, the U.S District Court for the Western District of Pennsylvania confronted a situation where a unit owner believed that he was being unfairly treated and targeted by a board member of a condominium association.

Although the complaint against the board member was dismissed at the summary judgment stage, the underlying facts of *Pacitti* serve as a cautionary tale of how a board member could find himself on the wrong end of a lawsuit.

The animosity between the unit owner in *Pacitti* and the condominium association stemmed from his continual failure to pay the monthly condominium assessments due on account of his unit. The condominium association even went so far as to commence legal proceedings against the unit owner on several occasions. Each time, the litigation was dismissed when the delinquent amount was paid in full.

The condominium association, which provided unit owners with written updates about various items of interest, eventually alerted the other unit owners that the unit owner was delinquent in his monetary obligations. The written updates were authored by one of the members of the board of directors

of the condominium association.

Soon thereafter, a number of disputes sprung up between the condominium association and the unit owner about renovations which the unit owner planned to perform on the unit, how the unit owner's contractor allegedly caused physical damage to the building during the ongoing unit renovations, and how the unit owner's guests were otherwise disruptive to other unit owners in the building.

The other unit owners were periodically informed of these disputes in writing by the condominium association which was authored by the same board member.

The unit owner then went on the offensive against that board member by filing a complaint based upon defamation of character, among other things.

At the summary judgment stage, the federal district court dismissed the defamation claim against the board member primarily based upon the defenses of truth and privilege.

"With respect to truth as a defense, a defendant can meet his burden of proving the truth of the communication as long as he proves the statement to be substantially true. Pennsylvania has determined proof of substantial truth must go to the gist or sting of the alleged defamatory matter.'"

"In addition to showing that a subject statement is true, a defendant may defend a defamation action by showing that he made a statement pursuant to a conditional privilege. 'An occasion is conditionally privileged when the circumstances are such as to lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that facts exist which another sharing such common interest is entitled to know.'"

"In other words, 'if the publisher reasonably believes that the recipient shares a common interest in the subject matter

and is entitled to know', the publisher may have a conditional privilege." That privilege may be waived, however, if, among other things, a publication of misinformation . . . is actuated by malice or negligence."

The federal district court ultimately found that the written statements made by the board member were substantially true and thus were not actionable under Pennsylvania law.

Moreover, the federal district court believed that the defense of conditional privilege applied because the unit owners shared a common interest in making sure that the rules and regulations of the condominium association were followed by all owners because failure to do so potentially affects all of them. As such, the written statements made by the board member about the unit owner only advanced that purpose by informing the unit owners of any deviations from these rules and regulations.

The federal district court flatly rejected the unit owner's assertion that the privilege was waived by the board member's negligent or malicious conduct toward the unit owner. In doing so, the federal district court merely pointed out that, prior to disseminating the information to the other unit owners, the board member took reasonable steps to ensure the accuracy of the information and, while the tone of these written communications conveyed the condominium association's obvious frustration with the unit owner, the board member was merely enforcing the rules and regulations which applied to all of the unit owners in the building and thus the board member's conduct did not rise to the level necessary to waive the privilege.

LESSON LEARNED

Although the board member in *Pacitti* was not found liable, the federal district court's ruling should be read very closely by individuals who serve as board members for condominium

associations and for attorneys who represent condominium associations in general.

Emotions clearly run high when unit owners and their condominium associations squabble. If, for instance, the unit owner does not pay his assessments, the burden could fall on the other unit owners in the building. Unit owners who serve on the board of directors of the condominium association not only have to deal with the troublesome unit owner in a position of authority but through their very own self-survival. On the flip side, that unit owner may either feel embarrassed or victimized when one of his neighbors exerts that authority on him.

Either way, it is not that all surprising that some of these conflicts escalate and become rather personal. For that reason alone, unit owners representing condominium association must not only learn to become emotionally detached from the situation but also protect themselves from legal liability by doing their due diligence under the circumstances and by strictly following and enforcing the condominium rules and regulations.

In *Pacitti*, the federal district court dismissed the defamation action not only because the unit owner actually owed the money, etc., but also because the board member, on behalf of the condominium association, dotted all of his "i's" and crossed all of its "t's". The federal district court's ruling in *Pacitti*, therefore, should not be interpreted as an open invitation by condominium associations and board members to victimize innocent unit owners but rather as a guide on how to deal with troublesome unit owners.

Alan Nochumson

Vertical Position 100%

Nochumson Appointed To The Education Task Force

Alan Nochumson has been appointed by Philadelphia Bar Association Chancellor A. Michael Pratt to serve as a member of the Philadelphia Bar Association's Education Task Force.

The Task Force has been empowered by Chancellor Pratt to address the significant funding disparities amongst school districts across the Commonwealth and to recommend governmental action so as to increase and equalize educational funding throughout the Commonwealth.

Vertical Position 100%

Subsequent Purchasers Liable For Mortgage Lien Despite Existence Of Mortgage Satisfaction Piece

Whenever real estate is purchased, the buyer should obtain title insurance to protect their interest in the property. As part of procuring title insurance, the public records are

reviewed to determine what liens, if any, encumber the property. Any such liens are then identified and paid in full and satisfied at closing. The reason for this is simple: when the property is transferred to the buyer at closing, the title insurer guarantees that the buyer now owns the property free and clear from any such liens.

In *Ingomar Limited Partnership v. Current*, the U.S. District Court for the Middle District of Pennsylvania recently found that subsequent purchasers were liable for a mortgage lien against the property when the title insurer had mistakenly concluded that the mortgage was previously satisfied of record.

In the late 1990s, a married couple borrowed money from Ingomar's predecessor-in-interest. The loan was collateralized by adjacent properties they jointly owned. The smaller parcel included their residence. The other, larger parcel consisted of unimproved land. The mortgage document contained separate legal descriptions of each parcel along with their respective tax identification numbers.

Since the married couple had believed that the mortgage lien attached only to the small parcel, they were surprised to discover that the mortgage lien attached to both parcels when they applied for a loan to construct a new home on the large parcel.

When the husband attempted to contact the mortgage holder at the time, he was advised that the mortgage lender had filed for bankruptcy and its assets were being managed by a third party provider. After a series of communications with the third party provider, the married couple received a copy of a satisfaction piece bearing the tax parcel identification number for the large parcel and stating that the "[m]ortgage has been fully paid or otherwise discharged and that upon the recording hereof said Mortgage shall be and is hereby fully and forever satisfied and discharged." The postal address

used for both the small and large parcels appeared in the satisfaction piece and was the same address that appeared in the note executed by the married couple. The satisfaction piece incorrectly referenced the deed book and page number at which the mortgage was recorded.

The married couple ceased making payments under the underlying promissory note after receiving the satisfaction piece. Because the postal address used for both parcels appeared in the satisfaction piece, they reasoned that the mortgage was released on both parcels, thus extinguishing their monetary obligations under the note. In spite of repeated written and oral demands by the mortgage holder at the time to repay the note, they refused to do so because of the alleged satisfaction of the mortgage.

After receiving notice of foreclosure, the married couple sold the small parcel to two individuals and used the net sale proceeds to build a new home on the large parcel. The purchasers of the small parcel arranged for a title search before purchasing the small parcel. The title search located the existence of the mortgage lien and the satisfaction piece. The married couple never disclosed to the purchasers that they had failed to satisfy the note in full.

After title to the small property was transferred, an amended satisfaction piece was recorded by the mortgage holder at the time that corrected the reference to the deed book and page where the previous mortgage was recorded. A revocation of the satisfaction piece followed thereafter and stated that the mortgage had not been satisfied and had been released in error.

After Ingomar acquired the note and mortgage, it filed suit in federal district court against the subsequent purchasers, among others, to obtain a declaratory judgment that they purchased their property subject to the mortgage lien.

Both parties then filed motions for summary judgment. In support of their motion and in opposition to Ingomar's motion, the subsequent purchasers argued that the declaratory judgment action should be dismissed as time-barred and because they acquired their property as bona fide purchasers.

They first argued that Ingomar's claim was barred by the statute of limitations.

In Pennsylvania, there is no uniformly applicable limitations period for a declaratory judgment action. Rather, such an action is instead governed by the time-bar rules applicable to the underlying substantive claim. As such, the federal district court pointed out that "declaratory judgment proceedings seeking relief at law must be filed within the statute of limitations applicable to a claim asserting legal rights underlying the declaratory judgment action."

The federal district court was unimpressed by the subsequent purchasers' attempt to redress the equitable claim in the language of negligence. They reasoned that the case hinged upon their alleged failure to perform a reasonable title search of the small parcel. As such, damage to the validity of the mortgage lien allegedly resulted from this negligence and was time-barred by the applicable two-year limitations period.

The federal district court instead found that "an action seeking declaratory relief to establish real property rights is not governed by a limitations period but by the equitable doctrine of laches."

In doing so, the federal district court emphasized that Ingomar did not seek recovery for negligence committed by the subsequent purchasers but rather sought declaratory judgment that the mortgage lien was satisfied in error and remained attached to the small parcel.

As an aside, the federal district court refused to consider

whether the doctrine of laches served as a potential bar to Ingomar's claim because the subsequent purchasers never raised that affirmative defense during litigation.

The federal district court next discussed whether the subsequent purchasers had bona fide status.

"A buyer of property qualifies as a bona fide purchaser if the buyer 'pays valuable consideration, has no notice of the outstanding rights of others, and acts in good faith.' A buyer who qualifies as a bona fide purchaser receives title to the property unencumbered by any previously existing interests."

"A buyer may receive notice of 'the outstanding rights of others' through two methods. First, proper recordation of an interest places subsequent buyers on constructive notice of prior interests, preventing them from attaining status as bona fide purchasers. Second, actual notice of a preexisting interest will prevent a buyer from claiming rights as a bona fide purchaser regardless of whether the interest is recorded."

The subsequent purchasers based their bona fide status on their lack of actual knowledge of the mortgage lien at the time of closing and their reasonable reliance on the title search which disclosed its satisfaction.

The federal district court disagreed with the subsequent purchasers' assertion that they were bona fide purchasers of the small parcel because the satisfaction piece incorrectly referenced the deed book and page where the mortgage appeared and contained only the tax parcel identification number for the large parcel.

Due to these discrepancies between the parcels identified in the mortgage lien and the parcel referenced in the satisfaction piece, the federal district court believed that the subsequent purchasers were placed on notice of potential

encumbrances to the title to the small parcel and thus they were not entitled to bona fide purchaser status.

In a footnote, the federal district court insinuated that the title insurer dropped the proverbial ball by failing to investing the potential preexisting interest and that the subsequent purchasers may have a right of action against their title insurer for its failure to discover Ingomar's prior interest.

LESSONS LEARNED

The federal district's holding in *Ingomar* is rather harsh but not surprising. Buyers obtain title insurance for a reason, which is to protect themselves from claims of preexisting liens. In *Ingomar*, the federal district court admonished the title insurer for its lack of detail and attention during the real estate transaction and, in essence, suggested that the subsequent purchasers should seek legal redress against the title insurer, as opposed to the mortgage holder which now had a valid lien against their property.

Alan Nochumson

Vertical Position 100%

Nochumson Speaks On Balancing Work And Life Stresses

Alan Nochumson spoke at a seminar entitled “Achieving Career Balance: Crossing Diverse Practice Settings” which was sponsored by the Philadelphia Bar Association and Drexel University School of Law.

Nochumson provided insight to young lawyers and law students as to how to handle the stresses which comes with a life in the legal profession.

Vertical Position 100%

Builder Lacks Insurance Coverage For Faulty Workmanship

What happens when a newly constructed home is not built in a workmanlike manner? The homeowner will certainly look to the builder for remediation. Assuming the builder is at fault, is the builder’s insurance company obligated to indemnify and otherwise defend the builder during litigation?

In *Millers Capital Insurance Company v. Gambone Brothers Development Co., Inc.*, the Superior Court of Pennsylvania refused insurance coverage to a builder who was sued by homeowners for faulty workmanship to their homes. In essence, the Superior Court found that a builder would only be protected against accidental phenomena, not claims predicated on allegations of negligent construction.

Gambone, a real estate firm headquartered in Montgomery County, planned, developed, and built two housing developments in the Delaware Valley. To cover its unforeseen risks and hazards, Gambone purchased the following insurance policies from Millers: a primary package policy (PL policy) that provided both property and liability coverage to Gambone; an umbrella excess policy to protect Gambone from exposure in an amount exceeding the policy limits of any other policy Gambone had, or would, purchase; and a commercial general liability policy (CGL).

When two separate groups of homeowners who had purchased their homes in communities developed by Gambone suffered damage to their homes attributable to faulty workmanship, Gambone sought coverage under these insurance policies.

The first group of homeowners had experienced water leaks in their respective homes, which, according to their complaint, "were the result of 'construction defects and product failures' . . . the homes' vapor barriers, windows, roofs, and stucco exteriors." After Millers received notice of the lawsuit from Gambone, Millers filed a declaratory judgment action, seeking an order declaring that Millers had no duty to defend or indemnify Gambone against the claims brought by the homeowners.

The litigation by the homeowners eventually proceeded to arbitration where they obtained an award in excess of $1 million against Gambone. On the day of the award, Gambone sent a notice of claim to Millers. Millers denied coverage.

The second set of homeowners was comprised of a married couple who had purchased a home where Gambone had allegedly "used defective stucco known as 'drivit' in building the exterior of the . . . home." In the filed complaint, the homeowners alleged that "the defective drivit resulted in 'delamination, peeling, disfigurement, compromise of structural integrity, infiltration by the elements, mold, cracking of the exterior

cladding, and moisture penetration and entrapment in and through said system'" and that "the defects are the result of poor workmanship during the initial construction of the [h]ome, including, without limitation, the improper or faulty design, implementation, workmanship, and supervision of the application of the exterior finish of the [h]ome by" Gambone.

Millers denied coverage to Gambone and filed a declaratory judgment action against Gambone for the same reasons set forth in the first lawsuit.

The two lawsuits were eventually consolidated and, at the summary judgment stage, the trial court declared that Millers had no duty to defend or indemnify Gambone for the arbitration award in the first lawsuit or defend or indemnify Gambone in the second lawsuit.

In granting summary judgment, the trial court cited the following two passages of the CGL and PL policies: "[w]e will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies" and "[t]his insurance applies to 'bodily injury' and 'property damage' only if: (1) [t]he 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory'." The trial court then noted that the policies "define an 'occurrence' as 'an accident, including continuous or repeated exposure to substantially the same general harmful conditions'."

Relying upon the cited policy language, the trial court found that Pennsylvania Supreme Court's recent decision in *Kvaerner Metals Division of Kvaerner of United States, Inc. v. Commercial Union Insurance Co.*, was controlling.

In *Kvaerner*, the Supreme Court held that language in a commercial general liability policy identical to the language in the CGL and PL policies set forth above was unambiguous and

did not provide coverage for claims against the insured which were premised on allegations of faulty workmanship in constructing a coke oven battery.

Gambone then appealed the trial court's ruling to the Superior Court of Pennsylvania.

Gambone attempted to distinguish the facts and circumstances of the underlying lawsuits from *Kvaerner*. Specifically, Gambone contended that the nature of the damage sustained by their homes varied from the nature of the damage to the coke oven battery in *Kvaerner*.

Gambone argued that the underlying lawsuits did not merely involve claims for faulty workmanship that led to the failure of the stucco exteriors but also involved claims for ancillary and accidental damage caused by the resulting water leaks to non-defective work inside the home interiors. As such, Gambone believed that the resulting water damage constituted an "occurrence" even though the damage to the faulty stucco exteriors did not.

The Superior Court reasoned that "the weight of common sense collapses the distinction Gambone attempts to create." According to the Superior Court, "[t]he *Kvaerner* Court held the terms 'occurrence' and 'accident' in the CGL policy . . . contemplated a degree of fortuity that does not accompany faulty workmanship" and, in reaching this holding, the Court suggested that natural and foreseeable acts, such as rainfall, which tend to exacerbate the damage, effect, or consequences caused ab initio by faulty workmanship also cannot be considered sufficiently fortuitous to constitute an 'occurrence' or 'accident' for the purposes of an occurrence based CGL policy."

In doing so, the Superior Court concluded that "damage caused by rainfall that seeped through faulty home exterior work to damage the interior of a home was not a fortuitous event that

would trigger coverage."

The Superior Court also refused to inquire into Gambone's "reasonable expectations" in purchasing the CGL and PL policies.

The Superior Court did not address whether the doctrine applied to a sophisticated commercial enterprise such as Gambone. Instead, the Superior Court left that "question[] for another day" because the policies clearly defined coverage.

According to the Superior Court, "[i]t is . . . well-settled that the focus of any inquiry regarding issues of coverage under an insurance policy is the reasonable expectations of the insured. An insured, however, may not complain that its reasonable expectations have been frustrated when the applicable policy limitations are clear and unambiguous."

With that in mind, the Superior Court stated that "[t]he policy limitation at issue – namely, the definition of occurrence – is unambiguous as a matter of plain language and judicial construction" and since "Gambone has failed in its attempts to demonstrate latent ambiguity, the reasonable expectations doctrine is inapplicable."

The Superior Court warned of the consequences if the doctrine was applied in the way advocated by Gambone: "if we were to allow an insured to override the plain language of a policy limitation anytime he or she was dissatisfied with the limitation by simply invoking the reasonable expectations doctrine, the language of insurance policies would cease to have meaning and, as a consequence, insurers would be unable to project risk. The inability to project risk would dissuade insurers from doing business in the Commonwealth and the net result would be an increase in premiums for consumers. We refuse to set such a deleterious sequence of events into motion."

Alan Nochumson

Vertical Position 100%

Court Refuses To Find That Letter Of Intent Contains Duty To Negotiate In Good Faith

Letters of intent are commonly used in the commercial landlord-tenant context. In the simplest sense, a letter of intent is a desire for the parties to enter into a contract without actually doing so. The letter of intent sets forth the principal terms and conditions of an "understanding", so to speak, between the parties and the basis for a contract. Only afterwards do the parties then begin the next phase of lease negotiations – preparation and execution of the lease. This way, the parties do not waste their valuable time and financial resources in drafting a lease until they know full well that they have a solid foundation for a meeting of the minds.

In order to encourage this streamlined process, however, most letters of intent contain language disclaiming its enforceability and expressly require lease execution so as to

bind the parties to contract.

LEASE NEGOTIATIONS

The U.S District Court for the Eastern District of Pennsylvania in *WP 851 Associates, L.P. v. Wachovia Bank, N.A.* recently refused to find that a letter of intent contained an implied duty for a prospective tenant to negotiate a lease in good faith with a property owner.

In early 2007, WP 851 was developing a parcel of land into a shopping center on the Main Line near Philadelphia. Wachovia Bank sought to lease a portion of that shopping center as a branch office. When WP 851 and Wachovia Bank discovered that the configuration of the shopping center could not accommodate the anticipated bank building, WP 851 agreed, in principle, to lease additional land from an adjoining property owner for Wachovia Bank's benefit.

Afterward, Wachovia Bank sent WP 851 a draft letter of intent outlining the proposed lease terms. The letter of intent contained numerous disclaimers. Among other things, the letter of intent stated that "[n]o such obligation [would] arise from th[e] letter and any resulting Lease drafts unless and until a mutually-satisfactory Lease [wa]s fully executed by, and delivered to, all parties" and the terms and conditions of the letter were still subject to the review and approval of Wachovia Bank's real estate committee.

WP 851 subsequently confirmed in writing that the parties had reached an agreement for Wachovia Bank to become a tenant of the shopping center. Wachovia Bank thereafter volunteered to perform the first draft of the lease.

Not only did several rounds of revisions of the lease take place, but, with Wachovia Bank's assistance, WP 851 began the process of obtaining land development approval from the local governmental authority for the bank building.

Wachovia Bank eventually ceased lease negotiations with WP 851. WP 851 then found out that Wachovia Bank was finalizing the terms of a lease agreement with another property owner and intended to develop a branch office on a different property instead.

WP 851 filed a complaint against Wachovia Bank asserting, among other things, a claim for breach of the duty to negotiate in good faith. Wachovia Bank moved for dismissal of that claim.

TRIAL COURT DECISION

The federal district court refused to find that the letter of intent in *WP 851* created an implicit agreement for Wachovia Bank to negotiate with WP 851 in good faith.

While noting that the Pennsylvania Supreme Court had not yet addressed whether a letter of intent can create such a duty, the federal district court pointed to the 3rd U.S. Circuit Court of Appeal's ruling in *Channel Home Centers v. Grossman*, where the appellate court predicted that the Pennsylvania Supreme Court would find that an agreement to negotiate in good faith would be enforceable if it meets the requisite elements of a contract.

Similar to *WP 851*, *Channel Home Centers* involved an agreement between a commercial property owner and a prospective tenant. Applying Pennsylvania law, the appellate court in *Channel Home Centers* focused its inquiry on whether the parties manifested an intention to be bound by the agreement, whether the terms of the agreement were sufficiently definite to be enforced, and whether there was consideration.

In *Channel Home Centers*, the appellate court found such a duty existed because, under the letter of intent, the property owner "'unequivocally promised' to withdraw a piece of property from the market, and to negotiate a lease only with the [tenant] 'to completion.'" The appellate court "found

other indicia of an intent to be bound persuasive, including the level of detail in the letter, and the subsequent actions of both parties."

The federal district court in *WP 851* then compared the Third Circuit's holding in *U.S.A Machinery Corp. v. CSC Ltd.* to that in *Channel Home Centers*. In *U.S.A. Machinery Corp.*, the appellate court found that "an oral 'registration' between a broker of steel-making equipment and a purchaser and seller of equipment did not give rise to an agreement to negotiate in good faith, because the parties did not expressly agree to negotiate in good faith, and had not made extensive preparations to further or consummate the transaction."

In distinguishing *Channel Home Centers*, the appellate court in *U.S.A. Machinery Corp.* noted that the parties lacked a "'similar indicia of intent to be bound' . . . because there was 'no detailed expression of the parties' intent.'"

The federal district court in *WP 851* thus surmised that, under 3rd Circuit precedent, which has predicted how the Pennsylvania Supreme Court would react under the circumstances, "in order for an agreement to negotiate in good faith to be enforceable, the parties must manifest a specific intent to negotiate in good faith."

In a footnote, the federal district court also mentioned two occasions where the Pennsylvania Superior Court has refused to find that a letter of intent embodied an agreement to negotiate in good faith. According to the federal district court, in *GMH Associates, Inc. v. Prudential Realty Group* and *Philmar Mid-Atlantic, Inc. v. York Street Assoc. II*, the Superior Court, respectively, found that such a duty did not exist because the letter of intent did not include an express term regarding such a duty or a mutual assent to be bound.

Similar to the Superior Court's ruling in *GMH Associates, Inc.*, the federal district court in *WP 851* pointed out that

the Eastern District in *Milandco Ltd. v. Wash. Capital Corp.* refused to find the existence of a duty to negotiate in good faith because the letter of intent did not contain an "expression that the parties agreed to negotiate a deal in good faith."

After reviewing the language contained within the letter of intent in *WP 851*, the federal district court concluded that such an implied obligation to negotiate in good faith did not exist.

The federal district court first pointed out that the letter of intent explicitly stated that it was not enforceable.

In another damaging blow to WP 851, the federal district court noted that the letter of intent only included an obligation for WP 851, not Wachovia Bank, to negotiate in good faith. Noticeably absent from the letter of intent was a provision requiring Wachovia Bank to "either to negotiate in good faith or to refrain from engaging in negotiations with other prospective landlords."

Finally and most importantly, the federal district court refused to find that a duty to negotiate in good faith may be implied by surrounding circumstances. Rather, the federal district court stated that the parties must expressly agree to negotiate a deal in good faith. In doing so, the federal district court merely confirmed previous rulings rendered by federal and state appellate courts in Pennsylvania.

LESSONS LEARNED

The federal district court's ruling in *WP 851* illustrates the potentially devastating consequences of letters of intent and why attorneys representing landlords and tenants in this forum should tread carefully.

In essence, a landlord or tenant who is inexperienced with the usage of a letter of intent may detrimentally rely on its

existence. Before doing so, such a landlord or tenant must, at the very least, include language in the letter of intent requiring his counterpart to negotiate in good faith. On the flip side, of course, a landlord or tenant who wants to keep his leasing options open should not execute a letter of intent expressing such an agreement to negotiate.

Alan Nochumson

Vertical Position 100%

Nochumson Speaks On How To Start Law Firm From Scratch

Alan Nochumson served as a panelist at a seminar entitled *How to Build Your Own Firm From Scratch* which was sponsored by PNC Wealth Management.

During the seminar, Nochumson, from his own experience and point of view, provided guidance to attorneys in the Philadelphia region who were thinking about starting their own law firm.

Vertical Position 100%

Klyashtorny Appointed To The City Policy Committee

Natalie Klyashtorny has been appointed by Philadelphia Bar Association Chancellor A. Michael Pratt to serve as Co-Chair of the Philadelphia Bar Association's City Policy Committee.

The City Policy Committee serves as an informal liaison between the city government and the members of the Philadelphia Bar Association. The Committee's work includes informing the members of the legal community with regard to changes in significant city practices and procedures as well as serving as a "sounding board" for proposals for city policy action that affects the Philadelphia Bar Association and its members. The Committee also represents the Philadelphia Bar Association in city policy dialogues in order to promote the best interest of the Philadelphia Bar Association and its members.

Vertical Position 14%

Klyashtorny Recognized As A Super Lawyer

Natalie Klyashtorny has been named by *Philadelphia Magazine* as a Pennsylvania Super Lawyer Rising Star in the area of business litigation.

The objective of the Super Lawyers selection process is to create a credible, comprehensive and diverse listing of outstanding attorneys that can be used as a resource to assist attorneys and sophisticated consumers in the search for legal

counsel. Only 2.5 percent of the best up-and-coming attorneys in the state are named to the Rising Stars list.