

THE COVENANT OF QUIET ENJOYMENT - A BANG OR A WHIMPER

February 2, 2012 by *Michael Gibson*

Almost all commercial leases in the United States include a covenant of quiet enjoyment. At its simplest level, the protection afforded by the covenant to a tenant is straightforward: a landlord must not interfere with a tenant's use and enjoyment of the leased premises. Tenants, however, have attempted to utilize the covenant in a more expansive way to make claims and obtain damages against landlords for various types of landlord behavior. The scope and nature of the landlord's detrimental behavior are important factors in determining whether the tenant will have a potentially successful claim for the breach of the covenant of quiet enjoyment. But recent cases suggest that leases can be drafted to limit the scope of the covenant and/or the landlord's liability for breach of the covenant. To constitute a breach of the covenant, the landlord's behavior must disrupt, in a meaningful way, the tenant's *use* of the leased premises. For example, in Maryland, the Court of Special Appeals focused on that concept when determining that the landlord's action of overcharging the tenant rent and making other accounting errors that resulted in overcharges did not result in a breach of the covenant of quiet enjoyment. The court concluded that such actions did not interfere with the tenant's use of the leased premises and could not support a claim based on the breach of the covenant of quiet enjoyment. The court went on to say that the landlord must engage in actions that strike at the *essence of its obligations under the lease* in order to support a claim for the breach of the covenant of quiet enjoyment. Unless the lease expressly provides that the landlord has specific lease obligations, the most basic obligation that the landlord has under the lease is not to enter onto the leased premises during the term of the lease. Without unpermitted entry onto the leased premises or, at minimum, actual interference with the leased premises even if it's from an adjoining premises, a tenant will have difficulty utilizing the covenant of quiet enjoyment to remedy any breach or default by landlord under the lease. *Nationwide Mutual Insurance Company, et al. v. Regency Furniture, Inc* (183 Md. App. 710 2009).

Even when the actions of the landlord disrupt the tenant's use of the leased premises, however, express language in the lease can insulate the landlord from claims brought by a tenant for breach of the covenant. In California, a court of appeal recently held that construction in a retail shopping center which disrupted with tenant's business at the leased premises did not give rise to a claim for a breach of the covenant. *Fritelli, Inc. v. 350 North Canon Drive, LP, et al.*, No. B228487 (Cal. Ct. App. 2nd Dist., December 20, 2011.) The lease provided an exemption on the landlord's liability for actions on adjoining premises and also limited the landlord's liability for any loss of income of the tenant. Although the court found that, as a matter of law, the claim for breach of the covenant of quiet enjoyment could not be maintained because of the liability exemption, there were several factual matters that inured to the benefit of the landlord which could have influenced this finding: (1) the landlord and tenant had discussions regarding the construction, (2) the construction was not prohibited or restricted in the tenant's lease and (3) there was evidence that tenant's business had begun to decline prior to the commencement of the construction. These facts likely did not help the tenant in its legal claim.

To avoid erosion of meaningful protection in the covenant of quiet enjoyment, a tenant needs to read a lease as a whole and determine the limitations placed on landlord's liability for acts or omissions. If the scope of the covenant of quiet enjoyment is limited by an express exemption of liability set forth in the lease, the factual case that a tenant has to make is much more difficult in that the tenant must show some extraordinary interference with the use and enjoyment of the leased premises. A tenant must consider the nature of the landlord's interference to ensure that the use of the leased premises has been disrupted and must also review the lease carefully to determine if there are any landlord exemptions from liability that could further erode a claim.