

2003

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Recommended Citation

Bernhardt, Roger, "Landlord's construction of defective tenant improvements: Del Taco v University Real Estate, 2003" (2003).
Publications. Paper 309.
<http://digitalcommons.law.ggu.edu/pubs/309>

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Roger Bernhardt

Transfer of property relieved former lessor of liability to lessee under ground lease due to sewer line failure that occurred after transfer.

Del Taco, Inc. v University Real Estate Partnership V (2003) 111 CA4th 16, 3 CR3d 311

In 1996, Del Taco entered into a ground lease agreement with University under which Del Taco would construct and operate a fast-food restaurant in a shopping center. University was required to provide a sewer line capacity sufficient for Del Taco's intended use, specifically a four-inch sanitary sewer lateral line to Del Taco's connection point. In March 1998, a sewage blockage due to congealed grease occurred, resulting from Del Taco's lax maintenance. Del Taco paid for the \$350 repair. In May 1998, University sold the shopping center, including Del Taco's leased premises, to Third Street. In June 2000, the sewer line serving Del Taco failed and had to be repaired. The repair job cost \$80,000. One cause of the failure was reported to be improper construction. Del Taco sued both University and Third Street for declaratory relief regarding their respective obligations under the lease. Del Taco argued that both express and implied lease covenants remained binding on University after it transferred the property. The trial court granted summary judgment for University.

The court of appeal affirmed, rejecting Del Taco's argument that express covenants in the lease (to maintain and repair the common area during the term of the lease, and to provide the sewer line) supported a continuing duty on University to provide a properly constructed, maintained, and repaired sewer line. The lease provisions did not support the imposition of an ongoing obligation to maintain and repair the sewer line beyond the transfer of ownership of the property, which terminated the term of the lease insofar as University was concerned.

The court explained that, because Del Taco was seeking to enforce lease covenants against University, a former owner of the property, the issue arose as to whether any privity of contract or privity of estate remained between the parties. It was clear that University's sale of the property terminated its privity of estate with Del Taco, because the transfer included the entire term of the lease, the entire physical premises, and the entire interest in the property. Further, the nature of the express covenants in the lease did not support a theory that sufficient privity of contract existed to connect those particular express promises to University as personal to it, or to hold it liable on an ongoing basis to Del Taco, past the time of transfer of the leasehold property.

The court also rejected Del Taco's argument that University should remain liable for the breach of implied covenants in the lease, arising from the lease as a whole or from its express covenants. The court explained that (111 CA4th at 20):

This rule would require the facts and circumstances of this lease transaction to support the making of an implied promise to provide lifetime maintenance and repair of a sewer line that was taken over from a previous restaurant tenant.

The court concluded that, because no facts showed there was any breach, before the transfer of the property, of University's obligation to provide a sewer line with sufficient capacity or to

maintain the common area, or of any implied promises that arose from those obligations, University was entitled to summary judgment.

THE EDITOR'S TAKE: The outcome of this action is perfectly understandable, but I find the reasoning completely unintelligible. Ordinarily, a tenant's improvements should be treated the same as the premises themselves, and a landlord's agreement to construct such improvements would not by itself subject the improvements to a greater warranty of quality than exists for the premises themselves. That means that if, later on, there is a problem with either the premises or the later-added improvements, both are probably the tenant's problem.

However, that is only a general principle and, of course, it can be subject to exceptions. The outcome would be different if there was an express warranty regarding the improvements, or if a warranty is implied, as might be the case when the improvements are not completed until after the leasehold has already commenced (and it is too late for the tenant to refuse to enter) or when the improvements are offsite and on property not included in the space leased to the tenant. While this was clearly the case with the underground sewer pipe involved here, it was also fairly clear that the pipe did perform pretty much as intended for a good long time, and the real basis for the court's ruling is probably that they saw no breach of any warranty, express or implied. Taquerias can generate a lot of grease and clog sewer pipes, no matter how well the pipes are constructed.

But that is not the kind of reasoning that will support a summary judgment. So we readers are put through some heavy and dubious reasoning about why a landlord has no warranty liability once it has transferred its premises. If there had been a warranty, whether express or implied, and if a court determined that it had been breached, then under the logic of Restatement (Second) of Property §16.3, cited by the court, the original landlord would have been liable for the sewer line failure, despite its sale of the shopping center. The landlord made a promise, which touched and concerned the land (although I don't know why that would matter); it was in privity of contract with the tenant-promisee; and it had never been released from that promise by the tenant-promisee—even if the new owner had assumed all the leases, the original landlord would not have been relieved from that obligation (although an agreement to indemnify would certainly be helpful if the original landlord were held liable). The court's statement that there was not "sufficient privity of contract" to make the promises personal to the landlord was neither necessary nor coherent.

This defendant was sued only as a former landlord; if it had been sued as a contractor the outcome might have been different. Negligent repairs made by a landlord constitute an exception to the general principle of landlord immunity, whether they occur on the premises themselves or in the common areas, but this landlord does not appear to have been sued under that theory. The suit against the present landlord still remains, but, given the conclusions rendered in this appeal, the tenant's prospects for success look dim. —*Roger Bernhardt*