LEASING CASE LAW UPDATE

Presented by

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The case selection for this episode of Case Law Update, like all of them in the past, is very arbitrary. If a case is not mentioned, it is completely the author's fault.

In an effort to streamline the case discussions, various statutory and other references have been reduced to a more convenient shorthand. The following is an index of the more commonly used abbreviations.

"Bankruptcy Code" – The Federal Bankruptcy Code, 11 U.S.C.A. §§ 101 et seq.

"DTPA" – The Texas Deceptive Trade Practices Act, Texas Business and Commerce Code, Chapter 17.

"UCC" – The Texas Uniform Commercial Code, Texas Business and Commerce Code, Chapters 1 through 9.

"Prudential" – ***Prudential Insurance Co. of America* v. *Jefferson Associates***, 896 S.W.2d 156 (Tex.1995), the leading case regarding "as-is" provisions in Texas.

The Texas Property Code and the other various Texas Codes are referred to by their respective names. The references to various statutes and codes used throughout this presentation are based upon the cases in which they arise. You should refer to the case, rather than to my summary, and to the statute or code in question, to determine whether there have been any amendments that might affect the outcome of any issue.

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PART I
FORMALITIES

2616 South Loop L.L.C.* v. *Health Source Home Care, Inc., 201 S.W.3d 349 (Tex.App.-Hous. (14 Dist.) 2006, no pet.). The Tenants leased office space in a building in Houston. Health Source contracted to lease a suite on the Property through December 31, 2003, and Pinwatana contracted to lease space through January 3, 2008. Both leases identify Quad Atrium Realty as the lessor, and contain provisions requiring that all notices to the lessor be sent to Quad Atrium Realty at its offices on the Property. The leases were signed by D.H. Virani, who was identified in the leases as the property manager for Quad Atrium Realty. However, at the time the Tenants signed their respective leases, the Property was owned by Quad L.P.

South Loop later bought the property. The day after the sale, South Loop's property manager notified the Tenants that South Loop now owned the Property, and informed the Tenants that their "month-to-month" leases were terminated "effective immediately." The Tenants were also told they had thirty days to vacate the property unless they entered into new leases with Boxer.

The primary issue involved was whether the leases, signed by Virani on Quad Atrium Realty, were validly executed.

The Statute of Conveyances requires that "a conveyance of an ... estate for more than one year, in land and tenements, must be in writing and must be subscribed and delivered by the conveyor or by the conveyor's agent authorized in writing." Property Code § 5.021. Its contract law counterpart, the Statute of Frauds, requires a lease of real estate for a term of longer than one year to be in writing and "signed by the person to be charged with the promise ... or by someone lawfully authorized to sign for him." Business and Commerce Code § 26.01(a)(2).

A lessor may validly lease property to another, despite the fact that the title to the property is in a third person, if the lessor lawfully possesses the property. In such a case, the lessee may enforce the lease against the lessor. But, this does not necessarily mean that the lessee can enforce the lease against the property owner. Although the lessee may have had a subjective, good faith belief that the lessor was the owner or an agent of the owner, this is not enough to create an agency relationship between the lessor and the property owner that binds the owner to the lessor's agreement. In the absence of the owner's ratification of the lease or the lessor's actual or apparent authority to act on the owner's behalf, there is no basis on which to enforce the lease against the property owner.

Here, the Tenants failed to produce any document in which Quad L.P. authorized Virani or Quad Atrium Realty to execute the leases on Quad L.P.'s behalf, instead arguing that it was obvious that when South Loop purchased the property, its purchase was subject to the existing leases of the property. But this contention presupposes that the leases were binding on the prior owner of the property, Quad L.P., and were conveyed to South Loop at the time of purchase. The Tenants apparently presume that Quad Atrium Realty had actual or apparent authority to execute the leases on behalf of Quad L.P. Alternatively, the Tenants presume Quad L.P. ratified the leases.

Actual authority includes both express and implied authority and usually denotes the authority a principal (1) intentionally confers upon an agent, (2) intentionally allows the agent to believe he possesses, or (3) by want of due

care allows the agent to believe he possesses. Here, the Tenants presented no evidence that Quad L.P. authorized Virani or Quad Atrium Realty--orally, in writing, or through a want of due care--to act as its agents. Thus, there is no support for the Tenant's presumption that Quad Atrium Realty or Virani had actual authority to bind Quad L.P.

The essential elements required to establish apparent authority are (1) a reasonable belief in the agent's authority, (2) generated by some holding out or neglect of the principal, and (3) justifiable reliance on the authority. A court may consider only the conduct of the principal leading a third party to believe that the agent has authority in determining whether an agent has apparent authority. The principal must have affirmatively held out the agent as possessing the authority or must have knowingly and voluntarily permitted the agent to act in an unauthorized manner. In this case, the Tenants presented no evidence that Quad L.P. affirmatively represented that Quad Atrium Realty or Virani were its agents, or that Quad L.P. knowingly and voluntarily permitted them to act in an unauthorized manner.

PSB, Inc.* v. *LIT Industrial Texas Limited Partnership, 216 S.W.3d 429 (Tex.App.—Dallas 2006, no pet. history to date). Forced to move its business, PSB contacted a leasing broker and was shown a new comparable space managed by Crow. Signage on the exterior of the building was important to PSB and it obtained oral assurances from the building's agent that it would be able to have the signage it wanted at the new building. PSB and building owner signed a five-year lease in 1999. The lease prohibited exterior signs without the owner's consent.

After PSB moved in, it asked for permission to put its desired signage on the exterior of the building, but the owner refused to approve the signage. Over the next four years, PSB made more applications to the owner for signs on the building wall with text including the business name and telephone number and larger and illuminated letters. All these requests for signage were rejected. In February 2003, PSB stopped paying rent and, on June 14, 2003, about two weeks before the end of the lease, it vacated the premises. The owner changed the locks and posted notices on the doors relating to the lockout and threatening action for eviction and recovery of rent.

PSB's suit in district court asserted several causes of action, including fraud and business disparagement. The owner filed a counterclaim for breach of the lease seeking actual damages, pre-and post-judgment interest, and attorney's fees. Summary judgment was granted in favor of the owner on all of its claims and against PSB on its.

PSB argued that the trial court erred in granting the owner's motion for summary judgment on its claim that PSB breached the lease because the owner failed to disprove as a matter of law PSB's affirmative defense of fraudulent inducement for PSB to enter into the contract. PSB asserted that the fraud was the representations (1) that PSB could have the same kind of signage it had at the old location, and (2) that PSB could conduct retail sales, but the lease limited sales to wholesale. The owner argued that, even if PSB was fraudulently induced into the lease, PSB ratified the lease by continuing with the lease and not seeking rescission after it learned of the fraud.

A contract procured by fraud is voidable, not void. If a party fraudulently induced to enter into a contract continues to receive benefits under the contract after learning of the fraud or otherwise engages in conduct recognizing the agreement as subsisting and binding, then the party has ratified the agreement and waived any right to assert the fraud as a basis to avoid the agreement. An express ratification is not necessary; any act based upon a recognition of the contract as subsisting or any conduct inconsistent with an intention of avoiding it has the effect of waiving the right of rescission. Here, pretty much all of the evidence showed that PSB knew of any alleged fraud yet decided to remain in the building under the lease. Its conduct was inconsistent with an intention of avoiding the lease, and it ratified the contract.

PART II
"TIME IS OF THE ESSENCE"

Deep Nines, Inc.* v. *McAfee, Inc., 246 S.W.3d 842 (Tex.App.—Dallas 2008, no pet.). After a lawsuit was filed by McAfee for failure to pay royalties on an oil and gas lease, the parties entered into a settlement agreement. Deep Nines agreed to pay $345,000 in seven installments. The agreement provided that McAfee would give notice if a payment was late and Deep Nines had three days to cure. The agreement did not expressly state that time was of the essence.

When Deep Nines was late, McAfee gave written notice. On the last day of the cure period, Deep Nines delivered a check. The check was returned NSF, apparently by mistake on the part of the bank. Some period of time after that, when Deep Nines learned that the check had bounced, it e-mailed McAfee, asking it to resubmit the check. Instead of doing that, McAfee insisted on modifying the settlement agreement to provide stricter terms or else it would declare a default and seek its remedies under the settlement agreement. Deep Nines refused to make the modifications McAfee requested. Approximately two weeks later, McAfee brought this suit alleging claims based on breach of the settlement agreement, anticipatory repudiation, and the dishonored check. McAfee sought actual damages and liquidated damages as well as attorney's fees. Summary judgment was awarded to McAfee.

Deep Nines contends the trial court erred in granting summary judgment in favor of McAfee because there are genuine issues of material fact regarding which party materially breached the contract first. Deep Nines argues there is nothing in the contract that makes time of the essence with respect to the monthly payments. Accordingly, Deep Nines contends its late payment was not a material breach.

For timely performance to be a material term of the contract, the contract must expressly make time of the essence or there must be something in the nature or purpose of the contract and the circumstances surrounding it making it apparent that the parties intended that time be of the essence. Ordinarily, time is not of the essence and, unless the contract expressly makes timely performance a material term, the issue of whether time is of the essence is a fact question for the jury.

Deep Nines argues that because the settlement agreement does not contain an express provision stating that "time is of the essence," the issue of whether timely performance is a material term of the agreement is a fact question for a jury. The court disagreed. Although the agreement does not use the phrase "time is of the essence," courts do not construe contracts or decide cases based on the inclusion or omission of "magic words."

The agreement in this case states specific dates and times for performance as well as provides a cure period if payment is not received when due. While a stated date of performance does not by itself make time of the essence, the settlement agreement does more than set forth a date of performance. In addition to providing a specific cure period if payment is not made when due, the agreement states that if payment is not received within the cure period, Deep Nines will be considered in default. To construe the agreement in a manner that does not make timely payment a material term would render the cure period and default provisions meaningless. The language of the contract clearly makes time of the essence, and Deep Nines's failure to pay in a timely manner was a material breach.

Deep Nines contends it did not breach the agreement or, in the alternative, whether it breached the agreement is a question of fact because the late payment was due to a mistake by a third-party rather than any fault of Deep Nines. Deep Nines argues the bank mistakenly dishonored the check because the check was processed before its account deposits were credited. However, the court held that even if the check was dishonored in error such a mistake does not excuse Deep Nines's failure to perform under the agreement.

By itself, an uncertified check is merely a conditional payment for an obligation owed to the payee. Tendering an uncertified check discharges an obligation to pay on a timely basis only if the check is subsequently honored by the bank. Where a party makes its payment by uncertified check, that party takes the risk that the check will not be honored and the payment obligation will not be fulfilled. This is true regardless of whether the paying party endeavors to have funds in the account sufficient to cover the check at the time payment is due.

Meadows* v. *Midland Super Block Joint Venture, 255 S.W.3d 739 (Tex.App.—Eastland 2008, no pet.). The lease was for a term of one month. The lease provided an option for the tenant to renew for successive one-month terms by giving written notice by the first of the month. Delivery of the rent for the month was sufficient notice. The tenant put the check in the U.S. mail on September 30, it was post-marked on October 3, and received by the landlord on October 5. The landlord claimed that the renewal notice (i.e., the check) was not delivered timely and that the lease expired. The court agreed. The language of section 2 of the lease agreement is unambiguous: the tenant had to exercise the option by making certain that its check was delivered to the landlord on or before the first day of the next month.

PART III
"AS-IS" PROVISIONS

Gym-N-I Playgrounds, Inc* v. *Snider, 220 S.W.3d 905, 50 Tex. Sup. Ct. J. 634 (Tex. 2007). The Landlord and Tenant entered into a lease that contained an as-is provision that read as follows: Tenant [Gym-N-I] accepts the Premises "as is." Landlord [Snider] has not made and does not make any representations as to the commercial suitability, physical condition, layout, footage, expenses, operation or any other matter affecting or relating to the premises and this agreement, except as herein specifically set forth or referred to and Tenant hereby expressly acknowledges that no such representations have been made. Landlord makes no other warranties, express or implied, of merchantability, marketability, fitness or suitability for a [document not legible]. Any implied warranties are expressly disclaimed and excluded." The lease term was extended, but finally the term expired, although the Tenant continued to occupy the premises and to pay rent.

Other than the unexercised renewal option, the sole written instrument in the record contemplating a continuation of the original lease was a holdover clause.

A fire completely destroyed the building and its contents. Gym-N-I sued Snider, claiming that Snider's failure to install a sprinkler system as required by the City constituted gross negligence and negligence per se and that leasing the premises in such a condition violated the DTPA and breached the implied warranty of suitability.

Snider filed motion for summary judgment asserting that all of Gym-N-I's claims were barred by the "as is" clause and by a valid waiver-of-subrogation clause. Snider further argued that the lease contained other valid waivers of express and implied warranties that barred certain claims and that Gym-N-I had admitted that no misrepresentations had been made by Snider.

In its first issue, Gym-N-I asserts that the "as is" clause in the original lease did not survive during the month-to-month tenancy under which it was leasing the property at the time of the fire. Gym-N-I asserts that the holdover provision failed to incorporate the "as is" clause and that only a formal, written, lease extension or renewal could carry that provision beyond the term of the original lease. The court disagreed. The lease's holdover provision states that "any holding over . . . shall constitute a lease from month-to-month, under the terms and conditions of this lease to the extent applicable to a tenancy from month-to-month . . . ." The court gave this provision its plain, ordinary, and generally accepted meaning and held that the "as is" clause from the original lease was incorporated into the holdover lease and was applicable at the time of the fire. To do

otherwise would be to give the phrase “under the terms and conditions of this lease” no meaning or effect.

Gym-N-I argued that the "as is" provision cannot nullify the implied warranty of suitability as to the defects at issue in this case. Gym-N-I contends that ***Davidow* v. *Inwood North Professional Group-Phase I***, 747 S.W.2d 373, 377 (Tex.1988) authorized a waiver of the implied warranty of suitability only when the lease makes the tenant responsible for certain specifically enumerated defects. Consequently, the general "as is" provision in this lease could not waive the warranty. Snider answers that Gym-N-I's claim for breach of the implied warranty of suitability is waived because the lease's "as is" clause expressly disclaimed that warranty. See ***Prudential***. The Supreme Court agreed with Snider.

The court first recognized the implied warranty of suitability for intended commercial purposes in ***Davidow***. The warranty means "that at the inception of the lease there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and that these essential facilities will remain in a suitable condition." ***Davidow*** did not address whether or how the implied warranty of suitability may be waived; however, the court did say that if "the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions of the lease will control." The court also listed several factors to consider when determining a breach of the warranty, including the nature of the defect, its effect on the tenant's use of the premises, the length of time the defect persisted, the age of the structure, the amount of the rent, the area in which the premises are located, whether the tenant waived the defects, and whether the defect resulted from any unusual or abnormal use by the tenant.

In ***Prudential***, the Supreme Court was asked to determine the effect of an "as is" clause on a buyer's claim for damages against the seller based on the condition of the commercial property. The court did not address what effect, if any, an "as is" provision would have on a claim for breach of the implied warranty of suitability, as this warranty applies only to commercial leases and ***Prudential*** involved a sale of commercial property. In this case, the court squarely addressed whether an express disclaimer may waive the implied warranty of suitability in a commercial lease. ***Davidow*** noted that the provisions of the lease would control if the parties expressly agreed that the tenant would repair certain defects. ***Prudential*** stands for the proposition that--absent fraud in the inducement--an "as is" provision can waive claims based on a condition of the property. Taken together, these cases lead to one logical conclusion: the implied warranty of suitability is waived when, as here, the lease expressly disclaims that warranty. Thus, the court held that as a matter of law, Gym-N-I waived the implied warranty of suitability.

The conclusion that the implied warranty of suitability may be contractually waived is also supported by public policy. Texas strongly favors parties' freedom of contract. Freedom of contract allows parties to bargain for mutually agreeable terms and allocate risks as they see fit. A lessee may wish to make her own determination of the commercial suitability of premises for her intended purposes. By assuming the risk that the premises may be unsuitable, she may negotiate a lower lease price that reflects that risk allocation. Alternatively, the lessee is free to rely on the lessor's assurances and negotiate a contract that leaves the implied warranty of suitability intact.

The court recognized that its holding stands in contrast to the implied warranty of habitability, which "can be waived only to the extent that defects are adequately disclosed." ***Centex Homes* v. *Buecher***, 95 S.W.3d 266, 274 (Tex.2002). The implied warranty of habitability "applies in almost all jurisdictions only to residential tenancies" while commercial tenancies are "excluded primarily on the rationale that the feature of unequal bargaining power justifying the imposition of the warranty in residential leases is not present in commercial transactions."

McGraw* v. *Brown Realty Company,

195 S.W.3d 271 (Tex.App.—Dallas 2006, no pet.). McGraw leased a building from Brown. Article 7 of the lease addresses the condition, maintenance, repairs, and alterations of the premises. Pursuant to Article 7.01 Brown represented that on the Commencement Date and for a period of thirty (30) days thereafter the building fixtures and equipment, plumbing and plumbing fixtures, electrical and lighting system, any fire protection sprinkler system, ventilating equipment, heating system, air conditioning equipment, roof, skylights, doors, walk-in cooler and refrigerator, and the interior of the premises in general were in good operating condition. It also gave McGraw a period of thirty (30) days following the Commencement Date in which to inspect the premises and to notify Brown of any defects and maintenance, repairs or replacements required to the above named equipment, fixtures, systems and interior. Within a reasonable period of time after the timely receipt of any such written notice from McGraw, Brown was required to correct the defects and perform the maintenance, repairs and replacements. In Article 7.03A(2) of the lease McGraw waived the benefit of any present or future law that might give him the right to repair the remises at Brown's expense or to terminate the lease because of the condition.

Pursuant to the terms of the lease, McGraw sent Brown a letter advising him of equipment in need of repair or replacement. McGraw also sent Brown a second letter complaining that the roof of the building leaked. The record does not show whether Brown ever responded to these letters. McGraw made timely rent payments from March through October of 2004. However, McGraw's November 2004 rent payment was returned for insufficient funds. Further, McGraw abandoned the premises in early December 2004.

Brown sued McGraw for breach of contract seeking to collect the outstanding and unpaid rent, assess late charges at a rate of five percent for the past due amounts, and accelerate the remaining base rent. The trial court entered summary judgment in favor of Brown Realty on its breach of contract claim.

On appeal, McGraw argued that Brown breached the implied warranty of suitability and the lease fails due to a failure of consideration. Brown responded that McGraw was raising the issue of implied warranty of suitability for the first time on appeal so the claim is not preserved for appeal and McGraw's affirmative defense of failure of consideration was misguided.

Any matter constituting an affirmative defense or avoidance must be "set forth affirmatively." Breach of the implied warranty of suitability may be pleaded as a cause of action, counter-claim, or as an affirmative defense.

McGraw specifically pleaded the affirmative defense of failure of consideration. The affirmative defense portion of McGraw's original answer also stated that the lease agreement required certain actions by both parties and that Brown failed in part to deliver and fulfill its obligations to McGraw upon execution of the lease and also stated that the lease allowed McGraw thirty (30) days to inspect the premises and notify Brown in writing of any defects and maintenance, repairs, etc and within a reasonable period, Brown Realty was to correct the defects and perform the repairs and maintenance at its expenses. Although McGraw did not specifically assert breach of the implied warranty of suitability as an affirmative defense, it was evident to the court that part of the basis of his defense to the suit was Brown's failure to repair latent defects in the leased premises. Brown did not file special exceptions asking for a clearer statement of McGraw's affirmative defenses. In the absence of any special exceptions, the court liberally construed McGraw's pleadings to include the affirmative defense of breach of the implied warranty of suitability.

A tenant's obligation to pay rent and a landlord's implied warranty of suitability are mutually dependent. Breach of the implied warranty of suitability is a complete defense to nonpayment of rent. The implied warranty of suitability covers latent defects in the nature of a physical or structural defect which the landlord has the duty to repair. The evidence must

indicate that: (1) latent defects existed in the leased premises at the inception of the lease and (2) such defects were vital to the use of the premises for their intended commercial purpose. Because the implied warranty of suitability may be contractually waived, a court may consider whether the tenant waived the defects.

A complete failure of consideration constitutes a defense to an action on a written agreement. Generally, a failure of consideration occurs when, because of some supervening cause after an agreement is reached, the promised performance fails.

McGraw asserted he had a complete defense to his nonpayment of rent under either the breach of the implied warranty of suitability or the failure of consideration defenses because Brown failed to repair or replace certain items. As evidence, he produced the two letters he had sent to Brown.

The court held that lease explicitly states that McGraw waived his right to terminate the lease because of the condition of the premises. Consequently, McGraw contractually waived his remedy or defenses to the nonpayment of rent. Accordingly, McGraw failed to raise an issue of material fact precluding summary judgment on Brown's breach of contract claim or establish his affirmative defenses as a matter of law.

Prudential Insurance Company of America* v. *Italian Cowboy Partners, Ltd., 270 S.W.3d 192 (Tex.App.—Dallas 2008, pet. pending). The Secchis wanted to expand their restaurant business. In late 1999 and early 2000, with the help of their real estate broker, the Secchis began to look for additional restaurant property. Hudson's Grill was a restaurant located in a building at Keystone Park Shopping Center. Keystone Park, as well as the Hudson's Grill building, was owned by Prudential. The Secchis' broker told them that Hudson's Grill was probably going to close and that the restaurant site might be coming up for lease. The Secchis met with the property manager and discussed the Hudson's Grill building. They entered into a letter of intent to lease the property and began negotiating the lease. Negotiations continued for about five months. At least seven different drafts of the lease were circulated. During this period of time, the Secchis visited the site on several occasions.

After the parties executed the lease, Italian Cowboy began remodeling the property. While it was remodeling the building, several different persons told Italian Cowboy that there had been a sewer gas odor problem in the restaurant when it was operated by Hudson's Grill. One of the owners also personally noticed the odor. He told the property manager about it about the problem but continued to remodel. After Italian Cowboy was operational and opened for business, the sewer gas odor problem continued. Although Prudential attempted to solve the problem, the transient sewer gas odor remained the same. Eventually, the restaurant closed. Italian Cowboy then sued Prudential.

The first claims dealt with by the Court of Appeals were Italian Cowboys' common-law fraud claim, the statutory fraud claim, and the negligent misrepresentation claim. The trial court found that the property manager made the following statements to Italian Cowboy during lease negotiations: (a) The tenant was lucky to be able to lease the premises because the building on the premises was practically new and was problem-free; (b) No problems had been experienced with the Premises by the prior tenant; (c) The building on the Premises was a perfect restaurant site and that the tenant could get into the building as a restaurant site for next to nothing; and (d) given the property manager's superior and special knowledge, these matters were represented as facts, not opinions.

The trial court also found that the statements were false; that the property manager and Prudential knew that they were false; and that they intended for the tenant to rely upon them. Further, the trial court found that the Tenant relied on the statements and would not have entered the lease and executed the guaranty if the representations had not been made.

Prudential and the property manager argue that common-law fraud, statutory fraud, and negligent misrepresentation all have the

common element of reliance and that the tenant disclaimed any reliance on representations not contained in the lease. The lease contained a statement that there were no representations not set out in the lease and also contained a merger clause.

Relying on ***Schlumberger Tech. Corp.* v. *Swanson***, 959 S.W.2d 171 (Tex.1997), the court noted that the following elements will foreclose a claim of fraudulent inducement: (1) the parties were attempting to end a situation in which they had become embroiled in a dispute over the value and feasibility of the subject project, (2) highly competent and able legal counsel were involved in negotiating the release, (3) the parties were negotiating at arm's length, and (4) the parties were knowledgeable and sophisticated in business. Here, the parties were represented by counsel as well as real estate brokers both before and during the negotiations leading up to the signing of the lease and guaranty. The record also reveals that the parties to this arm's length transaction were sophisticated in dealings involving the leasing and the operation of restaurant properties, that several drafts of the lease were circulated, and that various changes were negotiated and made to both the lease and the guaranty.

When sophisticated business parties who have fully negotiated a contract and who have been represented by attorneys or other professionals in the field are dealing at arm's length, they should be able to enter a contract in which they effectively disclaim reliance, or in which they agree that there are no representations outside of the written contract, or in which they otherwise provide for merger. Such a rule will result in agreements with predictable results and liability limitations that are well-defined. In this negotiated, redrafted lease agreement the disclaimer and merger clauses must be considered to be a part of that negotiated agreement and not simply boilerplate as found by the trial court. Under such circumstances, sophisticated parties who are represented by counsel and other professionals certainly can bargain to have the details of any representations upon which they are relying inserted into the contract, rather than agreeing that there are none.

The court next dealt with Italian Cowboy's claim of breach of the implied warranty of suitability. Here, there is no express waiver of the implied warranty of suitability. Rather, the parties rely upon the placement of repair responsibilities in support of their respective positions. Prudential and the property manager argue that the cause of the sewer odor problem was related to plumbing, ventilating, air conditioning, or some other mechanical installation. Prudential argues that, in accordance with the terms of the lease, the Tenant was required to make all repairs "foreseen or unforeseen " to the plumbing, ventilating, air conditioning, and "any other mechanical installations or equipment serving the Premises or located therein " In its arguments, the tenant contends that Prudential and the property manager ignore findings of fact regarding problems with a grease trap that contributed to the sewer gas odor problem. They also argue that, because the grease trap was located in the "Common Area," Prudential was obligated to repair it.

The court held as a matter of law that the lease placed the burden upon the Tenant to make any needed repairs, foreseen or unforeseen, to plumbing, heating, ventilating, air conditioning, and mechanical installations or equipment serving the premises. It went on to note that the subsequent tenant managed the odor problem by altering some of the ventilation pipes. The court also noted that, even if the grease trap, located in the common area, was implicated in the problem, the implied warranty of suitability applies only to the premises, and does not apply to the common area.

The third claim made by the tenant was that the odor problem constituted a constructive eviction and breach of the covenant of quiet enjoyment. The court held that, for an act to constitute a breach of the covenant of quiet enjoyment, it must occur during the lease term. Here, the misrepresentations were all made before the lease began, so they could not be the basis of a constructive eviction claim.

PART IV
MAINTENANCE AND REPAIR OBLIGATIONS

Airport Garage, L.L.C.* v. *Dollar Rent A Car Systems, Inc., 245 S.W.3d 488 (Tex.App.—Houston [14th Dist.] 2007, pet. denied). Dollar operates a car rental agency and three-story parking garage near Hobby Airport. The lease required the landlord to maintain and repair the foundation, exterior walls, and the roof, but did not require the landlord to repair any damages caused by the tenant. The lease required the tenant to make all other repairs. The facts of the case are quite complex, but, in a nutshell, there were some expansion joints at the garage that were in need of replacement. At some point before this lawsuit was filed, the building was being sold to 7979, and in response to a request by the purchaser, Dollar signed an estoppel certificate that said, among other things, that the landlord was not in default under the lease. At the time the estoppel was signed, Dollar was aware of and had been dealing with the landlord about the defective expansion joints.

The building was sold to 7979. Afterwards, Dollar began asking 7979 when it was going to repair the expansion joints. It did some work itself and asked to be reimbursed for the costs. It filed a lawsuit for breach of contract and breach of warranty relating to the expansion joints. After the suit was filed, 7979 had the work done and paid for it, but it refused to reimburse Dollar for any amounts it had expended. At trial, judgment was rendered in favor of Dollar and 7979 appealed.

According to 7979, the lease unambiguously requires 7979 to make repairs only to the foundation, exterior walls, and roof, and requires Dollar to make all other repairs or replacements. Here, the purpose the parties intended to accomplish is set forth in the Lease itself: the landlord is required to construct, and the tenant is required to operate, a three-story "first-class parking facility." Specifically, the landlord is required to construct a three-story parking garage of approximately 293,000 square feet, insure the building against loss or damage for its full replacement value, and lease it to the tenant for fifteen years. The tenant is permitted to use 2,200 square feet to operate a car rental business, and must "operate the remainder of the Garage as a first-class parking facility...." The tenant is required to "maintain the highest standards in the operation of the Garage so that the Parking Facility shall be operated in a fashion comparable to other first-class parking facilities in similar type buildings in the Houston area." The tenant is also required to "provide all materials, supplies and equipment needed for the proper and efficient use and operation of the Garage" and "use its best efforts to maintain and develop the Garage and to increase the volume of business for the same, and not to divert or cause to be diverted any business from the Garage to other parking facilities...."

As part of its obligation to operate a first-class parking facility, the tenant is required to provide, maintain and operate at least four shuttle vehicles to carry parking customers between the Garage and Hobby Airport Terminal, and to "operate such vehicles at all times necessary to provide prompt service." The tenant is required to pay the landlord the first $28,000.00 of net parking revenue, and any amounts due for guaranties, marketing expenses, taxes, or insurance. The tenant is then required to pay the landlord forty percent of the next $22,0000.00 of net parking revenue, and fifty percent of any remaining net parking revenue.

Reading the Lease as a whole, the court disagreed with 7979's contention that the repair provisions of the lease unambiguously restrict the landlord's repair obligations to the foundation, exterior walls, and roof, and require Dollar to bear the cost of any other repair or replacement, regardless of its nature. 7979's interpretation would permit the lessor to construct the outer shell of the building and leave the second and third floors in an incomplete or defective state, thereby transferring the cost of properly completing construction to the tenant. Thus, this interpretation would contradict the allocation of responsibilities expressly provided for in the

Lease. 7979's interpretation is also inconsistent with the parties' allocation of the risk of loss as shown in the Lease's insurance requirements. The tenant is required to insure its own property, the property of its customers, and its public liability, but is not required to insure any part of the Garage. The landlord is required to maintain insurance "for the full replacement value of the Garage" in the event of its loss or damage-even though, under 7979's interpretation of the Lease, the tenant is required to repair or replace essentially the entire interior of the building. Finally, 7979's interpretation effectively exempts the second and third floors of the Garage from the implied warranty of suitability without express language to that effect. This interpretation is contrary to Texas law, which provides that a tenant waives latent defects only if he takes the premises "as is" or expressly assumes the obligation to repair. The only reasonable interpretation of the relevant language is that the landlord must make structural repairs to the Garage, and must repair the foundation, exterior walls, and roof, even if the damage to these areas is not physical or structural (for example, if the damage is merely cosmetic).

7979's third issue challenges the legal and factual sufficiency of the evidence supporting the jury's finding that 7979 breached the implied warranty of suitability. In its fourth issue, 7979 makes the related argument that any breach of the implied warranty occurred prior to 7979's ownership of the property. In support of this argument, 7979 relies on paragraph 42 of the Lease, which states: "Lessee shall look solely to the then owner of the Leased Premises at the time of the breach or default for the satisfaction of any remedies of Lessee.

The implied warranty of suitability means that at the inception of the lease there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and that these essential facilities will remain in a suitable condition. A latent defect is one not discoverable by a reasonably prudent inspection of the premises at the inception of the lease. By its terms, the Lease became effective when the Garage was "substantially complete"; therefore, the problem with the expansion joints was a latent defect only if the joints were defective, and the defect was undiscoverable by a reasonably prudent inspection when the Garage was substantially complete. There is no evidence that the defect was discovered before 1998, and no evidence that problems with the expansion joints rendered any part of the Garage unsuitable for its intended operations until after 7979 assumed the Lease.

7979 argues that Dollar is estopped from asserting claims against it because Dollar's estoppel certificate recites that the prior owner is not in default, and Dollar did not attach the Moore Report to the estoppel certificate. To prevail on its affirmative defense that Dollar is equitably estopped from asserting its claims, 7979 was required to produce evidence of the following: (1) a false representation or concealment of material facts, (2) made with actual or constructive knowledge of those facts, (3) with the intention that the representation should be acted on, (4) the representation was made to a party who was without knowledge or means of obtaining knowledge of the real facts, and (5) the party to whom the representation was made detrimentally relied on the representations. At the time Dollar signed the estoppel certificate on June 19, 2001, the landlord had not failed to make repairs that were requested and required either by the condition of the premises or the Moore Report. Accordingly, Dollar's statement that there were no "uncured defaults" on June 19, 2001 did not constitute a false representation or a concealment of material fact made with actual or constructive knowledge of the true conditions.

Daitch* v. *Mid-America Apartment Communities, Inc., 250 S.W.3d 191 (Tex.App.—Dallas 2008, no pet.). Daitch slipped and fell in the bathroom of his apartment. He sued the landlord, Mid-America, alleging that water leaked from the air conditioning unit in the ceiling during the night and he slipped on the water the next morning. The air conditioner had been installed about nine months before the injury. The landlord had not received any notices from the tenant about the air conditioner not working properly.

The lease provides that Daitch takes the property as is except for conditions materially affecting the health or safety of ordinary persons. It requires him to use customary diligence in maintaining the apartment, but prohibits him from performing repairs or altering the property without authorization by Mid-America. The lease requires repair requests to be made in writing, signed, and delivered to Mid-America's designated representative. Daitch is required to give prompt notice of water leaks and other conditions that pose a hazard to property, health, or safety. The lease also requires Daitch to notify Mid-America as soon as possible of any problems or malfunctions in the air conditioning and requires Mid-America to use customary diligence to make repairs. The lease permits Mid-America to enter the apartment at reasonable times to respond to Daitch's requests, make repairs, or do preventive maintenance, among other things. Mid-America also agrees to act with customary diligence to maintain fixtures, heating and air conditioning equipment, and to make all reasonable repairs, subject to Daitch's obligation to pay for damages for which he is responsible.

Generally, a lessor has no duty to tenants or their invitees for dangerous conditions on the leased premises. This rule originates from the notion that a lessor relinquishes possession or occupancy of the premises to the lessee. One exception to this general rule is that a lessor may be liable for injuries resulting from a defect on a portion of the premises that remains under the lessor's control. Daitch argues Mid-America retained control of the air conditioning unit because Mid-America installed and maintained the unit and it was located in the bathroom ceiling. However, although the air conditioning unit was installed in the bathroom ceiling, there is no evidence Mid-America retained physical possession of the air conditioner or that Daitch used it in common with others. A contractual right of re-entry by the lessor to make repairs or improvements is not a reservation of control over a portion of the premises subjecting the lessor to liability.

Another exception to the no-duty rule is that a landlord who agrees to repair the leased property owes a duty to exercise ordinary care. Unless the contract provides that the landlord shall inspect the land to ascertain the need of repairs, a contract to keep the premises in safe condition subjects the landlord to liability only if he does not exercise reasonable care after he has notice of the need of repairs. Here the lease did not require Mid-America to inspect the property after the tenant took possession and required Mid-America to make repairs only on written notice from the tenant.

PART V
LEASE GUARANTIES

Smith* v. *Patrick W.Y. Tam Trust, 235 S.W.3d 819 (Tex.App.—Dallas 2007, pet. granted). The guaranties stated that they were "given by" Lauri and Howard. The signature lines were blanks to be filled in, the first indicated "By:"; the second indicated "Name"; the third indicated "Title". Lauri signed hers, printed her name, and in the "Title" line wrote "sec./treasurer." Howard left the "Title" line blank.

When they were sued on their guaranties, Lauri and Howard argued that the guaranties were corporate, rather than personal guaranties. First, they pointed out first that the guaranties did not say they were personal guaranties. Second, they noted that paragraph 10 of the guaranty began "If the Guarantor is a corporation or partnership" and goes on to state various representations and warranties of corporate or partnership authority. Howard also stated that he signed guaranties "Howard Smith" when they were corporate guaranties (to distinguish him from his son) and that he signs Michael Smith when they were personal guaranties. Lauri stated that she added her corporate titles because she was sure she was signing a corporate guaranty.

The court noted that the evidence shows the Smiths signed the documents using their names and not the name of the corporation. Each

document stated the guaranty was given by the individual to the landlord, and the lease agreement defined each individual as a guarantor. Although Lauri wrote her title below her name, Howard did not. The guaranty language included a conditional paragraph setting forth additional obligations that would arise only if the guarantor were a corporation. Thus, there is more than a scintilla of evidence that the Smiths were individual guarantors. The court also noted that, to conclude the Smiths signed the guaranties in their corporate capacity would render the guaranty meaningless. Because the obligation being guarantied was the obligation of the corporation, holding that the corporation was the guarantor would be a holding that there was not a guaranty obligation at all.

Hasty* v. *Keller HCP Partners, L.P., 260 S.W.3d 666 (Tex.App.—Dallas 2008, no pet.). Keller, as landlord, leased space inside a medical center to At Home Pharmacy Keller, L.P.. Hasty, the Pharmacy's president, signed the lease on behalf of the Pharmacy. A representative of Keller's general partner, Keller MOB GP, LLC, signed the lease on behalf of Keller. On the same day, Hasty entered into a lease guaranty that was designated as a rider to the lease and was expressly "made a part of" the lease. Unlike the lease, however, the guaranty identifies Keller GP, not Keller, as the "Landlord." When the Pharmacy defaulted, Keller sued Hasty on his guaranty. Hasty argued that he is not liable to Keller under the guaranty because the guaranty states that it is "to and for the benefit of Keller [GP]," not Keller.

Keller acknowledged that the guaranty identified its general partner, Keller GP, as the "Landlord," instead of Keller, but argued that "such an oversight will not provide the guarantor any defense where the parties are well aware of what lease the guaranty secures and which party is the true landlord."

To obtain summary judgment on a guaranty agreement, a party must conclusively prove: (1) the existence and ownership of the guaranty contract, (2) the performance of the terms of the contract by plaintiff, (3) the occurrence of the condition on which liability is based, and (4) guarantor's failure or refusal to perform the promise. Hasty argued that Keller cannot demonstrate ownership of the guaranty as a matter of law because the name of the landlord in the lease is different from the name of the landlord in the guaranty. In response, Keller argued that it has sufficiently demonstrated ownership as matter of law and describes the difference between the lease and the guaranty as a "typographical error ... of little moment."

Under Texas law, the court was required to construe the lease and the guaranty together because the guaranty states that "it is hereby made a part of that certain Lease." When one document is incorporated into another by reference, the two documents must be construed together. The primary concern is to ascertain the true intentions of the parties. The doctrine is well established that written contracts will be construed according to the intention of the parties, notwithstanding errors and omissions, when, by perusing the entire document, the errors can be corrected and omissions supplied, and, to this end, words, names, and phrases misused may be omitted entirely, and words, names, and phrases obviously intended may be supplied.

The court concluded that the reference to "Keller GP" as landlord instead of "Keller" is an error in the guaranty. There is no evidence, and Hasty does not contend, that the parties intended the guaranty to cover any lease or indebtedness other than the lease between the Pharmacy and Keller entered into the same day. Consequently, Keller demonstrated ownership of the guaranty as a matter of law and Hasty did not raise a fact issue on the element of ownership to defeat Keller's motion for summary judgment.

PART VI
MITIGATION OF DAMAGES

Cole Chemical & Distributing, Inc.* v. *Gowing, 228 S.W.3d 684 (Tex.App.—Houston [14th Dist.] 2005, no pet.). The tenant became

delinquent in his rent payments. After finding out that the tenant had moved out of its space, the landlord changed the locks on the space. There were disputes about the rent payments and the landlord sued the tenant.

Four and a half months after the lockout, the parties reached an agreement to mitigate damages that allowed the tenant to reoccupy the leased space for the remainder of the contract term. The landlord maintained its suit to recover unpaid rent and late fees in addition to attorneys' fees. The trial court found that the tenant had breached the lease, but awarded only the part of what the landlord claimed in damages based on its finding that the Landlord had failed to make reasonable efforts to re-let the space during the lockout period and therefore failed to mitigate its damages.

Section 91.006(a) of the Property Code provides that "[a] landlord has a duty to mitigate damages if a tenant abandons the leased premises in violation of the lease." Though it is the landlord's duty to mitigate damages, the tenant has the burden of proving that the landlord has mitigated or failed to mitigate damages and the amount by which the landlord reduced or could have reduced its damages. The landlord challenged the trial court's finding that the landlord's duty to mitigate commenced on the date of the lockout and that the landlord failed to exercise reasonable efforts to mitigate its damages during the lockout period by making reasonable efforts to find a new tenant.

The court held that it did not need to determine whether or not the landlord had used reasonable efforts to mitigate because, even assuming the landlord's efforts were inadequate, the tenant failed to prove the amount of damages that could have been avoided if the landlord had mitigated. A tenant's proof that the landlord failed to use objectively reasonable efforts to fill the premises, standing alone, is not a bar to recovery. Rather, the landlord's recovery is barred only to the extent that damages reasonably could have been avoided. Thus, where a defendant proves failure to mitigate but not the amount of damages that could have been avoided, it is not entitled to any reduction in damages.

After the trial court found that the landlord had not made reasonable efforts to mitigate, it deducted the full contract rental amount for the entire lockout period. Though it may have been reasonable to use the contract price in calculating the amount of damages that could have been avoided, there is no evidence to support the trial court's implicit finding that the full amount of rent accrued during the lockout period could have been avoided. Even if the landlord had made every mitigation effort identified by the tenant, there is no evidence that such efforts would have been successful at all, much less immediately, or of how much such efforts would have cost.

Landry's Seafood House-Addison, Inc.* v. *Snadon, 233 S.W.3d 430 (Tex.App.—Dallas 2007, pet. denied). A landlord has a duty to make reasonable efforts to mitigate damages when the tenant breaches the lease and abandons the property. However, the landlord is not required to simply fill the premises with any willing tenant; the replacement tenant must be suitable under the circumstances. The landlord's failure to use reasonable efforts to mitigate damages bars the landlord's recovery against the breaching tenant only to the extent that damages reasonably could have been avoided. The tenant properly bears the burden of proof to demonstrate that the landlord has mitigated or failed to mitigate damages and the amount by which the landlord reduced or could have reduced its damages.

There was evidence that the market during the time after Landry's vacated the premises was "soft" meaning it would be difficult to find a new tenant. There was evidence that both Steinmann and Park submitted lease proposals. Although Park's proposed rent was slightly higher than Steinmann's, her proposal was "bare-boned." However, Steinmann intended to spend up to $1 million to refurbish the premises. Snadon considered Steinmann's the better offer, as did Landry's realtor and Carl Cheaney, Landry's then-senior real estate manager. In addition,

there was evidence that Snadon granted Steinmann free rent between November 2003 and August 2004 in lieu of Snadon paying anything for premise improvements. Sandon testified, “I got the best deal I could get at the time, in the current market conditions.” This was enough to support the court’s conclusion that the landlord had adequately mitigated his damages.

PART VII
FORCIBLE DETAINER

Volume Millwork, Inc. **v.** ***West Houston Airport Corporation***, 218 S.W.3d 722 (Tex.App.—Houston [1st Dist.] 2006, pet. denied). The original landlord sold the building to the Trust. The Tenant was a tenant of the building. The Trust assigned its rights in the lease to West Houston, as the Landlord. The Tenant defaulted and West Houston brought a forcible detainer action in the justice court, where it prevailed. Volume Millwork appealed to the county court and after a trial de novo, West Houston again prevailed on the issue of the right of possession.

The Tenant then appealed to the court of appeals. As in the trial court, the Tenant questioned West Houston's legal authority to act on behalf of the Trust in claiming to have purchased the airport hangar in November 2001 and to have assumed management rights as Landlord. As in the trial court, tenant's challenges did not question standing, which may be asserted for the first time on appeal to question whether a party has an enforceable right or interest that can actually be determined by the judicial remedy sought.

Subject-matter jurisdiction cannot be conferred by consent, waiver, or estoppel at any stage of a proceeding. Lack of subject-matter jurisdiction is fundamental error that a court may properly raise and recognize sua sponte.

The Texas Constitution and the Legislature vest courts of appeals with jurisdiction over civil appeals from final judgments of district and county courts, provided the amount in controversy or the judgment exceeds $100.

Forcible-entry-and-detainer actions provide a speedy, summary, and inexpensive determination of the right to the immediate possession of real property. In keeping with this purpose, the Legislature has exercised its authority to limit this jurisdiction of courts of appeals in appeals from forcible-entry-and-detainer eviction proceedings by enacting section 24.007 of the Property Code, pursuant to which, "A final judgment of a county court in an eviction suit may not be appealed on the issue of possession unless the premises in question are being used for residential purposes only."

It is undisputed that the Tenant used the property at issue as its business location and thus exclusively for commercial purposes and not residential purposes. After the justice court awarded possession to West Houston, the Tenant appealed that issue for trial de novo to the county court, which again awarded possession to West Houston. The court of appeals has no jurisdiction, therefore, to review either the county court's determination on the issue of possession or any finding by the trial court that is essential to the issue of possession.

The Tenant challenged landlord's legal capacity to bring the forcible-entry-and-detainer action to evict tenant. Tenant presented its challenges by means of a Rule 12 motion to show authority. The trial court denied the Tenant's challenge and resolved this issue in favor of West Houston, thus permitting landlord to proceed in the trial de novo. Landlord's capacity, or legal authority, to proceed to evict tenant by forcible-entry-and-detainer was thus a finding by the trial court that was essential to the issue of possession. Because West Houston's capacity or authority to proceed against tenant was an essential finding on the issue of possession, section 24.007 precludes exercising jurisdiction.

Marshall **v.** ***Housing Authority of the City of San Antonio***, 198 S.W.3d 782, 49 Tex. Sup. Ct. J. 399 (Tex. 2006). Marshall leased an

apartment from a non-profit public facility corporation managed by the Housing Authority of the City of San Antonio for a term beginning on February 1, 2002, and ending on January 31, 2003. Her rent was subsidized by a federal housing assistance program. Following a shooting at her apartment, the Housing Authority gave Marshall notice that it was terminating her right to occupy the apartment, then filed a forcible detainer action seeking possession of the apartment. The trial court entered judgment awarding the Housing Authority possession of the apartment, court costs, and post-judgment interest. Marshall filed a motion seeking suspension of enforcement of the judgment or, in the alternative, setting of a supersedeas bond. In the motion she specified that she intended to appeal. Following a hearing on November 7, 2002, a supersedeas bond amount was set pursuant to Texas Property Code Section 24.007, but Marshall did not post bond. On November 8, 2002, she filed notice of appeal.

The parties agree that a writ of possession was never executed. Marshall does not contest the Housing Authority's assertion that she vacated the apartment.

After her lease term had expired, Marshall filed her brief in the court of appeals praying that the court reverse the trial court's judgment and award her possession of the apartment. She did not claim in her brief or in her later reply brief any contractual or other right to possession.

The court of appeals determined that Marshall's appeal was moot and dismissed the appeal for want of jurisdiction, although it did not vacate the trial court's judgment. The court of appeals reasoned that because Marshall had relinquished possession of the apartment, the court could no longer grant effectual relief.

The only issue in a forcible detainer action is the right to actual possession of the premises. Some courts of appeals have held that if a tenant fails to post a supersedeas bond pursuant to Texas Property Code Section 24.007, the appellate court lacks jurisdiction. Other courts of appeals have concluded that if a tenant vacates the premises, (1) the tenant's appeal is moot because the court can no longer grant effectual relief, or (2) the issue of possession is moot, but the court can still consider issues unrelated to possession. At least one court of appeals has concluded that a tenant's appeal is not moot even though the tenant vacated the premises.

Marshall argued that her failure to post a supersedeas bond pursuant to Texas Property Code Section 24.007 did not prevent her from appealing the trial court's judgment. The Texas Property Code provides that judgment in a forcible detainer action may not be stayed pending appeal unless the appellant timely files a supersedeas bond in the amount set by the trial court. Thus, if a proper supersedeas bond is not filed, the judgment may be enforced, including issuance of a writ of possession evicting the tenant from the premises. However, there is no language in the statute which purports to either impair the appellate rights of a tenant or require a bond be posted to perfect an appeal. Marshall's failure to supersede the judgment did not divest her of her right to appeal.

Marshall argued that because she timely indicated her intent to appeal the trial court's judgment and because she vacated involuntarily to avoid execution of a writ of possession, her relinquishing possession of the apartment should not moot her appeal. The Housing Authority, however, urges that because the record does not include evidence supporting Marshall's assertion that she vacated the apartment involuntarily, her appeal was rendered moot when she vacated. Again, the court agreed with Marshall.

Usually, when a judgment debtor voluntarily satisfies the judgment, the case becomes moot and the debtor waives any right to appeal. The rule is intended to prevent a party who voluntarily satisfies a judgment from later changing his or her mind and appealing. The court has held, however, that payment of a judgment will not moot an appeal from that judgment if the judgment debtor timely and clearly expresses an intent to exercise the right of appeal and if appellate relief is not futile.

Marshall timely filed a motion seeking suspension of enforcement of the judgment or, in the alternative, setting of a supersedeas bond. Her motion set out her intent to appeal. She timely filed notice of appeal before she vacated her apartment. In light of her timely and clear expression of intent to appeal, Marshall's action in giving up possession did not moot her appeal so long as appellate relief was not futile; that is, so long as she held and asserted a potentially meritorious claim of right to current, actual possession of the apartment. But, her lease expired on January 31, 2003, and she presented no basis for claiming a right to possession after that date. Thus, there was no live controversy between the parties as to the right of current possession after January 31, 2003, and the issue of possession was moot as of that date.

Persevering, and recognizing the possibility that the possession issue might be moot, Marshall asserted that even if the possession issue is moot, there are three reasons why the merits of her appeal should be determined.

Marshall argues that her case is not moot because if successful on the merits she would be able to recover, in this action, the fair market value of her leasehold interest for the time between the date she vacated the apartment and the date her lease expired. The court disagreed. Marshall, nevertheless, argued that recovery of the fair market value of her lost leasehold interest in this forcible detainer action is authorized by section 34.022 of the Texas Civil Practice and Remedies Code and by Texas Rule of Civil Procedure 752. Neither of these provisions, however, authorize the type of damages that Marshall seeks. Her property was not sold at execution, and the damages she seeks did not arise until after her county court appeal was complete. Thus, even if her appeal were to be heard and found to have merit, Marshall would not be authorized to recover damages in the forcible detainer suit on the bases she references. Consequently, the damage claims do not present a controversy preventing dismissal of the forcible detainer case as moot.

The court next considered Marshall's position that even if a live controversy does not exist, her appeal falls within the "collateral consequences" exception to the requirement that cases without live controversies are to be dismissed as moot. She argued that a favorable appellate ruling reversing the trial court's judgment would ameliorate collateral consequences to her resulting from the judgment. Marshall noted that the judgment for eviction caused loss of her federal rent subsidy and that loss of the subsidy might last for up to five years. She also asserted that the judgment has adverse practical collateral consequences, including the possibility that landlords may be dissuaded from renting an apartment to her. One purpose of vacating the underlying judgment if a case becomes moot during appeal is to prevent prejudice to the rights of parties when appellate review of a judgment on its merits is precluded. Once the judgment is vacated and the case dismissed, the collateral consequences of the judgment are ordinarily negated to the same extent as if the judgment were reversed on the basis of any other procedural error. The collateral consequences exception to the mootness doctrine is invoked only under narrow circumstances when vacating the underlying judgment will not cure the adverse consequences suffered by the party seeking to appeal that judgment. In order to invoke the collateral consequences exception, then, Marshall must show both that a concrete disadvantage resulted from the judgment and that the disadvantage will persist even if the judgment is vacated and the case dismissed as moot. She did not do so.

Mitchell* v. *Citifinancial Mortgage Company, 192 S.W.3d 882 (Tex.App.—Dallas 2006, no pet.). Mitchell contended that Citifinancial's complaint for forcible entry and detainer did not sufficiently describe the land or premises for which it sought possession.

Under rule 741 of the Texas Rules of Civil Procedure, a complaint for forcible entry and detainer "shall describe the lands, tenements, or premises, the possession of which is claimed, with sufficient certainty to identify the same...." A street address is sufficiently certain to identify the premises made the subject of a detainer action. Citifinancial's complaint

described the premises by the following legal description: "Being Lot 35, in Block B of Creek Tree Estates, Phase III-B, an addition to the City of DeSoto, Dallas County, Texas according to the map thereof recorded in Volume 85196, Page 3920 of the map records of Dallas County, Texas." The complaint also identified the "Property" as "more commonly referred to as 909 Hideaway Place, DeSoto Texas 75115." Further, the complaint identified the "Property" as the same location where appellants could be served with process.

Mitchell did not contend that she was misled or confused by the complaint's identifying information. In fact, she offered no argument to support her contention that the identifying information was lacking in some way. The court concluded that both the address and the legal description set forth in the complaint sufficiently identified the premises at issue.

Murphy v. Countrywide Home Loans, Inc., 199 S.W.3d 441 (Tex.App.—Houston [1st Dist.] 2006, no pet.). Murphy borrowed a home loan from Countrywide. After he defaulted, Countrywide posted for foreclosure. Murphy sued to enjoin the foreclosure, but the temporary injunction was denied, so Countrywide foreclosed. It then brought a forcible detainer action to evict Murphy.

Forcible detainer occurs when a person refuses to surrender possession of real property upon a statutorily sufficient demand for possession if that person is: (1) a tenant or subtenant willfully and without force holding over after his right of possession ends, (2) a tenant at will or by sufferance, or (3) a tenant of someone who acquired possession by forcible entry. Generally, an occupant of the property holding over after execution of a deed is considered a permissive tenant whose right to possession is inferior to that of the party holding title. To establish forcible detainer and prevail on its motion for summary judgment, Countrywide had to establish the following as a matter of law: (1) Countrywide was the owner, (2) Murphy was an occupant at the time of foreclosure, (3) the foreclosure was of a lien superior to Murphy's right to possession, (4) Countrywide made a statutorily sufficient written demand for possession, and (5) Murphy refused to leave.

Countrywide alleged that Murphy defaulted on his mortgage payments and failed to make payment even after notices of acceleration and demand notices were served on him. A substitute trustee's sale was held and Countrywide purchased the property and received a substitute trustee's deed. This deed, which transferred title to Countrywide, and an affidavit of mortgage were filed in the Galveston County real property records. Countrywide then gave Murphy written notice to vacate the property. Murphy refused to vacate and unlawfully remained in possession of the property.

As summary judgment evidence for the element of ownership, Countrywide attached its substitute trustee's deed and an affidavit of mortgage. To establish that Murphy was the occupant at the time of foreclosure, Countrywide attached a certified copy of the deed of trust. To establish that it had a lien that was superior to Murphy's right to possession, Countrywide relied on the deed of trust and the substitute trustee's deed. And to establish that it made a demand for possession, Countrywide relied on the notice to vacate. The fact that Murphy refused to surrender possession is uncontested.

Murphy argued that Countrywide's evidence is insufficient because the substitute trustee's deed shows the owner of the property to be Freddie Mac and not Countrywide. Countrywide attached the business records affidavit of Freddy Mac's attorney, to authenticate the notice to vacate. The notice to vacate affirmatively names Countrywide as the authorized servicing agent for Freddy Mac. Murphy offered no evidence to contradict this statement. Murphy did, however, attach exhibits to his response motion. The attachments consisted of a copy of the original promissory note, a cover letter purporting to transfer the original note to First Chicago National Processing Corporation, and Murphy's personal affidavit attesting to the validity of the attached

documents. These exhibits do not constitute evidence rebutting the issue of possession.

Finally, Murphy contends that the documents used by Countrywide as summary judgment evidence are "products of a void illegal defective fraudulent procedure" because Countrywide failed to prove it had authority to foreclose. However, rule 746 of the Texas Rules of Civil Procedure does not require Countrywide to prove title. To prevail in a forcible detainer action, Countrywide need only show sufficient evidence of ownership to demonstrate a superior right to immediate possession. Murphy's allegations concerning the propriety of the foreclosure or challenges to Countrywide's deed or title to the property cannot be considered in this action.

Merit Management Partners I, L.P.* v. *Noelke, 266 S.W.3d 637 (Tex.App.—Austin 2008, no pet.). The County Court has no jurisdiction to hear a case involving the effect of a consent to assignment of lease because the existence and extent of the tenant's leasehold rights are so involved in the case as to make the landlord's claims a suit for the determination of the existence and extent of the tenant's leasehold and, thus, a determination of title to real property.

PART VIII
HOLDING OVER

Carrasco* v. *Stewart, 224 S.W.3d 363 (Tex.App.—El Paso 2006, no pet.). Stewart leased office space to Carrasco in Pecos, Texas under a one-year, written lease agreement. Carrasco, who is an attorney, drafted the lease. Carrasco was required to pay rent each month with a five-day grace period and $10 per day in late fees for each day the rent was late after the grace period. The lease contained an option to renew, but it did not contain a holdover provision. Carrasco did not timely pay his rent and when the lease expired Carrasco owed $810 in late fee arrearages.

Carrasco claimed to have problems with the HVAC. When Stewart refused to take care of the problem, Carrasco paid for the repairs. Given the problems he had experienced, Carrasco told Stewart at the end of the lease term that he would continue to rent the premises at the rate of $300 per month, but he would not continue to pay late fees. According to him, Stewart agreed to rent the premises to him under these conditions on a month-to-month basis.

Stewart disagreed with Carrasco's version of their discussions and testified that she refused to enter into a new written lease until Carrasco paid the late fees. She agreed to continue leasing the property on a month-to-month basis under the same terms as the written lease, but she claimed the parties never discussed whether she would forego the late fee provision.

Carrasco continued to occupy the premises and to pay his rent late, racking up late fees of over $4,000.

Stewart demanded payment and that Carrasco vacate the premises. He left a month later and Stewart sued for the past due rent and late fees. The trial court found for Stewart.

On appeal, Carrasco argued that he was not a holdover tenant because of the agreement alleged was made at the end of the original lease term. He also argued that, if he were a holdover tenant, a holdover tenancy is limited to one year, so he should only be obligated for late fees for one year.

A tenant who remains in possession of the premises after termination of the lease occupies "wrongfully" and is said to have a tenancy at sufferance. Under the common law holdover rule, a landlord may elect to treat a tenant holding over as either a trespasser or as a tenant holding under the terms of the original lease. Proof of holding over after the expiration of a term fixed in the lease gives rise to the presumption that the holdover tenant continues to be bound by the covenants which were binding upon him during the term, in the absence of evidence to the contrary. The law implies an agreement on the part of the landlord that he will let and on the part of the tenant that

he will hold on the same terms of the expired lease. The holding over is normally a lease for a year binding on both parties in the absence of an express or implied agreement to the contrary. A second and subsequent holdover year can be created by holding over after the expiration of the first holdover year.

It is undisputed that Carrasco did not exercise the option to renew the lease. Thus, the original tenancy expired. Because Carrasco remained on the premises after the lease expired, a holdover tenancy was created under the common law holdover rule, and Carrasco impliedly agreed to remain under the same terms as the expired lease.

Stewart disputed Carrasco's testimony that the parties agreed to no longer be bound by the late fees provision in the original lease. Further, Carrasco's testimony in that regard is directly contrary to his course of conduct which included paying a portion of the late fees assessed by Stewart. While the holdover period is normally for one year, it is undisputed that the parties agreed that Carrasco could remain on the premises on a month-to-month basis. Thus, a month-to-month holdover tenancy was created and it did not expire until Carrasco vacated the premises.

PART IX
CONDEMNATION

Motiva Enterprises, LLC* v. *McCrabb, 248 S.W.3d 211 (Tex.App.—Houston [1st Dist.] 2007, pet. denied). Motiva entered into a long-term ground lease with the McCrabbs for the purpose of operating a gas station and convenience store. The lease contained a provision that stated the lease would terminate upon condemnation of the leased premises. The provision said the tenant would be entitled to receive from any condemnation proceeds the amount attributed to any of the following: buildings or other improvements installed on the premises by tenant; any damages to tenant's personal property resulting from said condemnation; removal or relocation costs of tenant's anticipated business proceeds lost to tenant; or any special damages of tenant.

The State of Texas condemned a large portion of the land and awarded more than $1,700,000 in damages. The trial court concluded that the tenant owned the improvements to the land and was entitled to recover the $1,401,000 of the compensation allocated for those improvements, the landlord was entitled to recover the remaining $304,000 allocated for the land, and the tenant was not entitled to any compensation for its "leasehold advantage" under the terms of the lease. The so-called "leasehold advantage" is the difference between the rent provided for in the lease and the market rental value.

Motiva argues that, based on its reservation of the right to recover its "special damages," it is entitled to "recover its damages for its lost leasehold," i.e., the market value of its leasehold interest in the property under the ground lease. The McCrabbs argue that because Motiva's leasehold rights terminated, Motiva is not entitled to compensation for future benefits under the lease. They also assert that the general reference in the lease to "special damages" in regard to Motiva's reserved rights upon the termination of the lease does not overcome Motiva's specific, contractual relinquishment of its leasehold rights that occurred upon condemnation.

Under Texas law, parties have a right to contract for termination of a lease in the event of condemnation. A lessee is entitled, as a matter of law, to share in a condemnation award when part of its leasehold interest is lost by condemnation. Unless a lease provides that it terminates upon condemnation, the tenant will recover compensation for the unexpired term. But, if a lease provides that it terminates upon condemnation, the lessee has no interest in the condemnation award. Here, the lease agreement specifically provided that the lease itself would "terminate as of the date when possession is required to be given" in condemnation. Because the lease automatically terminated upon condemnation, Motiva had no compensable interest in regard to the termination of the lease. Motiva's construction of the term "special

damages" in reference to its reserved rights upon termination of the lease conflicts with the specific language in the lease providing that it actually terminated upon condemnation. Because the lease itself actually terminated upon condemnation, Motiva, as a matter of law, was not entitled to recover any damages for its "lost leasehold."

PART X
PURCHASE OPTIONS

Rus-Ann Development, Inc.* v. *ECGC, Inc., 222 S.W.3d 921 (Tex.App.—Tyler 2007, no pet.). ECGC leased the golf course from Rus-Ann for one year beginning October 1, 2004. ECGC exercised an option to continue the lease through September 30, 2006. On December 6, 2005, Homer A. Lambert, President of Rus-Ann Development Company, sent ECGC a letter declaring that it was in default under the terms of the lease. On December 14, ECGC sent a letter in response stating that it was not in default but asking for more information on the alleged defaults. On December 21, 2005, ECGC filed suit seeking a temporary injunction to prevent Rus-Ann from evicting it under the lease. Correspondence flowed back and forth between Rus-Ann and ECGC over the next several months regarding the alleged defaults under the terms of the lease. On March 21, 2006, Rus-Ann sent ECGC a letter declaring that the lease was terminated. The next day, ECGC sent Rus-Ann a letter declaring that it was exercising its option to purchase the golf course. On April 7, ECGC amended its suit for temporary injunction, stating that it was "prepared and willing to perform in accordance with the [option] agreement." The trial court held two hearings on ECGC's temporary injunction. After the second hearing, the court said it would enter an order granting the temporary injunction if ECGC tendered $400,000 into the registry of the court along with a $1,000,000 promissory note made payable to Rus-Ann Development to be paid over thirty years at six percent interest. These were the terms specified in the option to purchase. Following ECGC's compliance with these terms, the trial court entered an order for a temporary injunction enjoining Rus-Ann from any attempt to evict ECGC from the golf course pending a trial on the merits in the case.

Rus-Ann contends the trial court abused its discretion in granting a temporary injunction enjoining it from proceeding with its forcible entry and detainer action because there was no evidence or insufficient evidence that ECGC had timely exercised its option to purchase the golf course. In the absence of a timely exercise of the option, there can be no cause of action for specific performance.

Rus-Ann first contends that the contract terminated because ECGC failed to notify it in writing, as required by the lease, that it was extending the term of the lease past September 30, 2005. Evidence before the trial court showed that ECGC could continue the lease following September 30, 2005 by increasing its monthly rental payment from $7,500 to $8,500. It did so. Rus-Ann accepted these increased monthly payments. A lessor waives its right to declare a lease terminated after its primary term if it continues to accept monthly rental payments.

Rus-Ann also contends that it terminated the lease by letter dated March 21, 2006, due to alleged breaches by ECGC. Specifically, it complains that ECGC failed to install a new entry gate, replace a shed, and install new carpet in the clubhouse as required by an addendum to the lease. On March 22, 2006, ECGC sent Rus-Ann a letter declaring its intent to exercise its option to purchase the property. The issue of whether ECGC had breached the contract in a manner that allowed Rus-Ann to terminate the lease before ECGC exercised its option to purchase was a question of law for the court to decide. The addendum including the allegedly breached terms is entitled "Promissory Note" and was signed more than two months after the lease was signed. Lambert signed for Rus-Ann, but no one signed for ECGC. The lease does not impose a deadline for accomplishing the three tasks. The court heard evidence from officers of both Rus-Ann and ECGC, who gave conflicting testimony about whether the lease had been breached. The trial court does not abuse its discretion if there is some evidence reasonably

supporting its decision.

Rus-Ann contends that the trial court abused its discretion in granting the temporary injunction because there was no evidence or insufficient evidence that ECGC had complied with the material terms of the contract and therefore was entitled to specific performance. Rus-Ann contends that ECGC was required to close the sale within ninety days of the date in which it exercised its option to purchase the golf course. ECGC contends that it is entitled to a temporary injunction and is allowed to show at the final hearing that it is entitled to specific performance even though it did not tender payment within ninety days as required by the option to purchase.

In Texas, the potential loss of rights in real property is a probable, imminent, and irreparable injury that qualifies a party for a temporary injunction. It is thoroughly settled that where a defendant has openly and avowedly refused to perform his part of the contract or declared his intention not to perform it, the plaintiff need not make tender of payment of the consideration before bringing suit. Beginning with its December 6, 2005 letter and subsequent correspondence, Rus-Ann left no doubt that it was refusing any attempt by ECGC to proceed with the purchase of the golf course. Where tender of performance is excused, the party must plead and prove that he is ready, willing, and able to perform. ECGC pleaded that it was "prepared and willing to perform in accordance with the Agreement between Plaintiff and Defendant." During the two hearings on the temporary injunction, ECGC presented testimony that it was ready to tender the $400,000 in cash and the $1,000,000 promissory note into the registry of the court to close the purchase of the golf course. Rus-Ann complains that ECGC changed its manner of financing for the $400,000 between the first and second hearings on the temporary injunction. This is irrelevant. When the trial court required tender into the registry of the court, ECGC did so. The record shows that ECGC was not required to tender payment of the consideration before bringing suit due to Rus-Ann's refusal to perform and that there is sufficient evidence that ECGC was ready, willing, and able to perform its duties under the terms of the option contract.

Rus-Ann contends that the trial court abused its discretion in granting a temporary injunction because the option contract was not sufficiently clear and definite for enforcement by specific performance. It argues that essential terms are missing, eliminating ECGC's right to specific performance.

Before a court will decree the specific performance of a contract for the sale of land, or entertain a suit for damages for the breach thereof, the written agreement or memorandum required by statute must contain the essential terms of a contract, expressed with such certainty and clarity that it may be understood without recourse to parol evidence. The essential elements required, in writing, for the sale of real property are the price, the property description, and the seller's signature. Those three essential elements are in the lease with option to purchase in the instant case.

Rus-Ann contends that the only terms of the seller financing included in the option to purchase contract were the term of thirty years and the interest rate of six percent. It says that the other terms of the seller financing such as how, when, where, how much, and to whom payments were to be made were not included. However, these terms were part of the provisions of the lease agreement. The court can look at both the option to purchase and the lease in determining the terms of a contract to be enforced by specific performance.

Rus-Ann also contends that because the deed of trust clause stating whether the note is assumable or due on sale is not included in the contract, it is unenforceable by specific performance. Not true. The failure of a real estate sales contract to provide the fundamental provisions of a deed of trust does not render it unenforceable by specific performance.

Rus-Ann further complains that the option contract does not include terms relating to proration of taxes or the place of closing. Again, failure to include these terms in the contract for

the sale of real property does not render it unenforceable by specific performance. Finally, Rus-Ann contends that the option to purchase does not include whether ECGC had a right to the partial release of lots that it sold on the golf course during the thirty years. That matter was covered in the lease. Therefore, it is a term that can be determined by the trial court at the final hearing.

PART XI
ASSIGNMENTS

Meridien Hotels, Inc. **v.** ***LHO Financing Partnership I, L.P.***, 255 S.W.3d 807 (Tex.App.—Dallas 2008, no pet.). LaSalle is the owner of the real property that included the Meridien Hotel in downtown Dallas. LaSalle leased the hotel space to a Meridien entity, Leasco. The hotel was operated by Meridien, and Leasco paid Meridien fees to manage the hotel.

The lease contained a provision if Leasco's parent transferred its interest in Leasco to a third party, the transfer would be a "Permitted Transfer" only if it was in conjunction with the sale of all or substantially all of the parent's hotel-management businesses. The "Permitted Transfer" could be made only if the parent gave LaSalle written notice of the proposed Permitted Transfer, after which LaSalle would have thirty days to decide whether to purchase the parent's interest in Leasco for its fair market value.

If LaSalle decided to purchase Leasco, then the closing had to occur within 60 days of the parent's delivery of notice of the transfer. If the parties could not agree on the fair market value of the parent's interest in Leasco, the issue was to be submitted to binding arbitration, which "to the maximum extent practicable" was to be concluded within ninety days of filing the arbitration claim. If there was a change in control of Leasco other the Permitted Transfer, LaSalle had the right to terminate the lease on thirty days' notice and evict Leasco.

Leasco's parent gave LaSalle notice that it was selling substantially all of its Meridien hotel-management businesses, including Leasco. LaSalle gave Leasco and Meridien notice of its intent to purchase Leasco and gave a schedule for transition to a new management company. LaSalle estimated the value of Leasco the be zero, because there was no market for such a short lease (there were six years remaining in the lease's term) and the hotel had been one of the worst performers in its class of hotels for the past few years.

Leasco commenced an arbitration proceeding to determine its fair market value. The same day, it also filed suit in district court requesting the court declare that the closing on the sale of Leasco could not occur until determination of Leasco's fair market value and to declare that any provisions in the lease allowing LaSalle to enforce the purchase provision without paying any consideration were void for absence of mutuality. Also it sent a letter to LaSalle stating in light of LaSalle's failure to comply with the terms of the lease, "we do not anticipate being able to participate in a February 14, 2002 transition. Until the relevant terms of the Lease are satisfied, and determined to be enforceable, your demands are premature." The letter did not state which provisions of the lease were not followed or enforceable. LaSalle responded with a notice of default and termination of the lease. Under the lease, Leasco had thirty days from the notice of default and termination to cure the default before the lease would be terminated.

At trial, the court granted partial summary judgment holding: (1) the transfer provision and purchase provisions of the lease were enforceable, and a closing on the purchase pursuant may occur prior to the determination of fair market value; (2) Leasco's refusal to close on the purchase on the date specified in LaSalle's purchase notice and to surrender possession of the premises constitute an event of default under the lease; (3) As a result of Leasco's event of default under the lease, LaSalle has the right and has lawfully exercised the right to terminate the lease; and (4) Leasco and Meridien, Inc. no longer have a lawful right of possession to the hotel.

LaSalle brought an action for forcible entry and detainer, obtained a judgment for possession of the premises, and Leasco and Meridien vacated the hotel.

Most of the issues in this case concern the interpretation and application of the provision of the lease concerning the parties' rights when Leasco is about to undergo a change in ownership. LaSalle argues that the provision permitted it to terminate the lease when a transfer that is part of the sale of substantially all of Leasco's parent's hotel-management businesses fails to comply. Therefore, according to LaSalle, it was entitled to terminate the lease when Leasco refused to close the transaction and surrender the premises as required. The court agreed with LaSalle's interpretation of the contract. The lease provision contained a two-part definition of "permitted transfer." The first part is the requirement that the transfer be a part of the sale of all of the parent company's hotel-management businesses. The second part is that the transfer "shall be made only upon the following terms and conditions," paragraphs (a) through (f). If a "permitted transfer" can be made "only upon" certain conditions, then the failure to meet those conditions results in the transfer not qualifying as a "permitted transfer" under the lease.

Leasco and Meridien next assert they did not breach the lease by refusing to close because they were not required to close until Leasco's fair market value had been agreed upon or determined in arbitration. They cited cases for the proposition that a contract which leaves essential terms open for later negotiation is unenforceable until the essential terms are fixed. However, a purchase agreement for real property that does not contain the purchase price is enforceable if the agreement contains a standard for determining the purchase price.

In this case, the purchase price was not left for later negotiation. Instead, the lease provided a standard for determining the purchase price in the event of the parties' inability to agree on the price: the price would be determined by an arbitrator following the procedures in the lease.Thus, the lease's failure to set an exact purchase price for LaSalle's purchase of Leasco did not render that part of the lease unenforceable.

Leasco and Meridien also argue that the purchase price had to be determined before closing could occur because paragraph (f) of section 22.22 provides, "unless and until the Fair Market Value of the respective interests in Tenant have been fully determined, Landlord shall have no obligation to complete the Purchase." Leasco and Meridien argue paragraph (f) gave LaSalle the right to decide not to complete the purchase if it was dissatisfied with the fair market value as determined by the arbitrator. Thus, they argue, if the closing and Leasco's surrender of the premises could be required before determination of the purchase price, then "LaSalle could essentially kick Meridien out of the Hotel, participate in the arbitration but then pull out if it did not like where the arbitration price was headed. This interpretation of paragraph (f), which is the basis of their argument, is incorrect. Paragraph (f) gave LaSalle the right to delay the closing until after determination of Leasco's fair market value. Paragraph (f) did not permit LaSalle to force the closing and then not pay the arbitrated price. Nor does it permit LaSalle to avoid either purchasing Leasco or paying the price set by the arbitrator.

Leasco and Meridien also argue that termination of the lease for failure to comply with section 22.22 would constitute a forfeiture and, as Leasco and Meridien observe, forfeitures are not favored. Forfeiture of a contract is to be avoided when another reasonable reading of the contract is possible. However, a clear and specific forfeiture provision in a contract will be honored.