

REAL ESTATE TRANSACTIONS

ALERT

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Two New Jersey Court Decisions May Influence How Risks Are Handled In Commercial Leases

By Gary N. Smith¹

Recent New Jersey Appellate Court decisions² have created new considerations for landlords and tenants entering into commercial leases in New Jersey. In addition to the specific indemnification language required under the Supreme Court's previous ruling in *Azurak v. Corp. Prop. Inv'rs*³, the new case law permits landlords to delegate the maintenance obligations of their properties to their tenants. Based on these rulings, landlords and tenants may want to re-evaluate their risk assessments for property maintenance when negotiating commercial leases.

Background

In *Azurak*, the New Jersey Supreme Court recognized the long-standing principle that an indemnitee cannot recover its costs under an indemnification provision when the loss resulted from the indemnitee's negligence, unless the contractual language explicitly provides coverage for such negligence. Since *Azurak*, New Jersey courts have looked for specific language to enforce indemnification provisions – especially in commercial leases – and have held that the failure to include such language will result in a denial of coverage.⁴

¹ Eric Garcia, a summer associate with Schnader, assisted with this article.

² *Shields v. Ramslee Motors*, 240 N.J. 479 (2020); *Underhill v. Borough of Caldwell*, No. A-1800-18T4, 2020 WL 2562925, at *1 (App. Div. May 21, 2020).

³ *Azurak v. Corp. Prop. Inv'rs*, 175 N.J. 110 (2003).

⁴ *Meder v. Resorts Int'l Hotel, Inc.*, 240 N.J. Super 470, 478-79 (App. Div. 1989), cert. denied, 121 N.J. 608 (1990);

The recent New Jersey Supreme Court decision in *Shields v. Ramslee Motors* and the Appellate Division decision in *Underhill v. Borough of Caldwell* have created additional issues for commercial tenants and landlords to consider. Imprecise drafting may shift property maintenance responsibilities from one party to the other, bringing about new economic assessments that landlords and tenants may not have confronted in their prior negotiations.

Recent Case Law

In *Shields*, the plaintiff was injured when he slipped and fell on ice on a driveway at a used car dealership. The lease between the tenant and landlord provided that the tenant was solely responsible for the maintenance and repair of the property as if it were the “de facto owner” of the leased premises. Despite the landlord maintaining the right to re-enter and make repairs, the New Jersey Supreme Court held that the lease placed responsibility for the maintenance of the premises on the tenant, and the landlord's right to re-enter did not create maintenance obligations for the landlord.

In reaching this decision, the Supreme Court found that because the tenant had control of the driveway, and because the tenant's actions demonstrated an understanding that it was responsible for maintaining the property – particularly with regard, to snow and ice removal – the tenant had the sole responsibility to

Englert v. Home Depot, 389 N.J. Super. 44, 51-58 (App. Div. 2006), cert. denied, 192 N.J. 71 (2007).

maintain the premises and was liable for the plaintiff's injuries.

In *Underhill*, the plaintiff was walking in a parking lot leased to the Borough of Caldwell when he slipped on ice. The lease to the Borough provided that the tenant was responsible for the "cost and expense" of the maintenance of the premises, including snow and ice removal. The Court, following *Shields*, held that the clear delegation of the maintenance obligations from the landlord to the tenant protected the landlord from liability. The Court's analysis also looked at the prior actions of the parties. Because the tenant had consistently removed snow and ice from the premises throughout the duration of the lease, the Court found that the tenant, not the landlord, had control over the parking lot where the plaintiff was injured. The landlord had completely delegated the responsibility to the tenant, and the tenant acted in accordance. Therefore, the Court found that the tenant was responsible for the plaintiff's injuries.

Practical Takeaways

The interplay of *Azurak*, *Shields*, and *Underhill* may require commercial real estate tenants and landlords to consider additional language when renewing or entering into new commercial leases in New Jersey.

First, the parties should review all language in a lease agreement relating to the landlord's and the tenant's responsibilities concerning maintenance and repair of the premises. The parties should be sure to utilize precise language to explicitly place the responsibility to maintain the premises, including snow and ice removal, on the correct party. Loose language which can implicate responsibilities that were not bargained for at negotiation can cause a party to lose its indemnification rights as well as be liable for a loss.

Second, the parties should be aware of these issues when negotiating how much access and control they each have over the property. Landlords and tenants should keep in mind that the less control the landlord has over the property, the more likely a New Jersey court will find that the landlord has vested the tenant with exclusive possession of the property. However, if the landlord maintains control, it may not have divested itself of responsibility.

Third, since the maintenance obligations are vital to a successful landlord-tenant relationship, the parties must understand their rights and responsibilities from the outset. Landlords and tenants should be aware that their prior actions in maintaining the property may be analyzed. Absent concrete language assigning responsibilities, a court will look at the parties' histories in maintaining the property. A party – who has properly delegated responsibilities in the lease – may unknowingly lose its indemnification rights, and be liable, simply by taking maintenance actions into their own hands rather than calling the other party to ensure that work is done.

The recent court decisions complicate how risks are handled in commercial leases. When in doubt, a business facing these issues in New Jersey should protect its interests and consult with knowledgeable counsel. ♦

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