



BY
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LEGAL VIEW

FLIPPING THE SCRIPT ON SECOND-RATE LANDLORDS CONSTRUCTIVE EVICTION JURISPRUDENCE IN TEXAS

WHAT IS CONSTRUCTIVE EVICTION?

Constructive eviction is an intentional act or omission of a landlord that permanently dispossesses tenants of the use and enjoyment of a rented premises, resulting in abandonment by the tenant. In more direct terms, constructive eviction is a way for tenants to terminate their lease and seek damages from landlords who render property unusable for its intended purpose. Most states employ some form of the constructive eviction doctrine, although the circumstances under which it may be invoked, as well as the source(s) of authority, vary. In Texas, constructive eviction is rooted primarily in case law, with limited input from statute via Texas Property Code, Title 8, Chapter 92.

While constructive eviction is widespread in its applicability, many are unfamiliar with its basic elements and potential to upend lease agreements across a variety of sectors. To this end, this memo serves to provide a basic overview of constructive eviction jurisprudence in Texas, beginning with the Texas Property Code's narrow treatment of constructive eviction before moving into broader, more applicable, case law.

CONSTRUCTIVE EVICTION BY STATUTE: WHAT DOES THE TEXAS PROPERTY CODE SAY?

The Texas Property Code outlines two general, non-exclusive scenarios in which tenants may assert constructive eviction, covered in the subsections below. As a preliminary matter, it is important to note that the following statutes apply to residential, non-commercial rental leases.

CONSTRUCTIVE EVICTION BY STATUTE: INTERRUPTION OF UTILITIES BY LANDLORD

Under Texas Property Code § 92.008, a landlord may not "interrupt or cause the interruption of utility service paid directly to the utility company by a tenant unless the interruption results from bonafide repairs, construction, or emergency." Similarly, a landlord may not interrupt or cause the interruption of utilities that they themselves "[furnish] to a tenant" (as opposed to when a tenant pays the utility company directly).

There are limited circumstances—apart from repairs, construction, or emergencies—under which a landlord may interrupt or cause the interruption of utilities without incurring liability. For one, a landlord who "submeters electricity or allocates or prorates nonsubmetered master metered electricity" may interrupt utilities for tenant nonpayment when all the following conditions are satisfied: 1. If the landlord's right to interrupt electric service is provided by a written lease entered into by the tenant.

- 2. If the tenant's electric bill is not paid on or before the 12th day after the date the electric bill is issued.
- 3. If advance written notice of the proposed interruption is delivered to the tenant by mail or hand delivery separately from any other written content.
- 4. If the landlord, at the same time the service is interrupted, hand delivers or places on the tenant's front door written notice.

If a landlord or their agent unlawfully interrupts or causes the interruption of utilities, as stipulated above, the tenant may (1) either "recover possession of the premises or terminate the lease" (2) and "recover from the landlord an amount equal to the sum of the tenant's actual damages, one month's rent plus \$1,000, reasonable attorney's fees, and court costs," minus any "delinquent rents or other sums" that the tenant owes the landlord. It is important to note that landlords cannot insulate themselves from liability by including lease provisions that waive the tenant's right to complain or exempts their duties as a landlord. Any such provision is void as a matter of law.

CONSTRUCTIVE EVICTION BY STATUTE: REMOVAL OF PROPERTY AND EXCLUSION OF TENANT BY LANDLORD

Under § 92.008(a), a landlord may not remove doors, windows, attic hatchways, furniture, appliances, or fixtures "furnished by the landlord from premises leased to a tenant unless the landlord removes the item for a bona fide repair or replacement." Even if a landlord duly removes these items for bona fide repair or replacement, the repair or replacement "must be promptly performed."

Separately, a landlord "may not intentionally prevent a tenant from entering the leased premises except by judicial process" unless the exclusion results from

- 1. bona fide repairs, construction, or emergency;
- 2. removing the contents of premises abandoned by a tenant; or
- 3. changing the door locks on the door to the tenant's individual unit of a tenant who is delinquent in paying at least part of the rent.

As described above, a landlord may change the door locks if the tenant is delinquent in paying rent. However, a landlord must preserve the right to change locks for tenant nonpayment in the lease and provide written notice to the tenant.

If a landlord violates this section as stipulated above, the tenant may (1) either "recover possession of the premises or terminate the lease" (2) and "recover from the landlord a civil penalty of one month's rent plus \$1,000, actual damages, court costs, and reasonable attorney's fees in an action to recover property damages, actual expenses, or civil

penalties," minus any "delinquent rent or other sums for which the tenant is liable to the landlord." It is important to note that landlords cannot insulate themselves from liability by including lease provisions that waive the tenant's right to complain or exempts their duties as a landlord. Any such provision is void as a matter of law.

HOW DOES CONSTRUCTIVE EVICTION WORK UNDER TEXAS CASE LAW?

The majority of legal authority concerning constructive eviction in Texas comes from case law. Unlike the Texas Property Code, commercial tenants may assert constructive eviction claims under common law. The four basic common law elements of constructive eviction are as follows:

- 1. The landlord must intend that the tenant no longer enjoy the premises.
- 2. The landlord or those acting under the landlord's authority or with the landlord's permission must commit a material act or omission that substantially interferes with the use and enjoyment of the premises for which they are let.
- 3. The act or omission must permanently deprive the tenant of the use and enjoyment of the premises. And
- 4. The tenant must abandon the premises within a reasonable time after the act or omission.

The following subsections will sequentially discuss each above-stated element of constructive eviction in further detail. As a preliminary matter, the following subsections will focus on the application of constructive eviction doctrine to commercial tenants. If you have any further questions regarding any of these individual elements, or constructive eviction more generally, please let me know.

ELEMENTS OF CONSTRUCTIVE EVICTION: LANDLORD INTENT

To succeed in a constructive eviction action the tenant must first demonstrate that the landlord intended that tenant to no longer enjoy the premises. Evidence of landlord intent may be inferred from the circumstances. For example:

- 1. In *Tex. Architectural Aggregate, Inc. v. ACM-Texas, LLC*, the court found that a wrongful detainer claim by the landlord against a commercial tenant sufficed as evidence of intent.
- 2. In *Lazell v. Stone*, the court found inferred landlord intent by "the combination of appellant's changing the locks on the Premises and informing appellee that [the commercial tenant] was no longer welcome on the Premises."
- 3. In *Columbia/HCA of Hous. v. Tea Cake French Bakery & Tea Room*, the court found intent where the landlord expressed a desire for the commercial tenants to relinquish their lease and relocate, offering to pay for relocation costs.

If you don't pay your exorcist, do you get repossessed?

In short, a landlord’s intention that the tenant should no longer enjoy the premises does not need to be explicit to satisfy this element.

ELEMENTS OF CONSTRUCTIVE EVICTION: SUBSTANTIAL INTERFERENCE WITH USE AND ENJOYMENT

The third element of a constructive eviction claim centers on whether the landlord, or those acting under their authority, committed a material act or omission that substantially interfered with the use and enjoyment of the premises for the purpose for which they were let. For example:

1. In *Holmes v. P.K. Pipe & Tubing, Inc.*, the court recognized a landlord’s silence concerning the existence of a waste disposal site, which “rendered the leased premises unsuitable for the purpose of pipe and equipment storage,” as materially interfering with the commercial tenant’s enjoyment and use of the premises.

• The presence of waste at the site prevented P.K. Pipe from working the pipe and from moving pipe freely onto and off of the property as contemplated by the express terms of the lease.

2. In *Charalambous v. Jean Lafitte Corp.*, the court recognized substantial interference when the landlord “[changed] the locks and effectively [prevented] the [tenants] from carrying on their business[.]”

3. In *Downtown Realty, Inc. v. 509 Tremont Bldg., Inc.*, the court recognized a landlord’s failure to repair the heating and air conditioning as “sufficiently material to constitute constructive eviction in a commercial context.”

ELEMENTS OF CONSTRUCTIVE EVICTION: PERMANENT DEPRIVATION OF USE AND ENJOYMENT

The third element of a constructive eviction claim centers on whether the landlord’s act permanently deprived the tenant of their use and enjoyment of the premises. Whether a tenant is “permanently deprived” largely depends upon the facts and circumstances of the case. For example:

1. In *Fid. Mut. Life Ins. Co. V. Kaminsky*, the court found that a landlord’s failure to prohibit the entry of protestors into tenant’s rented property, used as a medical office, permanently deprived the tenant of their use of the property. The court’s holding hinged largely on the fact that many of the tenant’s clients were unable to enter the property due to the protestors. In other words, the landlord’s omission resulted in patients’ lack of access to the office of a practicing physician, establishing a permanent deprivation of the use and enjoyment of the premises for its leased purpose “for the practice of medicine.”

2. In *Daftary v. Prestonwood Mkt, Square, Ltd.*, the court found that a landlord’s failure to address persistent noise generated by a neighbor—also a lessee of the landlord—permanently deprived the tenant, a dentistry practice, of the use and enjoyment of the premises for its intended use.

ELEMENTS OF CONSTRUCTIVE EVICTION: TENANT ABANDONMENT

The final element of a successful constructive eviction claim centers on whether the tenant abandoned the premises within a reasonable time after the landlord’s intentional, interfering act. As

a preliminary matter, it is important to clarify that Texas law does not recognize any specific time period as constituting a reasonable time. Rather, what constitutes a “reasonable time” depends on the facts and circumstances of the case, as well as expert testimony. For example:

1. In *Daftary v. Prestonwood Mkt, Square, Ltd.*, the court found there to be a genuine issue of material fact as to whether a dentist office had abandoned the premises within a reasonable time following a landlord’s failure to address persistent noise concerns. The court based their judgment in part on the testimony of an expert, who “advise[d] doctors and dentists to expect such a move to take from twelve to eighteen months.” Because the tenants in the case took 13 months to abandon their lease following the triggering acts, the court found that the trial court had abused their discretion in finding that their abandoning of the property did not fall within a reasonable time.

It is also necessary to establish causation, as courts will only recognize the abandonment requirement if the tenant “offer[s] evidence that the premises was abandoned because of the complained-of condition.” For example:

2. In *Joseph Kemp & KRR HH Retail, LLC v. Subrina Brenham & Subrina’s Tax Servs.*, the court found that the plaintiff failed to establish that they had abandoned the property “as a direct consequence of the triggering acts.” The court refused to infer causation even when it was clear that, otherwise, the landlord’s actions had substantially interfered with the tenant’s ability to use and enjoy the property. However, this case is an outlier because the court found that the tenant was a holdover who had unlawfully remained on the premises after her lease’s expiration. In other words, the court refused to recognize constructive eviction because there was no existing landlord-tenant relationship between the parties and no showing of causation with respect to abandonment. Nonetheless, this case is important because it highlights the need to link abandonment by the tenant directly to the landlord’s triggering actions.

CONCLUSION

Under common law, constructive eviction is an (1) intentional (2) act or omission of the landlord, or those acting under its authority, that (3) permanently deprives the tenant of the use and beneficial enjoyment of the demised premises or any substantial part of the premises and (4) consequently brings about an abandonment of the premises by the tenant. Constructive eviction is also recognized as a statutory cause of action under the Texas Property Code, specifically when either (1) the landlord interrupts a tenant’s utilities or (2) removes fixtures, furniture, and other property from the leased premises or excludes the tenant themselves from entering. It is important to re-clarify that constructive eviction under the Texas Property Code’s applies to residential leases, while the constructive eviction under common law applies to commercial and residential leases alike. In either case, there must be an existing landlord-tenant relationship. ■

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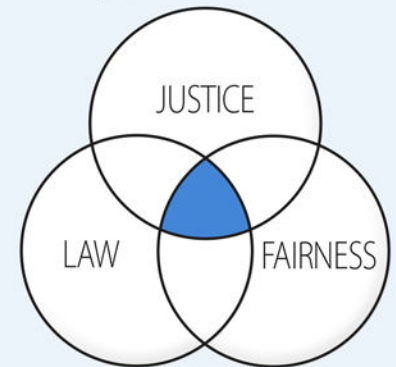


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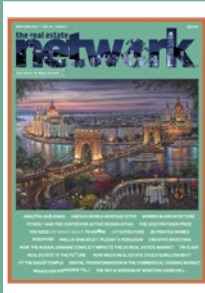
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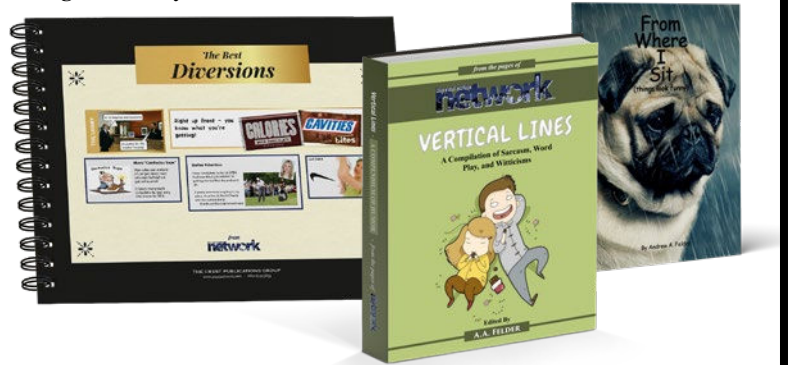
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