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Politics and Commercial Law – Trump’s Immigration Stance as Constructive Eviction?

By: David Lee Tayman*

For all the talk of big money and big business and their role in national politics, it’s actually relatively rare for national political issues to intersect with the mundane world of commercial law. That changed last week when a development entity controlled by (and named after) Donald Trump, the poll-leading republican presidential candidate and reality TV star, filed suit against entities controlled by D.C.’s own celebrity chef, José Andrés.

The case, Trump Old Post Office LLC v. Topo Atrio LLC and ThinkFoodGroup LLC, Case No. 15-1238 in the U.S. District Court for the District of Columbia, stems from Trump’s redevelopment of the Old Post Office Pavilion, a Washington, D.C. landmark, into a luxury hotel and conference center. As people familiar with the D.C. business community will likely recall, in November 2014, the Trump organization announced that it had entered into an agreement with world renowned chef José Andrés, pursuant to which Andrés would enter into a sublease for close to 10,000 square feet for the development of a “flagship restaurant” in the “Grand Cortile” of the Old Post Office Pavilion. In short, Andrés’ restaurant was to be a focal point and a key component of Trump’s luxury re-development of the Old Post Office Pavilion.

As is often the case with business relationships, this one seems to have started on a rosy-enough basis – the complaint quotes José Andrés as saying, in the January 2015 press release announcing the deal, that he has “long respected Donald Trump for his business acumen and [I] am proud to partner with him to create a truly remarkable, fine dining restaurant in the city I have called home for many years, right in the heart of the historic Post Office.” Andrés’ restaurant entity, Topo Atrio LLC, was to commence building out its restaurant space, pursuant to a sublease between the parties and, by the end of June 2015, was to submit documents to Trump Old Post Office LLC indicating that the build out was 90% complete. According to the Complaint, however, that never happened.

Instead, on July 8, 2015, the Washington Post quoted Andrés, who emigrated from Spain and became a U.S. citizen in 2013, stating that it was impossible for Andrés or his company to open his restaurant given Trump’s statements with respect to illegal immigration made during Trump’s June 16, 2015 presidential campaign announcement speech. Shortly thereafter, the relationship and the deal between the two men spiraled further downward, as Trump’s organization sent a notice of default to Topo Atrio LLC for failure to tender the 90% completion documents. Two days later, Topo Atrio LLC countered that the Trump organization had constructively evicted Topo Atrio through Trump’s statements and demanding that Trump recant those statements and somehow ensure that those statements “not be repeated, restated, or further disseminated.” Two days after that, the Trump organization rejected Topo Atrio LLC’s default notice because, among other things, Donald Trump himself was not a party to the sublease.

Topo Atrio LLC then sent a notice of termination of the sublease. On that same day, the Trump organization fired back with a denial that the tenant had a right under the sublease to terminate and giving Topo Atrio LLC until July 30, 2015 to tender the required 90% completion documents. When that did not occur, on July 31, 2015, the Trump organization sent a notice exercising its right to terminate and cancel the sublease. The Complaint was filed that same day.

Trump Old Post Office Pavilion LLC is suing Topo Atrio LLC, as the principal obligor under the sublease, and ThinkFoodGroup LLC, as guarantor, on three discrete counts: (i) Breach of the sublease; (ii) enforcement of the guarantee; and (iii) attorneys’ fees. Under its breach of sublease count, the Trump organization is seeking lost rent (defined to include base rent, percentage rent, and additional rent) and damages related to the “reprogramming” of the space to be occupied by Andrés’ restaurant. The complaint does not quote the rent provision of the sublease so it is not clear whether the Trump organization is alleging that termination caused the acceleration of all rents due through the full term of the sublease (a typical commercial lease provision). These damages are “in an amount to be proven at trial” but are estimated to exceed \$10 million. By the guarantee count, the Trump organization is seeking to tag ThinkFoodGroup LLC with full liability for all damages due under the sublease. Under the attorneys’ fee count, the Trump organization has isolated and is pleading separately the attorneys’ fee provision in the sublease.

Andrés has not yet responded to the Trump organization’s complaint (nor is he required to at this point), so this article is based on the court filing of only one side of the dispute. That being said, however, and with acknowledgement that there is at least a second side to every story, it appears that Trump’s claims against Andrés stand on a solid legal foundation while Andrés’ position ventures into uncharted legal territory. A brief search of precedent, both within the District of Columbia and elsewhere, failed to reveal even a single instance of a court finding constructive eviction caused by the public words of a nonparty to the transaction, even when the offending nonparty is a principal/affiliate of a party. Moreover, Trump’s comments on illegal immigration, objectionable or not, were political speech, protected by the First Amendment. While I might change my mind after I read Andrés response, at this point I would advise him to get back to what he knows best – building great restaurants – and to choose his business partners carefully.

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