

SAN LUIS OBISPO COLLEGE OF LAW

Real Property

Midterm Examination

Fall 2020

Prof. C. Lewi

Instructions:

There are three (3) questions in this examination. You will be given four (4) hours to complete the examination.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and facts upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other. Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles; instead, try to demonstrate your proficiency in using and applying them. If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions and discuss all points thoroughly. Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

1 REAL PROPERTY

Professor Christopher C. Lewi

SLO College of Law

Midterm, Fall 2020

Question 1

In 2007, Able inherited Blackacre, a 5-acre parcel of undeveloped real property on the outskirts of town. The public had used Blackacre as a dumping grounds for many years, depositing trash and other refuse all over the property. Able never visited Blackacre after he inherited it, or ever had knowledge of its condition.

In 2009, Able had a traumatic brain injury which left Able incompetent to manage his own affairs as declared by his treating physician. This was not a matter of public knowledge, there were no physical signs of Able's brain injury, and on any given day it may be difficult for someone who did not know Able to reasonably determine that Able was "incompetent." The doctor's declaration of incompetency remained in place at all material times.

In 2010, Charles began leaving his trash on Blackacre every week, and he continued to do so to present. Also, on a monthly basis in 2010, Charles began sifting through the refuse left by others on Blackacre, removing items he found, and selling those items from his home on the internet. He also began making separate piles on Blackacre of different types of refuse for later sale, and he continued that practice to present.

In 2011, Charles began to sell items from a table he found on Blackacre. He set up the table in the middle of Blackacre so anyone coming onto the property to dump refuse would be able to see him, though the table was not visible from the adjacent public street. He manned the table every weekend between 9:00 a.m. and 2:00 p.m., and has continued that routine up until present.

In 2012, Charles posted "Keep Out" signs at all entrances onto Blackacre. That same year, he began telling people, "Get off my property," if he caught them depositing refuse he did not want, and but said nothing if they were depositing refuse he wanted.

In 2014, Charles placed a large sign at the front of Blackacre, facing a public street, that read "Charles' Treasures for Sale."

In 2020, Able (more accurately Able's legal guardian) sold Blackacre to David.

Assume this jurisdiction has a 5-year statute for ownership of real property by adverse possession. Assume further that this jurisdiction has a 4 year "disability" statute for purposes of tolling the applicable statute of limitations.

Discuss the rights of Charles and David under the theory of acquisition of Blackacre by adverse possession (ignore any claim by David against Able).

Question 2

Acme is the owner of a multi-story commercial building.

On January 1, 2018, BankCorp, a bank ("Bank"), began leasing the first floor of the building from Acme on a 10-year written lease for \$3.00 per square foot per month, total of 5,000 sq.ft. of space leased. The lease provides that Bank's employees and customers have the right to use a common area in the central lobby of the building to access Bank's offices during business hours. The lease also provides that Acme will provide 10 onsite parking spaces for Bank's customers.

On July 1, 2019, Acme began to renovate the building, with an anticipated completion date of December 31, 2020.

The renovation creates noise and the occasional, unannounced disruption of electrical service to the entire building for about an hour at a time, sometimes during business hours and mostly at off-hours times, *e.g.*, 1:00 am to 2:00 am so as to avoid as much disruption as possible; still, in today's "24/7, 365" business environment, dependent on the internet and "e" transactions round the clock, losing power does cause a certain amount of disruption to Bank, even in the off-hours (*e.g.*, the servers and routers are turned off and often have to reboot, which does not always go well.) The renovation also prevents the use of six of Bank's parking spaces.

Since September 1, 2019, the central lobby has been inaccessible, and Bank's employees and customers have to use an unmarked side entrance to the building to access Bank's offices, which they can do safely in all weathers and at all necessary times.

On October 1, 2020, Bank moved out of the front half its leased space to another building, where it is leasing space at \$4.00 per square foot. Bank has only paid half of its rent to Acme since September 1, 2019.

We are in California applying California law. What claims and defenses might Acme and Bank assert against one another in an eviction proceeding (ignore any issue about notice prior to commencement of suit)?

Question 3

Oliver, owned Blackacre, a parcel of real property. At his ninetieth birthday party Oliver had a reunion with his niece, Alice, with whom he had had no contact in over 60 years. At the party, Alice told him of her fond memories of spending her childhood at Blackacre. Also at the party, Oliver told many people he expected “a bolt from above” to come for him at any moment due to his age.

The following day, Oliver decided to give Blackacre to Alice. So, he executed a deed that named himself as grantor and Alice as grantee, and designated Blackacre as the property being conveyed and he delivered the deed to Alice. Oliver’s signature was notarized.

Oliver told Alice that he, Oliver, wanted to live on the property until he died so he instructed Alice not to record the deed until he, Oliver died. Alice did as Oliver asked.

Oliver remained living at the property; Alice did not move in and to all the world its looked like nothing had changed.

Six months later, Oliver sold Blackacre to Brian Fred Parker (“Brian”) for fair market value and Brian recorded the deed from Oliver to Brian in due course.

Six months after that, Oliver died and Alice got word of Oliver’s death; she then recorded her deed and tried to move onto Blackacre only to find that Brian had already moved in.

Blackacre is located in California and a “race-notice” recording statute is the rule in the jurisdiction.

Alice goes to see you, her lawyer, and asks to be advised as her rights against Brian and Oliver. Advise.

REAL PROPERTY
Professor Christopher C. Lewi /KMcCarthy
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Midterm, Fall 2020

Question 1 Issue Outline (Adverse Possession)

(Many facts crossover in the analysis of the elements, but must be addressed in relation to the particular element (e.g. fact of possession may also be fact for continuity of use)

- ⌘ Actual Possession
 - o Was Charles using land as an owner might? Undeveloped? Better use than mere dumping ground? Preventing unwanted disposal?
 - o Keeping out trespassers/ asserting control to the public / organizing garbage (recall case about manure piles)
 - o Fencing (lack thereof) or substantial improvements (lack thereof) not determinative.
- ⌘ Exclusive Possession
 - o Timeline come into play here
 - o No concurrent use by public or owner
 - o Charles begins excluding people – gives ostensible permission only to those he wants to leave garbage
 - o What about during weekdays/was public still dumping/is that determinative?
- ⌘ Open / Notorious
 - o Go through timeline of increasing use
 - o When likely noticeable to owner – e.g. when piles appeared? Selling items offsite on net likely not enough?
 - o Table in center of property – would owner notice (table already rubbish), not visible from street but visible to trespassers who may think he's owner
- ⌘ Hostile (little analysis, but issue must be noted)
 - o Facts indicate Charles had no permission
 - o Able's lack of inspection/knowledge irrelevant – trespass is per se hostile
- ⌘ Continuity of Use
 - o Student needs to particularly focus on the timeline here, to walk through when "possession" may have occurred, and when trespass had not yet amounted to "possession"
 - o If student analyzes last, easier for student to incorporate prior

analyses, much of the above will merely be rehashed into a timeline

- ⌘ Tacking (little analysis, but issue must be noted)
 - (Conceptual subset of continuity of use.)
 - Tacking of prior time as against subsequent purchaser – statute continues to run after sale to David

- Disability Statute – Tolling of Statute of limitations
 - ⌘ If we assume Able is incompetent, statute does not begin to run until 2014 – 4 years after Charles began his occupation
 - Able is not necessarily “incompetent” for these purposes because not necessarily reasonably apparent to a reasonable person’s observation
 - ⌘ if not incompetent, no tolling at all
 - However, better conclusion is the doctor’s declaration of incompetency will prevail
 - ⌘ how would an adverse possessor know in any case the competency or lack thereof of the true owner?
 - ⌘ policy behind AP does not really require that the true Owner’s incompetency be common knowledge or apparent.
 - ⌘ If we assume tolling, then AP does not start until and must run until 2019 to ripen
 - did it?
 - see above analysis but if one concludes that Charles actions qualify as adverse possession, then he would have been in possession for 5 continuous years by 2019

REAL PROPERTY
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SLO/KCCL
Midterm, Fall 2020

Question 2 Issue Outline (Landlord/Tenant)

- ⌘ Identify type of tenancy: tenancy for years.
 - ⌘ also, commercial lease, so no issues of Breach of the Warranty of Habitability under California law
 - ⌘ much more a pure contract analysis
- ⌘ Breach of Covenant to Pay Rent as LL's Basis for Eviction (little analysis)
 - o Bank breached covenant by not paying full amount
 - o Tenant almost always must pay rent unless there is some good cause excuse, which, of course, what this problem is all about
 - o Past due rent / future rent is offset against mitigated damages
- Breach Of The Covenant Of Quiet Enjoyment – Defense to Eviction
 - o Substantial interference with use/enjoyment by LL?
Temporary? Reasonable in large commercial building?
 - o Parking spots – really a problem for bank? Drive up customers common? Local offsite parking? Not really enough here to say one way or another.
 - o Discussion of how renovation more than a mere inconvenience, e.g. modern bank needs electricity.
 - o Cumulative effects – totality of circumstances – occasional interferences add up
- ⌘ Constructive eviction (defense subset of Quiet Enjoyment)
 - o Abatement of rent for inability to use/partial constructive eviction of leased premises? Differing jurisdictional views
 - o Bank claim for difference in rent from \$3.00/sqft to \$4.00/sqft.
 - o For extra credit: Student will “do the numbers”:
 - ⌘ 15,000 sqft @ \$3.00/sqft = \$45,000/mo rent
 - ⌘ 10 years at \$45,000/month = \$5.4 million full rent obligation . . . a lot of money
 - ⌘ But
 - ⌘ Bank stopped paying full rent 1.5 years into lease and now only is paying \$22,500/month to LL

§
§
§ \$22,500/month @ 8.5 years (102 months) = \$2,295,000
that Bank will not pay LL at current practice – Wow, a lot of
money.

§
§
§ Bank also will claim an offset at \$1.00/sqft @ 7,500 sq ft
which equals \$795,000 over 8.33 years (99 mos @
\$7500/mo = \$742,500)

§
§
§ So, if one accepts that there was a breach of quiet
enjoyment, Bank will say that at worst it has failed to pay an
adjusted \$1,552,500 (\$2,295,000 less \$742,500) over the
term of the lease, and, more to the point that it does not owe
Bank anything and. . .

§
§
§ If one accepts that on these facts there was a constructive
eviction, then Bank owes nothing and if fact LL owes Bank
\$742,500

§
§ LL, of course will want all of the \$2,295,000

⋈ Subject to Bank's duty to mitigate by finding new
tenant

§
§ Sounds like a case to settle

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Midterm, Fall 2020
Question 3

Question 3 Issue Outline (Gift and Bona Fide Purchaser)

Gift to Alice of Blackacre – YES:

1. Present Donative Intent from Oliver to Alice?
Yes; we do not really have to guess at this one
2. Delivery to Alice?
Yes, the deed – which is a great way to deliver real property – was handed from Oliver to Alice.
3. Acceptance by Alice?
Yes; one, it is presumed, especially with land; and two, Alice did accept

What Was Given to Alice? FSA or Fee Simple Subject to a Life Estate?

-Land deal, so needs a writing and the deed said nothing about a life estate.

-But, intent of parties was for Oliver to preserve a life estate and that is probably the better argument here.

Alice Does Not Record Deed Until After Oliver sells at FMV to Brian and Brian Records – Brian has better Title on these facts.

- As between Alice and O, there is no issue – Alice has title, either in FSA or subject to life estate but in either case Alice has title.
- But what about Brian?

-Brian is a BFP

-FMV

-No facts to suggest that Brian is anything other than a 3rd party to Oliver who paid FMV.

-Notice to Brian of Alice's Deed?

-Alice did not record, so there is no "notice" to Brian of that prior deed so Brian takes clean title

-unless Alice can show that Brian had actual notice of her deed prior but there are no facts to suggest that this is so.

-Oliver still living there as if it was

his property and record title had Oliver, presumably, on title, which is what Brian would have seen in his title searches and on his physical inspection of Blackacre.

Alice Rights Against Oliver and Oliver's Estate:

- Alice may have recourse against Oliver (Oliver's estate since Oliver is dead) for Oliver's improper and unauthorized selling out Alice's title to Brian.
- Purchase price paid by Brian to Oliver paid to Alice is one possible remedy

1)

CHARLES

ADVERSE POSSESSION: There is an issue here as to whether Charles has obtained ownership of Blackacre through adverse possession.

To acquire property by adverse possession, the possessor must show an actual entry giving exclusive possession, that is open and notorious, hostile, meaning adverse to the original property owner's claim of right, and continuous throughout the statutory period.

Actual Entry and Exclusive possession

The requirement of actual possession is designed to give the true owner notice that trespass is occurring. Generally, the adverse possessor will gain title to only the land that she occupies. Exclusive possession means that the possessor is not sharing the land with the true owner or the public.

Here, Charles made actual entry to Blackacre that was originally owned by Able. However, the public was using the property as a dumping site for many years, and this was known by many of the public. Because of this, Charles' "exclusive possession" did not likely start until 2011 or 2012, when he began acting as the true owner. In 2011, when Charles began operating a clearly visible table on the premises and this would likely give anyone who entered the property notice that Charles had some possessory right over the property. and that he was the exclusive owner. However, there is a point of contention as to this issue because in 2012 when Charles began posting "Keep Out" signs and telling people to "get off of his property", he also permissively allowed the public to continue to use it. Charles would contend that this use was specific to his possessory interest in the land, while Able or David would argue that this was not exclusive possession as he was sharing the land with the public at large.

Adverse possession is typically reserved to the portion of land the adverse possessor maintains control over. Charles operated a table at the premises while also using large

portions of the property to stack different types of materials, so it is likely that he was using the entirety of the 5 acres to do so.

Open and Notorious

Possession is deemed to be open and notorious when it is the kind of use that an owner would typically make of the land. The adverse possessor's occupation must be sufficiently apparent as to put the true owner on notice that trespass is occurring.

Charles' possession of Blackacre was likely open and notorious either when he began posting keep out signs and informing people it was his property, (though this is arguable based on the permissive use stated above) or when he posted a the "Charles' Treasures" sign. Charles had a table and booth that was clear to anyone who entered the property, however, the point of contention here would be that it was not visible from the street that Charles was exercising possessory rights over the land. One had to enter the land in order to observe this activity.

Hostile

To be hostile, the adverse possessor must enter the property without the owner's permission. However, even permissive use can become "hostile" if the possessor makes clear to the owner that he intends to interfere with their possessory interest.

Charles' possession of the land was hostile because it interfered with the possessory rights of Able to the land. Able had inherited this parcel of land and had exclusive claim of right to it. Charles was arguably allowing waste to occur on the property, as well as seeking to claim the property to himself, so his occupation of the land was indeed hostile.

Continuous Throughout the Statutory Period

The adverse possession must meet the above requirements and be continuous throughout the statute of limitations in that jurisdiction. Here, the statute of limitations for the perfection of an adverse possession claim is 5 years.

Charles has had continuous use of the property since 2010. However, his exclusive possession did not likely start until he began to act as the true owner by posting Keep Out signs and presenting himself to the general public as the true owner of the property.

Because the property was sold to David in 2020, this would fall inside the required statute of limitations for this district, as Charles' adverse possession arguably continued for 8 years.

The Effect of Able's "Incapacity"

When a land owner is considered to be unable to manage his own affairs, most states have tolling statutes that temporarily halt the statute of limitations on any adverse possession. In this jurisdiction the tolling statute for "disability" is 4 years.

Here, Able was deemed incompetent and was incompetent during all material times of the events that occurred. Although no one was actively aware of this incompetency, the tolling statutes would still affect adverse possession and the requirements of the statute of limitations. The tolling statute in this case would go into effect once the period of adverse possession began. If the court determined that the adverse possession period did not begin until 2012, when the "Keep Out" signs were put up, the four years of tolling would cause the adverse possession to fail. However, if the court determined that the adverse possession began in 2010 or 2011, when Charles began making profit off the property and moving piles around, he would succeed in his adverse possession claim.

Conclusion

Because the court would likely determine that Charles did not start his possession until 2012, the tolling statute would bar him from perfecting his adverse possession claim beyond the the statute of limitations.

DAVID

RECORDING STATUTES

In 2020, Able's legal guardian, assumed to have power of attorney, sold Blackacre to David. If Charles was determined to have perfected his adverse possession claim, this would raise an issue as to the recording statute of the jurisdiction. Recording statutes are in place for clarity of title so that buyers, sellers, and lenders are assured of the marketability of title. Because no recording statute is mentioned in the facts, all scenarios will be discussed.

Notice

Recording statutes are based on the timing of the recording as well as the notice that any subsequent purchasers. Notice can be charged in three ways. (1) Actual notice, meaning they were told, saw, or made aware that there was a potential encumbrance of ownership, (2) constructive notice, meaning they found out through the grantor-grantees office or other recording, or (3) inquiry notice, in which a reasonable inquiry would have shown an an encumbrance or adverse interest.

Pure Race Jurisdiction

A pure race jurisdiction is based on the common law doctrine of first in time, first in right. In such a jurisdiction, the first person to record claim of title to the land prevails.

In a pure race jurisdiction, David would prevail over Charles regardless of any notice he had as to Charles' adverse possession claim.

Pure Notice Jurisdiction

A pure notice jurisdiction protects later purchasers who did not have notice of the prior interest, either through actual notice, public records notice, or otherwise.

Here, because David is a bonafide purchaser, meaning he paid value for the land and took possession without prior notice of any other possessory interests, he would be protected from previous unrecorded possessors if he did not have notice. There is no evidence that David had actual notice or constructive notice of Charles' presence on the property. Charles would argue that a reasonable inquiry would have shown that he was possessing the property, as he had posted keep out signs and told people to get off. David would argue that an inspection of the property would show nothing more than vast piles of junk and a gang of dregs, druggies, dumpster divers and derelicts. Charles would also point to his large sign that said Charles' Treasures, but it is not likely that Charles would succeed in this argument, as there were no noticeable improvements made to the land other than the sign, and someone who was unaware would not likely realize the reasoning for Charles' strategic crap-stacking.

Race-Notice Jurisdiction

Race Notice acts are the most common of the recording statutes. Here, the subsequent bonafide purchaser is protected against prior recorded instruments if they are (1) without notice of the prior instrument, and (2) records before the prior instrument was recorded.

Here, if David had no notice of Charles' possessory interest in Blackacre, and recorded his instrument, for the reasons discussed above, David would prevail.

FINAL CONCLUSION

David is the owner of Blackacre

This I also know:

Prevailing party will get attorneys fees under the lease:

In an action to determine possession of real property, the clearly prevailing party may be granted attorney's fees. However, when the prevailing party is determined under close circumstances or there is not a clear bad-faith or good-faith party, or if it is determined that both parties had an arguable claim, the court may consider it a push, therefore awarding attorney fees to neither party and not calculating that into the judgement,

END OF EXAM

2)

COMMERCIAL LEASEHOLD

A leasehold is an estate in land under which a tenant holds a present possessory interest and the landlord retains a reversion.

Tenancy for Years

A tenancy for years is generally a written agreement (subject to the statute of frauds if it is for a year or more) creating a leasehold for a fixed period of time. It ends automatically at the termination date. A tenancy for years may be surrendered prior to that time if the tenant surrenders possession and the landlord accepts; generally requires the same formalities used to create the initial lease, i.e. in writing.

BankCorp signed a 10-year written lease with Acme on January 1, 2018 to rent 5,000 square feet of space on the first floor of Acme's multi-story commercial building. They agreed to pay \$3 per square foot per month, for a total monthly payment of \$15,000. In addition, Bank has the right to use public spaces for its employees and customers including the central lobby and 10 onsite parking spaces.

Unless Bank surrenders and Acme accepts, Bank must pay Acme \$15,000 every month for 10 years, or \$1.8 million dollars over the full term of the lease. Under the majority view, if Bank abandons their tenancy prior to December 31, 2027, Acme has a duty to mitigate its losses by finding another tenant. Bank may be responsible for the difference between the rent it promised to pay and the rent Acme is able to obtain from a subsequent tenant.

On October 1, 2020, Bank moved out of the front half of its leased space, reducing its footprint to about 2,500 square foot. It is renting space in another building instead. There are no facts to suggest however that Acme accepted the surrender.

Covenants

Certain covenants are implied on both sides in a leasehold agreement. Furthermore additional covenants may be written into the lease. In a commercial lease, the tenant's duties include paying rent, not committing waste, not using the premises for illegal

purposes, repairing and maintaining against ordinary wear and tear. The landlord must delivery possession of the premises and ensure that the tenant's quiet enjoyment is not breached by actual or partial eviction.

In this case, there are no facts to suggest that Bank has failed to maintain the property, committed waste, or used the property for an illegal purpose. However Bank has only paid half its rent to Acme since September 1, 2019. Acme has provided possession of the premises to Bank, but has potentially breached the covenant of quiet enjoyment by failing to provide four of the parking spaces it rents to Bank and well as use of the common lobby area.

EVICTON PROCEEDING

Unlawful Detainer

Unlawful detainer is a legal action to evict a tenant for breach of a lease. It requires the tenant to forfeit the lease, surrender the property, and pay rent owed as well as other damages. In California, a series of new laws that went into effect in 2020 have significantly changed the way unlawful detainer actions operate for residential properties.

Because Bank has only paid half its rent to Acme since September 1, 2019, Bank has violated the tenant's duty to pay rent and therefore breached its lease. Acme can commence an unlawful detainer action against Bank. Any breaches of Acme's covenants will function as defenses for Bank during the unlawful detainer suit. Because the lease is commercial, Bank does not benefit from any of California's increased protections for residential renters.

Conclusion

If Acme prevails, Bank will be required to vacate the premises, pay some or all of the back rent it owes, and possibly pay some or all of the rent outstanding on the remainder of its 10 year lease. Acme's recovery may be reduced by the amount of Bank's successful counterclaim, if any, for its own breach of Bank's quiet enjoyment of the premises.

ACME V. BANK

Failure to Pay Rent

A tenant's duty to pay rent continues until the leasehold is surrendered and the landlord accepts the surrender. Traditionally, covenants in leases were severable and breach of one did not relieve the opposing party of the duty to perform. Modernly, most states permit a landlord to terminate a lease for failure to pay rent. In California, a tenant who has failed to pay rent may be given a 3-day notice to pay rent or quit. Failure to either pay rent or surrender the premises following such a notice gives rise to the landlord's cause of action for unlawful detainer. A tenant whose leasehold for a term of years terminates early is generally liable for the remaining rent, less landlord's mitigated damages by reletting the premises.

On September 1, 2019, after the central lobby became inaccessible, Bank began paying Acme only half its rent. Bank's breach of the tenant's covenant to pay rent is grounds for Acme to terminate the lease and evict Bank. If they are successful, Bank will be required to pay not only the \$90,000 it failed to pay between September 1, 2019 and October 1, 2020, but they may also be required to pay the difference between the remaining rent owed on their ten year lease and whatever profit Acme makes from reletting the space after Bank has been evicted.

Conclusion

Bank's failure to pay rent is grounds for termination of its lease. Acme must serve Bank with a 3-day notice quit. If Bank does not pay the back rent due or surrender the premises and forfeit its lease, Acme can initiate an unlawful detainer proceeding. Regardless, Bank is still liable to Acme for some, if not all, of the remaining rent under its 10 year lease agreement.

BANK V. ACME

Breach of Quiet Enjoyment

The landlord's duty to ensure tenant's quiet enjoyment of the premises may be breached by actual or partial eviction. In either case, if the landlord's actions prohibit the tenant from enjoying exclusive possession of all or part of the premises, the obligation to pay rent is terminated. Partial eviction by a third party may result in a prorated rent for the reasonable value of the portion retained. In an unlawful detainer action, breach of quiet enjoyment operates as a tenant's defense for nonpayment of rent.

Acme began to renovate the building on July 1, 2019, six months after Bank moved in. They planned to complete the renovation on December 31, 2020, 18 months later. The renovations are not taking place inside Bank's leasehold, however they create noise and disruption of electrical services. Starting September 1, 2019, the renovations also prevent Bank's customers from using 6 of its 10 parking spaces and their employees and customers have been forced to use a small side entrance instead of the central shared lobby.

Bank will argue that it leased the space in Acme's building for the purpose of conducting public business, which Acme knew when it signed the agreement with Bank. Bank relied on the central lobby, the parking spaces, reliable utility services, and lack of construction noise when it agreed to lease Acme's space. Therefore, Bank's quiet enjoyment of its leasehold has been disturbed by Acme's renovations. If so, Bank is not obligated to pay any rent at all to Acme, at least until quiet use and enjoyment is restored.

Acme will point out, however, that Bank has not been prevented from using any of the 5,000 square feet it is renting from them. The central lobby is a public area, which Bank is allowed to use but is not actually included in Bank's lease as an exclusive space that it has the right to occupy. An alternate entrance has been provided for employees and customers that is safe and usable. The parking spaces may or may not be considered part of Bank's exclusive leasehold.

Acme will also argue that even if Bank was partially evicted due to loss of quiet enjoyment, the construction company it hired is to blame so Bank still needs to pay the appropriate value for the portion of the premises it retains. However, because Acme hired the construction company, its actions are imputed to Acme and Bank will still be relieved of the entire duty to pay rent, if Bank is relieved of the duty at all.

Conclusion

Whether Acme has breached Bank's quiet enjoyment of the leasehold such that Bank's obligation to pay rent is terminated will depend on whether the court finds that Bank had a right to use of the central lobby and parking spaces, and whether the right to uninterrupted power and lack of nearby noise is part of Bank's quiet enjoyment. If Bank's quiet enjoyment of any of its leasehold has been disturbed by the landlord, Bank is relieved, at least temporarily, of the obligation to pay any rent.

Constructive Eviction

When a landlord breaches a duty that substantially and materially deprives tenant of the use and enjoyment of the premises, the tenant, after reasonable notice and opportunity to repair, may vacate the premises, terminate the lease, and sue for damages.

Bank will argue that because its customers have to come in through an unmarked side door, because there is insufficient customer parking, and because interruptions in the power supply are creating issues for its e-transactions and other business, it has been substantially and materially deprived of the use and enjoyment of the premises. Furthermore, Acme had notice that Bank was going to need a suitable commercial lobby for its customers to enter through as well as parking spaces and reliable internet when it signed the lease with Bank.

Therefore, since Bank has vacated the front half of its leased space, it has the right to terminate that portion of its lease and obtain damages in the amount of the extra \$1 per square foot it is renting the new space for. Additional damages for consequential losses, like missed e-transactions or a decline in customer foot traffic may also be appropriate.

Acme will argue that constructive eviction requires complete surrender of the property; Bank only moved out of the front half of its space. Furthermore, there are no facts to suggest that Bank gave Acme notice or opportunity to cure the defect. In fact, Bank moved out on October 1, 2020 after more than a year of renovations, with the end date of December 31, 2020 in sight. There are no facts to suggest that Acme had informed Bank that the renovations were being extended.

Conclusion

Bank has not fully surrendered the premises. Therefore it is unlikely that they can terminate their lease and seek damages, unless the doctrine of constructive eviction can be applied partially, which seems impractical since Acme can hardly relet the other half of the commercial space that Bank is still occupying to a new tenant.

END OF EXAM

2)

Claims and Defenses Of BanckCorp (B) and Acme (A)

What does the lease say?

Here BanckCorp (B) is in a fixed term commercial lease with Acme (A) for a 5,000 sq.ft. office space for 10 years. There is right to use a common area in the central lobby of the building to access the back during business hours, and also provides 10 onsite parking spaces for customers.

Tenant (T) Duties and Landlord (L) Remedies

The T has the duty to pay the rent, not create waste, or use the premises for illegal activity. The L reserves the right to terminate if the T breaches any of the leasehold covenants.

Failure to pay rent/notice

If a T fails to pay rent, the L can start eviction proceedings or can allow the T to remain and sue for rent owed. A L cannot resort to self help measures. A lease where a T has been there for less than a year requires a 30 day notice, and if over a year, a 60 day notice is required.

Here, B has been in the lease for over a year, so a 60 day notice would be needed to evict. CA also has a 3 day cure to notice. A

could start the process for an **actual eviction**, and sue B for remainder of the rent.

Landlord Duties and Tenant Remedies

A L has no duty to repair or maintain the premises, under common law. This has been modified for residential tenancies in most states under the implied warranty of habitability. The L also has a duty to deliver possession and to ensure the covenant of quiet use and enjoyment.

Here, the warrant of habitability does not apply because this is commercial property. However, B may have rights under the covenant of quiet enjoyment (discussed more below.)

Retaliatory Eviction

A T complains about the property, but get evicted within 90-180 days. This is a complete defense to eviction action, except T needs to be current on the rent.

Here, this may not be useful because are not told if T complained to L about the noise and disruption to T's business. Additionally, T is not current on the rent.

Covenant of Quiet Enjoyment

In every lease there is an implied covenant that the T shall have the right of possession, occupancy, and beneficial use of every portion

of the leased premises. The duty is on the L to provide a suitable premises. If the covenant is breached, the T can leave and the lease is over. This covenant may be breached in 3 ways 1) actual eviction, partial eviction, or constructive eviction. The T does not owe any further obligation to the L. It is a complete defense to the T if the covenant is breached. The T can leave or sue for damages.

Here, with all the construction of the renovation, B has had noise, disruption of electrical service for an hour at a time, and non-use of 6 of of there 10 parking spots. The central lobby common area is inaccessible (as a right in the lease), and staff and customers have to go through an unmarked side entrance. As a place of business, electricity and internet are vital to a bank. With routers being turned on and off this would be a huge disruption to the bank's business, and after 3 months of this, it is possible they could loose customers. To any reasonable person or business, this would be an interference in quiet enjoyment.

A may claim this was a renovation to make the building improved and more attractive for B (more improved than what they originally leased), and there was safe passage using the side entrance for staff and customers. Yet, the construction has been going on 3 months already, and is interfering with the purpose of the lease (commercial use for their bank.)

This is a claim B may have against A, as B has partially moved out of the front half of it's lease already.

Constructive Eviction

When a L's breach of duty renders the premises untenable, L must prove 1) L breached duty 2) the breach substantially and materially deprived the tenant of enjoyment and use of premises (flood, no heat) 3) the T gave L notice and reasonable time to repair, and 4) after such reasonable time T vacated the premises. This may be used as a defense in a L's suit for damages or rent.

As discussed above, there is a breach of quiet enjoyment and the breach is so substantial as to justify T abandoning the premises and T not obligated to lay rent as long as he vacates the premises within a reasonable time. L is not keeping the premises as per the lease, suitable for commercial use.

However, we are not told if B has given notice and time for L to repair. Since this is not a defect or damage that needs to be fixed, and rather is a renovation, is there notice to give about repair? B could always complain about how disruptive the renovations have been and give the L time to make better accommodations. B has now needed to move to a more expensive bank location (\$4 per sq ft vs current \$3 sq ft) because of the disruptions, and may have a claim against the L because of the increased expense.

This would be a defense for B in A's suite for damages or rent.

Additional claims/liability of L:

Public Use exception

If the L has a duty to the public. Several conditions need to be met:

- 1) L leases premises to T for use open to the public.
- 2) Defect in question exists at outset of the lease
- 3) L knew or should have known of defect,
- 4) L knew or should have known that T could not reasonably be expected to remedy the defect or guard against injury,
- 5) T didn't know or have reason to know of the defect.

The area is open to the public, but the "defect" did not exist at the outset of the lease. There has not been any injuries, and this may be better suited for a negligence claim.

Common Area Exception

Duty on the L to use reasonable care in keeping a common area safe. Precautions a reasonably prudent person would take.

The commons area is not accessible, as per the lease agreement. The L may have liability in breach of contract here.

END OF EXAM
