And The Defense Wins

Published 5-04-11 by DRI

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DRI members **Robert M. Cavalier** and **Daniel S. Strick** of **Lucas and Cavalier, LLC** successfully argued before the Pennsylvania Superior Court in the matter of *Graeber v. Kapuscinski, et al* and obtained a reversal of the trial court's decision in litigation involving the potential sale of commercial real property located in Philadelphia.

On September 2, 2002, the parties renewed a prior lease agreeing to a new five year term. The property was owned by non-party T.G. Cooper & CO., Inc. Mr. Kapuscinski is the sole shareholder of T.G. Cooper & Co., Inc. In part, the lease provided: "Lessee shall have the option to purchase the entire property at the end of the lease term at the then fair market value." The lease did not provide a method for determining the fair market value. Shortly before the end of the lease term, Graeber attempted to exercise his option to purchase the property for $480,000, which was consistent with an appraisal he received. The appraiser noted the property was industrial in nature. At the time, Graeber had already been advised by Mr. Kapuscinski that T.G. Cooper & Co., Inc. received an offer from an independent third party to purchase the property for an amount exceeding $975,000. Mr. Kapuscinski viewed the offer received from the third party as the then fair market value of the property. Graeber never extended a counter offer. Instead, Graeber filed suit against Mr. and Mrs. Kapuscinski for specific performance, seeking a court order forcing them to sell the property to him.

During the course of litigation, appellants Edward and Patricia Kapuscinski used three different methods to establish the fair market value of the property: (1) an unsolicited written offer received from a third party of $975,000; (2) the listing price from a commercial realtor of $1,000,000; and (3) an appraisal of $950,000 from an MAI certified appraiser who opined the highest and best use of the property was commercial.

At trial, Lucas and Cavalier, LLC argued Graeber failed to properly exercise his option to purchase the property because he never offered to purchase the property for fair market value; the fair market value of the property was over $950,000; and Graeber failed to sue an indispensible party—the property owner.

Following a two day bench trial, the trial court ordered Mr. and Mrs. Kapuscinski to sell Graeber the property for $565,000. This figure was the mid-point of Graeber's appraised value of $480,000 and an off-the-cuff estimate of $650,000 provided by a real estate agent who did not testify at trial.

Lucas and Cavalier, LLC timely appealed the decision to the Superior Court of Pennsylvania. On appeal, Lucas and Cavalier, LLC asserted Graeber failed to sue the property owner and the case should have been dismissed as a matter of law; the court abused its discretion by finding the fair market value of the property was $565,000 as of August 31, 2007; and the court erroneously found Graeber validly exercised his option to purchase the property.

Reversing the trial court's decision, the Superior Court found that Graeber failed to sue the property owner and a non-party could not be forced to sell its property. In response to a last ditch effort by Graeber to salvage its case, the Superior Court concluded there was no factual support to pierce the corporate veil to find T.G. Cooper & Co., Inc. was a party to the litigation because its sole shareholder fully participated at trial. Graeber now seeks *en banc* review.