

**JULY 2001 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Real Property

QUESTION

Artist owns a workshop in a condominium building consisting of the workshops and sales counters of sculptors, painters, potters, weavers, and other craftspeople. The covenants, conditions and regulations (CC&Rs) of the building provide for a board of managers (Board), which has authority to make “necessary and appropriate rules.” Board long ago established a rule against the sale within the building of items not created within the sellers’ workshops.

Artist accepted a three-year fellowship in Europe and leased the workshop to Weaver for that period. The lease prohibited an assignment of Weaver’s rights. Weaver used the workshop to produce custom textiles.

A year into the term, Weaver transferred her right of occupancy to Sculptor for one year. Sculptor moved into the workshop with his cot, electric hotplate, and clothes. He also brought several works of art that he had created during a stay in South America and offered them for sale along with his current works. Sculptor mailed his rent checks every month to Artist, who accepted them. Both Weaver and Sculptor knew the terms of the CC&Rs and Board’s rules when they acquired their interests in the workshop.

Three months after Sculptor moved in, Board told Sculptor to stop selling his South American pieces. He refused to do so and thereafter withheld his rent and complained that the regulation was unreasonable and that the building’s heating was erratic.

1. What action, if any, may Board take against Artist to enforce the rule against the sale of Sculptor’s South American pieces? Discuss.
2. Can Artist recover from Weaver the rent that Sculptor has refused to pay? Discuss.
3. Can Artist evict Sculptor from his occupancy? Discuss.

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ANSWER A

1. Action Board may take to enforce rule against sale of South American pieces

Whether the Board may enforce the rule against the sale of Sculptor's South American pieces depends on whether the covenant contained in Artist's lease runs to Sculptor. First, it must be determined if Sculptor ("S") is properly occupying the workshop. If S is not allowed to be in the workshop because of A's lease with the Board, the Board may be able to evict S.

Assignment/Sublease of A's workshop to S

An assignment occurs when a tenant transfers the complete tenancy in a lease to another party. The original tenant has no right to reoccupy the leased premises under an assignment. A sublease occurs when a tenant leases the premises to another tenant for a period of time less than the complete lease that the original tenant has with the Board. Artist had a three-year lease from Weaver in the workshop. Because A only transferred a right of occupancy for one year to S, this is a sublease, and not an assignment. The Board will argue that the lease expressly prohibits these types of transfers. However, the lease only prohibits assignments and does not mention subleases. When the lease is silent as to one or the other, the courts will strictly construe the lease as only prohibiting that which is named in the lease. Therefore only assignments are leased since that is all that is named in the lease. Furthermore, the fact that A accepted rent checks may prohibit the Board from taking any action.

Enforcement of Covenant - Equitable Servitude

The Board will argue that the covenant agreed to by A when he purchased the workshop should also govern any interests between those that are using the workshop in place of A. Because this covenant is being enforced as an injunction (to stop S from selling South American art), it will be easier for the Board to enforce than if they were trying to recover damages. Because the covenant will stop A from selling South American art, it is being enforced as a burden against A. For the burden to be enforced against A, there must be intent between the original parties, there must be a writing satisfying the Statute of Frauds, notice between the parties, and the covenant must touch and concern the land.

Intent between original parties

The Board and Artist intended that the covenant be binding. The Board has the authority to make "necessary and appropriate" rules that are binding on those occupying the building. Since the Board established the rule "long ago" the original parties, A and the Board, intended the covenant to be followed.

Statute of Frauds

As long as there is a written agreement signed by S, the Statute of Frauds is satisfied. This appears to be satisfied since there are no facts suggesting a written agreement was not entered into. Also, since the transfer between A and W is for more than one year, it had to be in writing. Because a tenancy is an interest in land, the Statute of Frauds must be met.

Notice between the Parties

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Both Weaver and S knew about the terms of the CC&Rs when they acquired their interests in the workshop. Therefore, all parties were on notice of the restriction.

Touch and Concern

The most challenging requirement for a burden to run with the land between occupiers the Board must meet is that the covenant touches and concerns the land. Here, a promise not to sell items not created within the sellers' workshops does not seem to touch and concern the land. In order for a covenant to touch and concern the land, the land must be benefited in some way. The only people that are benefited from such a covenant are those that own workshops in the building. They may argue that such a covenant does touch and concern the land because it makes their workshops more valuable. If this is the case, then the Board may have satisfied all the requirements to enforce this restrictive covenant. By not selling artwork not created in their workshops, the artists that own workshops there, may have a protective interest. If selling only local work increases the value of their units, the covenant touches and concerns the land. It seems likely that purchasers of artwork would like (sic) to be able to buy a variety of work, so it is unlikely (sic) that this covenant actually increases the value of the workshops. Therefore, this covenant does not touch and concern the land and therefore does not run with the land.

Breach of Covenant - Damages

The Board may also attempt to recover damages against A for failing to abide by the covenant. In addition to the elements discussed above, in order to enforce a covenant and recover damages there must also be vertical privity between the parties. This means that the parties must share an interest in land. The Board is just responsible for managing the complex, and does not appear to own the building. Therefore, no interest in land is shared, and there is no vertical privity.

Estoppel

S will argue that the Board is estopped from enforcing the covenant since they have waited three months after he moved in before requesting S to stop selling his South American pieces. S will argue that because they did not do anything, he assumed it was okay to sell that art.

Laches

S will also argue that too much time has elapsed for the Board to enforce the covenant. They waited three months before asking him to stop, and therefore should be barred from enforcement because of laches (defense that occurs when [sic] passage of time).

2. Ability of Artist to recover rent

Artist will be able to recover rent from Weaver if Weaver remains liable under the lease between A and W. As discussed above, the lease between A and W only prohibited assignments. Courts strictly interpret such provisions, and therefore will allow a sublease. S's interest in the workshop is a sublease since he did not take the full term of the original lease, but only took a one-month occupancy. Although W may not be in privity of estate with A during the time that S is in possession of the workshop, he is in privity of contract. A will argue that W is in privity of estate as well as contract. Privity of estate is present when two parties share an interest in land. Because this is only a sublease, A will argue that W still shares an interest in the workshop with

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A and that there is privity of estate. Privity of contract between A and W exists because A and W signed the original lease. W remains liable for any defaults of his subleasees since he is still in privity of contract with A. S has a duty to pay rent, and W has a duty to pay rent to A. Therefore A should be able to recover from W the rent S has refused to pay.

There is a duty to pay rent imposed on all tenants, unless this duty has been excused. S will argue that A breached an implied warranty of habitability by providing better heating to the condo. However, because this condo is being used for commercial purposes, A does not owe a duty of habitability. While A must maintain basic utilities, such as heat, it is understandable that the heating [will] be erratic in a commercial building. Heat is often turned down at night and during the weekend in order to save energy. Therefore, it is not a breach of habitability, and S must still pay rent.

3. Ability of Artist to evict Sculptor

Artist may evict S if S was not in rightful possession of the workshop, or if S has breached any duty owed to A. As discussed above, S is in rightful possession of the workshop, as a subleasee. Therefore W owes a duty to pay rent unless A has breached any of his duties owed to tenants.

Implied Warranty of Habitability

The implied warranty of habitability only applies to premises that are leased for residential purposes. It appears that this workshop was not leased for a residential purpose, and therefore no duty of habitability is owed. Although the workshop is located in a condominium, which is traditionally regarded as a residential property, the fact that all the other units in the condominium are used as workshops and sales counters of sculptors, painters, potters, weavers, and other craftspeople suggests that the condominium was not rented for residential purposes. Furthermore, the fact that S moved into the workshop, bringing with him his cot and electric hotplate, suggests that the condo did not contain a stove and therefore was not intended to be used as a residence.

Unreasonableness of regulation

The covenant was agreed to by the owners of the building and the Board has the authority to enforce it. If the covenant was properly instituted by the Board it is not unreasonable. Although the authority that gives the Board the power to pass such covenants, "necessary and appropriate rules," seems vague, the covenant is clear. Only items created in the building are offered for sale. This is probably an appropriate rule considering the interests of the other artists that work in the building. The fact that W and S knew of the terms before accepting the lease implies that they consented to the covenant.

Erratic Heating

When a property is to be used as a residence, the landlord is under an implied warranty of habitability. One of the warranties is that heat be provided to a building so that it is livable. However, as discussed above, it does not appear that this workshop was intended to be used as a residence. It would make sense that the heat would be erratic in a commercial office space. In normal office space, heating is often turned off at night and weekends, times when workers are

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not usually there. This would be appropriate in this case. Even [if] A is found to owe a duty of habitability, the fact that there is erratic heat does not excuse the tenant from withholding rent. If anything, the tenant will be allowed to abate the rental price by the amount it costs to repair the heater. The landlord should repair the heater first, but if the landlord has been notified and fails to repair, the tenant is allowed to repair and abate the purchase price. Therefore, S was still owed a duty to pay rent.

Breach of Quiet Enjoyment

S will also argue that there was a breach of quiet enjoyment when A did not provide constant heat to the building. As discussed above, this was probably not breached since erratic heat can be expected in commercial buildings. It would also be helpful, though, to know if erratic means the heat is not working during the day (times when it is expected that people would be using the building). Even so, S should only be allowed to abate rent, not discontinue payment of rent.

Privity of Contract

S will argue that he only owes rent to W, and not A, because he is a subleasee and therefore not in privity of contract with A. However, he is in privity of estate, and therefore owes the owner of the property rent. If W is also not paying rent (assuming this is the case, since S is not paying rent), then A can evict W, which would also have the effect of evicting S. If W continues to pay the rent to A, despite the fact that S is not paying rent to W, then A will not be able to evict S on the grounds that he is not paying rent.

Breach of Covenant

As discussed in part one, the covenant not to sell art not created in the workshop probably does not extend to S, since it does not touch and concern the land. If the court does find the covenant to extend to S, such that he is bound by the covenant, A will have grounds for eviction based on the fact that S is violating the covenant.

ANSWER B

1. What actions, if any, may Board (B) take against Artist (A) to enforce the rule against the sale of Sculptor's (S) South American pieces?

B, as a representative body of the condominium, has been granted the authority to make necessary and appropriate rules. B also presumably has the authority to enforce the CCRs of the condominium on behalf of the individual owners. The rules regarding sale of items not created in Seller's workshops are long established. Where the board of a condominium has established rules under proper authority for a condominium (i.e. under authority in the CCRs, which are generally recorded), the board may enforce these rules as either a restrictive covenant or an equitable servitude if the proper requirements are met.

Artist's liability for Sculptor's (S) acts

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A, as the owner of S's workshop may be liable for S's violation of the CCRs. The B may seek to enforce the CCRs as either a restrictive covenant or equitable servitude if proper conditions are met.

Real Covenant

In order to enforce a restrictive covenant against a party (enforce the burden), the burdened party must have notice, the parties creating the restrictive covenant must have intended the restrictive covenant to continue indefinitely and against successor parties, the restrictive covenant must touch and concern the land, and both horizontal privity and vertical privity must exist.

Where these conditions are met, the party seeking to enforce may seek a money judgment.

Intent

When the B created the rule, they likely intended it to continue and to bind successor parties. The condominium has established an identity and enforcement of this rule is an important part of maintaining that identity.

Notice

Where the party creating a condominium has established CCRs, the parties purchasing units in the condominium may be determined to have constructive knowledge if the CCRs are recorded or included or provided as part of the purchase transaction.

Here, A had notice of the terms of the CCRs when he acquired his interest in the condo. So, he had constructive notice.

Touch and Concern

Real covenants that touch and concern the land are those that generally relate physically to the property in a way that increases its value. Here, the rule relates to what may or may not be sold on the property. While this is not necessarily physically related to the property, it is part of the overall function of the condo as a location for artisans. While A may argue that this does not touch and concern the land, a court would likely view it as being closely related to the purpose and function and therefore find that the rule touches and concerns the land.

Vertical Privity

Vertical privity exists where the party is a recipient of the same possessory interest as the person who agreed to the restriction. A owns the workshop and is therefore in vertical privity with whatever party originally agreed to the rule.

Horizontal Privity

For horizontal privity to apply, the party agreeing to the restriction must have had a common property interest with the other party. Here, the original purchaser would have received

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property from the owner of the condominium. Also, all owners of workshops possess an interest in property that was once a single ownership interest.

Therefore horizontal privity is present.

The B may enforce the rule as a restrictive covenant and sue A for money damages.

Equitable Servitude

A party may enforce a restriction as an equitable servitude against a burdened party when the restriction touches and concerns the land, the parties creating the restriction had intent that it run against subsequent parties, and the burdened party had notice.

As discussed above, the rule touches and concerns the land, was intended to burden subsequent parties, and A had notice.

The B may enforce the rule against A as an equitable servitude and seek to enjoin the sale of South American goods on the premises.

2. Can Artist (A) collect from Weaver (W) the rent that Sculptor has refused to pay?

As the landlord, A may collect rent from a party with whom he is in privity of estate or privity of contract.

The duty to pay rent runs with the land and is an independent covenant of the tenant.

Here, although W has sublet his property, he is still in privity of contract with A and has a duty to pay rent. W would only be able to avoid this obligation if A agreed to a novation, which has not occurred.

W may try to argue that he is not obligated to pay rent because he has been constructively evicted (he would argue this based on the assertions of his sublessee) from the workshop due to the unreasonableness of the regulation and the erratic heating. However, in order for a tenant to assert constructive eviction under the landlord's covenant of quiet enjoyment, the tenant must move out of the premises within a reasonable time. Both W and S would also likely fail on the basis of the reasonableness of the regulation since it is being enforced by a third party. Finally, both W and S may be estopped from asserting the unreasonableness of the rule because they had notice when they accepted their interests.

In sum, A will be able to recover from W because they are in privity of contract, the tenant has a duty to pay rent, and W's defenses would not likely succeed.

3. Can Artist evict Sculptor from his occupancy?

A will likely attempt to evict S based on the prohibition against assignment and the violation of the rule on sale of outside goods. Both of these are likely to fail and so A will have to attempt to terminate his lease with Weaver or evict Weaver in order to retake possession.

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Prohibition Against Assignment

Prohibitions against assignment are enforceable. However, courts construe these prohibitions narrowly and will not interpret a prohibition against assignment to prohibit a sublease. A court will also be quick to find a waiver of a prohibition against assignment.

Here, the lease with W prohibited assignments, not subleases. W has subleased his property to S since W will retake possession for the last year of his own lease. In addition, A accepted rent checks from S and thereby likely waived any right he might have had. A will not be able to evict S due to the prohibition against assignment.

As a sublessee, S is not subject to restrictive covenants and so A may not evict S on this basis either. A sublessee is not viewed as being in either privity of estate or privity of contract.

If A attempts to evict S based on nonpayment of rent, he will also likely lose for the same reason that a landlord is not viewed as being in privity of estate with a sublessee.

A will likely have to sue W for damages and attempt to evict W. An eviction of W would also evict S since all rights of a sublessee are derivative of the sublessor.