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YOUR CLIENT HAS USED FAR MORE SPACE THAN PERMITTED UNDER A LEASE FOR OVER A DECADE, DOES THE CONTINUOUS ACCRUAL DOCTRINE APPLY OR IS THE CLAIM TIME BARRED?

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In the commercial property cases that we handle, tricky disputes can arise when a landlord seeks damages in unpaid rent from a tenant who is claimed to have been using more space than the lease permits. This type of dispute may invoke multiple legal questions: When does the applicable statute of limitations period begin to run? Does the tenant's use of extra space give rise to a single claim for breach of contract with a single limitations period accruing when the tenant first used more space, or may the landlord properly assert a continuous breach giving rise to multiple new claims with each having a new limitations period? Relatedly, when does a trespass claim against the tenant accrue? In providing answers to these questions, this article examines (1) the applicability of the continuous accrual doctrine to situations involving tenant encroachments; and (2) whether a trespass claim may be sustained in lieu of a contract action.

The Continuous Accrual Doctrine

A cause of action generally accrues, and the statute of limitations begins to run, when the wrongful act is complete, or when the wrongful result occurs and the consequent liability arises. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 387.) In other words, it accrues when the substantive claim's last essential element occurs—the three essential elements being wrongdoing, harm, and causation. (*Aryeh v. Canon Business Solutions, Inc*. (2013) 55 Cal.4th 1185, 1191.) The "last element" accrual rule is subject to many exceptions, including the continuous accrual doctrine. (*Ibid*.) Under the continuous accrual doctrine, each breach of a recurring obligation is independently actionable, and the statute of limitations runs from each breach of such obligation. (*NBCUniversal Media, LLC v. Superior Court* (2014) 225 Cal.App.4th 1222, 1237, fn. 10 (*NBCUniversal Media*).) Where a series of wrongs or injuries may be viewed as each triggering its own limitations period, a suit for relief may be partially time-barred as to older events but timely as to those within the applicable limitations period. (*Aryeh*, at p. 1192.) Thus, a plaintiff may pursue actionable wrongs for which the statute of limitations has not yet expired even if earlier wrongs would be barred. (*Orange County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 395.)

The common thread among cases applying the continuous accrual doctrine is a series of recurring, allegedly wrongful acts by the defendant, each of which can be analyzed separately as distinct claims. (*Luke v. Sonoma County* (2019) 43 Cal.App.5th 301, 306.) In *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.* (2004) 116 Cal.App.4th 1375 (*Armstrong Petroleum*), the Court of Appeal noted that "'[w]here a contract is divisible and, thus, breaches of its severable parts give rise to separate causes of action, the statute of limitations will generally begin to run at the time of each breach; in other words, each cause of

action for breach of a divisible part may accrue at a different time for purposes of determining whether an action is timely under the applicable statute of limitations.'" (*Id.* at pp. 1388-1389, quoting 15 Williston on Contracts (4th ed. 2000) § 45:20, p. 356.) Typical examples of severable contracts include installment contracts, periodic rental payments, and "'contracts calling for periodic, pension-like payments on an obligation with no final and fixed amount.'" (*Boon Rawd Trading Int'l Co. v. Paleewong Trading Co., Inc.* (N.D.Cal. 2010) 688 F.Supp.2d 940, 951, quoting *Armstrong Petroleum*, at p. 1388.)

In *Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, the Court of Appeal concluded that a commercial landlord's 1993 suit for payment of back rent going back to 1982 was not time barred; rather, the periodic monthly payments owed were a recurring obligation, with a new limitations period arising for each, and the landlord could seek disputed amounts for the duration of the limitations period preceding suit. (*Id*. at p. 1344.) Similarly, *Gilkyson v. Disney Enterprises, Inc.* (2016) 244 Cal.App.4th 1336 (*Gilkyson*), held that the four-year limitations period for breach of a written contract (Code Civ. Proc., § 337(a)) was subject to continuous accrual as to a songwriter's heirs' claim against a publisher who failed to pay royalties for home video sales of movies featuring the songwriter's songs. (*Gilkyson*, at pp. 1342-1347.) Accordingly, the royalty contract in that case, which provided for ongoing royalties based on revenues, was a divisible contract with each breach of the royalty right separately actionable and subject to its own limitations period. (*Ibid*.)

These types of claims are distinguishable from those that involve "a single breach or other wrong which has a continuous impact." (*Armstrong Petroleum*, *supra*, 116 Cal.App.4th at p. 1389.) For instance, in *Boon Rawd Trading Int'l Co. v. Paleewong Trading Co.*, *supra*, 688 F.Supp.2d 940, the defendant allegedly first breached an importation agreement's exclusivity requirement outside the limitations period, but continued to breach the exclusivity requirement during the limitations period. (*Id.* at pp. 947-948.) The court refused to apply the continuous accrual doctrine because the plaintiff did not allege facts regarding "a periodic procedure for the performance of [the parties] respective obligations," and because the allegations indicated a single breach, which had never ceased and "which has continuing impact," rather than a series of periodic breaches. (*Id.* at pp. 951-952.) Similarly, the court in *NBCUniversal Media*, *supra*, addressed whether continuous accrual might apply where NBCUniversal allegedly breached a contract by misappropriating ideas for a television series. (225 Cal.App.4th at pp. 1226, 1237, fn. 10.) The court found that each broadcast of a new episode did not constitute a new breach, but rather additional harm from a single breach, thereby precluding application of the continuous accrual doctrine. (*Id.* at p. 1237, fn. 10.)

In a more recent case, a landlord alleged that a wireless telecommunications-carrier lessee breached the lease by using significantly more space on the property for its equipment—i.e., antennas and cable trays—than the lease permitted. The alleged breach had commenced over a decade before the landlord filed its lawsuit, and there was evidence that the landlord knew of the alleged breach when it occurred. When the telecommunications-carrier lessee invoked the four-year limitations period for breach of a written contract, the landlord argued that its claim may proceed because there was continuous accrual. In response, the carrier pointed out that its purported contract breach related to the lease provision defining the "Premises," which limited the amount of space it could use. Because that breach allegedly occurred in 2008, over a decade earlier, and had not changed or ceased since, it constituted a single breach rather than a recurring breach that might have enabled the landlord to assert the continuing breach doctrine. When the landlord then argued that the telecommunications-carrier tenant had failed to pay sufficient rent for the excess space, the carrier asserted that it did not breach the rent provision in the lease because the lease called for a specific sum that it had always timely paid.

Although the landlord in this case did not assert a trespass claim against the telecommunications-carrier tenant, most likely such a claim would have been unsuccessful for similar reasons.

Continuing Versus Permanent Trespass

A trespass may be continuing or permanent. (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1219-1222.) A permanent trespass is "an intrusion on property under circumstances that indicate an intention that the trespass shall be permanent." (*Starrh and Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal. App.4th 583, 592 (*Starrh*).) The wrong is completed at the time of entry and the statute of limitations begins to run at the time of entry. (*Ibid*.)

In contrast, a continuing trespass as "an intrusion under circumstances that indicate the trespass may be discontinued or abated . . . . Continuing trespasses are essentially a series of successive injuries, and the statute of limitations begins anew with each injury. In order to recover for all harm inflicted by a continuing trespass, the plaintiff is required to bring periodic successive actions." (*Starrh*, *supra*, 153 Cal.App.4th at p. 592.) The classic example of a "continuing trespass" is "an ongoing or repeated disturbance . . . caused by noise, vibration or foul odor." (*Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 Cal.3d 862, 869.)

In *Field-Escandon v. Demann* (1988) 204 Cal.App.3d 228, the plaintiff argued that because a sewer pipe that was buried on his property years before he had acquired the land could be removed at any time, it constituted a continuing trespass. (*Id.* at p. 233.) The Court of Appeal disagreed, and affirmed the trial court's summary judgment in defendants' favor, finding that the trespass was permanent. (*Id*. at p. 234.) It held that the plaintiff's claim was time-barred because the pipe's impact on the property did not vary or increase over time. (*Ibid.*) *Spar v. Pacific Bell* (1991) 235 Cal.App.3d 1480 adopted *Field-Escandon*'s reasoning, and took it one step further by holding that the voluntary removal of a nuisance—namely, underground telephone lines buried under the plaintiffs' property by defendant Pacific Bell 25 years before the lawsuit—did not in and of itself render erroneous the trial court's judgment that the telephone facilities were a permanent nuisance. (*Id.* at pp. 1486-1487.) The facilities had the "overwhelming characteristics of a permanent nuisance or trespass": (1) they were intentionally placed to provide service to the public indefinitely (for at least 100 years); (2) considerable effort and heavy equipment would be required to install and remove the facilities, which were 10 feet underground; and (3) the defendant, as a public entity, might have been able to keep the facilities on the property by paying plaintiff just compensation. (*Id.* at p. 1486.)

Had the plaintiff landlord in the recent telecommunications-carrier case discussed above sued the carrier for trespass—alleging impermissible use of space on the property via antennas and cable trays since 2008—a court would most likely consider the intrusion to be a permanent trespass and, thus, barred by the three-year limitations period for trespass to property (Code Civ. Proc., § 338). This is because the defendant telecommunications-carrier intentionally placed its equipment to provide a service to its subscribers *indefinitely*: It would be operable for many decades (at least 30 years and possibly longer under the lease). Furthermore, installing and removing the antennas and cable trays would require considerable effort and heavy equipment. Finally, the landlord was on notice the telecommunications-carrier's purported trespass since 2008 when the parties signed an amendment to the lease agreement, which showed the location of the carrier's existing facilities. Since the permanent trespass "erected" in 2008, the statute of limitations period for the landlord to bring a trespass claim against the carrier ran in 2011.

Understanding the nuances of the continuous accrual doctrine and what constitutes a continuing trespass versus a permanent trespass, while not complicated concepts, may make or break a real estate case involving an alleged use of excess space. The key is to understand when the original breach occurred, when it was known or knowable to the landlord, and whether it may be subject to the continuous accrual doctrine or constitute a continuing trespass.

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