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Commercial Property

Landlords May Entirely Eliminate Leasing

BY ADAM LEITMAN BAILEY AND JOHN M. DESIDERIO

COMMERCIAL landlords need relief. They are, and have been increasingly, frustrated by the procedural and substantive moves that determine (more often than not) the scope and duration of an eviction action in landlord-tenant litigation. A knowledgeable commercial tenant's attorney, without any great effort, will readily employ defensive tactics that can delay, by as much as six months or more, the time when a landlord can reacquire lawful possession of its valuable commercial property. For example, lawyers utilize a number of successful tools to delay eviction, including, but not limited to, moving to dismiss a landlord's summary proceeding for improper service of process, or for other procedural violations, and by commencing affirmative defensive actions seeking "Yellowstone" injunctions.[1] Substantively, landlord-tenant litigation has also spawned new case law preventing immediate forfeiture of the premises.[2]

During this default period, the defaulting tenant continues to carry on its business while ignoring its obligations to the landlord, and the landlord, thus abused, loses valuable time to repair, renovate, and re-let the premises to a responsible tenant. In addition, the litigation delays may also have the added effect of hindering or preventing a sale of the premises to potential buyers.

The damage the landlord is likely to suffer from such litigation delay is multifold: lost rents, unpaid real estate taxes, and the expense incurred for attorney's fees. In addition there is the lost time and effort the landlord must devote to contesting many unfounded and frivolous claims before obtaining a final judicial resolution of the action— oftentimes long after the lease itself has expired and, possibly, without any recovery of its damages from a then-judgment proof tenant.

A New Solution

One possible solution that exists, but which landlord attorneys have either overlooked or been too cautious to suggest to their clients, is for commercial property owners to eliminate the landlord-tenant relationship entirely and to license their premises instead of leasing them.

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LICENSING LAW

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The legal relationship established between the property owner-landlord and a tenant, by a lease, is entirely distinct from the legal relationship established, by a license, between the property owner-licensor and a licensee.

As explained in Friedman On Leases, the distinction between a lease and a license is that

> a lease is a conveyance of exclusive possession of specific property . . . usually in consideration of the payment of rent, which vests an estate in the grantee, [while] a license, on the other hand, merely makes permissible acts on the land of another that would otherwise lack permission. A license is said to be revocable at the will of the licensor, [and] creates no estate.[3]

Chief among the owner-licensor's rights in a license relationship is the right to revoke the license "at will"[4] and to use "self-help"[5] to remove a defaulting licensee from the licensed premises without having to endure months or years of lengthy and frustrating litigation to regain possession of valuable real estate.

Self-help is not unavailable to landlords in New York who reserve the right to use it in their lease agreements.[6] However, courts are generally hostile to a landlord's use of self-help and will not approve its use if there is any ambiguity in the lease terms or if there is any factual question concerning whether or not the lease has expired.[7] Moreover, under RPAPL § 853, if a tenant is ejected from real property by force or other unlawful means, the tenant may recover treble damages from the landlord and may also be restored to possession if ejected before the end of the lease term.[8] Only when a court concludes that restoring the tenant to possession would be "futile," because the landlord will prevail in a summary proceeding to eject the tenant, is the court unlikely to order restoration of the premises to the tenant.[9]

In contrast, under a bona fide license agreement, the tenant-licensee owns no estate in the premises and has no right to possession. Common law principles apply, and the owner-licensor has the absolute right to use peaceable self-help, at any time, to remove a licensee from the licensed premises for any reason or no reason.[10]

Nevertheless, the use of a license agreement, instead of a lease, will not entirely eliminate all possibility of litigation between the owner-licensor and the tenant-licensee. The question of whether or not the "self-help"used was peaceable (and therefore lawful) or forcible (and therefore unlawful) is always a possible subject of litigation. However, where a valid license agreement exists, the owner-licensor will not be required to readmit the ousted licensee to the premises, even if the self-help used is found to have been forcible and not peaceable. The licensee's sole remedy will lie in the treble damages provided by RPAPL § 853 for forcible ejectment.[11] In the interim, before any judgment by a court, the owner-licensor is free to re-license use of the premises to another licensee.

In these circumstances, depending on the nature of the damages provable by the former licensee, the owner-licensor may view what is only a possible, but not certain, treble damage judgment as a far less onerous cost of doing business than the total of all the expenses normally associated with landlord-tenant litigation. In addition, instead of losing income during the litigation over self-help, the owner will actually be realizing income from the payments received from the new licensee of the premises.

Of course, the owner-licensor should take every precaution to ensure that the self-help it employs is always accomplished in a "peaceable"manner and without any real possibility of it later being found to have been done "forcibly."There are, in fact, several well known "peaceable"self-help techniques that have been employed, by landlords and licensors alike, which have passed muster with the courts, and that

should always be used to minimize any risk of a court finding of "forcible"ejectment.[12]

Licensing Factors

To obtain the benefit of a license agreement, the property owner must ensure that its agreement with the prospective user of the premises is indeed a license and not a lease. This is not necessarily an easy task to accomplish. Merely calling the agreement a "license"will not make it so. Whether an agreement is held to be a "license"and not a lease will depend on the presence or absence in the agreement of the three essential characteristics of a real estate license: (1) a clause allowing the licensor to revoke "at will;"[13] (2) the retention by the licensor of absolute control over the premises;[14] and (3) the licensor's supplying to the licensee all of the essential services required for the licensee's permitted use of the premises.[15]

Courts have found "licenses"to be leases where any one or more of these characteristics is either missing from the agreement altogether or not sufficiently vested in the powers retained by the licensor.[16] However, the less control given the licensee, the more likely the agreement is to be a license, because a license offers no autonomy, but merely allows a party "to render services within an enterprise conducted on premises owned or operated by another, who has supervisory power over the method of rendition of the services."[17] Nevertheless, it has been held that the licensor's retention of control over prices charged by the licensee, times of operation within the licensed space, and even the choice of the licensee's employees, is no guarantee that the agreement will be held to be a license and not a lease, as such controls may be deemed "no more than would reasonably be demanded by a careful owner as against a lessee for [any] business."[18]

Therefore, careful drafting of appropriate license agreements will be required, and, for this purpose, there must be close cooperation between attorneys and their clients who wish to implement a license regime. Communication to the client of the risks, as well as the benefits, of utilizing a license agreement will be essential. In addition, attorneys will need to give close attention to the objectives of the client and determine how much initial cost the client is willing to accept in order to provide the kind of "full service"agreement that will pass a court's "license"test.

Owners will also have to make judgments about the commercial feasibility of obtaining licensees who are willing to accept license agreements with "at will"revocation clauses. Whether potential tenant-licensees are willing to sign such agreements may depend upon the type of premises that the owner is making available for licensed use; whether the licensed space is a warehouse, an office suite for multiple users, or simple storage space. To attract licensees concerned about making a substantial investment in space subject to a revocable license, owners may create new financing incentives or build into the agreement a mechanism to compensate a non-defaulting licensee for the remaining unamortized value of its investment at such time as the licensor invokes the "at will"clause of the agreement.

At present, real estate license agreements appear to be utilized primarily by owners of properties licensed to short term users of office space and to users of certain types of storage. That there is a market for such agreements is clearly apparent. Whether there is a market for real estate license agreements for other types of occupancy may not be so apparent, but, given the need of landlords to be relieved of the onerous burdens and frustrations of traditional landlord-tenant litigation, the time is fast approaching when landlords may need to test the market by striving to transform the commercial rental landscape into a true license regime.

Tenant attorneys whose clients are in default of a bona fide license agreement will no longer be able to "guarantee"delaying a judgment of eviction for up to six months. If their licensee clients do not "cure"their default, the clients will be subject to peaceable self-help eviction from the licensed premises swiftly and without further ado. No longer will property owners eagerly waive income and past due monies owed in order to guarantee regaining possession of the premises on a date certain. The negotiating leverage will shift in favor of the owner-licensor who will be able either to require full payment from the defaulting licensee, if it wishes to avoid eviction, or to reacquire peaceable possession of the premises with the full backing of the law. For frustrated landlords, this is a revolution that is long overdue.

Tenant attorneys whose clients are in default of a bona fide license agreement will no longer be able to "guarantee" delaying a judgment of eviction for up to six months.

1. Because "equity abhors a forfeiture,"the courts will issue a so-called "Yellowstone" injunction to allow a commercial tenant to litigate whether or not it actually has defaulted under its lease, thus preventing the forfeiture of the premises in case the tenant prevails on its claim. This has allowed tenants to violate their leases for years at a time in blatant disregard of the lease terms. A tenant is entitled to a Yellowstone injunction where it has demonstrated that (1) it holds a commercial lease; (2) it has received a notice of default, notice to cure or concrete threat of termination of the lease from the landlord; (3) the application for a temporary restraining order was made and granted prior to the termination of the lease; and, (4) it has the desire and ability to cure the alleged default by any means short of vacating the premises. See, e.g., John Stuart, a Division of *Robert Allen Fabrics of NY, Inc. v. D & D Associates*, 160 AD2d 547, 545 NYS2d 197 (1st Dept. 1990).

2. See, e.g., cases noted at www.alblawfirm.com/news/articles.

3. M. Friedman, "Friedman On Leases," p. 1832 (1997).

4. "The common law rule is that a license in real property is revocable at the will of the licensor unless it is coupled with an interest or made irrevocable by the terms of the contract. [citations omitted] . . . [W]here a license is given pursuant to contract for a definite term, on valuable consideration, a revocation of the license before expiration of the term ordinarily constitutes a breach of contract and gives rise to a personal action. [citation omitted] . . . The parties to a license, however, may freely agree that the license be revocable at any time after notice has been given."I*n re Yachthaven Restaurant, Inc.*, 103 B.R. 68, 73 (U.S. Bankruptcy Court, EDNY, 1989).

5. "Self-help"is a remedy whereby the owner of the premises evicts a tenant or a licensee from the premises without a court order or other legal process. See, e.g., *Queens Boulevard Garage, Inc. v. Park Briar Owners, Inc.*, 265 AD2d 415, 696 NYS2d 490 (2d Dept. 1999). Self-help is limited to the commercial context only. New York City Administrative Code § 26-521 prohibits the use of self-help in the residential context.

6. See *Bosewicz v. Nash Metalware Co., Inc.*, 284 AD2d 288, 725 NYS2d 671 (2d Dept. 2001).

7. See *Rodriguez v. 1414-1422 Ogden Avenue Realty Corp.*, 304 AD2d 400, 758 NYS2d 43 (1st Dept. 2003).

8. See *Rodriguez*, supra, n 7; see also *Suffolk Sports Center, Inc. v. Belli Construction Corp.*, 212 AD2d 241, 628 NYS2d 952 (2d Dept. 1995) (punitive damages awarded to the tenant).

9. See *Queens Boulevard Garage*, supra, n 5.

10. See *P&A Brothers, Inc. v. City of New York Department of Parks & Recreation*, 184 AD2d 267, 585 NYS2d 335 (1st Dept. 1992).

11. See *Queens Boulevard Garage*, supra, n 5.

12. See *Jovana Spaghetti House, Inc. v. Heritage Company of Massena*, 189 AD2d 1041, 592 NYS2d 879 (3d Dept. 1993) (During early morning hours, the owner's manager entered upon the premises and, after determining that no one was present, padlocked the doors to tenant's restaurant and placed a temporary barricade in front of the main entrance to the restaurant.) Owners should also arrange to safely move and store the tenant's property and to have it photographed and inventoried by a credible third party witness who may also videotape the entire operation. See NYLJ, Real Estate Update, by Scott Mollen, May 3,2000, p. 5.

13. See *Ark Bryant Park Corp. v. Bryant Park Restoration Corp.*, 285 AD2d 143, 730 NYS2d 48 (1st Dept. 2001).

14. See *Karp v. Federated Department Stores*, Inc.d/b/a Macy's, 301 AD2d 574, 754 NYS2d 27 (2d Dept. 2003).

15. See *Nextel of New York v. Time Management Corporation*, 297 AD2d 282, 746 NYS2d 169 (2d Dept. 2002).

16. See *Miller v. City of New York*, 15 NY2d 34, 255 NYS2d 78 (1964), *Feder v. Caliguira*, 8 NY2d 400, 208 NYS2d 970 (1960).

17. *Lordi v. County of Nassau*, 20 AD2d 658, 659, 246 NYS2d 502, 505 (2d Dept. 1964).

18. *Miller*, supra, 15 NY2d at 38, 255 NYS2d at 81.

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