

Landlord Win In Sandy Rent Discount Suit Won't Be The Last

By **Kaitlin Ugolik**

Law360, New York (May 02, 2013, 7:54 PM ET) -- A New York City judge on Monday found that the owner of 100 Maiden Lane did not owe a retail tenant who lost electricity following Superstorm Sandy any form of rent abatement, in the first of what some attorneys say will be a spate of similar outcomes for rent discount cases filed by lower Manhattan tenants hit by the storm.

Judge Jennifer G. Schecter found that the lease Just Salad Partners LLC had signed with Maiden Lane Properties LLC — a fairly standard Real Estate Board of New York lease — protected the landlord from having to provide rent abatement for issues it was not immediately informed about.

While not all commercial leases are the same, many feature some version of the standard REBNY lease's wording. This means the landlords who have filed suits demanding rent withheld in the wake of Superstorm Sandy will likely get what they're looking for, several attorneys told Law360 on Thursday.

"This is a perfect first case to come down, because they used the lease that everybody uses," said **Adam Leitman Bailey**, an attorney for the landlord.

The standard commercial lease language "covers almost everything" and protects the landlord from abatements in a way residential landlords don't enjoy — particularly when it comes to the clause requiring tenants to notify the landlord immediately of any damage.

In the Just Salad case, Maiden Lane took the tenant to court after it failed to pay rent in December and January. The tenant argued it was entitled to rent abatement for that time, because the building was without electricity and commercial tenants were not permitted to use the generator Maiden Lane had commissioned for the upstairs residential units.

An argument like this might fly in a residential lease abatement case, according to [REDACTED], an attorney with [REDACTED] who was not involved in the case. But commercial landlords aren't bound to a warranty of habitability in the same way that residential landlords are.

Under the state's warranty of habitability, every residential lease contains an implied promise from the landlord that the space rented will remain habitable regardless of any outside force. The same isn't true for commercial leases.

"The law says that the obligation to pay rent is independent from any other breach of lease," [REDACTED] said.

But attorneys say commercial tenants may succeed by relying instead on constructive eviction, which requires showing that a landlord effectively blocked the use of the property by failing to fulfill a legal duty such as providing access or repairing damage.

In this case, the salad chain had been able to continue operating using its own separate generator during December and January, but it accused Maiden Lane of failing to provide it with proper notice when the electricity had returned and the property was ready for occupancy. The judge found that Maiden Lane didn't have to provide Just Salad with notice that it could reoccupy the property because the chain had never vacated it.

An attorney for Just Salad, Steven Kirkpatrick of Belkin Burden Wenig & Goldman LLP, told Law360 on Thursday that he disagreed with the judge's reading of the lease agreement and that the judge hadn't recognized a distinction the notice provision made between tenant notices and landlord notices.

These issues are specific to this dispute, of course, and while attorneys say the Just Salad decision will likely be a common outcome, they acknowledge that each downtown lease the courts parse will involve a certain amount of nuance.

"The reason [this decision] would have precedential value is the extent that the court interpreted the standard real estate board form, and that is something that's used pretty commonly," Kirkpatrick said. "But many of the rulings will be related to rider provisions, which are all typically very specific, lease by lease."

In the Just Salad case, the court considered a rider that said the tenant was responsible for obtaining its own electricity and wouldn't be entitled to any abatement in the event of an outage, according to court documents.

This time it worked in the landlord's favor, but ██████████ said he can imagine a plethora of other outcomes depending on the riders, and on the judge.

"The courts in New York are very tenant-favorable," he said Thursday. "Another judge could have easily looked at this and said that although the space wasn't damaged, only the electricity was disrupted, that it became unusable."

--Editing by Kat Laskowski and Jeremy Barker.