
A Key Commercial Leasing Litigation Update
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A Key Commercial Leasing Litigation Update

In the past two years, in litigations between commercial landlords and commercial tenants, New York courts continued to issue decisions on topics, unrelated to COVID questions, that should interest all real estate attorneys and their clients.


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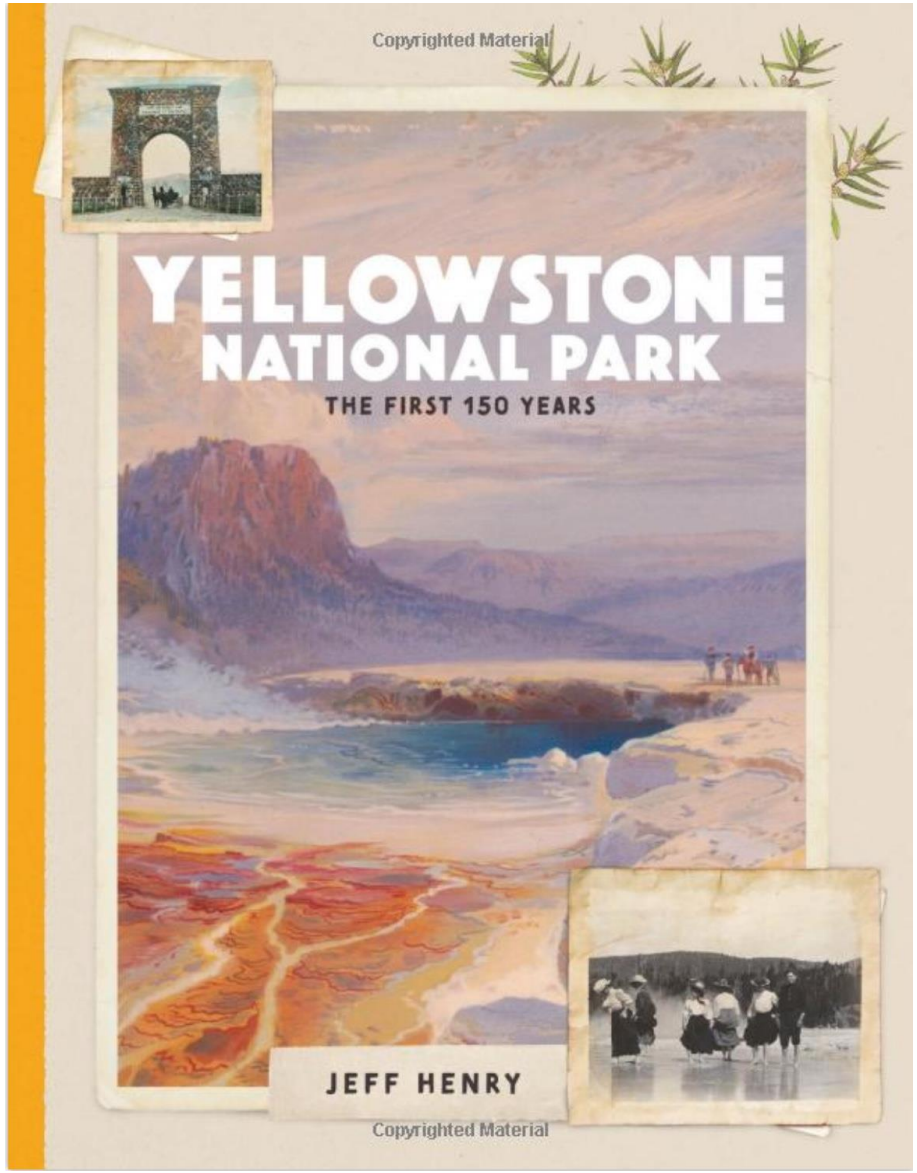
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YELLOWSTONE INJUNCTIONS
The Gap, Inc. v. 170 Broadway Retail Owner, LLC
(Appellate Division 1st Dept. 2021)

The commercial tenant in this case satisfied the requirements for obtaining a *Yellowstone* injunction, as set forth in *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Avenue*, 93 NY2d 608, 692 NYS2d 91 (1999), *i.e.*

1. that it held a commercial lease

2. the landlord had served it with either a notice of default, a notice to cure, or a threat of termination of the lease

3. it requested injunctive relief prior to termination of the lease

4. it was prepared and maintained the ability to cure the alleged default by any means short if vacating the premises

On these facts, the trial court had granted the tenant's request for a *Yellowstone* injunction.

YELLOWSTONE INJUNCTIONS
The Gap, Inc. v. 170 Broadway Retail Owner, LLC
(Appellate Division 1st Dept. 2021)

However, the First Department noted that "this Court has interpreted the third criterion to require a tenant to move before the cure period expired in the landlord's notice expires," and that the trial court "should not have granted a *Yellowstone* injunction because [tenant] failed to move before the cure period expired or argue that the cure period had been otherwise tolled."

Audthan LLC v. Nick & Duke LLC (Appellate Division 1st Dept. 2020)

Since there are questions as to whether the violations in the notice of default are plaintiff's responsibility to cure under the lease, a Yellowstone injunction was properly granted to maintain the status quo until there is a hearing on the merits.

Audthan LLC v. Nick & Duke LLC (Appellate Division 1st Dept. 2020)

MARCH 2020

While defendant is correct that Yellowstone relief may be denied where a tenant has failed to seek relief during the cure period:
1. defendant did not establish that the violations in the notice of default could have been cured within one year.
2. plaintiff's property manager attesting to his inability to obtain the violations from the New York City Fire Department to address them after the notice was served.
3. Furthermore, this Court has permitted tenants such as plaintiff to rely on a longer cure period under the lease where, as here, there is evidence that the cure could not be effected in the shorter period, and that the tenant has made a diligent effort to cure (id.).
4. Since there are questions as to whether the violations in the notice of default are plaintiff's responsibility to cure under the lease, a Yellowstone injunction was properly granted to maintain the status quo until there is a hearing on the merits.

Yellowstone Injunction Not Granted Based on Performance

***JDM Washington Street LLC v. 90 Washington Street LLC* (Appellate Division 1st Dept. 2021):**

The Court held that "[a]lthough Landlord disputes the effectiveness of plaintiff's remediation work, this merely raises issues of fact which are not properly resolved on a *Yellowstone* application."

Question of Whether the Time to Cure has Expired Size and Favor of Granting Yellowstone

***JDM Washington Street LLC v. 90 Washington Street LLC* (Appellate Division 1st Dept. 2021):**

The Court also noted that "issues of fact exist as to whether plaintiff's time to cure has expired [under] the subject Lease, which automatically extends plaintiff's time to cure for the amount of time reasonably needed to effect the cure, provided that plaintiff is proceeding with due diligence."

Parties May Plead for Yellowstone in the Alternative

The GAP Inc. v. 44-45 Broadway Leasing, Inc., 191 AD3d 549, 143 NYS3d 6 (Appellate Division 1st Dept. 2021):

The tenants in this case applied for and satisfied the requirements for obtaining a *Yellowstone* injunction while simultaneously alleging, in the alternative, that their leases had been terminated. The Court held that "[c]ontrary to [landlord's] contention, plaintiffs may plead in the alternative that the leases were terminated without abandoning their request for *Yellowstone* relief, as they asserted that if found in default, they were ready, willing, and able to cure, and the purpose of a *Yellowstone* injunction is to preserve the status quo, not to resolve the underlying merits of the parties' dispute."

Posting a bond
The Gap, Inc. v. 170 Broadway Retail Owner, LLC (Appellate Division 1st Dept. 2021):

The Court also held that, because tenant was still in possession, had never vacated the premises, and its lease was still in effect, the trial court should not have directed tenant to post a bond, but rather to "pay rent pendente lite directly to [landlord] in the amount specified in the lease while the *Yellowstone* injunction was in place."

“AS IS” v. “BROOM CLEAN”
1710 Realty, LLC v. Portabella 308 Utica LLC
(Appellate Division 2nd Dept. 2020):

On December 16, 2015, the parties in this case executed a lease which contemplated that the tenant was to undertake demolition and renovation work provided for in the lease. The lease further provided that “[landlord] agrees to deliver to [Portabella] the Demised Premises on the Commencement Date as is.”

The lease was terminated before the tenant moved in based on the premises not being "broom clean".

"AS IS" v. "BROOM CLEAN"
1710 Realty, LLC v. Portabella 308 Utica LLC
(Appellate Division 2nd Dept. 2020):

1. Section 13.1 of the lease, titled "Landlord's Work," "agrees to deliver to [Portabella] the Demised Premises on the Commencement Date as is,"

2. Section 1.2 of the lease, titled "Term," provides that the lease term shall commence on the Commencement Date. Section 2.1 of the lease, titled "Commencement of the Term," provides: "The 'Commencement Date' shall mean the date which is the later to occur of the date that (i) Tenant is delivered occupancy of the Demised Premises in the Delivery Condition (hereinafter defined), (ii) ... (iii) January 15, 2016. If the Demised Premises is not delivered within 90 days of the date of this Lease, then Tenant shall have the right to terminate the Lease. For purposes herein, the Delivery Condition shall mean vacant, broom clean and free of the prior tenants ['] personal property and fixtures."

"AS IS" v. "BROOM CLEAN"
1710 Realty, LLC v. Portabella 308 Utica LLC
(Appellate Division 2nd Dept. 2020):

3. By letter dated April 19, 2016, Portabella informed the plaintiff that it was exercising its right of termination pursuant to section 2.1 on the ground that the plaintiff had not delivered the premises in the Delivery Condition within 90 days of the date of the lease.

4. On September 26, 2016, the plaintiff commenced the instant action, alleging breach of contract and seeking to recover accelerated rent in the amount of $444,864.00, damages, and attorneys' fees from Portabella and Ashmawy, jointly and severally, claiming that Portabella's April 2016 letter constituted a unilateral surrender of the premises.

5. The defendants answered and asserted affirmative defenses, relying on section 2.1 of the lease and arguing that the plaintiff had failed to meet the Delivery Condition, that Portabella validly terminated the lease, and that Portabella's obligation to pay rent never commenced.

"AS IS" v. "BROOM CLEAN"
1710 Realty, LLC v. Portabella 308 Utica LLC
(Appellate Division 2nd Dept. 2020):

The Appellate Court:

6. "When parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms. [This rule has special import] in the context of real property transactions, where commercial certainty is a paramount concern, and where the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length.

7. In such circumstances, courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include. Hence, courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d 470, 475 [2004]

"AS IS" v. "BROOM CLEAN"
1710 Realty, LLC v. Portabella 308 Utica LLC
(Appellate Division 2nd Dept. 2020):

The Appellate Division (Continued):

8. "In the absence of any ambiguity, we look solely to the language used by the parties to discern the contract's meaning" (id. at 475). " '[W]here two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect' "

While acknowledging that some personal property of the prior tenant remained on a portion of the premises within the 90-day period, the landlord claimed that it was "*de minimis*" and that landlord had agreed only to deliver the premises "as is" and that neither party had intended the premises to be broom clean because of the contemplated demolition and renovation work.

"AS IS" v. "BROOM CLEAN"
1710 Realty, LLC v. Portabella 308 Utica LLC
(Appellate Division 2nd Dept. 2020):

The trial court held that "broom clean" was modified by the "as is" clause. The Second Department disagreed, stating that "[t]he interpretation of the lease urged by the [landlord], and accepted by the [trial] court, renders the Delivery Condition meaningless or without force or effect by excising the requirement that the plaintiff deliver possession vacant, broom-clean, and with the prior tenant's property removed before [tenant's] obligation to pay rent begins to run."

"AS IS" v. "BROOM CLEAN"
1710 Realty, LLC v. Portabella 308 Utica LLC
(Appellate Division 2nd Dept. 2020):

The Court reconciled "the two seemingly contradictory provisions" and gave effect to both by holding that the "Delivery Condition operated as a condition precedent to the triggering of the Commencement Date" at which point the landlord had to deliver the premises "as is" in broom clean condition. The Court noted that "the Commencement Date would not arrive unless the premises were vacant, broom-clean, and free of the property of the prior tenant," and added that "the fallacy in the [landlord's] position is that the "as is" condition referred to . . . is the condition of the premises on the Commencement Date, not the condition of the premises on the date of the lease."

LIQUIDATED DAMAGES v. IRREPARABLE INJURY

Eastview Mall, LLC v. Grace Homes, Inc.
(Appellate Division 4th Dept. 2020):

The "anchor" tenant of the mall in this case had the option of terminating its lease if its gross sales during the fifth year of the lease fell below a certain threshold amount. The tenant's gross sales in the fifth lease year failed to meet the threshold; but the lease was modified by reducing the rent and extending the termination option for another year.

LIQUIDATED DAMAGES v. IRREPARABLE INJURY

Eastview Mall, LLC v. Grace Homes, Inc.
(Appellate Division 4th Dept. 2020):

One year later, the tenant exercised its option to terminate, but the landlord claimed that the tenant had excluded certain sales from its "gross sales" calculation, and that therefore the gross sales threshold had been met and termination was precluded. The landlord sued for a declaratory judgment and asserted causes of action for breach of contract and anticipatory repudiation, while seeking a preliminary injunction enjoining the tenant from ceasing business operations or otherwise taking steps to terminate the lease. The trial court granted the landlord's motion for preliminary injunction.

LIQUIDATED DAMAGES v. IRREPARABLE INJURY

Eastview Mall, LLC v. Grace Homes, Inc.
(Appellate Division 4th Dept. 2020):

The Fourth Department's majority opinion reversed, noting that "preliminary injunctive relief is a drastic remedy [that] is not routinely granted," and said further, "[e]ven assuming, arguendo, that plaintiff demonstrated a likelihood of success on the merits, we conclude that plaintiff did not establish that it would sustain irreparable injury without a preliminary injunction." The Court noted that the lease contained a liquidated damages clause that entitled the landlord to money damages, which was intended as the sole remedy, and, therefore, the landlord had not suffered irreparable injury.

LIQUIDATED DAMAGES v. IRREPARABLE INJURY

Eastview Mall, LLC v. Grace Homes, Inc.
(Appellate Division 4th Dept. 2020):

To the contrary, the dissenting appellate judges opined that the landlord had shown clear and convincing evidence of irreparable injury and that the trial court had not abused its discretion in considering, "for the purpose of determining whether provisional relief is warranted, if [landlord] will suffer irreparable injury not adequately remedied by monetary compensation if preliminary relief is not granted."

LIQUIDATED DAMAGES v. IRREPARABLE INJURY

Eastview Mall, LLC v. Grace Homes, Inc.

(Appellate Division 4th Dept. 2020):

The Appellate Division Dissent:

We disagree with our dissenting colleagues that plaintiff established a likelihood of irreparable injury from the loss of goodwill that would occur if defendants were to cease operations by prematurely terminating the lease. The "loss of goodwill and damage to customer relationships, unlike the loss of specific sales, is not easily quantified or remedied by money damages" (Marcone APW, LLC v Servall Co., 85 AD3d 1693, 1697 [4th Dept 2011]) and may warrant a finding of irreparable injury in cases such as those involving unfair competition tort claims, the proposed demolition or alteration of the premises or the issuance of a Yellowstone injunction, in which it is a tenant, not the landlord, who seeks to enjoin the termination of a lease. No such scenario is implicated here and, moreover, as already noted, the specific injury complained of by plaintiff was accounted for by the terms of the lease agreement.

LIQUIDATED DAMAGES v. IRREPARABLE INJURY

Eastview Mall, LLC v. Grace Homes, Inc.

(Appellate Division 4th Dept. 2020):

The Appellate Division Dissent Continued:

"In balancing the equities, a court must inquire into whether "the irreparable injury to be sustained . . . is more burdensome [to the plaintiff] than the harm caused to defendant through imposition of the injunction". Here, we conclude that the harm defendants will suffer if forced to keep their 6,000-square-foot store open against their will is greater than the injury plaintiff will suffer from the loss of one tenant in the mall, especially because plaintiff may still recoup its loss via the liquidated damages provision."

LIQUIDATED DAMAGES v. IRREPARABLE INJURY

Eastview Mall, LLC v. Grace Homes, Inc.
(Appellate Division 4th Dept. 2020):

The Appellate Division Dissent Continued:

"We reject the view of the majority that the court erred in determining that defendants' breach would cause irreparable injury to plaintiff in the form of a loss of goodwill and damage to customer relationships under those circumstances."

LIQUIDATED DAMAGES v. IRREPARABLE INJURY

Eastview Mall, LLC v. Grace Homes, Inc.

(Appellate Division 4th Dept. 2020):

The Dissent: The Irreparable Problem

Plaintiff submitted evidence establishing that defendants' store is a premier retailer in the mall and that their tenancy impacts the leases of other tenants of the mall. Defendants' store is included in an exclusive list of "Named Retail Tenants" defined in co-tenancy provisions of some leases, and other leases refer to defendants' store as a "Suitable or Successor Replacement Anchor Store," as a "Required Tenant," or as an "Upscale Tenant" for purposes of plaintiff maintaining business operations with those other tenants. Unless anchor stores or *1063 suitable or successor replacements for those anchor stores, such as defendants' store, continue to occupy a certain amount of leaseable space within the mall, other tenants are not required to continue to operate under their lease agreements.

LIQUIDATED DAMAGES v. IRREPARABLE INJURY

Eastview Mall, LLC v. Grace Homes, Inc.

(Appellate Division 4th Dept. 2020):

Thus, the potential injury to plaintiff is not limited to the loss of rental income from one of approximately 150 tenants in the mall, a loss that is easily quantified and remedied by monetary compensation pursuant to the lease. Here, the potential injury to plaintiff includes a domino effect involving other tenants in the mall. Stated simply, if defendants breach the lease by vacating the mall prior to the expiration of their lease term, plaintiff will be entitled to recover liquidated damages based on that breach.

Plaintiff's other tenants in the mall whose co-tenancy provisions in their leases depend on defendants' continued occupancy in the mall throughout its lease term, however, will have the ability to terminate their leases based on defendants' premature departure, thereby causing irreparable harm to plaintiff. In our view, plaintiff sufficiently demonstrated that the premature termination of defendants' lease will cause a loss of goodwill and damage to plaintiff's customer relationships that will not be remedied by an award of liquidated damages and thus that temporary injunctive relief is appropriate.

Violet Realty, Inc. v. Amigone, Sanchez & Mattrey, LLP. (Appellate Division 4th Dept. 2020):

The tenant breached its commercial lease by abandoning the leased premises and ceased paying rent. The landlord moved seeking summary judgment

(a) for past rent due with interest,

(b) for accelerated future rent, and

(c) for costs and attorney's fees. The Tenant cross-moved seeking a determination that the term "tangible assets," as used in the parties' lease was limited to "furniture, fixtures, and equipment," and did not include tenant's accounts receivable, work in progress, or other physical property that did not have a physical presence on the leased premises. The trial court granted the tenant's cross-motion.

Violet Realty, Inc. v. Amigone, Sanchez & Mattrey, LLP. (Appellate Division 4th Dept. 2020):

The Fourth Department disagreed with the trial court, explaining: "We agree with [landlord] . . . that the court erred in granting [tenant's] cross motion insofar as it seeks a determination that [tenant's] accounts receivable are not 'tangible assets' under the lease." The Court noted that it must enforce a written agreement according to the plain meaning of the language chosen by the contracting parties, and that "it is common practice of New York courts to refer to **dictionaries** to determine the plain and ordinary meaning of the words in a contract."

Violet Realty, Inc. v. Amigone, Sanchez & Mattrey, LLP. (Appellate Division 4th Dept. 2020):

The Court then observed that Black's Law Dictionary defined "tangible assets" to expressly include accounts receivable, and that the trial court's contrary determination "does not 'comport with [the] plain meaning' of tangible assets."

Tenant Garners Ability to Exercise Renewal Option
Karr Graphics Corp. v. Spar Knitwear Corp.
(Appellate Division 2d Dept. 2021)

In ***Karr Graphics Corp. v. Spar Knitwear Corp***., 192 AD3d 673, 144 NYs3d 64 (2d Dept. 2021), the landlord rejected the tenant's election to renew its lease in accordance with the terms of the lease.

Lease Provision States Tenant Cannot be in Default of Lease
Karr Graphics Corp. v. Spar Knitwear Corp.
(Appellate Division 2d Dept. 2021)

The landlord claimed that tenant's prior default of the lease, which default the tenant had cured in the manner provided in the lease, precluded the tenant from exercising its right to renew the lease.

The Second Department affirmed the trial court's order enjoining the landlord from taking any action to evict the tenant on the ground that the tenant's exercise of its option to renew the lease was not valid.

Tenant Garners Ability to Exercise Renewal Option
Karr Graphics Corp. v. Spar Knitwear Corp.
(Appellate Division 2d Dept. 2021)

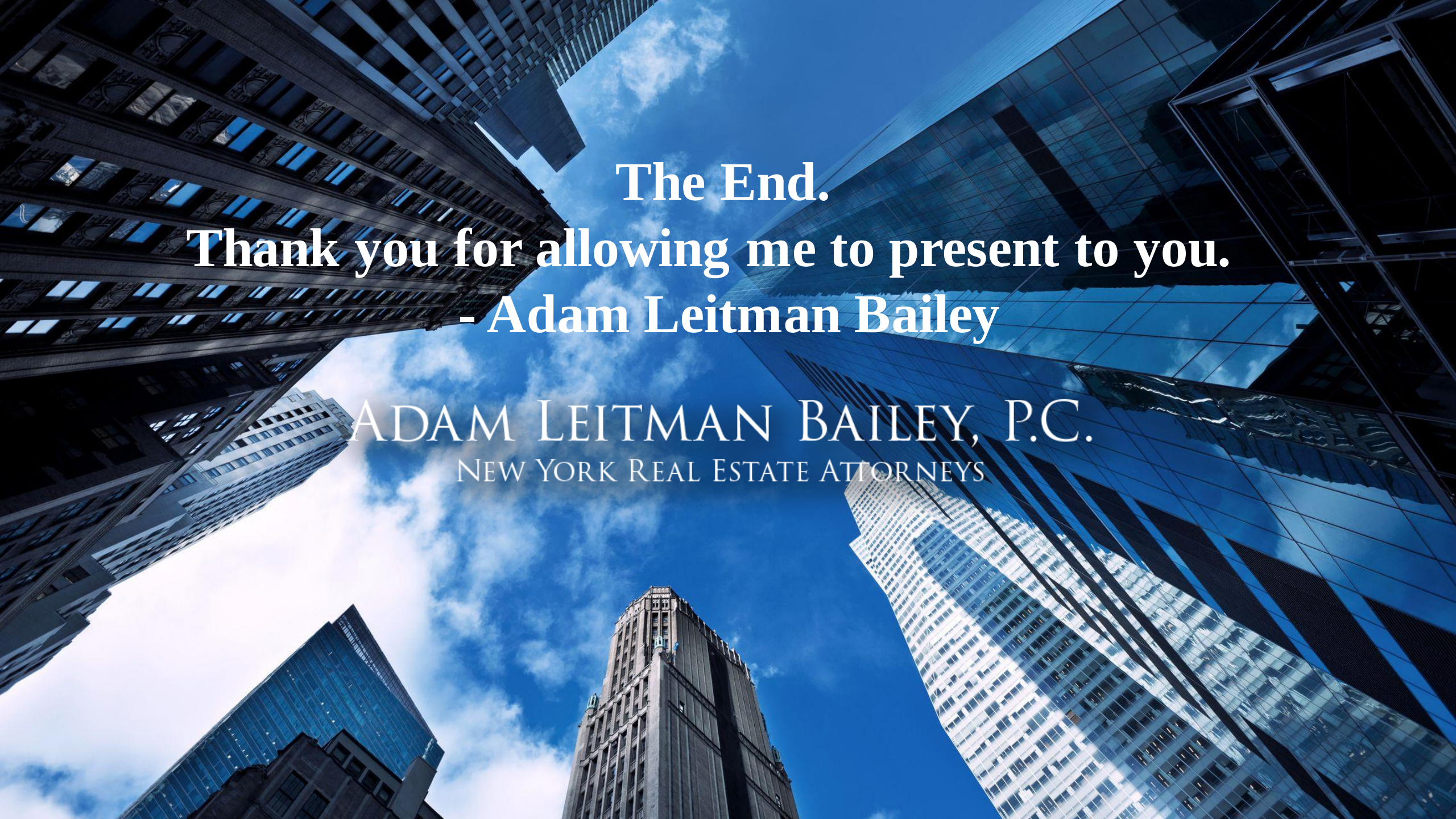
The Appellate Court held that the lease renewal provision, which granted the tenant the option to renew "[p]rovided Tenant is not in default in the performance of its obligations under the terms of this Lease," could not "reasonably be interpreted as providing that the tenant's default under the lease permanently extinguishes its option to renew regardless of whether the tenant cures the default."

Amendments to Lease Do Not Stop Enforceability of Guarantee

"The guaranty provided, inter alia, that no amendments of the lease would relieve the guarantors or the guarantors' obligations, and that notice to or consent by the guarantors was not required for amendments respecting the lease. Contrary to the contentions of Cipolla and Mucci, the October 2012 email provided by its own terms that it was to be deemed an amendment to the lease. "A guarantor is not relieved of his [or her] obligations where, as here, the written *862 guarant[y] allows for changes in the terms of the guarant[y] and expressly waives notice to the guarantor of these changes" (White Rose Food v Saleh, 292 AD2d at 378). Moreover, the email amendment to the lease did not change the risk Cipolla and Mucci assumed in guaranteeing the lease, as there was no ambiguity as to whose obligation was being guaranteed."

No Res Judicata for Landlord Lawsuits in Civil Court

In **231st Riverdale LLC v. Star Home Furniture, Inc.,** 198 AD3d 524, 152 NYS3d 820 (1st Dept. 2021), the First Department held that the trial court could not, on *res judicata* grounds, *sua sponte* dismiss a landlord's Supreme Court action against a tenant because the landlord had obtained some relief in Civil Court as to accrued rent and a warrant of eviction. Civil Court lacked the jurisdiction to grant the full remedies to which the landlord was entitled under the terms of the parties' commercial lease. The Court held that there were no extraordinary circumstances to justify a *sua sponte* dismissal of the landlord's action.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