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Property—Statutory Relief for Tenants of Destroyed Premises Rendered Applicable by Parties' Contrary Agreement

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plaintiff challenged the validity of an amendment to the Emergency Housing Rent Control Law.[36] Plaintiff had purchased a rent-controlled apartment house in Manhattan on February 20, 1961. Pursuant to statute,[37] the plaintiff tendered an application to the Rent Commission for the purpose of fixing higher rents computed on the new valuation of the apartment house. Prior to the Rent Commission's action on the application, the State Legislature passed the amendment in controversy.[38] The amendment states that a purchaser of a rent-controlled apartment house cannot increase the rents based on the new purchase price for one year from the date of purchase. This amendment was a modification of the past law which permitted an owner of newly acquired property to immediately increase his rents as provided by the former statute. Consequently, plaintiff was deprived of one year's increase in rent which he would have been able to receive prior to the enactment of the amendment. Plaintiff argued that due process demands that a law be not unreasonable or arbitrary and that it be reasonably related and applied to some actual and manifest evil.[39]

The Court of Appeals shows by sufficient factual data that the legislature has made a substantial investigation to warrant its legislation.[40] The Court further states that even if there were no record of the investigation, it may be presumed that the Legislature has made sufficient inquiry into the matter.[41]

The purpose of rent control is to prevent undue rent increases and is, therefore, beneficial to the public welfare.[42] Therefore, the constitutionality of the amendment is upheld by the Court on the basis of the police power of the State, which can be utilized to deter unwarranted and abnormal increases in rents so as to protect public health, safety and general welfare. The strong presumption in favor of the constitutionality of legislation coupled with the strong police power of the State point to the soundness of the Court's opinion.

L. H. S.

STATUTORY RELIEF FOR TENANTS OF DESTROYED PREMISES RENDERED INAPPLICABLE BY PARTIES' CONTRARY AGREEMENT

At common law, absent an agreement to the contrary, destruction of a building on land held under lease did not entitle the tenant to terminate his

36. N.Y. Unconsol. Laws § 8584(4)(a)(l)(v) (McKinney 1961).

37. N.Y. Unconsol. Laws, Rent and Eviction Regulations of the Temporary State Housing Rent Commission § 33(5) (McKinney's Appendix 1961).

38. Supra note 36.

39. Nebbia v. New York, 291 U.S. 502 (1934); Defiance Milk Products Co. v. DuMond, 309 N.Y. 537, 132 N.E.2d 829 (1956); Matter of Jacobs, 98 N.Y. 98 (1885).

40. See Rep. of the Comm. to Study Rents and Rental Conditions, Report on Rent Control, N.Y. Laws 1961, p. 1971; Report of Spec. Comm. to Study the Sales Price Basis and Evictions for New Housing under the Emergency Housing Rent Control Law, Report on Rent Control, N.Y. Laws 1961, p. 1985.

41. Defiance Milk Products Co. v. DuMond, supra note 39; Lincoln Bldg. Associates v. Barr, 1 N.Y.2d 413, 153 N.Y.S.2d 633 (1956).

42. New York University v. Temporary State Housing Rent Commission, 304 N.Y. 124, 106 N.E.2d 44 (1952).

obligations under the lease or to recover any portion of rentals paid in advance, even though such destruction deprived him of the benefits of the lease.[43] One aspect of the injustice attendant upon application of this rule was remedied by the enactment in 1860 of a statute which remained substantially unchanged until 1937.[44] This statute, present Section 227 of the Real Property Law, recited that where any leased building was destroyed by the elements, "and no express agreement to the contrary had been made in writing," the tenant might, if the destruction occurred without his fault, surrender possession and be relieved of liability to pay rent subsequent to surrender. Since the statute mentioned no right of apportionment of pre-paid rentals, the courts continued to apply the common-law doctrine, which permitted the landlord to retain any and all rent in his hands at the time the destruction occurred.[45] In 1937, however, the Legislature amended Section 227 to mandate the apportionment of such rent.[46]

In *Grimmer v. Gallery*,[47] the question was what constituted an "express agreement to the contrary" within the contemplation of Section 227. The lease agreement, via a typewritten insertion in a printed form lease, provided for a tenancy of one year, the rent payable fully in advance. Paragraph 5 of the lease contained a fire clause stipulating that either party might terminate the lease in the event the premises were totally destroyed by fire, the tenant to pay all rent to the date of said fire.

Subsequent to the execution of the lease, the tenant procured a "Leasehold Interest B" fire policy, insuring his "leasehold interest," defined in the policy as the insured's interest in the amount of advance rental paid in advance and not recoverable under the terms of the lease.

After three months occupancy, the premises were destroyed by fire. On the landlord's refusal to refund the unearned rental for the balance of the term and the insurer's denial of liability under the fire policy, the tenant instituted suit against both the landlord and the insurer, demanding judgment against the one or the other. The Supreme Court granted plaintiff's motion for summary judgment against the insurer but denied it as against the co-defendant landlord. Appeal was taken by the insurer and the Appellate Division unanimously affirmed without opinion.[48] The Court of Appeals reversed the entry of summary judgment against the insurer and remanded for reargument on plaintiff's motion against the landlord. The Court rejected the landlord's argument that the recitation in paragraph 5, which provided that the tenant shall pay all rent to the date of the fire rendered Section 227 of the Real Property Law inapplicable. It reasoned that the provision was but "boiler

43. Butler v. Kidder, 87 N.Y. 98 (1881).
44. N.Y. Sess. Laws 1860, ch. 345, § 1; N.Y. Sess. Laws 1896, ch. 547, § 197.
45. Werner v. Padula, 49 App. Div. 135, 138, 63 N.Y. Supp. 68, 70 (1st Dep't 1900).
46. Any rent paid in advance or which may have accrued by the terms of the lease or any other hiring shall be adjusted to the date of such surrender. N.Y. Sess. Laws 1937, ch. 100, § 227.
47. 8 N.Y.2d 369, 208 N.Y.S.2d 945 (1960).
48. 9 A.D.2d 718, 193 N.Y.S.2d 235 (4th Dep't 1959).

plate" in a printed form lease, a provision meaningful only where rent is payable periodically, and was rendered meaningless by the agreement that the rent was payable fully in advance. Assuming *arguendo* that the provision was relevant, the court concluded that far from evidencing a "contrary agreement," excluding the operation of Section 227, it reflects an agreement that, the rental being paid fully in advance, the tenant is to pay only for the period of actual possession and enjoyment and has a right to a refund of advance payments.

The almost summary reversal of a unanimous Appellate Division on the interpretation of a seemingly unambiguous statute can only be understood and explained by viewing Section 227 in the light of its common law heritage. The statute provides the tenant with two separate rights, termination of lease obligations and apportionment of rental paid in advance. Conditioning both is the proviso that "no express agreement to the contrary has been made in writing." What is required to exclude the operation of the statute and deprive the tenant of the benefits thereunder—an express agreement between the parties concerning termination or one concerning apportionment? The issue is crystallized by an examination of the opinion of the Supreme Court at Special Term.[49] The court reasoned that a tenant, paying rent in monthly installments, would have no right to the refund of any unearned portion thereof on destruction of the premises during that period. Therefore, the court concluded that there is no basis for any distinction between recovery of advance payments of rent in a lump sum and the advance payment of only an installment. The agreement that rendered Section 227 inapplicable was the agreement giving either party the right to terminate the lease. The inescapable conclusion is that any mention of termination or apportionment by the parties will render Section 227 inapplicable. A slightly modified position was reached in the cases of *Seigel v. Goldstein*,[50] *and Coast Delicatessen Co., Inc. v. Cox's Bath Inc.*[51] In the former case the court was confronted with a lease silent upon the question of apportionment of prepaid rentals but providing that the landlord alone was entitled to terminate on destruction of the premises. There the court denied the tenant's right to an apportionment because the operation of Section 227 was excluded by the contrary agreement of the parties with respect to termination.

A similar conclusion was reached in the *Coast Delicatessen Case*, the court reasoning that:

> The last sentence of the statute [providing for apportionment] . . . should not be read alone but the statute must be read as a whole, and where the lease contains a clause completely providing for the rights and obligations of the parties in the event of a fire, then, there being an

49. 7335 Cases & Points, Case 8, pp. 8-10.
50. 1 Misc. 2d 839, 148 N.Y.S.2d 266 (Munic. Ct. 1955).
51. 175 Misc. 928, 24 N.Y.S.2d 893 (City Ct. 1941).

> "express agreement to the contrary," the statute is not controlling. . . .[51a]

The lease in question is distinguishable from those in the above cases for there is in fact no contrary agreement concerning the tenants right of termination. But arguably, there is such an agreement concerning apportionment; the lease provides that the tenant shall pay all rent to the date of the fire, the statute rendering him liable for rent to the date of surrender.

It is submitted that the Court's holding is a liberalization of the rule laid down in *Seigel* and *Coast Delicatessen*, a conscious progression away from the strict common law rules of non-termination and apportionment, evidenced in the opinion of the Supreme Court at Special Term, so as to fully effectuate the sense and spirit of Section 227 of the Real Property Law.

The dissenting judge reasoned that since the tenant was denied summary judgment against the landlord at Special Term and *no appeal was taken*, the appeal was limited only as to the suit by the tenant and the insurance company on the fire policy. Thus restricted, he argued that the policy had no meaning whatever and covered no risk unless the insured and the insurer were in effect agreeing that in the event of fire the insurance company would reimburse the tenant for prepaid rent. Any other construction, it is said, would be manifestly against common sense and justice, as it would allow the insurer to write a policy and accept a premium without assuming any risk whatsoever.

It is submitted that the fact that the tenant applied for insurance, or that the insurance company wrote the policy, does not necessarily mean that he, or the insurer, construed the lease to deny the tenant the right to the return of any advance rental. Had that been the construction put on the insurance contract by the parties thereto, they would have simply defined the insured's "leasehold interest" as "the amount of advance rental paid by the insured" without adding—as they did—"and not recoverable under the term of the lease." Be that as it may, it is likely that the tenant procured the insurance simply because he was not sure what his rights were under the various contingencies which could eventuate and wanted to provide against any and all of them.

R. D. G.

CONSTRUCTION OF A NOTICE OF TERMINATION IN A LEASE OF REAL PROPERTY

In *Morlee Sales Corp. v. Manufacturers Trust Company*,[52] the Court of Appeals was required to construe a "notice of termination" clause in a lease of real estate to determine whether the purchaser of the property might terminate the lease. Paragraph 18 of the lease provided:

> That if the Landlord should sell said premises, prior to the expiration of this lease and the purchaser thereof desires possession of said premises, then and in that event, the Tenant will cancel this lease and

51a. Id. at 929, 24 N.Y.S.2d at 895.
52. 9 N.Y.2d 16, 210 N.Y.S.2d 516 (1961).