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Property—Construction of a Notice of Termination in a Lease of Real Property

Joseph S. Mogavero

> "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).

> surrender possession of said premises, . . . upon receiving 60 days written notice of the cancellation of this lease. . . .

The seller-landlord had entered into a contract to sell the leased premises to Manufacturers Trust Company, hereinafter referred to as the Bank, and several weeks later, formal title was conveyed. Subsequent to the passage of title, the Bank, in strict compliance with paragraph 18 of the lease, notified Morlee, the tenant in possession, that the lease was to be cancelled in 60 days.[53] Morlee then instituted an action against the Bank in the Supreme Court, Kings County, for a declaration that the attempted termination of the lease was invalid. Morlee argued that the Bank was not a landlord who was about to sell the premises, which Morlee contended was required by paragraph 18 of the lease. Thereafter, the Bank instituted a summary dispossess proceeding against Morlee,[54] and the action and the proceeding were consolidated in the Supreme Court.[55]

The Supreme Court, concluding that this exact question was decided by *Furio v. Smith*,[56] entered judgment for Morlee and dismissed the dispossess proceeding instituted by the Bank.[57] The Appellate Division affirmed[58] on the basils of *112 East 36th St. Holding Corp. v. Daffos*[59] and *Furio v. Smith*.[60]

On appeal, the Court of Appeals unanimously reversed the decision below and held that a purchaser could, under paragraph 18 of the lease, cancel the lease if he purchased the property with that intent and did not assume the position of landlord after the purchase, *i.e.*, by waiting an unreasonable amount of time before canceling, or by accepting rent from the tenant in possession prior to sending a cancellation notice. In other words, the cancellation must be in connection with the sale of the property.

In its opinion, the Court stated that the reasoning attributed to the cases cited in *Furio v. Smith*[61] should not be followed, and that the *Daffos* case was distinguishable on the grounds that in that case there was a waiver of the purchaser's right to terminate because he had assumed the position of landlord by accepting rent and by waiting an unreasonable amount of time before giving notice; in effect, an attornment had occurred.

Furio v. Smith[62] involved an identical cancellation provision, but in that case, the purchaser of the property informed the tenants that the lease would be cancelled *only if* the tenants were not interested in purchasing the property.

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53. See Annot., 116 A.L.R. 931, 933 (1938); Annot. 163 A.L.R. 1019 (1946).
54. See N.Y. Civ. Prac. Act § 1410.
55. See N.Y. Civ. Prac. Act § 1426-a.
56. 272 App. Div. 941, 72 N.Y.S.2d 425 (2d Dep't 1947).
57. 16 Misc. 2d 599, 185 N.Y.S.2d 679 (Sup. Ct. 1959).
58. 11 A.D.2d 796, 205 N.Y.S.2d 979 (2d Dep't 1960).
59. 273 App. Div. 447, 78 N.Y.S.2d 31 (1st Dep't 1948), aff'd, 298 N.Y. 763, 83 N.E.2d 462 (1948).
60. Supra note 56.
61. Ibid.
62. Supra note 56.

The decision was a memorandum by the court and stated simply that "The notice served upon the tenants is ineffectual to cancel the lease as a consequence of the meaning which attaches to paragraph 18 of the lease. . . ."[63] The court then went on to cite a sizable number of cases to substantiate this statement,[64] but never actually clarified its meaning. Therefore, one could not be certain whether the notice served was ineffectual because its form did not comply with the provisions of paragraph 18, or whether it was ineffectual because it was given by the purchaser and not the seller-landlord.

Assuming then, as Morlee did, that *Furio* stood for the proposition that a purchaser could not cancel under the lease, Morlee's most compelling argument was that they should be allowed to rely upon the law as it existed at the time he entered into the lease. At first blush, this argument has a great deal of appeal, for "rules of law on which men rely on in their business dealings should not be changed in the middle of the game."[65] And certainly as Morlee contended, there were no great public or moral issues involved which necessitated a re-examination of pre-existing legal precedents.[66]

However, a closer examination of the facts reveals that this argument presupposes that the intention of the parties when they entered into the contract was that only the landlord would have the right to give notice of termination. And as the Court of Appeals so clearly pointed out, it seems unlikely that this would have been the agreement, for the landlord, in agreeing to such a contract, would have subjected himself, if he ever decided to sell, to the risk of losing a tenant before he was assured that title would close.

In addition to what was discerned to be the intention of the parties at the time they entered into the lease, the court also noted that the language of the lease referred to a sale and not a contract to sell and did not require that notice be given by any particular party. Therefore, the Court concluded, to interpret the lease as allowing only the landlord to give notice, as Morlee contended it should be interpreted, would have been reading meaning into the lease that was not there, and in effect, would be making a new contract for the parties under the guise of interpreting the writing.[67]

J. S. M.

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63. Supra note 56 at 941, 72 N.Y.S.2d at 426.

64. Hotel Dauphin, Inc. v. Remey, 53 N.Y.S.2d 301 (Sup. Ct. 1945), (Purchaser attempted to cancel the lease over a year and a half after he had purchased the property); Payne v. Brathwaite, 113 Misc. 517, 185 N.Y. Supp. 107 (Sup. Ct. 1920), (The lease provided that "the lessor shall have the privilege of terminating the within lease at any time in the event of a sale of the premises by giving sixty (60) days written notice."); Krim Realty Corp. v. Varveri, 97 Misc. 407, 161 N.Y. Supp. 229 (Sup. Ct. 1916), (The lease provided that the landlord may cancel this lease).

65. 303 N.Y. 349, 102 N.E.2d 691 (1951).

66. See Bing v. Thunig, 2 N.Y.2d 656, 163 N.Y.S.2d 3 (1957); Sears, Roebuck and Co. v. 9. Avenue-31 Street Corp., 274 N.Y. 388, 9 N.E.2d 20 (1937).

67. Green v. Doniger, 300 N.Y. 238, 90 N.E.2d 56 (1949); Raner v. Goldberg, 244 N.Y. 438, 155 N.E. 733 (1927).