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Property—Dependent and Independent Covenants in a Lease

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of the Residential Rent Law in a proceeding before the Rent Administrator who ruled that the tenant's apartment had not become decontrolled, since the exchange was for the landlord's benefit and merely a substitution of controlled housing accommodations. The Supreme Court dismissed the petition, but the Appellate Division[23] reversed, holding that the above statute demands only two conditions; (1) a renting after April first, Nineteen Hundred fifty-three, and (2) continuous occupancy by the owner for one year prior to renting. Since petitioner landlord met both provisions, the disputed apartment must be ruled decontrolled.

It is a common proposition that the literal meaning of an unambiguous statute should be followed,[24] but the purpose which the statute is to effect must be given precedence.[25] "A thing which is within the letter of the statute is not within the statute unless it is within intent of the lawmakers."[26] Prior lower court decisions[27] on almost identical fact situations as the instant case, have held that such exchanges for the landlord's benefit do not result in rent decontrol for the tenant. The purpose of the instant statute was to induce owner-occupiers to make their housing accommodations available to the rental market. This being the purpose, the legislature could not have intended to penalize a tenant with a controlled apartment who exchanges with a landlord, for the latter's benefit.

The Court of Appeals felt the Rent Administrator had made an equitable adjustment of the interests of the parties, the landlord getting the larger apartment and the tenant getting the landlord's apartment, subject to rent control. The Court made reference to decisions which allowed departure from the literal meaning of a statute[28] and held that the Rent Administrator's determination was neither arbitrary nor unreasonable, and a clear case for administrative discretion. In giving great weight to the administrator's interpretation of the rent control statute, under diverse conditions, the court reaffirmed a policy, *i.e.* to leave undisturbed an administrative ruling where it is not clearly shown to be contrary to law.[29]

DEPENDENT AND INDEPENDENT COVENANTS IN A LEASE

Landlord and tenant entered into a lease whereby premises were to be used for storing and shipping of goods. The certificate of occupancy then in effect permitted the first floor of the leased premises to be used as a dance hall. In the lease, the landlord covenanted to make application to obtain a certificate

23. 7 A.D.2d 1004, 184 N.Y.S.2d 289 (2d Dep't 1958).
24. Lawrence Const. Co. v. New York, 293 N.Y. 634, 59 N.E.2d 630 (1944).
25. People v. Ryan, 274 N.Y. 149, 8 N.E.2d 313 (1939).
26. River Brand Rice Mills Inc. v. Latrobe Brewing Co., 305 N.Y. 36, 110 N.E.2d 545 (1953).
27. Brettler v. Weaver, 14 Misc. 2d 1031, 177 N.Y.S.2d 835 (Sup. Ct. 1958); Ashen v. McGoldrick, 17 Misc. 2d 23, 189 N.Y.S.2d 919 (Sup. Ct. 1954).
28. New York Post Co. v. Leibowitz, 2 N.Y.2d 677, 163 N.Y.S.2d 409 (1957); See also, *supra* notes 25 and 26.
29. People v. McCall, 219 N.Y. 84, 113 N.E. 795 (1916); See also, Ry. Comm'r v. Rowen and Nichols Oil Co., 311 U.S. 570 (1914); Gray v. Powell, 314 U.S. 402 (1941).

of occupancy authorizing the use of the demised premises according to the terms of the lease. No time was fixed for the performance of this covenant but there was a further covenant to the effect that if the landlord exhausted all his remedies and the certificate was "refused," the tenant could vacate the premises within 60 days after notice from the landlord, and the lease would be at an end.

Tenant entered into possession on March 1, 1953 and, on April 27, 1954 it sent a letter to the landlord informing it that if a new certificate of occupancy was not forthcoming by June 30th, the tenant would deem the lease terminated. This step was taken after many oral complaints to the landlord produced no tangible result, and even though during the 14 months of possession no violations were placed against the premises by an official agency. The landlord filed for a certificate of occupancy after receiving this letter, and five days before the deadline set by the tenant, landlord was notified that the certificate was held up because of storage of combustibles on the premises. Tenant moved out on the 30th of June and with the combustibles removed, a certificate was issued.

The instant action, *56-70 58th St. Holding Corp. v. Fedders-Quigam Corp.*[30] was commenced for the recovery of rent accruing under the lease after tenant had vacated premises. The question was raised as to whether the covenant to pay rent was conditional upon the landlord's procurement of a suitable certificate. Efforts to formulate distinctions of dependence and independence of promises or covenants have proved to be a difficult undertaking, and it can only be best determined "by the intention and meaning of the parties as expressed by them, and by the application of common sense to each case."[31] Of course, the general rule exists that a covenant which goes to only a part and not to the whole consideration of the contract is an independent covenant, whereas covenants which are dependent or conditional are such that performance of one depends on the prior performance of the other.

The lease itself was not void for illegality. It contemplated a corrected and hence a lawfully occupied premise, and it would fail as a valid contract only if the contemplated correction became impossible.[32] The bar to legal use was readily correctible and the parties must be deemed by the language which they elected to use in the instrument to have intended that it be corrected. However, where a lease or contract is incurably violative of some ordinance or regulation designed for the protection of property or human life, a court will refuse to lend it enforcement.

In an action for rent, a tenant can set up a defense that he was evicted, either constructively or otherwise. An actual eviction is the forcible ouster of the tenant, but in a constructive eviction the tenant has the burden of showing

30. 56-70 58th Street Holding Corp. v. Fedders-Quigan Corp., 5 N.Y.2d 557, 186 N.Y.S.2d 583 (1959).

31. Rosenthal Paper Co. v. National Folding Box & Paper Co., 226 N.Y. 313, 320, 123 N.E. 766, 768 (1919).

32. Elkar Realty Corp. v. Kamada, 6 A.D.2d 155, 157, 175 N.Y.S.2d 669, 671 (1st Dep't 1958).

such an unlawful interference with its possession and use of the demised premises so as to amount to a substantial impairment.[33] However, there can be no constructive eviction unless there is a surrender of the possession of the premises;[34] and if a defendant remains in possession, then he must pay rent.[35]

In the instant case, the Court of Appeals in a divided opinion found that since the certificate had not been "refused," and the landlord was still seeking its issuance, the tenant was not justified in vacating the premises and ceasing to pay rent. However a shadow is cast on the decision by the concurring opinion of Judge Fuld. Concurring with the opinion of three judges in holding tenant liable, Judge Fuld also held that the covenants were dependent—thus he agreed with the three dissenters who became the majority in the particular holding that the continued payments of rent depended on the landlords securing a certificate of occupancy. However, Judge Fuld felt that his sole ground for favoring the landlord was because "the tenant in this case waived its right to demand *timely* compliance by the landlord." Since a motion for reargument has been granted to the parties involved to the extent of allowing a reargument of the question concerning the tenant's alleged waiver of its right to demand timely compliance by the landlord,[36] it might be interesting to explore "waiver" a bit further.

Before a party may rescind for failure to perform a contract containing no fixed date for performance it is incumbent upon that party to give notice declaring his intention to rescind if the contract is not performed within a reasonable time. Not only must the time be reasonable, but it must also be specified in the notice.[37] What constitutes time is, of course, a question of fact.[38] In the present fact situation, the conversation between landlord and tenant as to complaints of delay, specified no definite time as to when correction was to take place and, therefore was not such a warning to the defendant as the law requires.[39] However, the written notice was sufficient. Time is not the essence of a contract which is to be performed within a reasonable time, but either party can make it so whenever he desires by simply giving reasonable notice to that effect.[40] Even though there is a waiver, it can be negated by a reasonable notice and stating that the contract will be rescinded if the notice is not complied with.[41] The notice must be clear and definite both as to time and the effect of non-performance.[42]

It appears, therefore, that since four judges held the covenants involved

33. 1 THOMPSON, NEW YORK LAW OF LANDLORD AND TENANT § 270; Herstein v. Columbia Pictures Corp., 4 N.Y.2d 117, 172 N.Y.S.2d 808 (1958).
34. Edgerton v. Page, 20 N.Y. 281 (1859).
35. Hizington v. Eldred Refining Co. of N.Y., 235 App. Div. 486, 257 N.Y. Supp. 464 (4th Dep't 1932).
36. 6 N.Y.2d 878 (1959).
37. 3 CORBIN, CONTRACTS § 722, p. 820.
38. Murray Co. v. Lidgerwood Mfg. Co., 241 N.Y. 455, 150 N.E. 514 (1926).
39. Taylor v. Goelet, 208 N.Y. 253, 260, 101 N.E. 867, 868 (1913).
40. *Ibid.*
41. Lawson v. Hogan, 93 N.Y. 39 (1883).
42. Boswell v. United States, 123 F.2d 213 (5th Cir. 1941).

herein to be dependent on each other, the tenant had a right to rescind the contract for failure to perform. The question is, was there a reasonable time given by the tenant to the landlord in the letter dated April 27, 1954. It gave till June 30th for the landlord to comply, and it appears that this letter made time of the essence and if it could be shown that the time was reasonable in the light of all surrounding circumstances, then landlord breached his covenant and tenant had a right to rescind.

INDIAN LANDS; JURISDICTION TO DETERMINE TITLE

Section 8 of the New York Indian Law states:

> Except as otherwise provided by law, no person shall settle or reside upon any lands owned or occupied by any nation, tribe or band; and any lease, contract or agreement permitting such residence shall be void. The county judge of the county in which the lands are situated, upon complaint made to him, of such illegal residence, shall if he thinks there is reasonable ground therefore, issue a notice directed to the person against whom complaint is made, requiring him to appear before such judge at a time and place therein specified, to answer the complaint. Such judge shall attend at the time and place mentioned in the notice, and upon proof of the personal service of the notice, shall take proof of the facts alleged in the complaint, and shall determine whether such person is an intruder upon the lands of such reservation. If he shall determine that such person is an intruder, he shall issue a warrant to the sheriff of the county commanding him, within ten days after the receipt thereof, to remove such person from such lands. The district attorney of any county in which reservation lands are situated, upon written application of the chiefs, councilors or head men of the nation, tribe or band owning such lands shall make complaint of any intrusions on such lands, and cause the intruders to be removed.[43]

Does Section 8 of the Indian Law give a County Court jurisdiction to decide right or title in land when an intruder proceeding is brought under it?

In the case of *Brenner v. Great Cove Realty Co.*,[44] a proceeding was brought by the District Attorney of Suffolk County pursuant to Section 8 of the Indian Law. The proceeding involved a nine acre parcel of land to which both the Indians and appellants claimed title. There was a disputed issue of fact as to where the boundary line of the reservation was situated. This issue was resolved in favor of the Indians. Appellants were adjudged intruders, and the County Court directed issuance of a warrant for their removal from the land. The Appellate Division affirmed the order, but in its decision stated that the order removing the appellants as intruders did not determine right or title in the land.[45] On appeal, the ruling of the Appellate Division concerning the right or title in the land was held to be erroneous, and as a result, the

43. N.Y. INDIAN LAW § 8.
44. 207 Misc. 114, 137 N.Y.S.2d 570 (County Ct. 1955).
45. Brenner v. Great Cove Realty Co., 4 A.D.2d 749, 165 N.Y.S.2d 143 (2nd Dep't 1957).