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PROPERTY

Liability of Tenant for Damages for Period of Appeal from Dispossess Order—Emergency Rent Law

The Legislature enacted the Emergency Rent Law[1] to remedy the unequal bargaining position between landlord and tenant existing because of the chronic shortage of business and commercial rental space. The law compels the landlord to continue the tenant in possession after the expiration of the lease[2] so long as the tenant actually occupies[3] the premises, in exchange for which the landlord receives an artificially imposed statutory rental.[4]

A statutory tenant[5] may be removed only as provided for by stature.[6] One provision for eviction, known as the "match-lease" clause, provides that under defined circumstances the landlord may enter into a lease with a third party, and if the tenant refuses to enter into a lease substantially the same[7] as that offered to the third party, the tenant may be dispossessed.[8]

In *Self Service Super Market v. Harris,*[9] a previous disposition was had between the same parties, and a final dispossess order pursuant to summary dispossess proceedings[10] was entered against the tenant on March 2, 1950. A stay of issuance of the dispossess warrant was granted for a limited time[11] under the Business Space Law[12] until July 2, 1950, inasmuch as the tenant needed additional time to vacate because of unusual circumstances or inconvenience.[13] The tenant obtained subsequent stays of the dispossess warrant pending appeal[14] until the

1. The Commercial Space Law and the Business Space Law, which are similar in substance and purpose, comprise the Emergency Rent Law, and are found in N. Y. Unconsol. Laws §§8521-8538, and §§8551-8567 respectively. Also see *Analysis of the New York State Emergency Rent Statutes* by Frank A. Barrera in N. Y. Unconsol. Laws, pp. 775-810 (McKinney 1953). Only the Business Space Law is relevant in this note.
2. *Stern v. Equitable Trust Co. of New York,* 238 N.Y. 267, 144 N.E. 578 (1924).
3. 207-17 West 25th St. Co. v. Blu-Strike Safety Razor Blade Co., 277 App. Div. 93, 98 N.Y.S.2d 62 (1st Dep't 1950), *rev'd on other grounds,* 302 N.Y. 624, 97 N.E.2d 356 (1951).
4. *Supra* note 2. Also see N. Y. UNCONSOL. LAWS §8558 (1953).
5. A tenant in possession by virtue of the Emergency Rent Law is defined as a statutory tenant.
6. N. Y. Unconsol. Laws §8558 (1953).
7. Self Service Super Market v. Harris, 303 N.Y. 868, 104 N.E.2d 921 (1952).
8. *Supra* note 6, §8558(k).
9. 3 N.Y.2d 615, 170 N.Y.S.2d 816 (1958).
10. N. Y. CIV. PRAC. ACT §§1410-1447.
11. *Supra* note 6, §8558(m).
12. *Supra* note 1.
13. Colonna & Co. v. Anthony M. Meyerstein, Inc, 198 Misc. 556, 96 N.Y.S.2d 316 (Sup.Ct. 1950), *aff'd.* 278 App. Div. 588, 102 N.Y.S.2d 920, *appeal den.* 278 App. Div. 697, 103 N.Y.S.2d 655 (2d Dep't. 1950).
14. N. Y. CIV. PRAC. ACT §1443.

dispossess order was finally affirmed, whereupon a warrant was issued on April 1, 1952. The tenant continued to pay only the statutory rental until eviction.

The landlord then brought this damage action[15] to recover the difference between the statutory rental and the fair rental value of the premises, alleging such damages accrued from the date of the entry of the final dispossess order on March 2, 1950, until the tenant was evicted. The Court held (6-1), in an opinion written by Judge Van Voorhis, that the tenant was liable for the difference between the statutory rental and the fair rental value, not from the date of entry of the final dispossess order on March 2, 1950, but from the expiration on July 2, 1950, of the stay obtained under the Business Space Law until the tenant was evicted under the dispossess warrant.

Ordinarily the entry of the final dispossess order terminates the statutory tenancy, though the tenant thereafter continues in possession.[16] However, the statutory tenancy is not terminated by the entry of the final order where the warrant is subsequently stayed as provided for by the Business Space Law.[17]

In *Smith v. Feigin,*[18] a statutory tenant continuing in possession after the termination of the statutory tenancy was held to have the status of a trespasser, and liable for storage charges which the landlord was required to pay to store his equipment during the holding over period. Dicta in the *Feigin* case suggesting that the statutory tenant wrongfully holding over is liable in damages to the landlord for the difference between the statutory rental and the fair rental value became law in *207-17 West 25th St. Co. v. Blu-Strike Safety Razor Blade Co.*[19]

The tenant's contention in the present case was that a stay granted by the Court merely continued the tenant in possession against the will of the landlord as was the case prior to the entry of the dispossess order, and if in possession by permission of the Court, the tenant had a legal right to the premises, and could not be held to have the status and liability of a trespasser.

The Court said that the stay taken pursuant to the Business Space Law by reason of circumstances affecting the tenancy extended the statutory tenancy, but held that the tenant obtained subsequent stays pending appeal at his peril. The decision recognized the distinction in purpose between stays obtained under the Business Space Law because of hardship or other inconvenience and stays merely obtained under the Civil Practice Act pending appeal. The

15. *Supra* note 9.
16. Smith v. Feigin, 276 App. Div. 531, 96 N.Y.S.2d 123 (1st Dep't 1950).
17. *Supra* note 13.
18. *Supra* note 16.
19. *Supra* note 3. *Cf.* 105 Franklin Street Corp. v. Seratoff, 284 App. Div. 262, 131 N.Y.S.2d 257 (1st Dep't 1954).

majority reasoned that if the tenant were not liable to the landlord for the landlord's losses caused by a stay pending appeal, then the language of section 1443 of the Civil Practice Act, insofar as it requires the posting of a bond to cover damages where such a stay is obtained, would be meaningless. The majority pointed out that if the tenant were liable only for the statutory rental and not the fair rental value during the period in which a stay was granted pending appeal, a tenant, merely by appealing and obtaining such a stay of the warrant, would be able to "elevate himself by lifting his own bootstraps."

Judge Burke, in a vigorous dissenting opinion, contended that the statutory tenancy continues until the issuance of the dispossess warrant, and that in any event, a tenant in possession by permission of the Court does not incur the liability of a trespasser. He argued that the majority decision, in allowing this cause of action, inhibits the process of appeal in these cases, and is therefore against the spirit of the Legislature's intentions. He suggested that the landlord's proper recourse was to have the statutory rental increased as prescribed by the statute.

There are three possible alternative solutions to this situation. First, the tenant could be evicted after the entry of the dispossess order though appeal is pending, but this is so impractical that neither litigant would suggest it. Second, the tenant could be allowed to stay in possession after the entry of the dispossess order, being liable only for the artificially low statutory rental. Third, the tenant could be allowed to stay in possession, by permission of the Court, after entry of the dispossess order pending appeal, but liable in damages as a trespasser should he lose on appeal. This third approach forces the tenant to appeal at his own risk, and not at the risk of the landlord. Therefore it not only precludes a disgruntled tenant from utilizing an appeal to perpetuate the statutory rental after the trial court has held him liable for the higher fair rental value, but also, by allowing the tenant to appeal only at his own risk, inhibits the encumbering of the courts with bad-faith appeals.

Breach of Covenant of Quiet Enjoyment—Payment of Rent Condition Precedent to Suit by Tenant

In *Herstein Co. v. Columbia Pictures Corp.*,[20] the tenant brought an action for damages against his landlord for breach of covenant of quiet enjoyment. Under the lease, the covenant of quiet enjoyment was predicated upon the payment of rent. In November 1955, the tenant was in default in his rent; the landlord in the same month began alterations which the tenant alleged constituted a partial actual eviction. The Court held that the action could not be maintained.

20. 4 N.Y.2d 117, 17 N.Y.S.2d 808 (1958).