Finkelstein, Ferrara, and Treiman's

Landlord-Tenant Monthly

Volume 3 Issue 5 May 2005

Letting Go of Leases and Allowing Licenses

By Adam Leitman Bailey and Dov Treiman

Why Licenses?

Inevitably, when courts seek to readjust the balance between landowners and non-owner occupants, owners' counsel will reach into the ancient common-law toolbox to find occupancy arrangements that give owners the panoply of rights and remedies they thought they enjoyed as landlords. In the movie *Jurassic Park*, it is observed that nature will find a way. So, while the dinosaurs on the island are all female, they find a way to reproduce. Similarly, when so many judges appear determined to remove landowners' rights, owners will find a way to assert them. Some properties are so uniquely situated or configured that unless the landlord has extraordinary levels of control, the property's profitability may be doomed. Since many courts are antagonistic to such levels of control in ordinary leasing arrangements, creativity is often required.

For institutional landlords dealing with large corporate tenants, the answer lies in careful lease crafting. And inevitably, both sides of the negotiating table will share responsibility for problems in interpretation that will undoubtedly arise.[1]

However, for smaller businesses, particularly startups, the old-fashioned license may be perfect for shared spaces, office suites, and for other types of commercial occupancy. And these arrangements give owners considerable latitude. By way of example, typically, a landlord will develop something such as a loft building by licensing each floor to five different businesses, where each occupant has its own space but all share an elevator and kitchen. These landlords give the occupants special access cards to gain entry to their space, each of which is pre-built. Some supply basic furniture. Others do not. This obviously factors into the rents that may be charged. Technology allows "turn key" control for owners if a licensee fails to pay the licensee fee or otherwise defaults.[2] Also, owners may use technology to control and charge for extra services such as copies, faxes, kitchens, conference room use, and communications equipment.[3] Much of this could also be encompassed within a lease agreement. But when self help is being utilized, courts clearly favor license agreements over traditional leases.[4] Although lease clauses permitting self help have been enforced, attorneys should be aware of the possibility of a court reinstating the tenant while litigation continues. By contrast, with license agreements, licensees may sue for damages incurred due to an unlawful eviction, but courts will almost never restore the licensee to possession.

What is "self help"? It is an odd name, really. Simply, it means locking an occupant out of the premises without court process.

(Continued on page 2)

(Letting Go of Leases, continued from page 8)

Benefits of a License Agreement

By entering a license agreement instead of a traditional lease, the landlord may be able to:

(a) utilize self help in the event of a default;

(b) avoid landlord-tenant proceedings, thereby saving both the time and money that would otherwise be associated with such litigation;

(c) avoid having the court put the licensee back in the space while the case is being litigated;

(d) earn additional revenue by charging for features found in the premises; and

(e) offer commercial space in areas that are considered less than prime precisely because the occupants are optimistic that once their business takes off, they will be able to leave these less luxurious surroundings to go into the "big time" without being burdened by having to serve out the balance of the fixed lease-term.

Disadvantages of a License Agreement

Just as landowners can make the licensee come and go at will, the licensee may also leave at will. This flexibility comes at a price. The landlord may be deprived of a reasonably steady income flow and may, in extreme circumstances, see a vacancy rate high enough to drive the building into a negative cash flow status. In fact, if a licensee who plans on staying smells weakness in the landlord's negotiating position as the vacancy rate climbs, the licensee can demand reductions in the licensing fees, thereby further undermining the building's financial stability. Lenders are also more willing to lend against a "tenanted" building than one filled with "licensees."

A license is attractive for a startup business because in the event of a failure, its principals will not be stuck with years of rent due. However, as soon as that business shows success, it is going to want the stability of a lease. Therefore, owners may well find that this tremendous churning in the building's occupancy also destabilizes the building's financials.

Marketing of a "terminable-at-will" license agreement may be extremely difficult if the property owner is competing with other landlords for occupants. Typically, occupants want to know that they will have use of a delineated space without interruption for a certain amount of time. The amount of notice that will be required to terminate the license agreement may also be a deal-breaker when negotiating the license.

How Does One Obtain the Benefits of a License?

Many spaces that are the subject of a lease agreement could be the subject of license agreement, affording building owners more control and leverage over the tenancy. But many spaces cannot fit into the license mold in view of all the accompanying limitations and requirements.

The Difference Between a Lease and a License

A lease is a conveyance of exclusive possession of specific property. A license merely makes permissible certain acts on another's property that would not otherwise be permissible. Case law deals more with what does not constitute a license, rather than what it is. However, the hallmark of a license is the nonexclusivity of possession. Thus, one way to mark a license as a true license is to include a provision that the landlord can relocate the licensee to a different portion of the premises, at will. While the landlord may never actually exercise this right, the fact that the right exists will help define the agreement as a license rather than a lease. To this end, it is useful for the license to include a floor plan which shows the initial space designated under the license, with a provision that if the space should change, a different floor plan will be annexed to the agreement to reflect the modification. An owner with a taste for it may use photographs instead of floor plans.[5]

Having The Agreement Terminate at Will

One factor that distinguishes a license from a lease turns on whether the drafted agreement contains a clause allowing for revocability at will. Courts have held that documents "called" license agreements

(Continued on page 10)

(Letting Go of Leases, continued from page 9)
were actually leases merely because the document only allowed the agreement to be terminated for cause.[6] They reason that when one party's interest in another's real property exists for a fixed term and is not revocable at will, a landlord-tenant relationship has been created. Therefore, an at-will termination clause is another condition a careful owner's counsel will insist on seeing in any license agreement. Of course, this presents a marketability issue and owners should feel free to assure licensees that as a businessperson, the landowner would be unlikely to terminate the license on a "whim," since that would negatively impact the building's income. However, the owner should not go on to say that there would have to be a reason to terminate the license. That would mean that one of the license's terms is that it could only be terminated for cause and the owner faces the problem of fraud charges if it is not true, or a finding that the agreement is really a lease if it is true. So, the owner really has to restrict comments to saying that it would be bad business to terminate the license on a "whim."[7]

Restricting the Amount of Control Given the Licensee

Much of what distinguishes a license from a lease turns on the amount of control the licensor has granted to the licensee.[8] The less control given the licensee, the more likely the agreement will be considered a license. Owner's counsel should therefore avoid anything that appears to transfer absolute control and possession to the licensee. Owners will also want to limit in some way the granting of access to the space. For example, wise owners avoid having a licensee have control over areas in which the licensee does not conduct permitted activities. For similar reasons, the owner may wish to grant the licensee less than absolute twenty-four hour access to the space. Prudent owners do not give licensees control of keys and locks to the space's entrance ways. Finally, in order to preserve the definition of license, the owner should retain the right to enter the licensed space for more than just emergencies.[9]

Sometimes "More" Really Is "Less"

Another factor in distinguishing licenses from leases is the degree to which the licensor provides the licensee with services. Property owners seeking to preserve license status should bear the expense of installing computer networks and cabling, major office equipment, and telephone and electrical wiring within the space. Owners should also provide services such as facsimile,[10] copier, and kitchen use if available, and should limit the licensor's power to install its own sophisticated electronic equipment within the licensed space. This limiting of the licensor's rights—and the owner's retention of these rights—will reinforce the agreement's status as a license.

Assignment or Transfer of the Space

Owners should prohibit the licensee from transferring any interest in the licensed space.[11] The License Agreement should therefore be automatically terminated[12] upon the licensor selling or transferring all or any part of its interest in the space to a third party. Similarly, owners should provide that the license will terminate automatically if the licensee engages in a bulk sale, or if greater than a 50% interest in the licensee's business is transferred to another party, whether corporate or individual. In the world of leasing, transfer of all (or even a part) of the stock of a corporation can be considered a forbidden assignment[13] and there is no reason a properly worded license agreement cannot contain the same language.

A License by Any Other Name May Not Smell As Sweet

In order for the courts to deem an agreement to be a license, it should be called a "license" or "occupancy agreement" and not a "lease". While the courts do not consider themselves bound by the name,[14] whether it is called a license or a lease, the moniker has some persuasive value in litigation. So, if an owner is going to the trouble of creating a license, it should say that that is what it is (or, at least, that is what was intended).[15]

And, Finally?

We do not mean to imply that licenses are the one-size-fits-all solution for today's marketplace. They are really only meant for landlords who are filling smaller or marginal spaces and places such as office suites whereby the landlord is not giving up total control of the tenancy and will be managing the

(Continued on page 11)

(Letting Go of Leases, continued from page 10)

space daily. Such property owners—and their licensees—will be limited to those who appreciate the benefits of greater flexibility and independence from the court system and who are willing to endure the financial risks and instability inherent in their use. For the right landlord, the license agreement may be the best revival of anything since that guy at Jurassic Park made dinosaurs.[16]

(Endnotes)

[1] In this regard, we commend to the reader's amusement the many cases centered around 666 Fifth Avenue. These leases have been found ill crafted as a matter of law. However, since there were attorneys on both sides of the process, the leases are not construed against the landlord. Instead the courts are constrained to apply the dictum of the immortal Rachel Treiman: "When in danger, when in doubt, run in circles, scream and shout."

In *Executive Office Network, Ltd. v. 666 Fifth Ave. LP,* 30 HCR 276A, 294 AD2d 166, 742 NYS2d 36, NYLJ 5/16/02, 18:1, HCR Serial #00013172 (AD1 Williams; Tom, Saxe, Rubin, Friedman), the court wrote:

> While each party's interpretation finds support in various lease provisions, they simply cannot be harmonized. Thus, the agreement is ambiguous, and extrinsic evidence should have been considered in order to establish its meaning.
>
> The record before us is insufficient to permit resolution of the parties' intent. Industry custom affords no assistance where it is unclear whether the intention was to follow it or to depart from it. The custom of providing for base rent and, separately, for additional rent has already been noted. Finally, the respective affidavits concerning lease negotiations are cursory and serve only to raise questions of fact.

In *Citibank v. 666 Fifth Ave. LP,* 31 HCR 722B, 2 AD3d 331, 769 NYS2d 268, NYLJ 12/26/03, 26:4, HCR Serial #00014082 (AD1 Nardelli; Saxe, Rosenberger, Williams), the court wrote:

> The lease provisions at issue, respecting the effect of real estate tax decreases on the rent paid by plaintiff lessee to defendant landlord, were properly found ambiguous (see, *Exec. Off. Network, Ltd. v. 666 Fifth Ave. Ltd. Partnership,* 294 AD2d 166, 742 NYS2d 36). The ambiguities are not, however, to be construed against defendant by reason of its having drafted the initial version of the leases, since the lease agreements ultimately entered into resulted from extensive negotiations in which both parties, each a commercially sophisticated entity, were represented by counsel, and plaintiff failed to show that it "had no voice in the selection of [the leases'] language" (*67 Wall St. Co. v. Franklin Natl. Bank,* 37 NY2d 245, 249, 333 NE2d 184, 371 NYS2d 915).

[2] That is a key concept. Licensees do not pay rent. They pay a licensee fee. If there is litigation, the occupants will often try to claim that they are tenants. On their side is the legal doctrine that a court is not bound to regard an agreement by the name that the parties choose for it, but will look to the root of what the arrangement actually represents. But while names are not determinative, they can be ammunition in the analysis. Therefore, landlord's counsel should be meticulous never to use the word "rent," for only landlord-tenant relationships have rent. It must consistently be called a "licensee fee." Many, of course, will notice that this means that the landlord cannot bring a nonpayment proceeding under RPAPL § 711(2). Yet to many practitioners this is a small price to pay for the greater owner rights possessed by a licensor compared to a traditional landlord.

[3] Without, of course, the ability to characterize these as "additional rent" for the purposes of summary proceedings.

[4] License agreements can be particularly attractive for small spaces where sharing allows tenants to pool the expenses of copiers, fax machines, kitchens, and conference rooms. In some settings, even clerical and secretarial staff can be included in the license. Landlords with these kinds of spaces may have find that license agreements are just what it takes to turn these sows' ears into silk purses. In doing so, they can save thousands of dollars and years of court battles. The kinds of questions typical in lease litigation– such as whether a sign must be removed, a leak makes the premises unworkable, or whether the process server delivered proper legal notices to an employee or a customer of the tenant–rarely crops up in license litigation.

For an example of the kind of wasteful lease litigation that ties things up for years on end, we refer the reader to www.alblawfirm.com, "News and Appearances," *Candy World*. If ever there were an argument in favor of the simplicity of licenses as opposed to the complexity of leases, that case is it.

[5] Diagrams and pictures, while not the most common form of description of demised premises, whether by lease or license, are still recognized as useful. *See, 25 West 43rd St. Co. v. Sioris,* 22 HCR 701B, NYLJ 12/8/94, 28:1 (AT1 Miller; McCooe, Glen) HCR Serial #00007258. In the kinds of licenses we are describing in this article, however, they are virtually irreplaceable.

(Continued on page 12)

(Letting Go of Leases, continued from page 11)

[6] What the parties choose to call an agreement, while indicative of the agreement's true nature, is by no means binding. As the court wrote in *Metered Appliances, Inc. v. St. Marks Housing Assocs. LP*, 33 HCR —, 6 Misc3d 1029(A), NYLJ 3/16/05, 20:1, HCR Serial #00014 (Sup Kings Rivera):

> They also raise an issue of fact regarding whether the lease agreements are enforceable. Defendants' contention that the leases violate General Obligations Law §5-903, turns on whether the agreements are properly deemed to be leases or licenses. It is the intent of the parties and not the language of the leases which should control the analysis (*Linro Equipment Corp. v. Westage Tower Associates*, 233 AD2d 824 [3rd Dept. 1996]; see also, *Sebco Laundry Systems, Inc. v. Oakwood Terrace Housing Corp.*, 277 AD2d 303 [2nd Dept. 2003]).

[7] Courts have held that a purported license which is not terminable at will, but only for cause and is for a fixed period, is in reality a lease. *American Jewish Theatre, Inc. v. Roundabout Theatre Co., Inc*., 22 HCR 244B, NYLJ 4/25/94, 26:1 (AD1 Sullivan; Carro, Wallach, Kupferman, Ross) HCR Serial #00001151; *Board of Mgrs. Of Builders Apt. Corp. Condo v. Caruso*, 23 HCR 577A, NYLJ 9/27/95, 29:4 (Civ Kings Greenbaum) HCR Serial #00007832.

[8] The transfer of absolute control and possession is the hallmark of a lease as opposed to a license. *Zemach Corp v. John*, 29 HCR 62A, NYLJ 2/2/01, 26:1, HCR Serial #00012382 (AT1 Parness; McCooe,Davis)

[9] *Id*.

[10] Does anybody ever really call it "facsimile" anymore? Do folks even know what a facsimile is and is it proper to discuss it in polite company? Let's face it. The real term is "fax." Anyone who thinks to the contrary should just get over it. And let's face it, it's a lot more fun to fax someone than to facsimile him, although faxing of complete strangers without appropriate latex precautions is never a good idea. Finally, in the end, which is a good place to have things be final, it is always wise to remember what Joe Friday said to his secretary when asked if he wanted both the snail mail and the fax, "Just the fax, ma'am." You knew you were not going to get away without our using that one. Fess up.

[11] Because of the transient nature of the occupancy in the first place, the owner will want to maintain full control over that very transience.

[12] Again, we must caution that a written license agreement must call for termination "at will" in order to preserve its character as a license. So, when crafting termination "for cause," exercise caution so as to make it clear that cause is sufficient for the termination, but not required.

[13] *Barnes v. Raikelson*, NYLJ 6/20/90, 27:1, 18 HCR 319B (AT 2 & 11 Kassoff; Pizzuto, Santucci); *Dennis' Natural Mini-Meals, Inc. v. 91 Fifth Ave. Corp.*, NYLJ 4/22/91, 23:1, 19 HCR 230A (AD1 Sullivan; Wallach, Kupferman, Kassal); *The Cigno Revocable Trust v. Palummo Bros., Inc. et ano*, NYLJ 7/25/91, 25:2, 19 HCR 456A (AT 2 & 11 Monteleone; Pizzuto, Williams); *Francis Lewis Assocs. v. Beer Barrel Distributors, Inc.*, .21 HCR 214A, NYLJ 5/7/93, 32:3 (AT 2 & 11 Kassoff; Aronin, Scholnick) HCR Serial #00000529.

[14] See note 6, above, or *Metered Appliances, supra* if you are feeling hoity toity.

[15] Keeping in mind that courts will look behind agreements to what they really are and not be bound by the labels that parties put on them.

[16] At this point in the article, Mr. Bailey sought to introduce a wholly gratuitous reference to Mr. Treiman's life partner, Mr. Antonovich. However, when in his editorial capacity, Mr. Antonovich reviewed the article, he demanded that he in no way be associated with this article. You are therefore directed to disregard this note.

Restoration: "I'm Sorry," Doesn't Make It Didn't Happen

PART III

By Dov Treiman

Procedural Considerations – Balancing Equities

As we have already noted, restoration orders must be the result of evidentiary hearings that balance the equities of the various parties to determine whether the court should exercise its discretion in favor of the applicant seeking restoration. However, those equities are not necessarily the issues upon which the applicant for restoration was removed from the premises in the first place. Let us say

(Continued on page 13)

(Restoration, continued from page 12)

that the tenant was evicted from the premises for the nonpayment of rent and the landlord is now resisting restoring the tenant to the premises because the tenant is a drug pusher. This is the problem that appears to have faced the court in *Hazy Realty Corp. v. Bermuda*.[1]

There are definite due process problems with this case — problems that the court managed to overcome without so much as mentioning their existence. However, that does not mean that we should not. The problem is that we have the civil equivalent of a person being charged with A and being called upon to defend B. This is inherently unfair. If it were in the course of the main proceeding, there is no question that the evidence related to the tenant's drug use would not be permitted. However, that is not the point we are at in the proceeding. Instead this is a restoration hearing and there is no question at all about the eviction's propriety. The tenant, without genuinely contesting the eviction itself, seeksthe exercise of the court's discretion to overcome the strictly legal considerations, which inevitably came into play upon the balancing of the equities I described earlier, many of which have nothing at all to do with whether or not the tenant paid the rent. And, while this case focused on whether or not to receive evidence on a "good riddance" argument from the landlord, we need to place our focus on the procedural problems such receipt of evidence entails.

So, how does this data come before the court? When we are dealing with restoration orders, usually there is some urgency to the matter and the court does little to advance the tenant's plight by adjourning the case for an exchange of paperwork. However, in other situations, there may not be such great urgency, as when the tenant has very few personal possessions and is waiting out the case in Mom's spare bedroom. Obviously, then, there will have to be a crafting of specific solutions to specific problems.

So, the amount of time that a landlord is given to reduce the "good riddance arguments" to paper form will very much depend on just how homeless the tenant is at the moment. If the tenant is staying with relatives during the proceeding's pendency, a week to prepare papers is not unreasonable. If the tenant is sleeping in a box on a subway grate, the landlord should be given until the afternoon of the day the motion is being heard to come up with a hand written précis of any applicable arguments.[2] Alternatively, the landlord's attorney may be called upon to make an oral representation on the record of what will be proven. With that hand written précis in place, the tenant can then decide whether to seek an adjournment and the court will pretty much yield to the tenant's desires on this issue. However, if the tenant does insist on an immediate hearing, then the tenant has waived the argument that the tenant needed time to gather evidence. This is going to be a delicate balancing act no matter what. But even the most vicious tenant should not be made to walk into a hearing with no idea as to what kinds of allegations are going to be presented. That much process is assuredly due.

Procedural Considerations – Technical Process

As noted, in order for the ousted tenant to bring a restoration petition when there is a new tenant in place, the new tenant has to be served and joined. Absent that, the tenant is without recourse to restoration, but may still bring an action for damages.[3]

We are told that restoration in the context of a proceeding when there was a legal eviction requires the vacatur of the judgment and warrant.[4] But that seems a bad rule. It may be that both the judgment and warrant were obtained perfectly legitimately, but that there was a stay on the warrant's execution that was violated. In such a scenario, there is no reason to vacate either the judgment or the warrant. Indeed, as we look at landlord-tenant law generally, there are more reasons to vacate warrants than judgments. Just because there is a problem in the execution process, or in the entitlement to execution does not mean that the underlying judgment that adjudicated the parties' legal status is not proper.[5] However, the inverse rule is correctly understood: Once the warrant is vacated, the eviction under that warrant becomes illegal and the evictee becomes a candidate for restoration.[6]

Enforcement of restoration orders is always a bit problematic. It frequently happens that the court has previous experience with the landlord in the context of this particular proceeding or another and has, or believes it has, reason to distrust the landlord's inclination to go along with duly issued

(Continued on page 14)

(Restoration, continued from page 13)
court mandates. However, anticipation of the landlord's overstepping should not be an invitation for the court to overstep its own bounds. The local courts where restoration cases are almost exclusively heard have extremely limited equity jurisdiction. This does not include the ability to issue injunctions ancillary to restoration itself.[7] Neither is the court allowed to anticipate that the landlord will be in contempt of its orders. Yes, restoration orders are enforceable through the contempt process, but not through a process which predicts the contempt and sets the penalty ahead of time.[8]

It would be tempting to say, "Okay, if you can't give the tenant that apartment, give them some other one." The problem with that, however, is that such an order would require the exercise of equity jurisdiction the court simply does not have.[9] Of course, the Appellate Term is a branch of the Supreme Court and has full equitable power, in addition to the power it has derived from the lower court it is reviewing.[10]

Because of the doctrine that spouses cannot remove each other through summary proceedings,[11] they also cannot seek restoration through summary proceedings.[12] Neither can they seek restoration when their spouse has surrendered the premises.[13] All of these rules supposedly seek to preserve the institution of marriage.[14] The local courts are also forbidden to interfere with any Family Court proceedings by entertaining a restoration proceeding which would undo an order of protection.[15]

As appealing as the idea of one-stop shopping is, and should be, money damages for wrongful eviction cannot be awarded in the context of a summary proceeding seeking restoration.[16] The damages claim must be brought as a separate action.[17]

Procedural Considerations – Lockout Proceedings

As with any other judicial proceeding, standing is an issue. Obviously, the person who is or who claims to be locked out, has standing to bring a proceeding.[18] If self-help occurs during a summary proceeding, the court may use its continuing jurisdiction to order restoration.[19] But if the self-help has no connection to a summary proceeding, the locked-out person is relegated to an independent lockout proceeding.[20] And the mere denial of involvement in the lockout will not serve as a defense to the proceeding.[21]

Interestingly, the rescission of a fraudulently induced surrender agreement is not a proper predicate for a lockout proceeding.[22]

Procedural Considerations – Appeals

Appeals present their own problems. While summary proceedings are designed to be expeditious, appeals are not. There is no special acceleration that is granted to an appeal from a summary proceeding. So, they grind through with the same schedule as all the other appeals pending in the department where they are to be heard. If the tenant is in possession and peaceably occupying the apartment while paying use and occupancy during an appeal's pendency, there is nowhere near the measure of dislocation associated with a tenant who is kept homeless. This reality no doubt informs a Court's decision of whether to restore the tenant pending appeal.[23] When there is a genuine doubt about the landlord's claim, restoration pending appeal should be virtually assured.[24] With a tenant being restored, the landlord's burden of an undertaking is relieved since dwelling in the apartment itself is properly regarded as undertaking enough.[25] If after the restoration the parties enter into a new lease, the courts properly regard the controversy as over and the appeal mooted.[26] As a practical matter, if a tenant is not restored pending appeal, the tenant is most likely to evaporate. This leaves the landlord in the uncomfortable position of renting an apartment without certain knowledge that there will be no court order to evict the new tenant, but all in all, it's a pretty good bet.

Effect of Restoration

The effect of restoration is supposed to be a return of the parties to the *status quo ante*[27] with certain notable exceptions. First, if the ouster from the premises was illegal in any way, then restoration does not vitiate the occupant's cause of action for wrongful eviction.[28] Second, it does not remove the
(Continued on page 15)

(Restoration, continued from page 14)

tenant's liability for ongoing rent,[29] although it is once again subject to claims of violation of the warranty of habitability.[30] In cooperatives, restoration reinstates the full panoply of cooperators' rights, including the rights associated with stock ownership.[31] One of the logical consequences of being restored to the *status quo ante* is that any proceedings the parties may want to bring against each other with respect to possession of the premises need to be started anew.[32]

Since restoration has no direct effect on a damages claim, restoration motions and restoration proceedings are improper vehicles for an attempt to bolster a cause of action for the wrongful eviction.[33] Logically flowing from that is the inverse concept that it is unnecessary to seek restoration in order to seek vacatur of a judgment of possession or a warrant of eviction.[34]

And Finally – Lest You Think

From this analysis, it would be all too easy to conclude that any time a landowner uses self-help, that will instantly give rise to the right to bring a restoration proceeding. However, that is not the case. While the law restricts the application of self-help as regards persons who have been residentially present for thirty days or more, those who are commercially present[35] or present for a shorter time are still subject to self-help eviction. This is a common-law right and subject only to the limitation that it be done peaceably. Of course, what the case law allows as "peaceable" is absolutely farcical. Police officers can stand around holding more fire power than that possessed by small countries, and as long as those weapons are holstered, the mere implication that they could be drawn is seen as "peaceable."[36] Judicial process is also unnecessary when an agency issues a vacate order.[37] Of course, we should recall that vacate orders are only issued when the building is life threatening. So, it is not much of a stretch to say that we are not going to get too finicky about judicial process when we are trying to save lives.

Restoration is therefore limited to those situations when either the law or equitable situations demand that a person be placed back into possession. For both legal and equitable analysis, there must be an examination on a case-by-case basis, weighing the equities and examining the substantive legal rights that are implicated, and trying to find where the balance ultimately lies.

(Endnotes)

[1] 32 HCR 728A, NYLJ 11/22/04, 20:1, HCR Serial #00014620 (Civ Bx Alpert). My original commentary on this case appears at 32 HCRComm 120. The following paragraphs are a bit of a rewrite of that commentary, but since I am telling you that, it doesn't count as plagiarism, and can at most form an accusation against me of laziness or a lack of desire to rechew my cud.

[2] Keep in mind the landlord, or more likely the landlord's attorney was served with an order to show cause usually a week prior to the hearing date. This should be ample time for the landlord to gather together at least the materials to list why the tenant is undesirable. While opposition papers on orders to show cause in landlord-tenant practice are frequently dispensed with, this is a really good time for the landlord to put forth the effort.

[3] *Demko v. Ventrone***,** 12 HCR 256E, NYLJ 11/7/84, 13:4, HCR Serial #00010889 (AT 2nd & 11th).

[4] *SMJ Assocs. v. Stalling*, 28 HCR 150A, NYLJ 3/15/00, 28:6 (Civ Kings Marton) HCR Serial #0011799.

[5] Consider the myriad of cases decided under RPAPL § 753(4) which allow that the judgment is just dandy, but the warrant should be permanently stayed upon the cure of the underlying problem.

[6] *Lemish v. East-West Renovating Company,* NYLJ 1/2/90, 22:4, 18 HCR 1B (AD1 Kupferman; Asch, Kassal, Rosenberger).

[7] *Greaves Lane, LLC v. NBM Development, LLC, Decision at* 30 HCR 493A, NYLJ 8/28/02, 23:4, HCR Serial #00013335 (Civ Richmond Fusco) *Commentary at:* 30 HCR Comm 95.

[8] *1809 Realty Co. v. Nicholas*, NYLJ 3/8/91, 29:1, 19 HCR 141B (AD2 Mangano; Thompson, Eiber, Rosenblatt).

[9] *River Park Assocs v Griffith*, 14 HCR 109A, n.o.r., L&T #70953/85, decision dated 12/4/85 (Civ Bx. Rosen); *but see, NYCHA Kingsborough Houses v. Sullivan,* 32 HCR 439C, NYLJ 7/8/04, 28:2, HCR Serial #00014425 (AT 2 & 11 Pesce; Aronin, Patterson).

[10] *Hegeman Asset LLC v. Smith,* 32 HCR 432B, NYLJ 7/6/04, 28:4, HCR Serial #00014420 (AT 2 & 11 Pesce; Golia, Rios).

[11] *Rosenstiel v. Rosenstiel,* 20 AD2d 71, 245 NYS2d 395, 1 TLC Licensee 1, TLC Serial #0060 (AD1 1963).

(Continued on page 16)

(Restoration, continued from page 15)

[12] *Bart v. Bart*, 23 HCR 85B, NYLJ 2/9/95, 29:1 (AT2 & 11 Kassoff; Aronin, Scholnick) HCR Serial #00007389; *Billips v. Billips*, 29 HCR 419C, NYLJ 8/20/01, 30:2, HCR Serial #00012749 (Civ NY Acosta).

[13] *Tsionkas v. Clinton Housing Development Co., Inc.*, 23 HCR 45B, NYLJ 1/24/95, 25:2 (AT1 Parness; Miller, McCooe) HCR Serial #00007340.

[14] Formaldehyde might be more effective.

[15] *Bart v. Bart*, 23 HCR 84B, n.o.r. Decision dated 10/6/93 Under Index #93866/93 (Civ Kings Birnbaum) HCR Serial #00007387; *Bart v. Bart*, 23 HCR 85B, NYLJ 2/9/95, 29:1 (AT2 & 11 Kassoff; Aronin, Scholnick) HCR Serial #00007389.

[16] *Rucci Oil Co., Inc. v. Rucci*, 31 HCR 207A, NYLJ 4/30/03, 21:1, HCR Serial #00013682 (AT 2 & 11 Pesce; Patterson, Golia); *Kiryankova v. Brovkina*, 31 HCR 208B, NYLJ 4/30/03, 21:4, HCR Serial #00013684 (AT 2 & 11 Pesce; Patterson, Golia); *Carpio and Garcia v. Crowley*, 25 HCR 230A, NYLJ 4/24/97, 32:2 (AT2 & 11 Kassoff; Aronin, Chetta) HCR Serial #00008874.

[17] RPAPL § 853; *Rodriguez v. 1414-1422 Ogden Ave. Realty Corp.*, 31 HCR 188A, NYLJ 4/17/03, 19:1, HCR Serial #00013657 (AD1 Buckley; Rosenberger, Ellerin, Wallach, Lerner).

[18] Yeah, another one of those, "and you needed to tell me this?" *Harris v. French Institute*, NYLJ 2/8/83, 5:1, 11 HCR 34C (AT 1st); *Daniels v. Christofoletti*, NYLJ 6/7/89 26:6, 17 HCR 212B (Civ Qns Rios); *Greaves Lane, LLC v. NBM Development, LLC, Decision at* 30 HCR 493A, NYLJ 8/28/02, 23:4, HCR Serial #00013335 (Civ Richmond Fusco) *Commentary at:* 30 HCR Comm 95.

[19] *Harley of NY Assocs. v. Republic 42nd St. Garage Corp.*, 28 HCR 164A, NYLJ 3/22/00, 28:2 (Civ NY Kornreich) HCR Serial #0011815.

[20] *Subramany v. Subramany*, 28 HCR 761A, NYLJ 12/11/00, 34:5, HCR Serial #00012267 (AT2 & 11 Kassoff; Chetta, Patterson); *Tsafatinos v. Jimenez*, 27 HCR 68A, NYLJ 2/9/99, 32:2 (AT2 & 11 Scholnick; Chetta, Patterson) HCR Serial #00011148.

[21] *Lachhonna v. Levenson*, 20 HCR 479A, NYLJ 8/11/92, 21:1 (AT1 Ostrau; Riccobono, Parness) HCR Serial #00000012.

[22] *Pomranz v. Tauber*, 29 HCR 53A, NYLJ 1/29/01, 24:6, HCR Serial #00012370 (AD1 Nardelli; Williams, Andrias, Wallach, Lerner). RPAPL §713(10) speaks of force or unlawful means. Fraud is not that kind of "unlawful means," apparently.

[23] *But see, Seley v. Churchill Ct. Assocs*, 16 HCR 340B, NYLJ 9/22/88 22:2, HCR Serial #00010188 (A.T. 9&10 DiPaola; Stark and Collins).

[24] *Western Estates LLC v. Roberts*, 32 HCR 469B, NYLJ 7/26/04, 27:5, HCR Serial #00014458 (AT 2 & 11 Pesce; Aronin, Patterson).

[25] *Ocean Realty Co. v. Molina*, 22 HCR 492A, NYLJ 8/17/94, 24:4 (Civ Kings Gould) HCR Serial #00001395.

[26] *Ocean Gate Assocs. v. Burnell*, 13 HCR 125E, NYLJ 5/1/85, 12:4, HCR Serial #00003239 (AT 2&11 Buschmann; Jones and Kunzeman).

[27] *Riverbay Corp. v. Hibbert*, 21 HCR 488A, NYLJ 9/23/93, 23:4 (AT1 Parness; McCooe, Glen) HCR Serial #00000767.

[28] Hence the "I'm Sorry, Doesn't Make It Didn't Happen" of the title of this article. Of course, if there is a stipulation of restoration, one of the terms of the stipulation may well be release from precisely that liability. I used to work for an attorney who was completely unflappable. The only things that ever made him break out into a sweat were his lunchtime adulterous escapades (not getting caught, mind you, the escapades themselves) and traverses after eviction. He knew well that the process server he employed was inexpensive, but also less than meticulous about the propriety of service. So, since an illegal eviction would mean his personal liability, I was under standing-instructions to settle traverses after eviction however I could, but always procuring a release from liability for the eviction's illegality. Those were the instructions. What the language should actually say I was not told and so I used the only release language I had ever read: "from the beginning of the world to date" and I got some mighty strange looks on that one. Hey, the ink was still wet on my license. What did I know?

[29] *Crawford v. Hinds*, 13 HCR 239C, NYLJ 7/23/85, 12:4, HCR Serial #00020122 (AT 2&11 Kassoff; Monteleone and Lerner).

[30] *Milman v. Cataldi*, 16 HCR 303A, n.o.r., L&T #81561/86, decision dated 3/5/88, HCR Serial #00002531 (Civ NY; Klein).

[31] *Saccheri v. Cathedral Properties Corp.*, 29 HCR 44A, NYLJ 1/22/01, 35:3, HCR Serial #00012363 (District Nassau Alonge).

[32] *Magliore v. Mack*, 24 HCR 191B, NYLJ 4/9/96, 33:5 (AT 2 & 11 Aronin; Chetta, Patterson) HCR Serial #00008182.

[33] *Gran Sabana Corp., N.V. v. Midtown Gourmet Food Market, Inc.*, 30 HCR 196A, NYLJ 4/10/02, 20:3, HCR Serial #00013096(Civ NY Rakower); *Darcy v. Edward J. Castle Associates Inc.*, 17 HCR 16A, NYLJ 1/17/89, 25:2 (Civ NY; Dankberg, J.) HCR Serial #00020213.

[34] *Nicole Holding Co. v. Sargent*, 23 HCR 144B, NYLJ 3/16/95, 33:2 (AT2 & 11 Aronin; Scholnick, Patterson) HCR Serial #00007443.

[35] *110-45 Queens Blvd. Garage, inc. v. Park Briar Owners, Inc.*, 25 HCR 216A, NYLJ 4/21/97, 31:1 (Civ Queens O'Donoghue) HCR Serial #00008865.

[36] *Paulino v. Wright*, 22 HCR 739A, NYLJ 12/27/94, 26:1 (AD1 Ellerin; Kupferman, Williams, Tom) HCR Serial #00007290, TLC Squatters 1, TLC Serial #0057.

[37] *Carter v. HPD*, 25 HCR 510B, NYLJ 9/25/97, 27:2 (AT1 Ostrau; McCooe, Davis) HCR Serial #00009139.