

Real Estate *Update*

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ALM

Self-Help Evictions

*The Neglected Commercial Remedy*BY ADAM LEITMAN BAILEY
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Where the right to do so is expressly reserved in a commercial lease, a landlord may reenter the leased premises peaceably, without resort to court process, upon termination of the lease or upon the commercial tenant's defaulting on payment of rent or other lease terms.¹ A commercial landlord's common law right to use "self-help" to reenter his property peaceably to evict a defaulting tenant or other person with no right of possession has been recognized from time immemorial.² Nevertheless, although the common law right of self-help reentry is not abrogated by the statutory remedy of summary proceedings,³ it is a remedy that is rarely used.

Attorneys who represent commercial landlords are often reluctant to advise their clients to use this neglected self-help remedy to regain possession of leased premises from defaulting commercial tenants.⁴ This reluctance stems, in part, from the perception that courts are generally hostile to a commercial landlord's use of self-help because it renders a forfeiture of the premises before a tenant can litigate his right to remain in possession.⁵ In addition, because of the lack of use of self-help, many attorneys are unfamiliar with this body of law and are hesitant to employ such an aggressive measure. Courts also refuse to approve use of self-help where there is ambiguity in the lease terms or factual questions concerning the expiration of the lease.⁶ In addition, under RPAPL 853, a tenant wrongfully ejected from real property by force or other unlawful means may sue to recover treble damages from the

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landlord and be restored to possession if ejected before the end of the lease term.⁷

Landlords Hampered

This combination of general court hostility and attorney reluctance to recommend the use of proper self-help measures has created a situation in which commercial tenants have been allowed to violate their leases or extend them based on technical or frivolous defenses, sometimes for months and years at a time, in blatant disregard of the lease terms.⁸ In addition to the loss of rental income that often accompanies such disputes, landlords faced with this situation lose valuable time to repair, renovate, and re-let their premises to responsible tenants. These circumstances also adversely affect any effort by the landlord to sell the leased premises to potential buyers.

It would seem, therefore, that commercial landlords have every incentive to insist on including a proper and effective self-help provision in their commercial leases. With appropriate draftsmanship and proper execution of the self-help measures provided in their leases, commercial landlords should not be reluctant to exercise their right to peaceable reentry whenever such action is warranted. Indeed, with the availability of self-help written into the lease, it is likely that most tenants are going to be very careful to avoid any

action that will place themselves in default and thereby become subject to immediate peaceable eviction. In this way, commercial landlords may both (a) provide an incentive for their tenants to comply with the lease terms, and (b) be able, when compelled to use self-help, to timely re-let the premises without having first to await the outcome of costly and lengthy litigation before doing so.

Landlords who use self-help will not always avoid litigation. There may be the possibility of having to litigate (a) whether the tenant was in default at the time of the landlord's reentry, and (b) whether the self-help used was peaceable and otherwise lawful.⁹ But, for the landlord who is careful to document a tenant's default before reentering the leased premises and who is equally careful to ensure that reentry is accomplished peaceably, there should be little worry that a court will find either that the reentry was not lawful or that it was done in a forceful manner. However, if it is not crystal clear that the lease term has expired or that the tenant is in default, the landlord should not use self-help, but should resort only to summary proceedings or other legal process. If there is any uncertainty about the landlord's right to use self-help in the particular circumstances involved, then self-help should not be used.

Nevertheless, recognizing that the outcome of any litigation is always uncertain, a landlord may view the remote possibility of a future, adverse, treble damages judgment as a risk worth taking in order to obtain the real, current ability to re-let the premises to a responsible tenant who will pay rent during any litigation that ensues between the landlord and the evicted tenant.

Avoiding Damages

In deciding whether or not to run that risk, the landlord should consider the kind of damages that the evicted tenant will have a right to claim; i.e., whether any injury caused by the reentry will

be limited to property damage only or whether the evicted tenant will be able to claim and prove damages measured by the loss of the value of the leasehold.¹⁰ Where the lease has expired or been terminated by reason of the default, the tenant is not entitled to possession.¹¹ In that situation, the tenant's damage is likely to be limited to such property damage as may occur during the course of the reentry only—the sum of which a landlord may be more than willing to bear—but a judgment that the landlord may also be able to avoid by taking care to see, as noted below, that the tenant's property is carefully removed from the premises and placed in a reputable storage facility.

Whether a landlord's reentry is deemed peaceable or not will depend on whether it is made in a "forcible" manner. For a reentry to be forcible, the force used:

must be unusual and tend to bring about a breach of the peace, such as an entry with a strong hand, or a multitude of people, or in a riotous manner, or with personal violence, or with the threat and menace to life or limb, or under circumstances which would naturally inspire fear and lead one to apprehend danger or personal injury if he stood up in defense of his possession.¹²

In the absence of force that tends to breach the peace, hiring trucks and men and even a garbage company to evict a tenant does not constitute forcible entry.¹³ However, to ensure that its use of self-help is indeed "peaceable," the landlord should arrange for the reentry to occur during late night/early morning hours when the tenant's business is closed. The landlord's agents should be certain that no one is present on the leased premises before entering.¹⁴ Upon reentry, the landlord may change the locks or padlock the doors. To thwart any potential damage claims, the entire reentry operation should be videotaped, and all items of tenant property removed from the premises should be photographed and inventoried. The tenant's property should then be placed in storage for a reasonable period of time, in accordance with a lease provision that contemplates such action in the event of an eviction.¹⁵

Lease Provisions

Ultimately, whether or not the landlord is permitted to use self-help to regain possession of the leased premises will depend on whether the landlord's right to do so is reserved in the lease. The lease should expressly provide (a) that, if the tenant defaults in the payment of rent or commits any other violation of the lease constituting a

default, the lease shall terminate automatically, (b) that the landlord may thereafter recover possession in accordance with its common law rights, and (c) that the landlord may do so without any duty, requirement, or necessity to provide due process or to seek prior court approval, through summary dispossession proceedings or any other action or proceeding at law, before evicting the tenant and removing tenant's property and/or any person from the premises. Such a provision does not preclude the landlord from initiating summary proceedings if it chooses to do so. However, the landlord should exercise its options carefully. If the landlord does not use self-help initially, but commences a summary proceeding in the first instance, the right to use self-help thereafter may be waived.¹⁶

The lease terms should also obligate the tenant to pay the landlord all monies owed by the tenant up to the time of the landlord's recovery of possession, whether the landlord recovers possession through self-help or summary proceedings. In addition, the lease should reserve the landlord's right to sue after reentry for any damages incurred as a result of the tenant's actions, such as an unlawful holdover that causes the landlord to lose an opportunity for re-letting the premises. The lease should also provide that the landlord need not assert such claims against the tenant in summary proceedings only, but may do so in a separate plenary action.

Self-help is a useful tool that commercial landlords should always write into their leases. Doing so will provide them with much needed leverage and flexibility for dealing with recalcitrant tenants who continually ignore their leasehold obligations. While there are decided risks involved in using self-help measures, the careful landlord and the careful landlord's attorney should generally be able to avoid the pitfalls that exist and make self-help work to the landlord's benefit in the long run. In a world where property owners are forced to endure the

arduous and time-consuming litigation process before regaining possession, attorneys should add self-help to their arsenal of remedies.

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1. See *Bozewicz v. Nash Metalware Co., Inc.*, 284 AD2d 288, 725 NYS2d 671 (2d Dept. 2001); *Matter of 110-45 Queens Blvd. Garage, Inc. v. Park Briar Owners, Inc.*, 265 AD2d 415 (2d Dept. 1999); *Matter of Jovan Spaghetti House, Inc. v. Heritage Company of Massena*, 189 AD2d 1041, 592 NYS2d 879 (3d Dept. 1993).

2. See *Bliss v. Johnson*, 73 NY 529, 534 (1878) ("The true owner of land wrongfully held out of possession may watch his opportunity, and if he can regain possession peaceably may maintain it—and lawfully resist an attempt by the former occupant to retake possession, nor will he be liable to be proceeded against under the statute of forcible entry and detainer. There can be no wrongful detainer by the true owner when the entry was both lawful and peaceable."); *Fulfs v. Munro*, 202 NY 34, 39 (1911) ("Statutes relating to forcible entry and to forcible detainer, which are separate and distinct wrongs, have existed for centuries."); see also *Mayes v. UVI Holdings, Inc.*, 280 AD2d 153, 723 NYS2d 151 (1st Dept. 2001).

3. See *Cohen v. Carpenter*, 128 AD 862, 113 NYS 168 (2d Dept. 1908); *Liberty Industrial Park Corp. v. Protective Packaging Corp.*, 71 Misc.2d 116, 335 NYS2d 333 (Special Term, Kings Co., 1972), affirmed, 43 AD2d 1020, 351 NYS2d 944 (2d Dept. 1974).

4. Self-help is limited to the commercial context only. New York City Administrative Code §26-521 prohibits the use of self-help in the residential context.

5. For example, courts created the so-called "Yellowstone" injunctions to allow the parties to dispute their differences while in possession and to prevent forfeitures. A tenant is entitled to a Yellowstone injunction where it has demonstrated that (1) it holds a commercial lease; (2) the landlord has issued a notice of default, notice to cure, or a concrete threat of termination of the lease; (3) the application for a temporary restraining order was made and granted prior to the termination of the lease; and (4) it has the desire and ability to cure the alleged default by any means short of vacating the premises. See, e.g., *John Stuart, a Division of Robert Allen Fabrics of NY, Inc. v. D&D Associates*, 160 AD2d 547, 545 NYS2d 197 (1st Dept. 1990).

6. See *Harley of New York Associates v. Republic 42nd Street Garage*, NYLJ, March 22, 2000, p. 25.

7. See *Suffolk Sports Center, Inc. v. Belli Construction Corp.*, 212 AD2d 241, 628 NYS2d 952 (2d Dept. 1995).

8. See, e.g., *Million Gold Realty Co., Inc. v. SE&K Corp.*, 4 AD2d 196, 772 NYS2d 271 (1st Dept. 2004). See also www.alblawfirm.com click on News and Appearances and review articles concerning "Candy World."

9. See *Maracina v. Shirmeister*, 105 AD2d 672, 673, 482 NYS2d 14, 16 (1st Dept. 1984) ("RPAPL 853 no longer requires that the use of physical force be demonstrated.")

10. See *Mayes*, supra, n 2.

11. See *110-45 Queens Blvd. Garage*, supra, n 1; *Friends of Yelverton, Inc. v. 163rd Street Improvement Council, Inc.*, 135 Misc.2d 275, 514 NYS2d 841 (NYC Civil Ct., Bronx Co., 1986).

12. *Fulfs v. Munro*, supra, n 2, 202 NY at 42.

13. See *Liberty Industrial Park Corp.*, supra, n 3.

14. To ensure that the eviction is peaceable, the property owner should avoid confrontation during the eviction. If there is any conflict when conducting the eviction with the tenant or its representatives, then the eviction should be accomplished at a later date.

15. See NYLJ Real Estate Update, by Scott Mollen, May 3, 2000, p. 5.

16. See *Harley of New York Associates*, supra, n 6.

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