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The Most Crucial Commercial Lease Cases

THE MOST CRUCIAL COMMERCIAL LEASE CASES EVERY LEASING LAWYER AND COMMERCIAL LITIGATOR MUST KNOW BEFORE DRAFTING A LEASE OR ENTERING THE COURTROOM

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For almost two years, the attorneys at Adam Leitman Bailey, P.C have been compiling a list of the greatest commercial leasing cases of all time. The authors have always been fans "greatest" lists—there being something special about choosing the best among so many great people, entertainers, athletes, composers, or, in our case, cases that have had the greatest effect on leasing law. "Greatest" lists permeate our entire culture and are the basis for entire institutions like the Academy Awards, Tonies, Grammys, and the various Halls of Fame. Cooperstown, New York is a city entirely based on "greatest" lists, housing both the Baseball Hall of Fame and the greatest of the American summer opera festivals, Glimmerglas.

Law, however, is a peculiar field which, like baseball, lends itself well to actual statistical analysis of "greatness." These "greatest" are the cases are therefore those cases that are so heavily cited to that have demonstrated they have the most important impact on landlords' and tenants' businesses and are those cases in ignorance of which no litigator or drafter dares to enter either a courtroom or a lease negotiation. A mere handful of cases have achieved that kind of influence in commercial landlord-tenant relations. While across the United States of America there are a number of localities having enacted residential rent regulation, for the most part in the commercial arena, the principles of governing law are those of the common law finding their roots in its development over the past thousand years at first in Britain and then later here. These cases cover stability in leasing law, mitigation of damages, lease interpretation, lease enforcement, lease violations, attorneys' fees, court stipulations, and actual and constructive eviction. While late night television talk show hosts would no doubt list these cases in inverse order of importance, we will use them to trace the lifetime of a leasehold from negotiation through breach and enforcement.

Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.: stability in commercial leasing law and mitigation of damages Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.: development in commercial leasing law and mitigation of damages

Of these leading cases, probably the most essential one to understand is Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc., 23 HCR 748B, 87 NY2d 130, 661 NE2d 694, 637 NYS2d 964, TLC Mitigation 1, TLC Serial #0095 (NY Court of Appeals 1995) for it is this case that erects the entire dominant theory of commercial leasing law. The court wrote:

Parties who engage in transactions based on prevailing law must be able to rely on the stability of such precedents. In business transactions, particularly, the certainty of settled rules is often more important than whether the established rule is better than another or even whether it is the "correct" rule. This is perhaps true in real property more than any other area of the law, where established precedents are not lightly to be set aside. (citations omitted.)

Of necessity, this holding sets the theme for this entire article. Yes, some jurisdictions will vary from other jurisdictions about their holdings on a particular point, but the principle of stability is so important to real property law, that these jurisdictions will not lightly be persuaded to abandon their own view and hold some better view. In ancient Egypt, this principle of stabil-

ity was known as maat and endured for 5,000 years. Therefore, there is no reason to believe that in New York the principle of Holy Properties will be changed any time soon. Under Holy Properties, better is simply not good enough.

Holy Properties adhered to the common law, now minority rule held only in Alabama, Georgia, Minnesota, Mississippi, New York, and West Virginia that a landlord has no duty to mitigate damages when the tenant abandons the lease. After acknowledging its minority position, the New York high court felt that the adherence to maat was so important that it overrode any considerations of having a right or better rule. The majority view imposing such a duty is set forth in the Texas decision, *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293 (1997) which lists leading cases from all the states on the question and for that reason, *Austin Hill* makes it to the "greatest case" list. But, for its preservation of maat, *Holy Properties* is the leading case in the nation and *Austin Hill* for its violation of maat, is reduced to a mere footnote.

While it is perhaps more the business of economists and MBA's than of lawyers to make these determinations, it cannot be doubted that maat in commercial transactions, especially commercial leasing, will make a State more economically attractive for businesses seeking a new location. Nobody likes the law to be an unknown commodity.

Interpreting Leases

151 West Associates v. Printsiples Fabric Corp.: construction of leases against their drafters

While leasing no doubt has a flavor of conveyancing to it and was certainly understood at common law to be such, Holy Properties, supra, modern commercial leasing law is vastly more inclined to look at the lease as a contract subject to the same kinds of principles that govern contracts generally. Austin Hill Country Realty, supra; For an extended discussion, see also, Foundation Development Corp. v. Loehmann's Inc., infra ("The interplay of property and contract law in the landlord-tenant relationship is complex. Thus, before deciding whether the breach in this case could support a forfeiture, we must examine the common law nature of that relationship.").

Amongst the most important of these principles is that of contra proferentem, the idea that contracts are construed most strongly against their drafters. This doctrine is somewhat stronger in the residential leasing context than in the commercial leasing context because in all but very few residential leasing markets, the leases are presented to the tenants essentially take-it-or-leave-it. However, in commercial leasing, the amount of participation by the tenant can vary widely. The mere fact, however, that a lease says that it was jointly drafted by the landlord and the tenant will not, in most jurisdictions, foreclose the tenant from offering proof that this was simply not true. The clause reciting that a contract is not one of adhesion may be no less a contract of adhesion than the rest of the contract. As a practical matter, therefore, any landlord who wants to elude the doctrine is going to have to have and maintain a paper trail demonstrating the tenant's actual participation in the drafting process. For landlord's counsel, this may well mean letters that begin, "This is to memorialize your request that the lease say…" The leading case discussing all these ideas is 151 West Associates v. Printsiples Fabric Corp., 61 NY2d 732, 460 NE2d 1344, 472 NYS2d 909, TLC Contracts 1, TLC Serial #0012 (NY Court of Appeals 1984) in which the Court wrote:

It has long been the rule that ambiguities in a contractual instrument will be resolved contra proferentem, against the party who prepared or presented it. Moreover, unless the terms of a lease are clear, no additional requirements or liabilities will be imposed upon a tenant. (citation omitted).

Vermont Teddy Bear Co. v. 538 Madison Realty Co.: strict adherence to the terms actually embodied in a lease

In Vermont Teddy Bear Co. v. 538 Madison Realty Co., 32 HCR 205B, 1 NY3d 470, 807 NE2d 876, 775 NYS2d 765, NYLJ 3/26/04, 19:5, HCR Serial #00014218, TLC Leases 5, TLC Serial #0256 (NY Court of Appeals), the court takes this idea to the next step, holding that it does not matter what the parties meant to say or what they should have said. When it comes to a lease, the parties will be bound by the clear meaning of the words actually employed. As the court put it:

When interpreting contracts, we have repeatedly applied the familiar and eminently sensible proposition of law that, when parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms… We have also emphasized this rule's special import in the context of real property transactions, where commercial certainty is a paramount concern.

Again we find that same concern we saw in Holy Properties, supra, the idea of "commercial certainty," stability, or maat. And the

kicker in Vermont Teddy Bear is the phrase, "In the absence of any ambiguity, we look solely to the language used by the parties to discern the contract's meaning." In short, if the clause is clear, it need not be sensible to be enforced.

Vermont Teddy Bear stands as something of an unsung hero of capitalism. Its proposition that a written agreement two people entered into shall be enforced no matter the severity of the consequences or the lunacy of the terms actually monumentally strengthens business relationships. Business people will only do business in a reliable province where the laws are stable and justice is invoked fairly. But fairness can only be achieved when courts enforce the agreements before them without relying on the equities or any prejudices--hence the importance of this animal of a case.

Fifty States Mgt. Corp. v Pioneer Auto Parks: Enforcement of leases as written and acceleration of rent upon default.

Cummings Properties, LLC v. National Communications Corp.: Enforcement of leases as written and acceleration of rent upon default.

Foundation Development Corp. v. Loehmann's Inc.: Equitable non-enforcement of lease acceleration clause

Yet, in spite of its importance, Vermont Teddy Bear can hardly be regarded as unique. It stands in a line of increasingly powerful cases binding landlords and tenants to the actual wording of their leases. In one of the most signal cases of all time, Fifty States Mgt. Corp. v Pioneer Auto Parks, 46 N.Y.2d 573, 389 N.E.2d 113, 415 N.Y.S.2d 800 (NY Court of Appeals 1979) examined whether a clause in a lease making the rent for the entire term of the lease due upon a single default could be enforced. While there were earlier cases that had argued that such a drastic result was inequitable and an unenforceable forfeiture, New York's high court in Fifty States cut through all of that, holding:

In sum, the facts of this case do not justify equitable intervention. The parties freely bargained for the inclusion of a clause in their lease whereby the rent for the remainder of the lease term would be accelerated upon breach of tenant's covenant to pay rent. ... That honoring at least this aspect of its bargain may cause Pioneer fiscal hardship does not, standing alone, serve as a basis for construing the acceleration clause as a penalty under the guise of applying equitable principles to a routine commercial transaction.

In short, in a commercial transaction, the parties are to be held to the terms they negotiated, even if harsh. Cummings Properties, LLC v. National Communications Corp., 869 N.E.2d 617 (Mass. Supreme Jud. Court 2007); contra, Foundation Development Corp. v. Loehmann's Inc., 788 P.2d 1189 (Arizona Supreme 1990) (refusing to apply a forfeiture statute or lease clause where the default is brief).

Foundation Development is a particularly important case in this entire area which not only states the view contrary to that of Fifty States and Cummings Properties, but masterfully gathers the historical and judicial precedents nationwide for the purpose.

Enforcing the Lease

Greenblatt v. Zimmerman: Use of "practical construction" to interpret a lease

Morgan Guaranty Trust Co. of NY v. Solow d/b/a Solow Building Co.: Adherence to "practical construction" to interpret a lease

The ideas associated with enforcing leases are tightly tied with the ideas of interpreting them. Frequently cases discussing how a lease is to be enforced will of necessity also deal with the rules of how one is to be interpreted. Since commercial leases tend to be for longer terms than residential leases, there can be some considerable lapse in time from when a clause is written to when it falls upon a court to interpret it. So, in commercial leasing, one often comes across the idea of "practical construction" whereby a court, rather than taking a fresh look at the language in the lease itself, will look instead to how the parties actually lived under that language in the early years of the lease. Greenblatt v. Zimmerman, 132 A.D. 283, 117 N.Y.S. 18 (NY 1st Dept. 1909). If the landlord suddenly departs from that interpretation, such as in calculating the rent, the courts will rarely sustain that departure.

For example, common in commercial leases are so-called "pay now—fight later" clauses. In these, the lease contains a component of the payments that the tenant must make usually called "additional rent." However, unlike the "base rent," the actual numbers are not set forth in the lease. Instead, the landlord has to examine the operating expenses of the building, typically including real estate taxes and compute which of the operating expenses are properly passed along to the tenant as additional rent. Where either the lease is unclear in its writing as to which expenses count as "operating expenses" and which don't or where there are expenses that could be characterized either way, depending on one's point of view, disputes

will arise as to how much additional rent the tenant owes.

For example, a roof repair is typically an operating expense, but a roof replacement is typically not. It therefore becomes a disputable item as to whether a particular repair was so extensive as to be essentially a replacement and therefore outside of the tenant's fiscal obligation. Leases will often call for arbitration to resolve such disputes. However, in a "pay now—fight later" clause, the tenant must first pay the disputed amount as a prerequisite to demanding arbitration as to whether it was, in fact, owed. However, if the landlord abuses that process, the courts will enjoin the landlord's improper calculations. See, Morgan Guaranty Trust Co. of NY v. Solow d/b/a Solow Building Co., 32 HCR 276A, 68 NY2d 779, 498 NE2d 147, 506 NYS2d 674, HCR Serial #00014289, TLC Rent 6, TLC Serial #0279 (NY Court of Appeals: 1986).

Ran First Assocs. v. 363 E. 76th St Corp.: Tenants' entitlement to the benefit of tax abatements procured by landlord

Clauses like the "pay now—fight later" clauses are part of the generally common phenomenon in commercial leasing of the rent being broken out into the tenant paying a base rent plus increases in the rent itself and a share of the operating expenses of the building. Often these expenses include real estate tax escalations. While leases often call for such things, they are generally silent about whether the tenant gets to share in the benefit of tax decreases the landlord manages to procure. Unless the lease says to the contrary, the tenants do indeed get such benefit. Ran First Assocs. v. 363 E. 76th St Corp., 30 HCR 520A, 297 AD2d 506, 747 NYS2d 13, NYLJ 9/16/02, 19:2, HCR Serial #00013353, TLC Taxes 1, TLC Serial #0230 (NY 1st Dept. 2002).

41 Fifth Owners Corp. v. 41 Fifth Equities Corp.: Fixtures defined

While many leases call for fixtures becoming the property of the landlord, almost no lease attempts even a decent job at defining just what is and what is not a fixture. 41 Fifth Owners Corp. v. 41 Fifth Equities Corp., 33 HCR 30C, 14 AD3d 386, 787 NYS2d 326, NYLJ 1/18/05, 26:5, HCR Serial #00014723, TLC Fixtures 1, TLC Serial #0300 (AD1 Tom; Andrias, Saxe, Williams, Sweeny) takes the lead in filling that gap, albeit somewhat tersely. While it may no attempt to provide a comprehensive definition of the term fixture, at least it stated, "The dedicated purpose of the unit, its size and the extent of its connection to the structure render it a fixture." We would have to conclude that a vastly smaller unit would also be a fixture if indeed it was of dedicated purpose and extensively connected to the structural fabric of the building itself. Apparently the equipment in 41 Fifth had fairly complex connections to the structure.

Lease violations

Jefpaul Garage Corp. v. Presbyterian Hospital in the City of New York: Definition of waiver, acceptance of rent not constituting a waiver

Homstead Enterprises v. Johnson Products, Inc.: Acceptance of rent not constituting a waiver

Dunbar Housing Authority v. Nesmith: Acceptance of rent not constituting a waiver

Closely tied to the ideas behind enforcing leases are the ideas associated with when they are breached. While it is generally an ordinary exercise in lease interpretation to determine if the tenant has technically breached the lease, it is a more fact laden question to determine whether the landlord has waived that breach. The first and most important concept with waiver is its very definition. For that purpose, the leading case is Jefpaul Garage Corp. v. Presbyterian Hospital in the City of New York, 61 NY2d 442, 462 NE2d 1176, 474 NYS2d 458, TLC Waiver 1, TLC Serial #0084 (Ct of Appeals 1984) that defines a breach as a voluntary relinquishment of a known right. The two key words in that definition are "voluntary" and "known." If the landlord is acting under compulsion, there is no waiver. However, much more importantly, if the landlord is unaware of either the right itself or the breach of it, then the landlord cannot be said to have relinquished a known right.

How does ignorance of the breach take the situation out of the definition? Let us illustrate this by way of an example. Under a rather common lease clause, if the tenant fails to have certain insurances naming the landlord as an additional insured, the tenant is in breach of the lease. It would stand to reason and indeed the law charges the landlord with knowledge of the contents of its own lease. So there is no real question that the landlord knows of the right that the tenant's insurance insures the landlord. However, if the landlord does not know that the tenant is breaching this clause, as, for example, by fraudulently claiming that certain insurances are in place when in fact the insurance certificates are forged, then the landlord has not waived this breach if the landlord is fooled by the certificates.

Why? Because the lease gives the landlord a remedy for the tenant's breach. That remedy is itself one of the landlord's rights, but if the landlord is kept in the dark about the breach, the landlord, while knowing of the right to be insured, does not know of the right to evict to which the breach of the insurance clause had given rise. Thus, with the falsified insurance the landlord's right to terminate the lease is an unknown right which landlord cannot be said to have waived. The other key point of Jefpaul is that the conduct on the part of the landlord cannot be accidental or inadvertent but must have been specifically intended as a waiver. The key phrase from the decision is, "While waiver may be inferred from the acceptance of rent in some circumstances, it may not be inferred... as a matter of law, to frustrate the reasonable expectations of the parties embodied in a lease when they have expressly agreed otherwise." To the same effect are Homstead Enterprises v. Johnson Products, Inc., 540 A.2d 471 (Supreme Maine 1988) and Dunbar Housing Authority v. Nesmith, 400 S.E.2d 296 (Supreme W. Va. 1990).

TSS-Seedman's, Inc. v. Elota Realty Company: Difference in remedies allowed by conditional limitations and conditions subsequent

Summary proceedings, while generally regarded a derogation of common law, are now approaching the conclusion of their second century since their invention and have had ample time to develop a common law of their own. For most of that period, the courts have shown a decided hostility to the invocation of the summary remedy and the proceedings have, in many jurisdictions, betrayed a certain fragility. This is no less true in the State of New York, the geography of their invention, than anywhere else. Generally in garden variety commercial summary proceedings, especially those of the nonpayment kind, a landlord can get the relief sought. However, in summary proceedings brought not to recover funds, but rather to recover the property itself, many courts will find in the summary proceedings common law ample doctrine relegating suitors to the long, slow, and expensive common law ejectment proceeding.

The legal theory here is between two ostensibly different kinds of contingencies in leases in the event (typically) of a default by the tenant in fulfilling some obligation under the lease. In the one kind, the conditional limitation, upon the occurrence of the triggering event, the termination of the lease is automatic without any further actions by the landlord. In the other kind, the condition (a/k/a condition subsequent) the default gives the landlord the option to terminate the lease. There is nothing automatic. The landlord must exercise the option for it to take effect. TSS-Seedman's, Inc. v. Elota Realty Company, 72 NY2d 1024, 531 NE2d 646, 534 NYS2d 925, TLC Conditions and Conditional Limitations 8, TLC Serial #0075 (Court of Appeals 1988). While it is generally easy to state this theory, it is remarkably difficult to apply it by using any kind of analytical means. But, if one applies the mechanical method of finding that the presence of a notice to cure creates a conditional limitation and the absence of one creates a condition subsequent, one will most generally come up with the correct result. However, a notice to cure will often provoke a Yellowstone injunction (see next section) and one is therefore better off with a naked termination notice, set up as a conditional limitation – if the jurisdiction where the property is located allows for it. For undeniably obsolete reasons, while conditional limitations can be the predicate of a summary proceeding, a condition subsequent can only be enforced through an ejectment action.

For all of the reasons commercial litigators condemn badly written leases and their drafters, no complaint rings louder or more justifiably than when a landlord finds its case can no longer can be maintained as a summary proceeding designed to last a few months but instead must proceed in the longer more cumbersome common law ejectment action lasting typically a few years before an order of eviction. Hence, no lesson is more important to the lease drafter than understanding, drafting and implementing conditional limitations and staying far away from the ocean of dangerous conditions subsequent.

First National Stores, Inc. v. Yellowstone Shopping Center, Inc.: Tenant's right to litigate whether it is in breach prior to actual forfeiture of the lease

Food Pantry, Ltd. v. Waikiki Business Plaza, Inc.: Tenant's right to litigate whether it is in breach prior to actual forfeiture of the lease

We must also note that in some jurisdictions, including New York and Hawaii, a procedure has been developed allowing a tenant who has received a notice to cure the opportunity to contest prior to the declaration of the termination of the lease, whether there really has been a lease violation. First National Stores, Inc. v. Yellowstone Shopping Center, Inc., 21 NY2d 630, 237 NE2d 868, 290 NYS2d 721, TLC Lease Viola-

tions 1, TLC Serial #0003 (Court of Appeals 1968); Food Pantry, Ltd. v. Waikiki Business Plaza, Inc., 575 P.2d 869 (Supreme Hawaii 1978). Jurisdictions allowing such a procedure accord the tenant an enormous safeguard permitting the tenant the opportunity to find out if the landlord was right and to put things to rights before losing a valuable leasehold. Food Pantry, supra. However, there is a cost to that benefit. The same line of authority holds that unless the tenant utilizes this procedure to obtain a tolling of the cure period actually during that period, by way of a declaratory judgment action, if the tenant actually was in default of the lease, once the cure period is up, the courts themselves have no power to fix it. These Yellowstone injunctions, as they have come to be known, are the single most powerful weapon in a tenant's arsenal and fear of their employment has guided many a landlord's decisions.

Stipulations

Hallock v. State of New York and Power Authority of State of New York: High favor to which attorney stipulations are entitled and authority of attorney

Koval v. Simon Telelect, Inc.: High favor to which attorney stipulations are entitled and authority of attorney

Luethke v. Suhr: High favor to which attorney stipulations are entitled and authority of attorney

Although not itself a decision from the realm of commercial leasing, the single most influential decision in the realm commercial litigation is Hallock v. State of New York and Power Authority of State of New York, 64 NY2d 224, 474 NE2d 1178, 485 NYS2d 510, 1 TLC Stipulations 1, TLC Serial #0017 (NY Court of Appeals 1984). The theme of this article is that of case law. Yet, it is obvious that there can be no case law without litigation. As soon as one deals with any kind of litigation, it is preferable for the parties, for the courts, and for society itself that the parties arrive at some kind of resolution of the matter without requiring the court to go to judgment. The chief mechanism of such resolution is the judicial stipulation and they save taxpayers hundreds of millions of dollars annually. They are therefore highly favored by the courts and when crafted by attorneys on all sides should be almost invulnerable to attack. Indeed, absent notice of lack of authority to the other side, it is conclusively presumed that an attorney's stipulation binds his or her client. Koval v. Simon Telelect, Inc, 693 N.E.2d 1299 (Supreme Indiana 1998), but see, Luethke v. Suhr, 650 N.W.2d 220 (Supreme Nebraska, 2002).

1029 Sixth LLC v. Riniv Corp.: Strict enforcement of stipulations

However the attack can be somewhat subtle. The parties may continue to avow that the stipulation binds them while one side seeks to be excused from a de minimis departure from the obligations undertaken in the stipulation. Courts will generally allow such departures unless the stipulation by its own terms forbids such. 1029 Sixth LLC v. Riniv Corp., 32 HCR 340A, 9 AD3d 142, 777 NYS2d 122, HCR Serial #00014343, TLC Stipulations 22, TLC Serial #0281 (NY 1st Dept. 2004).

379 Madison Avenue, Inc., v. The Stuyvesant Company: Attorneys' fees clause in favor of landlord enforceable

Sykes v. RFD Third Ave. I Assocs., LLC: Stipulated victory sufficient predicate for an award of attorneys' fees

It is now generally agreed that a lease clause calling for the tenant to pay for the landlord's attorneys' fees in the event of litigation is fully enforceable. 379 Madison Avenue, Inc., v. The Stuyvesant Company, 242 A.D. 567, 275 N.Y.S. 953 (NY 1st Dept. 1934), affirmed on opinion below 268 N.Y. 576, 198 N.E. 412 (NY Court of Appeals 1935).

In those jurisdictions which allow victory in the litigation in chief to be the basis of an award of attorneys' fees when authorized by the lease, there is some controversy as to whether a "win" achieved by means of a stipulation is enough of a win to justify the attorneys' fees award. Some hold that such a doctrine discourages parties from stipulating to their own defeat, but others hold that it encourages the winner to win at the bargaining table, knowing that the win will not be diminished by it having been achieved through a stipulation. The dominant view is that a stipulated win will, in fact, support an award of attorneys' fees. Sykes v. RFD Third Ave. I Assocs., LLC, 35 HCR 361A, 39 AD3d 279, 833 NYS2d 76, HCR Serial #00016522, TLC Attorneys' Fees 66, TLC Serial #0428 (NY 1st Dept. 2007).

F & F Restaurant Corp. v. Wells, Goode & Benefit, Ltd.: Subletting and assignment, landlord bound not to withhold consent without a valid reason

Amongst the most common clauses in commercial leases are those dealing with subletting and assignment. At common law, tenancies are freely sublettable and leases freely assignable. So, if the lease is silent on the issue, the tenant can do as it wishes. However, most leases are not silent on the issue and they

either prohibit one or the other of these are they restrict it. The most common form of restriction is that sublets or assignments must only be on consent of the landlord. Also, most typically, consent "shall not be unreasonably withheld." This phrase has come to mean that consent will be deemed given unless the landlord can articulate a valid reason to refuse consent. The two key concepts in that sentence are "articulate" and "valid." If the landlord is silent, the law deems consent to have been given. If the landlord simply says "no" without stating a reason, the law again deems consent to have been given. If the landlord says "no" and gives a reason that is not valid, the law still again deems the consent to have been given. As F & F Restaurant Corp. v. Wells, Goode & Benefit, Ltd, 12 HCR 93A, 61 NY2d 496, 474 NYS2d 707, 463 NE2d 23, NYLJ 5/1/84, 14:5, HCR Serial #00001542 (NY Court of Appeals) states it:

It is enough on this point to note that Neuman as equitable owner had the right to withhold consent only if he had a reasonable ground for doing so and that the existence of a reasonable ground must be proved by Neuman's successor, the present owner, and will not be presumed. For like reason, the assignment from Margin Call to plaintiff must be given effect unless the landlord can establish a reasonable ground for withholding consent.

Actual and Constructive Eviction

Echo Consulting Services, Inc. v. North Conway Bank: tenant's entitlement to declare itself sufficiently deprived of essential use of premises to abandon them

Barash v. Pennsylvania Terminal Real Estate Corporation: definition and distinctions of actual and constructive eviction

At the other end of the spectrum from stipulations resolving litigation is self-help. This comes in two principal species. The first, actual eviction, is where the landlord without benefit of judicial process deprives the tenant of actual possession of the premises in whole or in part – by means of physically depriving the tenant of some or all of the leased space. The second, constructive eviction, is where the tenant, also without benefit of judicial process, deems itself to have been deprived of the use of the premises and abandons them in whole or in part. If the tenant only abandons a portion of the used space, deeming it unusable, this is a "partial constructive eviction." Echo Consulting Services, Inc. v. North Conway Bank, 669 A.2d 227 (Sup. N.H. 1996). In sum, actual eviction is a self-help remedy employed by landlords; constructive eviction is a self-help remedy employed by tenants. Barash v. Pennsylvania Terminal Real Estate Corporation, 26 NY2d 77, 256 NE2d 707, 308 NYS2d 649, 1 TLC Constructive Eviction 1, TLC Serial #0042 (Court of Appeals 1970) states, "To be an eviction, constructive or actual, there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises." From this point of view, the action is in either case regarded as being taken by the landlord, but this is a faulty perception. It is the inaction of the landlord and the action of the tenant that makes one realize a constructive eviction has taken place. It is the opposite for an actual eviction.

Eastside Exhibition Corp. v. 210 E. 86th St Corp.: Landlord's entitlement to rent in spite of de minimis permanent deprivation of leased space

Returning to our theme of maat, we find it seriously upset by Eastside Exhibition Corp. v. 210 E. 86th St Corp., 33 HCR 843A, 23 AD3d 100, 801 NYS2d 568, NYLJ 9/22/05, 18:1, HCR Serial #00015254, TLC Actual Partial Eviction, TLC Serial #0339 (First Dept. 2005). The common law rule had been that an actual partial eviction, no matter how small, deprives a landlord of the entire entitlement to rent. To put this in realistic terms, let us say that the landlord rents the tenant some 2,000 square feet and then reduces the square footage to 1,980 for the purpose of installing a utility closet to which the tenant is forbidden access. At common law, such deprivation of the 20 square feet would deprive the landlord of all entitlement to rent until the premises are restored to their previous condition. However, in Eastside Exhibition, the court ruled that a de minimis deprivation will not forfeit the landlord's entitlement to rent.

Note the important distinction here: actual eviction whether it is actual total eviction or actual partial eviction entitles the tenant to total forgiveness of the rent, except that Eastside holds that where the actual partial eviction is de minimis, the tenant is not entitled to total forgiveness, but only an assessment of the damages actually sustained. Constructive eviction, on the other hand is where the tenant has deemed the premises have become so unusable that the tenant has abandoned them in whole or in part. Under constructive eviction, the amount of forgiveness of rent the tenant receives varies with the amount of space the tenant has abandoned.

Those watching the devel-

opment of commercial leasing law are keeping a careful eye trained on how and whether Eastside's doctrine spreads across the country. That it violates maat cannot be denied.

Conclusion

As we saw with our analysis of Holy Properties, supra, the principle of maat is critical in the study of commercial leasing law. Yet, as we see from Eastside Exhibition, supra and Austin Hill, supra, it is not necessarily the last word. Indeed, Echo Consulting, supra, states:

When reasons of public policy dictate "courts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life – particularly old common law doctrines which the courts themselves created and developed." Our society has evolved considerably since the tenurial system of property law was created by the courts.

There are fields of law in which one can rely on ancient doctrines and not worry about their changing much. One can keep practicing law at the end of one's career essentially the way one did at the beginning. But commercial leasing law is not such a field.

Many of the above cases help commercial leasing practitioners avoid land mines. Other cases assist in understanding the essence and important rules of commercial leasing. Other cases are simply core elements of the always developing common law of commercial leasing. Although many other cases could and should be added to this body, these cases will give the reader enough weapons and shields to enter the friendly battle of commercial lease representation. The practitioner who does not master at least the cases discussed in this article and keep an eye open for further developments works at peril.