

The On-Going Tenant Nuisance: What's An Owner to Do?

The rent-regulatory laws have been described by the New York State Court of Appeals as “an impenetrable thicket, confusing not only to laymen but to lawyers.” (*Matter of 89 Christopher v. Joy*). One of the thorniest of those thickets for owners and their lawyers is determining whether a tenant’s objectionable conduct constitutes a substantial violation of his or her tenancy or a nuisance.

This is not merely a matter of semantics. A tenant who violates a substantial obligation of his or her tenancy is usually – though not always – afforded an opportunity to cure that violation, even if the tenant loses at trial. On the other hand, a tenant who causes or permits a nuisance is generally not entitled to cure. Thus, coming to the correct conclusion early on can mean the difference between regaining or not

regaining possession of the tenant’s apartment.

Although Section 2524.3 of the Rent Stabilization Code (which governs rent-stabilized tenants) and Section 2204.2 of the New York City Rent and Eviction Regulations (which governs rent-controlled tenants) permit an owner to evict a tenant who is violating a substantial obligation of his or her tenancy, or who is committing or permitting a nuisance in his or her apartment, neither the Code nor the Regulations specifically define those terms. For guidance, the owner must look to court decisions.

According to the Court of Appeals (New York’s highest court), “to constitute a nuisance, the use of property must interfere

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“Mom & Pop” Commercial Tenant Defeats Owner on Lease Option

A recent case of interest in New York’s Richmond County favorably addressed a commercial tenant’s claim that its exercise of an option to renew its lease should be upheld notwithstanding the existence of technical defaults under its lease.

In *Denice v. Lin-Escrow Deposit Enterprise, Inc.*, an owner sought to recover possession from a holdover commercial tenant. The Court ruled that given the circumstances, the tenant’s exercise of its option to extend its lease would be recognized, despite the tenant’s late payment of rent in the month in which it exercised its option to renew its lease. The Court found that the potential harm to the tenant (loss of its lease) was much greater than any prejudice experienced by the owner.

The “equity-scale” used by the Court (weighing the relative potential harms to the tenant and owner) avoided a literal interpretation of the lease. The Court discounted the tenant’s tardy payment of rent in the month in which it exercised its option to renew the term, dismissing the owner’s assertion that the late payment of rent, clearly a default under the lease, was reason enough to deprive the tenant of the continued right to occupy the premises. The Court afforded great weight to the tenant’s long term tenancy and improvements to the premises during the term and its “Mom & Pop” status. The Court also noted that a stipulation between the parties had permitted the late payment.

The Court described the owner’s
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Special Points of Interest:

- **Fighting Back Against Chronic Nuisance Offenders**
- **Court Enforces Commercial Tenant’s Right to Renew, While Ignoring Tenant’s Technical Defaults Under its Lease**

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with a person's interest in the use and enjoyment of land." Continuing on, the Court stated that "the term 'use and occupancy' encompasses the pleasure and comfort derived from the occupancy of land and the freedom from annoyance... however, not every annoyance will constitute a nuisance... nuisance imports a continuous invasion of rights – 'a pattern of continuity or recurrence of objectionable conduct'..." (*Domen Holding Co. v. Aranovich*).

Interestingly, in *Domen*, it was not the tenant who was the source of the nuisance; it was the tenant's boyfriend, who also lived in the apartment. The boyfriend had been involved in a series of altercations at the building. One incident involved the doorman, another involved the superintendent, and the third involved another resident of the building. The altercations involved the use of abusive and profane language, racial epithets, and threats of violence. Although on each occasion the police was called and a complaint was filed, the lower court threw the case out, holding that three incidents over the course of five years were insufficient as a matter of law to state a claim for nuisance.

The Court of Appeals reversed and remanded the case for trial. In particular, the Court of Appeals held that there was an issue of fact as to whether the boyfriend's "presence in the building has resulted in a recurring or continuing pattern of objectionable conduct threatening the comfort and safety of others in the building sufficient to constitute a nuisance."

The courts found conditions warranting eviction in *Frank v. Park Summit Realty Corp* and *301 East 69th Street Associates v. Eskin*. Both cases involved schizophrenics who terrorized other tenants and building staff. The courts have also found nuisances in cases where the tenant's apartment was "literally overcome with thousands of books, magazines, cans, bottles, pictures, rag and other

assorted items," creating a health and fire hazard (*Kast Realty LLC v. Houston*); where the tenant held recurring all-night parties at which music was "blasted" and the tenant's guests engaged in disruptive and anti-social behavior (*Roaj Realty, Inc. v. Ortega*); and where the tenant permitted offensive and intolerable odors to emanate from the apartment for a protracted period (*Mosholu Preservation Corp. v. Fisher*).

On the other hand, the courts declined to find a nuisance where the tenant plugged an extension cord into an electrical socket which caused a fire (*Yukovic v. Wilson*); and where the tenant was feeding pigeons at the building (*ACP 305 E. 72nd Street Assocs. v. Kokkinogoulis*).

Within the past year, BBW&G successfully prosecuted two nuisance cases against rent-controlled tenants. In one case, the tenant had overflowed his toilet five times over an 18 month period. In the other case, the tenant had completely gutted her apartment without the owner's approval, and without obtaining work permits from the Department of Building, which resulted in violations being placed against the building. Consequently, the Housing Court found that the unauthorized and illegal renovations rose to the level of nuisance, such that the tenant was not afforded the opportunity cure.

Other violations are less clear. For example, at least one court has held that the installation of a satellite dish without the owner's consent constitutes a substantial violation of a tenancy (*Lemle Realty Corp. v. Desjardin*); while another has said it does not (*Urban Horizon Tax Credit Fund v. Zarick*).

There is no easy, all encompassing, readily identifiable definition of what constitutes a violation of a substantial obligation of a tenancy. As the Court of Appeals noted in *Matter of Park East Land Corp. v. Finkelstein*, "'substantial' is a word of general reference which takes on color and precision from its total context. Having little if any meaning when considered in an abstract or in a vacuum, it must be

defined with reference to the peculiar legal and factual setting in which it occurs." In other words, the court will determine if a violation is "substantial" on a case by case basis.

For rent-stabilized tenants, that generally means a violation of a material term of the lease. Thus, the courts have held that permitting a subtenant to occupy a rent-stabilized apartment for a period in excess of two years constitutes a breach of a substantial obligation of the tenancy (*Kur Development Corp. v. Aleandri*). Similarly, the courts have held that the tenant violated a substantial obligation of his tenancy by subletting his one bedroom apartment without the landlord's written consent (*Offit, Fort, Gang & Komito v. Moshlak*). Other examples of substantial violations of a tenancy include the failure to furnish a security deposit (*Markowitz v. Landau*); the installation of a washing machine (*Crystal Apartment Groups v. Cook*); and harboring a dog in violation of a no-pet clause in a lease (*Landmark Properties v. Olivo*).

For rent-controlled tenants, determining what constitutes a violation of a substantial obligation of a tenancy is more difficult, inasmuch as there is often no lease clauses delineating tenant obligations (rent controlled tenants may have had a lease when they took occupancy – generally prior to June 30, 1971 – but then remain in occupancy as statutory tenants without the need for a lease). Nevertheless, the courts have held that a rent-controlled tenant who unnecessarily made physical alterations to an apartment without the owner's consent violated a substantial obligation of his tenancy (*Freehold Apartments v. Richstone*). On the other hand, if the alterations do not inflict serious and substantial injury to the owner's property, the courts have held that the tenant did not violate a substantial obligation of the tenancy (*Rumiche Corp. v. Eisenreich*).

As noted above, a tenant who violates a substantial obligation of his tenancy is usually entitled to cure the

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violation. However, a least one recent case has held that where the violation is not susceptible to cure, such as where the tenant has a history of chronic non-payment of rent, then the tenant is not entitled to cure (*Adams Tower Ltd. v. Richter*). Whether this represents a trend is unclear. For example, in *326-330 East 35th Street Associates v. Sofizade*, the Appellate Term remanded for an inquiry as to whether a probationary cure was appropriate.

The lesson is that before an

owner institutes legal proceedings against a tenant whose conduct is objectionable, the owner needs to carefully examine the scope, duration and ramification of the tenant's behavior in order to determine whether it is a nuisance or a breach of a substantial obligation of the tenancy. By taking the time to conduct a thorough and thoughtful analysis of the problem prior to the institution of legal proceedings, the owner will likely save time later on and may, in fact, be able to permanently be rid of the chronic offender, rather than merely be

relegated to giving the offending tenant one more chance to "be good."

This article was written by Jay H. Berg, who practices in BBW&G's Appeals and Litigation Departments.



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underlying case as: "The landlord's petition scraped together a list of (the tenant's) alleged defaults in an attempt to establish that the tenant had not exercised its option (to renew the lease)." The Court also saw the owner as demanding that the Court "[give] precise, full and wooden effect to the words of the lease." The outcome of this case is made apparent by the Court's characterization of the owner's case (insistence upon adherence to the terms of the lease) in less than favorable terms.

Was the Court's decision good or bad?

While the Court may have reached the correct result in this instance (although the particular owner would surely disagree), the Court's decision to overlook the existence of technical defaults under a commercial lease is worrisome. Rather than rely upon the plain terms of the lease, the Court accepted the equitable arguments of the tenant to reach its result. Oftentimes, one party's technical default is another party's Titanic. Perhaps New York owners and practitioners can take some solace in the fact that

this case is a lower court ruling in New York's Civil Court.

Could the owner have done things differently to attempt to reach another result?

It is not clear what actions the owner took after the tenant exercised its option to renew the lease, but then paid its rent late in the same month. The Court's opinion mentioned that the Owner cashed the rent and additional rent payments notwithstanding the late payment and exercise of the option. It is possible that a different result may have been reached by the Court if the owner did not accept rent for that month, or accepted rent without prejudice to other provisions of the lease.

What to consider next time to accomplish a different result:

1. Rejecting the rent payment and asking the court to permit the owner to accept the rent without prejudice (this may or may not have been a Pyrrhic victory if the tenant was then astute enough to exercise its option during the next month and pay its rent on time – even though the tenant might have then been in technical default – few courts would permit the forfeiture of a renewal option under those circumstances).

2. The owner may have consid-

ered writing to the tenant rejecting the exercise of the option. However in light of the timing of the exercise of the option, this course of action may not have resulted in a different outcome either.

3. Perhaps, if the tenant was habitually late in its payment of rent (a fact the Court mentioned), a viable option would have been commencement of a "chronic non-payment proceeding"; a proceeding brought where a tenant is consistently late in payment. Sometimes a chronic non payment is found to be non-curable, whereas in other less egregious circumstances it can be used to obtain the court's jurisdiction via a probationary' stipulation which helps to enforce the tenant's compliance with the lease.

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