COUNSEL'S CORNER

Addressing the Issue of Evictions in Difficult Economic Times

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WHITE PLAINS—When we represent a Landlord in an eviction proceeding, whether it is a Non-Payment proceeding (for failure to pay rent and/or additional rent) or a Holdover proceeding (failure to comply with lease provisions), we try to get the quickest result while complying with the increasingly inordinate technicalities of landlord-tenant law.

Many courts are not only generally loathe to evict a tenant, but many judges will use any excuse to interpret the law strictly and against the Landlord. That is why it is important to utilize counsel with an expertise in this area to make sure that you get an even chance at the eviction and not be thrown out on a technicality.

While doing it may take somewhat more time in the first instance, to avoid a case being dismissed is the aim and will ultimately be much quicker, less expensive and more often result in a favorable determination.

An Example

One situation where a Landlord lost even after originally obtaining a Judgment and Warrant was the case of 3414 Knos LLC v. Bryant, decided December 30, 2010. In that case, the named party in the landlord-tenant court proceeding was not the leaseholder, but the owner, whose name was different in this case. The Court held that this was a non-curable mistake and not amendable, even though it was an oversight.

While seemingly at odds with reality and common sense, this case represents a reality check for an attorney to make sure that the proper party is named, since there was no direct relationship between the owner and the tenant, only between the lease holder and the tenant.

In The City

In New York City, when a landlord wants to serve a notice of non-renewal of a lease (for non-primary residence, for example) the required time period is no less than 90 and no more than 150 days prior to the expiration of the lease (90 to 120 in Westchester County).

In Mendis v. Bartholomew, decided on December 14, 2010, the Landlord served the notice 151 days before the lease expired. This one day mistake gave the court the ability to dismiss the proceeding and, more significantly, to find that the tenant was thus entitled to a renewal lease.

In the case of Papadeas v. West, decided November 10, 2010, the court dismissed the allegations in the proceeding, alleging violation of a substantial obligation of the tenancy based on the fact that the notice to cure, dated December 11, 2009 was mailed the same date and the effective date was December 21, 2009. The Court added 5 days for mailing, and thus, the notice was not timely and was defective.

Where the tenants complied with a stipulation and were nevertheless evicted, the Landlord was held liable for an illegal eviction and there was also a possibility of treble damages. Greaves v. Memadet Realty Corp., 12/16/10, Supreme, New York.

Our advice to landlords, large or small, is to consult with your counsel at the very inception of an attempt to bring a legal action. Do not wait too long and risk the argument of waiver, be timely in the service of notices, serve the proper notices in the proper proceedings, make sure the documents are properly prepared with the correct allegations, and be patient.

On the other hand, a court finally had enough when a tenant came in after agreeing in a stipulation to pay the rent and brought five (5) orders to show cause, and the court found there was not "good cause" to vacate the warrant of eviction. Audubon 189-190 LLC v. Cabrera (12/3/10).

A Negative Presence

In another case, involving a Housing Authority, the Court allowed the eviction where the tenant was considered a threat. Thomas v. Rhea, decided 11/19/10, Supreme, New York. The Court has a tendency to be somewhat more favorable to landlords in a commercial situation. In the case of A.K. Estates v. 454 Central Corp., a Nassau County case decided on November 29, 2010, the Court held that a Notice to Cure was not necessary where the tenant consistently failed to pay the rent on time and violated the lease by defaulting in its payment of rent for at least 3 months in an 18-month period.

The lease was well drafted from the landlord's point of view and only required a notice of termination and no notice to cure was required as to a failure to pay rent on time.

A Positive for Landlords

Finally, in another case favorable to the landlord, Frebar Development Corp. v. Posner, decided in New York City on Nov. 16, 2010, the Court reaffirmed Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc., 87 NY2d 130 [1995], which held that a Landlord had no duty to mitigate its damages by re-renting the apartment, even in a residential setting.

Thus, even in bad economic times, as in Frebar where the landlord said he would try to re-rent and the tenant never even moved in, the Court upheld a lease and held the tenant responsible. However, the landlord followed the correct legal procedure and was successful.

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Editor's Note: The authors are with Finger and Finger, A Professional Corporation. The firm, based in White Plains, is Chief Counsel to the Building and Realty Institute of Westchester and the Mid-Hudson Region (BRI).