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WHY RED AND GREEN?

Most leases restrict what tenants can do within their apartments. Alterations, or other changes made without the owner's consent, are usually prohibited.

By way of example, paragraph 10 of The Real Estate Board of New York, Inc.'s "Standard Form of Apartment Lease" provides, in substantial part, as follows:

> You [Tenant] cannot build in, add to, change or alter, the Apartment in any way, including wallpaper, painting, repainting or other decorating, without getting Owner's written consent before You do anything. Without Owner's prior written consent, You cannot install or use in the Apartment any of the following: dishwasher machines, clothes washing or drying machines, electric stoves, garbage disposal units, heating, ventilating or air conditioning units or any other electrical equipment which, in Owner's reasonable opinion, will overload the existing wiring installation in the Building or interfere with the use of such electrical wiring facilities by other tenants of the Building.

Violations of these provisions can not only get a tenant evicted, but can also lead to liability for the costs incurred by the landlord to restore the unit to its original condition (ordinary wear and tear excepted, of course).

In *Ebrahimi v. Martino*, Mr. Ebrahimi sued his landlord for the return of his security deposit ($850) together with an additional $200 which had been promised to him if the tenant vacated the apartment and no "damage" was found. Of course, as one might anticipate, the landlord refused to release the monies, claiming that he had to pay $1475 to undo the tenant's unauthorized "alterations." For some undisclosed reason, Ebrahimi had decided to paint the apartment's walls "red and green."

After a trial, the Nassau County District Court (small claims part), concluded that Ebrahimi was not entitled to the monies in question. And, on appeal, the Appellate Term, 9th and 10th Judicial Districts, affirmed.

The tenant recovered ZILCH. Nada. Nothing. Which reminds us of a bad joke, which goes something like this:

What's red and green and goes 175 miles an hour?

Answer:

A frog in a blender.

(Our sincerest apologies, in advance, to all our friends at PETA.)

If you have any questions or comments about this article, please contact partner Daniel Finkelstein at 212-619-5400 x 209 or email him at DFinkelstein@fnfllp.com. To join the debate, visit us at www.nyreblog.com.

WRONGFUL EVICTION SPELLS "T.R.O.U.B.L.E."

James Moran was not getting along with his landlord, Kathleen Orth.

Back in March of 2003, Moran -- a cabinet maker -- leased a garage space in Orth's Nassau County building. A month later, Moran allegedly failed to pay the rent and summary eviction proceedings ensued. Orth was forced to start two different nonpayment cases and both were dismissed due to service irregularities and pleading defects.

In apparent frustration with the judicial process, in May of that year, Orth allegedly locked Moran out of the garage space and had his personal property "hauled away." Moran later filed suit in the Nassau County Supreme Court alleging wrongful eviction and theft of his personal property.

After a jury trial, a verdict was returned in Moran's favor in the sum of $1,500. Contending that the trial judge had erred in not allowing the issue of treble and punitive damages to be submitted to the jury, and that the verdict was contrary to the "weight of the evidence," Moran appealed to the Appellate Division, Second Department.

While the AD2 was of the opinion that treble damages were warranted by operation of state statute, it did not believe that punitive damages were also justified or that the jury's verdict was unreasonable or "deviated materially" from the loss incurred.

In *Moran v. Orth*, the appellate court justified the trebling of the money judgment as follows:

> Here, the record shows that Orth's unlawful eviction was not unintentional. Although Moran failed to pay rent, Orth was not entitled deliberately to resort to self-help. Orth locked Moran out of the premises for more than three months, from mid-May, 2003, until early September, 2003, when she was ordered by a judge to give him keys. Further, Orth admits to throwing out some of Moran's property. Moreover, Orth ultimately commenced a third nonpayment proceeding against Moran, which, like the petitions in the two prior proceedings, sought more rent than that to which she was entitled, and Orth never secured a warrant of eviction, although she stated at trial that she had done so. Under these circumstances, an award of treble damages was appropriate ....

"This is not the kind of vice I had in mind!"

If you have any questions or comments about this article, please contact partner Jonathan Newman at 212-619-5400 x 205 or email him at JNewman@fnfllp.com. To join the debate, visit us at www.nyreblog.com.

HERE'S A MANSION YOU DON'T WANT!

New York assesses taxes on the sale or transfer of real property at varying levels depending on the nature and amount of the transaction.

By way of example, when the purchase price of "residential real property" (defined as premises that are or may be used as a personal residence, and includes one-, two-, or three-family homes, or an individual condominium or cooperative apartment unit) reaches a million dollars or more, a "mansion tax" of one percent (1%) of the transaction's total cost will be due and payable at closing.

Does this "mansion tax" apply to tiered transactions which involve construction activity? That was the question posed to the New York State Tax Appeals Tribunal (TAT) in the case of *In re Kevin Kelly*.

Mr. Kelly entered into a construction and purchase contract with J&B Builders, for a home to be built on two lots in a new subdivision in upstate New York. The agreement provided that Kelly would pay J&B Builders $1.7 million according to the following schedule: $10,000 upon contract, an additional $300,000 upon Kelly delivering a mortgage commitment, with the balance of $1,390,000 due at closing or passing of title.

When the builder was unable to fund the project, Kelly sought construction financing. Chase Manhattan Bank approved the loan, but required Kelly to own the land outright, unencumbered by the builder, so that the lender could perfect a first priority lien on the land. To that end, a deed was given to Kelly prior to the construction's completion.

Because of the transaction's bifurcated nature, Kelly believed he was exempt from the "mansion tax" since $300,000 was attributable to the vacant land, while the remaining sum owed under the contract was allocable to nontaxable construction services. Of course, the Division of Taxation disagreed and assessed taxes in the amount of 17,000 plus interest (1% of $1.7 million).

On administrative appeal, the New York State Tax Appeals Tribunal (TAT) denied Kelly's petition. According to TAT, Kelly's deal comprised a single transaction, with a single purpose (the sale of land with a single-family home), with a single purchase price. (Apparently, no documentary evidence, or testimony, established to the contrary.)

Severing the transaction into steps for financing purposes did not change the arrangement's integrated nature.

Interestingly, TAT did not foreclose the notion that a contract for the sale of vacant land and a separate contract for construction services may be exempt from the "mansion tax." In an Advisory Opinion (TSB-A-96(14)R, October 24, 1996), the Division of Taxation suggested such distinct transactions were possible. In that particular instance, a purchaser entered into a contract to purchase vacant land from a developer for $550,000. At the same time, the parties entered into a separate contract for the construction of a home on the land for $1 million. Since the two agreements were separate and distinct (with no cross-default provisions), the "mansion tax" was inapplicable.

And that, is TAT.

Our thanks to Marc Lawrence and our other friends at AMERICAN LAND SERVICES, INC., for flagging this decision.

If you have any questions or comments about this article, please contact partner Lucas A. Ferrara at 212-619-5400 x 211 or email him at LFerrara@fnfllp.com. To join the debate, visit us at www.nyreblog.com.

DIDN'T SHE RATIFY HUSBAND'S DEAL?

In 1989, Vytautas Vebeliunas (claiming to be the fee owner of the "burdened" property) entered into a 20-year "Lease and Easement Agreement" with Henry and Sandra Knecht, in exchange for a lease to certain real property together with an option to purchase same after 20 years.

After acquiring title from the Knechts, a new owner, Daniel Lipman, with knowledge of the agreement's existence, accepted rent from a trust ("the Vart Trust") which Vytautas's wife, Vanda, was the trustee.

Once Lipman discovered that the trust had always owned the property and that Vytautas had misrepresented his status as "owner," an action was commenced in the Nassau County Supreme Court to annul the 1989 Lease and Easement Agreement. In response to Lipman's motion for summary judgment – a disposition on the merits, based solely on the submission of papers, without the need for trial – the Vebeliunas's both cross-moved to declare the agreement valid.

While the Supreme Court ruled in Lipman's favor and nullified the agreement, on appeal, the Appellate Division, Second Department, reversed. The AD2 noted that while someone other than a fee owner may lack the legal capacity or authority to grant an easement, or other interest in property, that irregularity may be corrected if the true owner "ratifies" the agreement -- accepts its terms and agrees to be bound as if he, she, or it had originally entered into the transaction.

Interestingly, rather than rule in the Vebeliunas's favor, the AD2 in *Lipman v. Vebeliunas* concluded there were unresolved issues of fact which required a formal hearing. Those questions were summarized as follows:

> Under the circumstances presented here, issues of fact exist as to whether Vanda, as trustee for the Vart Trust, had full knowledge of the material facts relating to the transaction such that she, as trustee for the Vart Trust, ratified the agreement.

But why are there unresolved issues, if Vanda -- as the Vart Trust's trustee -- made payments pursuant to the agreement's terms and affirmatively sought to declare it valid and enforceable?

Vhat are ve missing?

If you have any questions or comments about this article, please contact partner Robert Finkelstein at 212-619-5400 x 227 or email him at RFinkelstein@fnfllp.com. To join the debate, visit us at www.nyreblog.com.

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Look who's bugging out!

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