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SISTER EVICTED FOR NOT BEATING CLOCK

Timing is everything in succession cases.

In *Torres v. New York City Housing Authority*, Lillibea Torres sought permission to continue living in her deceased sister's apartment, which was located in the Lincoln Houses, a New York City Housing Authority (NYCHA) owned and operated housing development for low-income families. Torres, along with her husband and 11 year-old daughter, moved into the apartment in 2002, when Hannah Lane--Torres's sister--was diagnosed with a metastatic lung cancer that required 24-hour care.

In December of 2002, Lane asked the management office to allow Torres and her family to "join the household" and filed a written request with NYCHA for that purpose. NYCHA denied the request, "citing insufficient proof that [Torres] was actually Lane's sister."

In May of 2003, Torres submitted a second written request, along with documentation of Lane's physical condition and proof that the two were related. Although NYCHA eventually approved Torres's request to join the household on June 18, 2003, Lane died the following day.

Upon Lane's death, Torres requested that her family be allowed to continue living in the apartment as remaining family members. The property manager found Torres ineligible, as she had not lived in the unit for at least one-year following written permission to join the household; an outcome with which NYCHA's district director concurred. After a "Remaining Family Member Grievance Hearing," a hearing officer again concluded that Torres hadn't satisfied the "one-year rule."

In response, Torres filed an Article 78 proceeding in the New York County Supreme Court seeking to overturn NYCHA's decision. She contended that the agency "failed either to provide proper notice of the adoption of the one-year rule or to modify the lease agreement in writing as required by its terms." The New York Supreme Court believed that NYCHA should have posted the one-year rule in each development's office, and that the omission violated Lane's lease. As a result, the Supreme Court found NYCHA's decision to deny Torres a lease "arbitrary and capricious," and found Torres entitled to succeed to the apartment.

NYCHA appealed to the Appellate Division, First Department, arguing that the Supreme Court should not have considered the objection, as Torres had not preserved that issue for judicial review. The record clearly indicated that Torres asserted two theories at her grievance hearing, neither of which related to the lease violation. As a consequence, the AD1 refused to consider the arguments which she subsequently proffered in her appeal.

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LANDLORD GETS A $361K HAIRCUT!

Sixteen years is a long time for a rent strike, but that's how long it's taken the case of *Solow v. Tanger* to reach resolution. (And, it still may not be over, if further appeals are taken.)

The New York County Supreme Court originally awarded the landlord legal fees in the amount of $652,141.94, plus interest calculated from April 4, 2004. On appeal, that award was reduced by the Appellate Division, First Department, to $290,737.

Even though the case was a "contentious and protracted landlord-tenant dispute," the AD1 was of the opinion that the higher sum was "excessive" and a reduction "bearing a closer relationship" to the amount in controversy was appropriate.

So, here's the $361,000 question: If a case escalates out of proportion and a contentious adversary causes fees to exceed the amount in dispute, what is a litigant (or attorney) to do? Surrender?

The AD1's rationale strikes us as completely unworkable and legally untenable.

SUBTENANT COULDN'T EXERCISE OPTION

The right to extend "free-market" or unregulated leases (whether they be commercial or residential in nature) is typically governed by the terms and conditions of the parties' agreement.

In *Federal Realty Ltd. Partnership v. Wizman*, the lease provided that the renewal could only be exercised by Chaim Z. Wizman, Esq., and no other. While an "undertenant" (or subtenant), Y. David Taller, on behalf of Taller and Wizman, P.C., alleged to have extended the lease on Wizman's behalf, both the Kings County Civil Court, and the Appellate Term, Second and Eleventh Judicial Districts, did not believe that the option was validly exercised.

Here's how the AT2 summarized the operative facts:

> Paragraph 64 (A) (3) of the lease states that the only person entitled to exercise the right of renewal is Chaim Z. Wizman, Esq., and specifically excludes any assignee or successor in interest of Chaim Z. Wizman, Esq., from exercising said right of renewal. The letter purporting to exercise the option to renew emanated from undertenant, Taller and Wizman, P.C. and was signed by Y. David Taller, Esq., on behalf of Taller and Wizman, P.C. Since neither Y. David Taller, Esq., nor Taller and Wizman, P.C. was accorded the right under the lease to exercise the option to renew, the lease was not renewed.

As a result, the landlord's acceptance of rent after the expiration of the original lease term created, at most, a month-to-month tenancy, which was terminable by the service of a 30-day notice upon the occupants. Since such a notice issued in this case, the final judgment of possession, secured within the context of a summary holdover proceeding, was permitted to stand. You needn't be a Wiz to figure this one out!

SISTER EVICTED FOR NOT BEATING CLOCK

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In addition, because Torres had not complied with the governing occupancy requirements, the AD1 did not find NYCHA's decision to be "arbitrary and capricious," and reinstated the eviction order.

A rather torrid outcome, wouldn't you agree?

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

TREE WELLS AIN'T PART OF SIDEWALK?

On January 31, 2004, Dzafer Vucetovic was walking on East 58th when he fell in front of a building known as 234 East 58th Street, a property owned by Epsom Downs, Inc. (EDI).

Dzafer alleged he injured his ankle and back after tripping on a cobblestone which surrounded a tree well on EDI's property, and later filed a personal injury lawsuit claiming that EDI failed to maintain the sidewalk in "reasonably safe condition" as required by New York City law.

When EDI moved to dismiss the case, it argued that the law did not apply to tree wells, and both the Supreme Court and the Appellate Division, First Department, agreed. As the AD1 noted in its opinion:

> Administrative Code § 18-104 entrusts the Department of Parks and Recreation with "exclusive jurisdiction" over "[t]he planting, care and cultivation of all trees and other forms of vegetation in streets." The "care" of the trees would necessarily entail the tree wells, which encompass soil and roots. Moreover, the statute makes evident that the trees are "in streets," and thus something separate and distinct from streets. The Department is to "employ the most improved methods for the protection and cultivation" of trees under its "exclusive care and cultivation" (Administrative Code § 18-105), which would include tree wells, which exist for the protection of trees.

In a dissent, two justices of that appellate court disagreed and asserted that the law's "including but not limited to" language encompassed tree wells, since they "lie within the physical boundaries of a sidewalk."

Well, unless the case is settled, it looks like the Court of Appeals will be called upon to cultivate a resolution of this one.

DESPITE WIN, TENANT DENIED FEES

To the victor belong the spoils, except, of course, in landlord-tenant disputes.

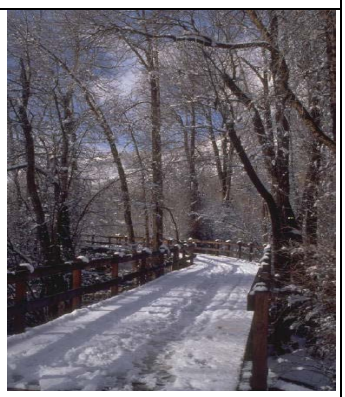
In *First Ave. Village Corp. v. Harrison*, a holdover case started against tenant Alexander Harrison was dismissed due the landlord's "incredible" testimony and failure to establish the existence of certain lease defaults alleged in its predicate notice.

Upon dismissing the holdover, the New York County Civil Court granted the tenant's request for legal fees and also concluded that the landlord had engaged in frivolous litigation practices.

While the Appellate Term, First Department, agreed that the case should have been dismissed, it did not believe that the landlord's counsel had engaged in sanctionable conduct nor that the tenant should recover his legal costs since the latter had engaged in "unauthorized" alterations and there had been "initial intransigence in responding to the landlord's demands for access" which resulted in "undue delay in resolving the disputed issues."

So, even though the tenant's purported misconduct couldn't be established at trial, his "unclean hands" impeded his ability to recover fees. Does that make sense to you?

ROAD LESS TRAVELED?



In *Mackie v. Martucci*, Robert and Katherine Mackie appealed from a judgment of the Westchester County Supreme Court which found that their neighbor, Katherine Martucci, shared an "express easement" over a portion of a roadway which crossed the Mackies' land.

The private roadway, known as “Traveled Way,” began on Martucci’s property and ran south through the Mackies' parcel and eventually led to a public street.

The Mackies were unable to stop the roadway's use due to a predecessor's foresight.

Apparently, Bernard Kayden -- the prior owner of all of these lots -- used Traveled Way to access his home. When he later subdivided the property, Kayden reserved a right for all of the homes to be built on the land to share Traveled Way's use.

In view of that deed related provision, both the Supreme Court and the Appellate Division, Second Department, denied the Mackies' request for Traveled Way to become a Road Not Taken.

If you have any questions or comments about the above articles, 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.

A LULU OF A CASE

In *Bloom v. Lula Realty Corp.*, the Appellate Division, First Department, dismissed a tenant's complaint which alleged liability by her landlord for injuries caused by a broken gate.

Anita Bloom, age 71, a tenant in one of Lula Realty Corp.'s buildings, disposed of her garbage by accessing a fenced-in area on the property. The handle on the wrought-iron gate leading into that space had been missing for some eight years.

Although it had been tied open for most of that time, for about six months the gate had been allowed to swing shut. One day, when Bloom tried to open the handleless gate, by reaching above the heavy mesh-wire lining, she slipped and broke her wrist.

In a personal injury case filed with the Bronx County Supreme Court, Bloom alleged that the defective gate caused her injuries. When her complaint was dismissed, Bloom appealed to the Appellate Division, First Department.

The AD1 sided with Lula since the gate was not inherently dangerous, defective, or violative of law. Furthermore, Bloom's knowledge of the defect, and her use of the gate for years without incident, operated against her.

While Justice Saxe agreed that the lack of a doorknob did not constitute negligence as a matter of law, he thought the complaint's dismissal was inappropriate and dissented. To Saxe, the fact that Bloom knew of the dangerous condition was not dispositive, and he was of the opinion that the case should have been heard by a jury.

Unless the Court of Appeals intervenes, yet another door will have slammed shut on poor Ms. Bloom.

If you have any questions or comments about this article, please contact 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.

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