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IT'S TIME TO PLAY: "WHO'S THE TENANT?"

Some of the nation's top-rated television programs are "reality-based" and offer participants millions in cash prizes. Despite this trend, it's probably best to leave the risk-taking and game-playing to the pre-screened contestants who often have little to lose.

By way of example, here's a case involving a landlord and tenant who played a bit "fast and loose" with their obligations under a commercial lease agreement.

In *Hip Hop Fries Shop Inc. v. Gibbons Realty Corp*., a ten-year commercial lease (beginning September 1, 1999 and ending August 31, 2009) identified Hip Hop Fries Shop, Paul Boritzer and Mario Sanchez as the "Tenants" of certain store space located at 2459 Eighth Avenue. During the course of its lease, Hip Hop Fries alleged that it had been wrongfully evicted from its premises and started a special proceeding in the New York County Civil Court to be restored to possession.

In response to the eviction and restoration claim, the owner contended that Hip Hop had "skipped"–that is, sold or assigned its lease to an individual named Jose Polanco and that he had surrendered the space to the landlord, on or about January 14, 2004. In February 2004, the landlord and a gentleman named Hector Cruz reportedly entered into another lease for the same premises for the period beginning January 1, 2004 and ending December 31, 2008.

According to the Civil Court's decision, in 2002 or 2003 a Spanish restaurant was established at the premises and operated by Mr. Polanco, who is said to have later advised the landlord that he had paid the tenant for the lease and had the authority to surrender same.

Yet, during the course of Hip Hop's illegal lock-out case, Polanco flip-flopped and submitted conflicting affidavits. In one document, Polanco averred that he was the "successor-in-interest to Hip Hop Fries Shop's previous owner, that he purchased the business, and that on January 14, 2004 he voluntarily surrendered the subject premises to the landlord." While in another affidavit, dated just two days later, Polanco represented that any purported surrender was involuntary and made under duress.

Noting that it was the landlord's burden of proof to establish that a surrender had occurred, and displeased with the fact that Polanco was not produced to testify at the hearing, the court found the landlord's explanations unpersuasive and characterized the

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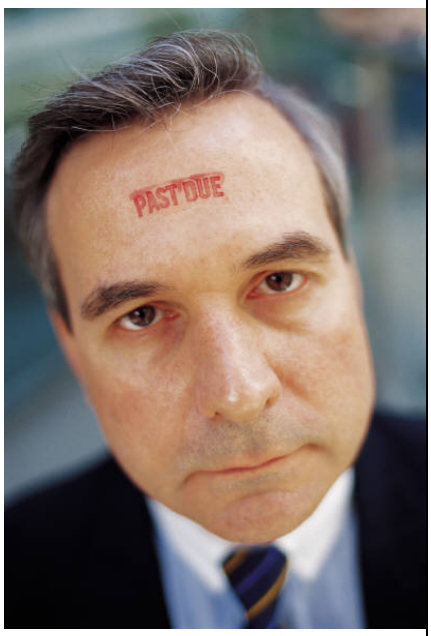
VIOLATING PROBATION WILL GET YOU EVICTED

At one time or another, all of us have paid our rent or maintenance late. While these lapses typically result in the imposition of a late fee (when that charge is authorized by the lease and is reasonable in nature), tardiness–when repetitive and unjustifiable–can result in a tenancy's termination.



Commonly known as a "chronic non-pay" or, more aptly, a "chronic rent delinquency holdover," this kind of summary proceeding is usually filed when a tenant has demonstrated a prolonged pattern of late rent payments.

Courts have considerable latitude in structuring a resolution of these kinds of cases (particularly when the forfeiture of a long-term regulated tenancy is at stake), and can direct that the tenant be given a probationary period within which the tenant would be required to remit the rent on a timely basis or suffer an eviction. Before granting this relief, courts will weigh such factors as the:

- length of the tenancy;
- rent-payment history;
- circumstances and severity of the rent defaults; and
- tenant's financial status and other indicia of credit-worthiness.

When a court determines that imposing a probationary period would be futile, or when a tenant violates the conditions of such an arrangement, the tenant's eviction is an inevitable reality.

By way of example, in *1675 Realty LLC v. Castillo*, the landlord was compelled to file six nonpayment proceedings against its tenant over the course of 38 months. And, in each instance, the tenant presented no bona fide basis for its default. As a result, the Appellate Term, First Department, concluded that in the absence of any justification for the tenant's conduct, relief was appropriately awarded in the landlord's favor and the tenant justifiably evicted from the subject residential space.

In yet another case, *255 E. 10th St., LLC v. Durante*, the tenant repeatedly failed to remit timely rent payments, even during the course of the probationary period that had been imposed by the court. Faced with the tenant's noncompliance, the Appellate Term, First Department, concluded that "a stay of execution of the warrant of eviction was unwarranted."

Finally, in *Riverton Assoc. v. Garland*, the landlord's filing of nine nonpayment proceedings over the course of decade–and the absence of any bona fide defenses to those rent-collection cases–triggered a tenant's removal from a Manhattan apartment.

Wouldn't it have been easier to pay the rent?

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

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weakness of the owner's position as follows:

> The landlord's and Mr. Cruz's failure to produce Mr. Polanco...casts a shadow over their testimony as to the bona fides of their belief that Mr. Polanco had the authority to surrender the lease, and of the circumstances under which the 'surrender affidavit' was obtained. This finding is particularly compelled given Mr. Polanco's statement that he executed the surrender under duress. There can be no doubt in this Court's opinion that Mr. Polanco would provide elucidating, material information concerning the transaction at issue and that such information would not be cumulative of the testimony already provided. The landlord's and Mr. Cruz's failure to produce Mr. Polanco, indeed, no indication was given that any attempt was made to secure his attendance, requires this Court to presume that the reason Mr. Polanco's attendance was not secured or compelled was because his information and testimony would be unfavorable to the landlord and Mr. Cruz.

As a result of these gaps in the landlord's case, the Civil Court concluded that the tenant had been illegally evicted and granted the restoration request. On appeal, the Appellate Term, First Department, noted as follows:

> Giving due deference to the trial court's findings of fact and credibility...we find ample support for the court's conclusion that landlord failed to satisfy its burden of proving tenant's surrender of the commercial lease in response to tenant's prima facie showing of an illegal lockout...Thus, tenant was properly restored to possession of the premises...We note that the surrender agreement relied upon by landlord was purportedly executed on behalf of tenant by a nonparty to the original lease who failed to testify at trial despite numerous requests by the court to secure his attendance. We have considered landlord's remaining arguments and find them unavailing.

Ultimately, Hip Hop's landlord–and the new tenant, Mr. Cruz–got fried.

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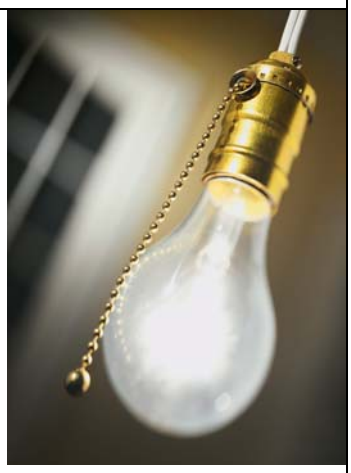
LIGHTS OUT? TELL SOMEONE!



On July 9, 2001, at about 12:15 in the morning, tenant Wendy Woodward fell down a flight of her building's porch steps. In a negligence case she later filed against the structure's owners, Woodward claimed that her fall was the result of inadequate lighting. (Supposedly, a motion sensor which triggered the porch light was not working properly at the time of the incident.)

There was just one little snag with her case. Woodward conceded that she never complained to the landlords about the defect prior to the accident. (And, of course, the owners contended that the light functioned properly earlier that evening and the following night.)

Faced with these facts, the Suffolk County Supreme Court dismissed Woodward's case. On appeal, the Appellate Division, Second Department, affirmed the dismissal. It was the appellate court's position that the absence of "actual or constructive notice" to the owners of the defect precluded a recovery in the tenant's favor.

Which just goes to show you, particularly as far as negligence cases are concerned, there's no point keeping your landlord in the dark.

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.

PAYBACK'S A B*TCH!

With increasing frequency, people are incurring substantial property damage or suffering from severe physical maladies as a result of mold.

If you think these kinds of claims are covered by insurance, and haven't scrutinized your policy for the precise wording or language, you may be woefully mistaken. More often than not, insurance companies are disclaiming coverage for mold-related incidents and will rebuff reimbursement efforts (unless intertwined with a covered event).

A case in point is *Siegel v. Chubb Corp*. In that particular dispute, as a result of "high level of toxins in the air, caused by mold," an insurer advanced its policy holder $120,000 in living expenses "without prejudice" to the company's right to seek the return of those funds in the event the incident later proved to be an excluded event.

As you might have guessed, the company eventually concluded that the policy did not apply to losses "caused by" mold and sought a refund of the proceeds. The New York County Supreme Court concurred and awarded the insurer a money judgment in the amount of $120,000. In its affirmance of that result the Appellate Division, First Department, offered the following guidance:

> The policy excludes "any loss caused by...mold." The term "caused by" is defined as "any loss that is contributed to, made worse by, or in any way results from that peril." Plaintiffs' assertion that the loss was caused not by mold but by toxins in the air is unavailing, as mold is the "efficient proximate cause" of the insured's loss...Moreover, there is no evidence that the mold was caused by any leak, which plaintiffs argue would be a covered occurrence.

That had to hurt!

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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