Finkelstein Newman LLP

Finkelstein Newman LLP

Newsletter

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Issue 3

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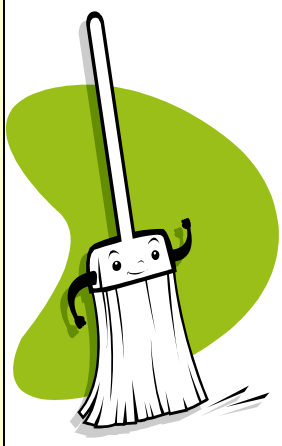
EARN *FREE* CLE CREDITS

Are you looking for an easy way to fulfill New York State's Continuing Legal Education ("CLE") credit requirements? Look no further than Finkelstein Newman LLP. Our office has been accredited as an approved CLE provider for up to eight hours of instruction on landlord-tenant proceedings and attendant legal issues. Partners Daniel Finkelstein and Lucas A. Ferrara, as well as other members and attorneys of the firm, are available to teach you and/or your staff the latest developments on landlord-tenant law and recent changes in governing legal doctrines. We can create a variety of schedules in order to accommodate your needs and tailor course topics to suit your interests. And, for a limited time, we are offering these courses to you at no charge.

Allow us to show you, first hand, why we are the leaders in our field. Please contact Managing Partner Jonathan H. Newman at JNewman@FinkelsteinNewman.com or at 212-619-5400 x 205, for more information.



IN THE COURTS:

"BROOM CLEAN" OR NOT "BROOM CLEAN": THAT IS THE QUESTION

People with real-estate experience are generally familiar with the expression "broom clean." It's a term of art meaning "free of personal property and refuse of all kinds, and reasonably clean." "Broom clean" is typically used in leases and other real-estate agreements in which one party agrees to surrender possession of real property to another and is bound to deliver the premises not only in timely fashion, but in "broom clean" condition as well.

There is no legal reason why a tenant's contractual promise to leave the premises clean and free of personal property upon vacating should not be given full force and effect by the courts. But recent landlord-tenant decisions suggest that landlords may be disappointed if they rely on the courts to enforce such a promise. In fact, in two cases, the Supreme Court, Appellate Term, First Department (the court to which all New York County landlord-tenant matters are appealed), has excused the tenant's non-performance of this important obligation.

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IN THE COURTS: *continued from page 1*

"BROOM CLEAN" OR NOT "BROOM CLEAN": THAT IS THE QUESTION

In the first such case, *1029 Sixth, LLC v. Guity Fashion Corp.*, the landlord exercised its option to terminate its commercial tenant's lease based upon the planned demolition of the building. After the tenant held over and the landlord commenced a holdover proceeding, the tenant agreed to vacate by a date certain, and leave the premises in "broom clean" condition. In return, the tenant was to get a move-out payment.

After the tenant vacated, the landlord argued that the tenant defaulted and was not entitled to the move-out payment because the tenant had left behind "garbage bags/refuse and shelving" in the premises, and the Civil Court agreed. But on appeal, the Appellate Term, First Department, downplayed the landlord's evidence, opined that the items left behind after the tenant vacated "could have been expeditiously removed for a nominal sum," and viewed the tenant's violation of its obligation to leave the premises in broom-clean condition as essentially *de minimis*. The Appellate Term therefore reversed the Civil Court, ruling that the tenant had not forfeited the agreed-upon payment from landlord by violating its "broom clean" promise.

In a similar case decided the same week, the Appellate Term, First Department, also rejected the landlord's claim that the tenant was disentitled to a promised move-out payment because she had left dirt and refuse behind when she surrendered her space. *Future 40th Street Realty, LLC v. Mirage Night Club, Inc.* concerned commercial premises occupied residentially, in violation of the lease. After the landlord commenced a holdover proceeding against the tenants, the parties executed a settlement agreement, in which the occupant agreed to deliver vacant possession to the landlord, and in broom-clean condition. In return, the occupant was to receive substantial benefits: the landlord's waiver of $37,500 rent, landlord's waiver of sizeable attorneys' fees, and a $15,000 move-out payment.

But when the occupant vacated, the premises were hardly broom clean. She had left behind a large quantity of rubbish, furniture, old clothes, bric-a-brac, and the like, so much that it cost the landlord $800 to remove it all. Nonetheless, the Civil Court ruled that the occupant was still entitled to her benefits under the settlement agreement (including the $15,000 move-out payment) even though she had failed to satisfy one of the conditions for receiving such benefits: surrendering the premises in broom-clean condition.

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UPCOMING SEMINARS:

REAL ESTATE CLOSINGS: FROM THE RESIDENTIAL HOME TO THE MULTI-UNIT DWELLING

On Wednesday, January 19, 2005, from 9:00 A.M. to 4:30 P.M., at Pace University, partner Lucas A. Ferrara will be a featured speaker at a continuing legal education ("CLE") seminar sponsored by Lorman Education Services, a national CLE provider.

CRITICAL ISSUES ON THE AGENDA

- The Contract, the Negotiation, the Players and the Closing of the Real Estate Deal
- Title Insurance Issues
- Taxes Due and Tax Strategies to Minimize Tax Implications At Closing
- Cooperative and Condominium Contracts and Closings
- Landlord-Tenant Issues Affecting Real Estate
- Due Diligence Issues Affecting the Multi-Family Dwelling
- Ethical Issues Involving the Real Estate Transaction.

CONTINUING EDUCATION CREDITS:

- NY RE 6.0
- NY CLE 7.0 / Ethics 0.5
- Bankers 7.75
- IACET 0.60

For additional information about upcoming seminars, please contact Daniel J. Curtin, Jr. at DCurtin@FinkelsteinNewman.com or at 212-619-5400 x 217.

IN THE COURTS:

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On appeal, the Appellate Term, First Department, essentially adopted the lower court's position: the occupant's "substantial compliance" with the settlement agreement entitled her to the benefits, and "[t]he *de minimis* items of personalty left in the premises by the tenants did not constitute a breach" of the settlement agreement. And, notably, the Appellate Term so ruled even though, under the settlement agreement, "substantial compliance" was not enough to entitle the occupant to any benefits; rather, the occupant was required to "fully and timely" comply with the settlement agreement to receive such benefits.

So in this regard, landlords should have muted expectations when negotiating a move-out agreement with a tenant. For if the landlord agrees to reward the tenant's timely surrender with a move-out payment, but the payment is conditioned on the surrendered premises being "broom clean", the courts will apparently compel the landlord to make the move-out payment even if the premises are not returned in the desired condition.

If you would like copies of the two cases mentioned above--or if Finkelstein Newman can assist you in any other way--please feel free to call Melissa Ephron-Mandel at MEphron-Mandel@FinkelsteinNewman.com or at 212-619-5400 x 229.

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Newsletter

Season's Greetings

All of us at Finkelstein Newman
wish you and yours
a joyous holiday season.

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