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WHERE DO YOU PRIMARILY RESIDE?

When a regulated tenant is suspected of "living elsewhere"–no longer utilizing the apartment unit as a "primary residence"–a landlord is permitted to terminate the tenancy and seek recovery of the unit by way of an eviction proceeding known as a "nonprimary residence" holdover case. Before such a dispute can be started, a landlord is first required to serve a notice upon the tenant advising of the lease's nonrenewal (in the case of NYC stabilized tenants) and a notice of the tenancy's termination (in both rent-controlled and rent-stabilized settings).

Of course, as anyone who has been party to this kind of case will attest, the process is easier said than done and is riddled with technicalities. By way of example, any notice served upon the tenant must set forth, in particular detail, the basis of the landlord's belief that the apartment is no longer being utilized as the tenant's principal or primary home. This recitation can include the location of that alternate residence (if known)–information typically garnered from public filings, such as a motor-vehicle registration, driver's license, voter's registration, or other document on record with a public agency. Also relevant are the number of days per year the tenant did (or did not) actually utilize the regulated unit, and, whether or not the apartment has been subleased.

When a notice is found to lack the required factual specificity, a judge will likely characterize the document as defective and dismiss the case. That was the outcome of the dispute in *Mak v. Yun Pan Lee*, wherein the New York County Civil Court found the predicate to be legally insufficient. On appeal, the Appellate Term, First Department, agreed that the generalized content of the landlord's notice–which simply alleged that the tenant was "living at another [unspecified] location"–was noncompliant with the governing law.

While brevity may be the soul of wit, "more" is often better than "less" within the context of summary proceedings.

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.

LANDLORD ZONKED FOR SAME-SEX HARASSMENT

According to a recent Appellate Division decision, landlords who sexually harass their tenants–even those of the same sex–could get hit with substantial fines and penalties. In *Matter of State Division of Human Rights v. Stoute*, a property owner was allegedly interested in pursuing a sexual relationship with one of his male tenants and, when those efforts were rebuffed, created a "sexually hostile housing environment" for that occupant.

In this particular case, the owner allegedly:

- made "sexually offensive comments and gestures" to the tenant and his guests;
- advised the tenant's friends that he wished to have sexual intercourse with the tenant;
- "spied" on the tenant (through a curtained, ground-floor window) while the tenant was engaged in sexual activity;
- entered the tenant's apartment (and bedroom) without advance notice;
- photographed the tenant and his guests as they entered and exited the building;
- simultaneously exited and followed the tenant when the tenant would leave the building;
- threatened the tenant with "physical force;" and
- eavesdropped on the tenant's conversations.

After a hearing, at which the landlord did not participate, an Administrative Law Judge (ALJ) with the New York State Division of Human Rights (NYSDHR) found in the tenant's favor and awarded $7,500 in compensatory damages. On administrative appeal to the NYSDHR, the landlord later objected to the ALJ's findings and alleged that the tenant was a "flagrant exhibitionist," who refused to properly cover his ground-floor windows and who engaged in sexual activity in full view of passersby. The owner further asserted that his actions were in response to legitimate community and building-related complaints and security concerns, and that the tenant was the "epitome of dishonesty" who was attempting to extort monies from the owner.

The NYSDHR Commissioner was unpersuaded by these latter arguments and concluded that the record supported the ALJ's findings that the owner's conduct was "severe and pervasive" and adversely impacted the tenant's ability to use and enjoy the apartment. Since the state's Human Rights Law prohibits a building owner from engaging in discriminatory housing-related acts, the Commissioner determined that same-sex harassment comprised a violation of that statute. And, as a result of the tenant's "mental anguish," the Commissioner upped the compensatory-damage award to $10,000 and further directed that the landlord to "cease and desist" from engaging in such conduct in the future.

When the landlord failed to pay the sum awarded by the agency, a special proceeding was commenced in the Kings County Supreme Court to enforce the award. Upon transfer of the case to the Appellate Division, Second Department, the appellate court ruled in the tenant's favor since all the requisite elements of a "hostile housing environment" had

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WHAT'S IN YOUR PREMISES?

Ever wonder what is included in your commercial or residential space when a lease uses the word "premises?" According to the state's highest court, the definition of that term will be governed by the parties' agreement.

In *South Road Assoc., LLC v. International Business Machines Corp.*, a dispute arose as to whether the word "premises" solely encompassed the buildings' interior areas or also included the land upon which the structures had been erected.

IBM occupied several buildings in Poughkeepsie, New York, pursuant to a 1981 lease with its landlord. The agreement described the "premises" in question as follows:

> That the Landlord hereby leases to the Tenant and the Tenant hereby hires and takes from the Landlord the space being more particularly shown on the attached floor plan designated Exhibit 'A' (hereinafter called the 'premises') consisting in the aggregate of 113,400 gross square feet in two buildings consisting of 113,400 gross square feet (hereinafter called the 'buildings') situated on real property (hereinafter called the 'land') located at 622 South Road (Route 9), and a Water Tower and appurtenances in the Town of Poughkeepsie, State of New York (her[e]inafter referred to as Buildings 952, 982).

During its tenancy, IBM installed an underground chemical-waste storage tank which leaked and contaminated the site's bedrock, groundwater and soil. While IBM accepted responsibility for the spill and agreed to abate the pollution, the landlord still commenced an action in the Dutchess County Supreme Court alleging IBM had breached its lease by failing to return the premises in "good order and condition."

With respect to that particular obligation, the governing agreement provided that at the end of the lease term:

> [T]he Tenant will remove its goods and effects...and will (a) peaceably yield up to the Landlord the premises in good order and condition, excepting ordinary wear and tear, repairs required to be made by the Landlord, or damage, destruction or loss by fire or other casualty or by any other cause...and (b) repair all damage to the premises and the fixtures, appurtenances and equipment of the Landlord therein, and to the building, caused by the Tenant's removal of its furniture, fixtures, equipment, machinery and the like and the removal of any improvements or alterations.

When the parties moved for summary judgment–that is, a judicial decision deciding the case based solely on the papers presented by the litigants, without the need for a formal evidentiary hearing or trial–the Dutchess County Supreme Court found in the landlord's favor. The Appellate Division, Second Department, reversed concluding that the "clear and unambiguous" language of the parties' lease limited the encompassed space to the building's interior areas and could not "be construed to include the surrounding soil and groundwater." On appeal, the New York State Court of Appeals sided with the Appellate Division and concluded as follows:

> Since the meaning of "premises" is clear and unambiguous in the lease, extrinsic evidence such as the conduct of the parties may not be considered. IBM's conduct–placing underground storage tanks in the surrounding land and cleaning the resulting pollution–is not sufficient to create an ambiguity in the lease where the language is clear...The contract, read as a whole, clearly and consistently uses the term "premises" to refer only to interior space and we cannot rely on extrinsic evidence to find otherwise.

Clearly, by this decision, the state's highest court is cautioning all parties to a lease to ensure that their agreements are appropriately premised.

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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been demonstrated. As the court observed:

> Here, substantial evidence supports the Division's determination that [landlord] sexually harassed the complainant, and in doing so violated the Human Rights Law. The Division relies on the hostile housing environment theory, and the record supports its determination that [landlord] created such an environment with respect to [tenant].
>
> To prevail on a hostile housing environment theory, it must be shown that (1) the complainant is a member of a protected group, (2) he or she was subjected to unwelcome and extensive sexual harassment, in the form of sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, which were not solicited or desired by the complainant, and which were viewed as undesirable or offensive, (3) such harassment was based on the complainant's sex, (4) such harassment makes affected a term, condition, or privilege of housing, and (5) if vicarious liability is claimed, the complainant must show that the owner knew or should have known about the harassment and failed to remedy the situation promptly....

Although the Appellate Division conceded that this was a case of "first impression"–in that it was the first time a sexual harassment remedy had been applied to the housing context–the appellate court did not believe that the case's uniqueness foreclosed a comparison to other awards in other kinds of cases considered by the agency. The court concluded that the $10,000 compensatory-damage award was well within the range of prior decisions and, in the absence of a punitive or punishment component, "entirely proper" under the circumstances.

Now how hostile was that?

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