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Inside this issue

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WHAT'S THE POOP?

In *565 Tenant's Corp. v. Adams*, a cooperative shareholder faced eviction from his apartment based on "nuisance."

The underlying holdover proceeding was settled by way of an agreement (dated July 31, 2006) which provided that the tenant would "not permit his dogs to defecate or urinate in the [apartment or common areas of the building] and/or if same occurs shall promptly [and] properly clean so as to avoid issuance of any odor. If [tenant] or any authorized individual is in [the apartment] said clean-up to be done immediately."

For a period of two years, any breach by the tenant was to be treated with "zero tolerance" and would result in the issuance of a warrant of eviction on as little as five days' notice.

As luck would have it, about a month later (August 22, 2006), one of the tenant's Afghans defecated on the unit's hallway floor and there the deposit remained for about a three week period -- until the tenant returned from a Caribbean vacation.

When the cooperative alleged breach and sought to evict the tenant for his noncompliance with the parties' agreement, the New York County Civil Court concluded that the tenant had not seen the "accident" occur (as he had been leaving for a vacation) and removed the pile upon his return -- thus satisfying the "immediate" clean-up requirement.

On appeal, the Appellate Term, First Department, didn't buy the tenant's "professed unawareness of the dog's mess," since the debris had been "conspicuously deposited immediately outside tenant's bedroom." Undeniably, the tenant's "ignorance defense" didn't pass the smell test:

> In evaluating tenant's breach using the "zero tolerance" standard formulated by the parties, it is not unreasonable to charge tenant with knowledge of what he ought to have discovered through the ordinary use of his senses.

The appellate court also expressed concern (as had been cited in an earlier Appellate Division decision) for the sanctity of contractual arrangements reached in Housing Court, and noted that owners would be discouraged from amicably resolving disputes if settlements were dishonored and unenforced by our courts.

The Appellate Term, 2nd and 11th Judicial Districts, didn't share that sentiment in *600 Hylan Associates v. Polshak*. In that case, Ilonka Polshak sought to vacate a money judgment and a possessory judgment which she had stipulated to in a nonpayment case. While she initially to agreed to owing some $11,000 in "back rent, costs and fees," she later retained counsel and sought to be relieved of her obligations, claiming to have "inadvisably" waived certain defenses to the landlord's claim.

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WHEN ARE FINES EXCESSIVE?

In *Street Vendor Project v. City of New York*, an association of street vendors filed an Article 78 proceeding challenging a new fine schedule promulgated by the Environmental Control Board ("ECB"), which increased the penalties associated with violations of the New York City Health Code or Administrative Code from a maximum of $250 to $1,000.

The street vendors argued that the increase was arbitrary and capricious, excessive, violative of the United States and New York State Constitutions, and, adopted in violation of the City Administrative Procedure Act (CAPA) because the City failed to provide proper notice of its intent to implement the schedule.

The New York County Supreme Court found that the street vendors were unable to demonstrate that the plan was arbitrary or capricious. Nor was there any evidence that the new penalties were "grossly disproportionate" to the offenses in question, or that the fines were an unreasonable means of deterrence.

The court further noted that constitutional challenges to excessive fines "arise in an as-applied context, thus requiring, as a predicate for judicial review, 'the imposition, or immediately impending imposition, of a challenged punishment or fine.'" Since the street vendors had not yet incurred any penalties under the new fine schedule, their "claims were premature and factually insufficient."

Although the ECB failed to comply with CAPA, in that it omitted "any indication of its reasons or the rule's basis and purpose," and the schedule had not become effective as a result of that error, the Supreme Court noted that the defect was curable by a proper republication in the City Record.

On appeal, the Appellate Division, First Department, affirmed the lower court's decision. The AD1 agreed that the increased penalties were not arbitrary and capricious, since they "had a 'foundation in fact' in the comments from the Department of Consumer Affairs, the Health Department, a business improvement district, and a Soho resident."

The AD1 also reiterated that a fine is constitutionally excessive only if "grossly disproportional to the gravity of a defendant's offense." To assess disproportionality a court must weigh a number of factors, many of which deal with the unique factual particulars under examination. Thus, the AD1 held that while "[t]he present record does not permit such consideration … individual street vendors are free to raise such a challenge in future lawsuits where the facts of each case can be developed."

The AD1 also agreed that the published "Statement of Basis and Purpose" was defective, but pooh-poohed the vendors' argument that the defect could not be cured by republication. So, ultimately, while the street vendors could not get the penalties invalidated, they managed to delay the new schedule's imposition.

Shouldn't they be penalized for that?

If you have any questions or comments about the above 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.

WHEN J-51 EXPIRES, STABILIZATION MAY BE LOST

In *Ogando v. Pamela Equities Corp.*, David Ogando sought a declaration that his apartment was rent stabilized. Pamela Equities, the landlord, moved for summary judgment seeking the case's dismissal.

When the New York County Supreme Court granted Pamela Equities' motion, Ogando appealed to the Appellate Division, First Department, which affirmed.

There was sufficient evidence "that the rents had been stabilized solely as a result of [Pamela Equities'] participation in the former J-51 tax abatement program," and that protection ended when the tax-abatement period had expired. In addition, the landlord, as statutorily required, had included a warning in its lease riders notifying Ogando and other tenants about the expiration of those tax benefits and the attendant consequences.

While Ogando objected to certain irregularities in those notices, since the content was "neither false nor materially misleading," the AD1 ultimately concluded the owner was entitled to the litigation's dismissal.

Quite an equitable outcome for Pamela Equities, wouldn't you agree?

TREBLE RENT WAS UNENFORCEABLE PENALTY

Here's a case which proves that you can't believe everything you'll find in a lease agreement.

In *Gellis v. Marshak*, Denise Gellis filed a lawsuit against her landlord, disputing a provision which provided that should she remain in possession of her space after her sublease expired, her monthly rent would increase threefold -- from $8,000 to $24,000.

The New York County Civil Court sided with the landlord, Harvey Marshak, and awarded him $71,646 on his counterclaim for damages. On appeal, the Appellate Term, First Department, reversed. The AT1 found that "[a]s of the commencement date of the sublease, the parties could not reasonably have believed that the stipulated sum would be fair compensation for [Gellis'] failure to timely surrender possession," and concluded that "the true purpose of the provision was to secure performance 'by the compulsion of the very disproportionate ... rather than to provide a reasonable assessment of probable damages.'"

Since it lacked a correlation to the landlord's damages, the trebling of the rent was viewed as an unenforceable penalty.

So, clearly, one needs to be trepidatious about treble damages.

WHAT'S THE POOP?

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Since her motion failed to demonstrate any of the typical factors -- fraud, collusion, accident or mistake -- which would have triggered an entitlement to relief, the Richmond County Civil Country denied the request. On appeal, the AT2 reversed.

Because the tenant had "made it clear" she was unable to remit payment of the monies sought to be recovered without assistance from the Department of Social Services, and, in view of the possibility that the landlord may have waited too long -- i.e., two years -- to bring the nonpayment case, the AT2 was of the opinion that the tenant had made "a sufficient showing of prejudice arising from landlord's delay" in filing its lawsuit.

Having demonstrated a "meritorious and substantial laches defense," the AT2 rescinded the parties' agreement and restored them to the *status quo ante* – so that there could be a full and complete trial on the parties' respective claims.

A lone dissenter, Justice Michelle Patterson, did not concur with the appeal's outcome and noted as follows:

> [T]he record shows that the tenant entered into the stipulation freely and knowingly in open court and that the amount agreed to was in fact owed. To unravel a stipulation of settlement under these circumstances would have a chilling effect upon future litigants entering into such settlements and, indeed, would render them meaningless. While the Court is sympathetic to this self-representing litigant, it must be mindful of its role to administer justice fairly and evenly and cannot ignore the basic tenets of the law.

This much is certain, folks: There are no absolutes in landlord-tenant law.

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.

TENANT WHO ABATED NUISANCE GOT NO FEES

In *Townhouse Co. v. Peters*, a nuisance holdover proceeding had been filed against Frances Peters.

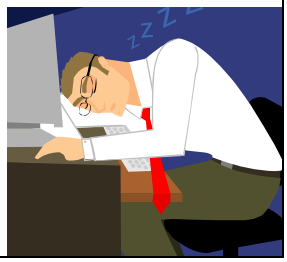
Townhouse alleged that Peters' apartment was so cluttered and unkempt, that eviction was merited.

Peters countered that the condition had been remedied and agreed to allow Townhouse to inspect the unit in order to determine whether a cure had been effected. After two of those visits, Townhouse sought to end or "discontinue" the case.

Interestingly, when the parties were unable to agree on the terms of the discontinuance, Townhouse asked the court for an order ending the case. The New York County Civil Court granted the motion, but conditioned the request upon Townhouse's payment of Peters' legal fees and costs.

On appeal, the Appellate Term, First Department, disagreed with that result and vacated the fee award. The AT1 was of the opinion that "absent a showing of prejudice to tenant, landlord's motion to discontinue should have been granted unconditionally."

Can't the incurrence of legal fees be a form of "prejudice?" And, was relief denied to the tenant because she was not free of guilt in this particular instance? Unfortunately, the decision fails to address those questions.



We do know this: At this point, Townhouse is probably Petered out.

If you have any questions or comments about the above 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.

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