Finkelstein Newman LLP

Finkelstein Newman LLP Newsletter

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GETTING "*YELLOWSTONED*": JUST SAY … "YES!"

"What is a tenant supposed to do when it receives a default notice from a landlord?" If the document is intended as a precursor to a holdover proceeding, our response to this question varies depending on the nature of the tenancy. In the residential setting, if a correction of the problem is not possible within the given time constraints or there is a bona fide dispute as to the nature of the default, tenants are often left with little choice but to await a notice terminating the tenancy and litigate the matter. If the existence of the default is later confirmed (say, after trial), in most instances residential tenants retain a statutory right to correct the default, even after judgment. In so doing, tenants may avoid a lease forfeiture and eviction from their homes.

But what about commercial tenants? Since there is no statutory post-judgment cure opportunity available to these occupants in a holdover context, the strategic concerns are quite different. Once the curative period set forth in a default notice expires and a subsequent termination notice issues, litigation based upon the default will inevitably follow. If the court ultimately sides with the landlord, the commercial tenant may be unable to stave off an eviction.

Therein lies the *Yellowstone*. Named after a landmark New York State Court of Appeals case, a *Yellowstone* injunction "stops the clock," preventing the running of the cure period and preserving the remaining time within which a cure may be undertaken so that the tenant may dispute the position taken in the landlord's initial

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LOCKED-OUT, BUT NOT OUT OF LUCK

Finkelstein Newman LLP frequently assists commercial tenants with their lease related disputes. In a recent case, partner Robert Finkelstein and associate Andrew J. Wagner defeated a landlord's nonpayment proceeding—and secured a "treble," or triple, damage award for the tenant.

The case concerned a tenant's use and contemplated assignment of certain restaurant space to a potential assignee, who in turn began "renovation" work. The restaurant's principals were informed that the work to be undertaken by the potential assignee was cosmetic in nature. However, after the work began, the building's owner believed that more substantial and unauthorized construction was underway.

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LOCKED-OUT, BUT NOT OUT OF LUCK

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In order to halt the construction, the landlord obtained an injunction from the New York State Supreme Court preventing the occupants from engaging in any further work. After obtaining that relief, the landlord's agents thereafter purportedly observed men performing "unauthorized" work in the space. At that point, rather than bring the conduct to the court's, attention, the landlord ousted the tenant from the premises, changed the locks, and posted a sign that read: "Locks changed per court injunction . . . ." There was just one hitch: The order issuing the injunction did not authorize a change of the locks or any other act of "self help."

Subsequently, when the restaurant-tenant tried to gain access to the space, it could not. And, when a new key was requested, the tenant was denied one. Whenever the restaurant-tenant desired access to its space, it was told that it needed to coordinate entry by way of the parties' respective counsel. Despite this inconvenience and questionable conduct, the landlord then commenced a nonpayment proceeding in the Civil Court for all outstanding rent.

Finkelstein and Wagner argued that the denial of access, as evidenced by the failure to provide the tenant a key to the new lock, triggered an "illegal lock out." "Under New York law, there are very limited circumstances when a landlord can resort to 'self-help,'" explained Wagner. "The self-help in this case—the changing of the lock and failure to give a key—constituted an illegal eviction, or one that was done without the court's permission."

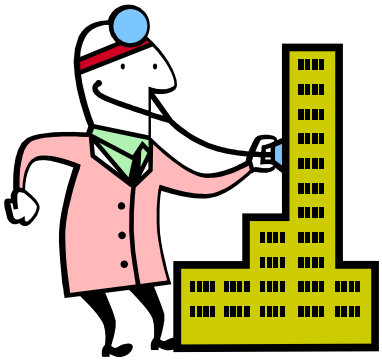
After trial, the Civil Court agreed, finding that the restaurant's ouster was one that suspended the tenant's obligation to pay rent, and thus dismissed the landlord's nonpayment case.

But, because this was an illegal lock-out, the tenant also sought damages. As Finkelstein noted, "The illegal lock out of a tenant authorizes the tenant to seek treble, or three-times, the amount of any damages incurred as a result of the landlord's illegal acts." Here, the court applied the law and awarded the tenant treble damages.

As demonstrated by the outcome of this case, acting in haste or in disregard of governing law can have serious adverse consequences for a landlord. When in doubt about the best course of action to take with respect to a given problem, it's always best to consult with counsel. While such advice may sound cliché, this recent dispute certainly reinforces that landlords and tenants should avoid acting impulsively, or they do so at their peril.

If you have any questions concerning this case or other commercial matter, please contact associate Andrew J. Wagner, at 212-619-5400 x 220 or AWagner@FinkelsteinNewman.com.

"SICK BUILDING SYNDROME"— YOU MAY NOT BE IMAGINING THINGS



With increasing frequency, complaints are being filed throughout the nation about buildings' air quality. And, many of these complaints are finding scientific legitimacy. Commonly known as "sick building syndrome," problematic physical conditions or ailments, such as breathing problems, nausea, dizziness, fatigue, and memory loss, are typically associated with poor ventilation and exposure to toxic fumes and chemicals released by way of a structure's heating and ventilation system.

The fact that people may suffer from physical ailments is not necessarily enough to classify a building as "sick." When determining a claim's sufficiency, New York courts will consider generally accepted standards and practices espoused by the scientific community, including air quality tests. And even when these results are within acceptable levels, should a claimant's symptoms subside upon relocation to another workspace, a court may find that information relevant when determining the outcome of a "sick building syndrome" case.

In essence, a "connection" between a claimant's symptoms and presence in the building must be established in order for a "sick building syndrome" claim to survive attack or dismissal. This typically means that the testimony of one or more physicians as to the cause of a claimant's condition will need to be considered. However, when an expert cannot identify the source of the specific chemical(s) or allergen(s) present in a claimant's environment, a finding of "sick building syndrome" may not be supportable. Courts will also look for a "link" between an alleged condition or disease and a distinctive aspect or feature of the claimant's environment.

And, the timing of a "sick building syndrome" diagnosis may also be relevant. By statute, the time period within which a "sick building syndrome" claim may be made is typically three years from the date the injury is discovered or should have been discovered.

The growing reliance on heating and ventilation systems in "sealed" buildings of all types and sizes, coupled with the use of chemical compounds for cleaning, maintaining, and even constructing these structures, will likely give rise to more "sick building syndrome" complaints. And with the increase in these cases comes a greater need for landlords and tenants to monitor and address the causes of these conditions in an expeditious and effective fashion.

For more information about "sick building syndrome" contact partner Jonathan H. Newman, at 212-619-5400 x 205 or JNewman@FinkelsteinNewman.com.

GETTING "*YELLOWSTONED*": JUST SAY … "YES!"

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notice without risking a forfeiture of its valuable commercial space.

When a commercial tenant receives a notice to cure and disputes the alleged lease default, or is unable to cure within the delineated time period, the tenant should run to Supreme Court to get this special type of injunction to "stop" the landlord from continuing with the lease-termination process.

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From a tenant's point of view, the *Yellowstone* is a "good thing," as the granting of that relief means that there is no "immediate" threat of eviction. And, from a landlord's perspective, the *Yellowstone* is not really that bad of a remedy, either. First, it puts the tenant in the position of having to spend some legal fees to preserve (or try to preserve) the leasehold. Second, as a condition for receiving this relief, tenants will often be required by the Court to remit all, or part of, any unpaid rent to the landlord and will likely be directed to timely pay all prospective rent. Third, the process often brings the parties "to the table" to work out a mutually agreeable solution. And finally, it often results in a resolution of the alleged default and a correction of the underlying problem or condition.

Of course, this right is also available to commercial subtenants. That is to say, if a commercial subtenant receives a notice from its landlord (the prime tenant), the subtenant has the same right to "save" the space vis-à-vis a *Yellowstone* application. But, a subtenant's rights to use and occupy the premises often rise and fall with the prime tenant's rights. So there is some limitation in the value of a subtenant seeking injunctive relief, particularly when the prime lease or the sublease is nearing its natural expiration.

"Yellowstone" is not just the name of national park, but an old and faithful "friend" to landlords and tenants alike.

For more information about "Yellowstone" relief, please contact partner Lucas A. Ferrara, at 212-619-5400 x 211 or at LFerrara@FinkelsteinNewman.com.

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