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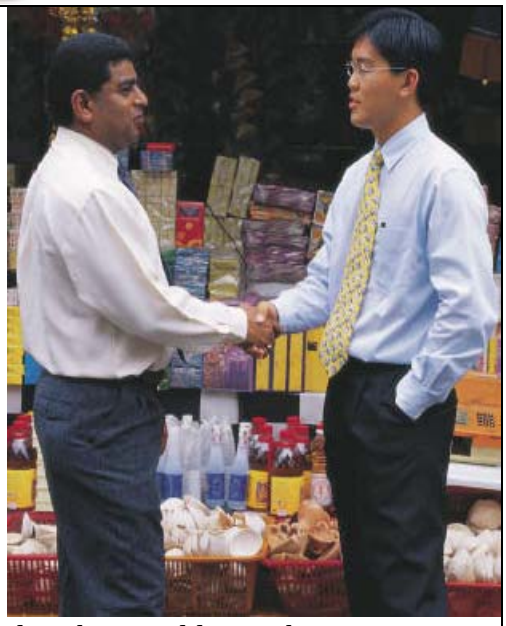
SHOULD I SIGN A LEASE?



Some landlords and tenants believe that written lease agreements are to be avoided at all costs because they bind the parties to the agreed-upon time frame and impede any flexibility to end the relationship sooner should circumstances change. Many also feel that the writing is more of a hindrance–a needless formality–and that a handshake should suffice.

Be disabused of that notion.

While leases allow tenants to remain in exclusive possession and control of their space for the stipulated duration, should problems later arise, these documents frequently provide the parties with a number of legal rights and remedies that would not otherwise exist.

For example, if one were to sue the other during the course of the landlord-tenant relationship, the individual being sued would ordinarily be able to assert any claim for damages they might have against the one suing them–known as a "counterclaim"–and could request that the matter be heard by a jury. That request for a jury trial–a matter of constitutional right–would convert a simple rent nonpayment or holdover proceeding to a costly and delay-ridden process, to say the least. Taking the typical case from weeks to months to reach a disposition and significantly exacerbating legal fees and costs.

Most lease forms avoid this problem with counterclaim and jury-trial waivers; provisions wherein the parties agree that they will not seek a jury trial or raise "unrelated" counterclaims in the event a dispute in which they are involved is taken to court. (To date, appellate decisions continue to give these waivers full force and effect.) By "unrelated," we mean that courts are unlikely to entertain countersuits that are not somehow "intertwined" with the main case or case-in-chief. So, while a court in a rent nonpayment case would allow a tenant to raise the fact that an apartment was riddled with unsafe conditions or that essential services had been denied, and would award a tenant an offset against the rent due or direct a refund of such sums paid, a judge would likely be less inclined to entertain a property-damage or personal-injury claim as a result of the waiver language. These latter claims would be severed without prejudice to the tenant bringing them in a different case or forum (like a small-claims case) and would allow the main claim–the nonpayment or holdover case–to proceed to conclusion without needless delay or complication.

Along those same lines, most lease forms provide that in the event a landlord is forced to

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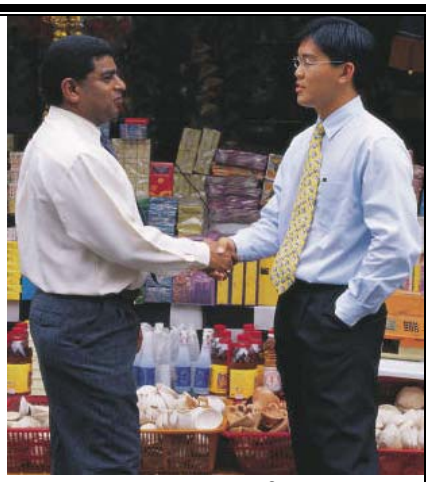


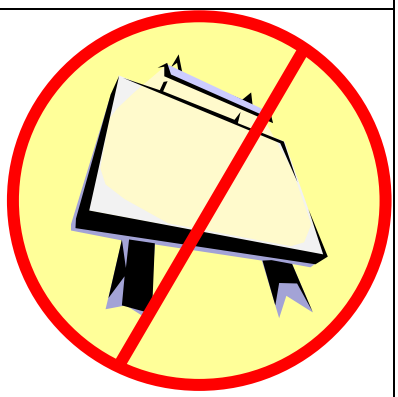
bring a case against the tenant, and wins, the landlord would be entitled to recover its attorneys' fees and costs. There typically would be no entitlement to such fees without such language. (Under the "American rule," each side to a lawsuit bears its own fees and costs, in the absence of a lease agreement or statute which provides to the contrary.)

Here's the kicker. Under New York State law, when a residential lease provides that a landlord may recover its fees and costs incurred during the course of a lawsuit, a tenant will also be entitled to seek such reimbursement–should it prevail on its claims or defenses–even when the wording of the parties' agreement is silent as the tenant's right to recoup such charges. This reciprocality often serves to deter landlords from commencing frivolous or baseless suits against tenants–a deterrent that would not exist if the parties operated on the basis of an oral agreement or handshake.

Finally, outside of rent regulation (where tenants are afforded the option between a one or two year lease), there are very few restrictions on how long or short a free-market lease may be. It's possible to enter into a lease for as little as several hours in a day or as long as many decades; with the ability to provide for the premature termination of the agreement upon notice given by one to the other. With free-market leases, there's also no prohibition to an arrangement allowing a tenancy to end prior to the stated termination date (subject to some advance notice, for example) thus avoiding the possibility that one is locked into a long-term arrangement with all of its attendant responsibilities and liabilities. Thus, when properly structured, there's no question that a written lease can be a landlord's and tenant's best friend.

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.

"ATTORNEY ADVERTISING," NOT!



As we anticipated in several of our blog posts, the first federal lawsuit has been filed challenging the constitutionality of New York's new attorney-advertising regulations (which went into effect on February 1, 2007).

The litigation, brought by the nonprofit consumer advocacy group, Public Citizen, Inc., against the Chief Counsels of the various Departmental Disciplinary Committees, seeks to stay the enforcement of these overly broad and restrictive rules and to have them declared unconstitutional. The complaint alleges, in part, as follows:

> The ethics rules, as amended...allow for arbitrary and discriminatory enforcement and impose onerous restrictions on both commercial and noncommercial speech that the state has no legitimate interest in regulating. The amended rules are therefore unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution.

We wholeheartedly support Public Citizen's efforts and wish the organization much success.

ADVERSE POSSESSION: WHAT DOES IT TAKE?

The legal doctrine of "adverse possession" triggers more fear in the hearts and minds of real-property owners than any other issue imaginable (other than death and taxes, of course). As we have previously reported, it's legal in the State of New York to take another's real estate, without having to pay for the privilege, as long as certain criteria are satisfied.

In a lawsuit filed by Sylvia Heumann in the Herkimer County Supreme Court, an entity known as Old Forge Properties, Inc., was declared the owner of a parcel of property that had actually belonged to Ms. Heumann. On appeal, the Appellate Division, Fourth Department, affirmed that outcome.

How is that outcome possible, you ask? Well, it appears that Ms. Heumann allowed Old Forge to take considerable liberties with her property for some ten years. Over the course of a decade, Old Forge constructed a "garage and a shop" and made other "improvements." This lapse of time and the range of activity which occurred on the parcel triggered certain rights in the hostile possessor.

Here's how the AD applied and defined the governing elements:

> [D]efendants met the common-law and statutory requirements of adverse possession (*see* RPAPL 521, 522). Defendants established by clear and convincing evidence that the character of their possession was "hostile and under a claim of right, actual, open and notorious, exclusive and continuous...for the statutory period of 10 years"...Because there was no written instrument describing the boundaries of the disputed property, defendants were required to establish cultivation or improvement of the property, or that it has been protected by a substantial enclosure...Defendants established cultivation and improvement of the property by showing that, on the disputed property, they expanded a sandpit, improved a snowmobile trail for use as a road and constructed a shop and garage, a septic tank, and a well pump.

While we certainly regret the outcome for Ms. Heumann, *Old Forge* reinforces the danger of inaction. An owner's failure to reclaim possession and control of property used or occupied by another without consent can ultimately lead to its forfeiture.

READER'S COMMENTS

I regret to read that another NYS landowner has lost one of life's most valuable possessions: property. I am pleased, however, to bring everyone up to date on some good news. Recently, I received word from Senator Elizabeth Little's office in Albany, that they have met with the New York State Bar Association and others and have compromised on a new bill on adverse possession. They will extend the time limit from 10 years to 20 years. They will take out the term "cultivation" and write in that the property must have a "substantial enclosure" placed on it. Mowing or planting something on the property WILL NOT meet adverse possession. At least with a fence or structure the landowner may be alerted to a squatter.

I am not sure if state lawmakers have abandoned the thought of a formal filing or notice requirement. The subject did arise when speaking with Senator Little's assistant. Other states are starting to adopt the idea that if someone is trying to take property they must alert the property owner. In England, where this law originated, they also have gone to this notification system. You need to notify the owner and then if the owner does not respond you have the right to the property. Such a system makes good sense.

We may not have a "perfect" bill, but at least a 20-year time limit and the few other changes are a start. In today's age when people no longer have "old fashioned" values–like "though shall not steal"–our lawmakers need to step up to the plate and protect innocent homeowners.

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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.

JUDGES NOT SWEET ON CHOCOLATE-MAKER'S EVICTION

In order for a corporation to enjoy the benefits of rent stabilization, the lease must specify a particular individual (and not a class of individuals, like a "corporate officer" or "President") as the authorized occupant. The reason for this rule is that without a person's name, the tenancy could run in perpetuity; an end result disfavored by law.

In *New York University v. Kopper's Chocolate Specialty Co, Inc.*, the University sought to terminate Kopper's Chocolate's corporate lease for a Washington Square Village rent-stabilized apartment occupied by Kopper's principal, Leslye Alexander. After motion practice, a Housing Court Judge concluded that the University had failed to state a proper basis for eviction and dismissed the case. On appeal, the Appellate Term, First Department, affirmed, noting as follows:

> Although the initial 1982 lease was issued solely in the name of the corporate tenant, at least four subsequent renewal leases identified respondent Alexander as a tenant and occupant of the stabilized apartment premises. Moreover, landlord's real estate director candidly admitted at deposition that he "understood that the apartment would be for" Alexander, to be "occupied by her only." In this posture, the possibility of a "perpetual tenancy" was obviated...Since it is undisputed that Alexander, the original occupant, has remained in sole and continuous possession for over two decades, the holdover petition was properly dismissed.

Every victory should be as sweet.

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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