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Expert Analysis

Common Law Right to Use Self-Help To Evict a Commercial Licensee

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When a commercial tenant stays beyond the term of a lease and refuses to leave, owners often have little alternative but to go through a time-consuming and expensive court process. Any attempt to evict the tenant by changing the locks may subject the owner to severe penalties. Significantly, under Section 853 of New York's Real Property Actions and Proceedings Law (RPAPL), a victim of an unlawful eviction may recover an amount that is three times the damages from the malfeasant. To be clear, RPAPL 853 states:

> If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefore against the wrong-doer.

As you can imagine, RPAPL 853 gives many attorneys pause when counseling clients regarding an unwanted commercial occupant of their land. With the foregoing in mind, most attorneys would be wise to caution their clients to proceed to Civil Court, commence a commercial holdover proceeding, secure a judgment of possession and, thereafter, have the marshal perform an eviction of the commercial occupant. Such advice is sound, and in most cases, should be followed.

> A commercial licensor, who is unshackled by the terms of a lease agreement, may more readily use self-help to evict a licensee so long as no force or unlawful tactics are used to effectuate the eviction.

Of course, it is the preference of most every owner to change the locks and throw away the key rather than go through the often long and expensive process of going to court to evict an occupant. With the foregoing in mind counsels should be reminded that a commercial licensor, who is unshackled by the terms of a lease agreement, may more readily use self-help to evict a licensee so long as no force or unlawful tactics are used to effectuate the eviction.

Initially, it is important to understand the difference between a lease (which governs a tenancy) and a license agreement (which governs a license). The court in *Echelon Photography v. Dara Partners*, 816 NYS2d 695 (Civ Ct NY Co 2006), aptly described a license agreement as follows:

> The difference between a license and a lease is that a lease conveys to the lessee absolute possession and control of the premises for a specific term and rent, subject to the lessor's rights, whereas a licensee does not obtain exclusive possession, and its right to possession is revocable at will and without cause. (Finklestein and Ferrara, Landlord and Tenant Practice in New York §3:22, 23 [West's N.Y. Prac Series 2004]; *American Jewish Theatre v. Roundabout Theatre Co.*, 203 A.D.2d 155, 156 [1st Dept. 1994]).

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As noted, a tenant typically occupies and has exclusive possession of a premise pursuant to a lease agreement. While regaining possession through legal methods is the safest process, it is well established that a landlord may, under limited circumstances, use self-help to evict a commercial tenant.[1] Landlords may only exercise this common law right to self-help if (1) the lease expressly reserves that right, (2) tenant was in fact in default of its obligations under the lease, and (3) the eviction is performed peaceably.[2]

Although it may sound simple enough it rarely is. In a practice that is dominated by strict conformity to statute and complicated lease language it is not always clear if a lease reserves a landlord the right to re-enter. Moreover, questions of fact often exist as to whether the tenant was in default and, if so, did the landlord properly notice tenant of same. Lastly, even if a landlord manages to traverse the foregoing, a self-help eviction can always take a turn for the worse if the tenant arrives during the process and things escalate, turning a peaceful self-help eviction into a hostile situation.

Even worse is the distinct possibility that a landlord does everything right and is still unsuccessful in regaining possession of the space. A tenant with a lease is a tenant who can call a police officer (who may not be well versed in the common-law right to use self-help) and, with the lease in hand, seek to be restored to possession.[3] As one can readily see, a landlord's use of self-help is riddled with uncertainty and one that this author has rarely, if ever, seen put to use by a landlord. Thus, while self-help by a landlord is a feasible (and aggressive strategy), a landlord needs to be sure that it has satisfied all three elements set forth above before resorting to self-help or risk having to bear the penalty of treble damages.

License

On the other hand, a commercial licensor is not so limited. A licensor does not need to concern itself with restrictive language in a lease. Likewise, it is irrelevant whether the commercial licensee is in default of the license agreement. A licensor may simply terminate the commercial license and, immediately thereafter, evict the commercial licensee by using self-help, i.e., changing the locks, so long as licensor is mindful not to violate RPAPL 853.

> The Pelt court explained that the statutory right of an owner to commence a licensee summary holdover proceeding does not abrogate an owner's common law right to oust a licensee.

The reasoning behind this proposition was set forth more than a century ago by the Court of Appeals in *Napier v. Spielman*, 196 NY 575 (1909), affg., 127 AD 567. Therein, the Court of Appeals affirmed a judgment in favor of defendant-licensor and dismissed the complaint for treble damages for an alleged forcible entry and detainer. Significantly, in the underlying opinion, the First Department held that an "action for forcible entry and detainer will not lie where the ousted occupier is a servant or mere licensee…In such a case the possession is not changed, for it remains in the master or licensor."

In *P&A Brothers v. City of New York Dept. of Parks & Recreation*, 184 AD2D 267 (1st Dept. 1992) the First Department reiterated this well-settled rule when it held that "a licensee involved in an arms-length commercial relationship… is subject to ouster…without legal process." Notably, the foregoing was also re-affirmed in *World Evangelization Church v. Devoe Street Baptist Church*, 27 Misc.3d 141(A) (App Term 2nd, 11th and 13th Jud Dist 2010). Therein, the Civil Court properly found that petitioner, which had been given a contractual right to use the subject premises on specified days at specified hours, was a mere licensee and, therefore, could not maintain a proceeding for unlawful entry and detainer. See also, *Best v. Samjo Realty Corp*., 709 NYS2d 508 (1st Dept. 2000).

Pelt Case

This hotly contested issue was analyzed in 2013 in *Pelt v. City of New York*, 2013 WL 4647500 (EDNY 2013), albeit in the context of a residential squatter. In *Pelt*, plaintiff lived with a New York City Housing Authority (NYCHA) tenant in a NYCHA-owed building for many years. For reasons not relevant here, the tenant vacated and surrendered the apartment in July, 2010; however, plaintiff remained in occupancy. As alleged by plaintiff, on Aug. 19, 2010, NYCHA, with the aid of the police, used self-help to evict plaintiff and did not permit plaintiff to return.

Plaintiff commenced suit seeking restoration and damages for being ousted from the NYCHA apartment by NYCHA with the aid of the police. Plaintiff claimed that he occupied the apartment pursuant to a license granted to him by the tenant who had previously surrendered and vacated. The court did not give any credit to plaintiff's claim of a license since he provided no proof of same and plaintiff did not provide any proof that his purported license could survive tenant's surrender and vacatur of the apartment. Regardless, the court held that plaintiff had no right to remain in the apartment, stating that plaintiff's self-serving and conclusory allegation that he was a licensee (as opposed to a squatter or trespasser) was of no help because:

> Under New York law, it is well settled that a "licensee acquires no possessory interest in property." *P&A Bros., Inc. v. City of New York Dep't of Parks & Recreation*, 184 A.D.2d 267, 269, 585 N.Y.S.2d 335 ([1st Dept.] 1992)…; see also *Gladsky v. Sessa*, No. 06-CV-3134, 2007 WL 2769494, at *8 (E.D.N.Y. Sept. 21, 2007) ("It has long been the rule in New York that a licensee, as opposed to a tenant…, cannot maintain an action for wrongful ejection.'")…Consistent with this principle, New York state and federal courts have routinely held that "'[w]hile it is true that *tenants*…may be evicted only though lawful procedure, others, such as licensees and squatters, who are covered by RPAPL 713 are not so protected.'" E.g., *Paulino v. Wright*, 210 A.D.2d 171, 172, 620 N.Y.S.2d 363 ([1st Dept.] 1994) (emphasis added).

Importantly, the Pelt court went on to explain that the statutory right of an owner to commence a licensee summary holdover proceeding does not abrogate an owner's common law right to oust a licensee. The court opined that RPAPL 713, which governs proceedings where no landlord-tenant relationship exists, including a licensee, is but an option for owners rather than a requirement. To be clear, the court stated that RPAPL 713 does not require an owner to commence a proceeding and that self-help is still available:

> Contrary to plaintiff's contention, §713 does not obligate landlords to provide notice to licensees prior to eviction from a premises; nor does §713 confer upon licensees a constitutionally protected property interest in or legal right to that premises…Instead, §713 is part of an optional summary eviction scheme that "merely permits a special proceeding as an additional means of effectuating the removal of nontenants," such as licensees. *P&A Bros.*, 184 A.D.2d at 268, 585 N.Y.S.2d 335 (citing *Bliss v. Johnson*, 73 N.Y. 529, 534 (1878)); see also *Walls v. Giulani*, 916 F.Supp. 214, 219-20 (E.D.N.Y. 1996)…. Indeed, New York state courts have repeatedly clarified that §713 "does not replace an owner's common-law right to oust an interloper without legal process." E.g., *P&A Bros.*, 184 A.D.2d at 268, 585 N.Y.S.2d 335 (citing *Bliss*, 73 N.Y. at 534); see also *Gladsky*, 2007 WL 2769494, at *8.[4]

Thus, there can be no doubt that a commercial licensor has a viable alternative to seeking a judgment of possession in court. If the situation is right, a commercial licensor may use self-help to remove a commercial licensee or interloper from their property. In doing so, an owner has the opportunity to quickly and inexpensively regain possession of their premises without the need to resort to litigation. Of course, one should take caution to first understand the nature of the occupancy and always refrain from using force, fear, violence or unlawful means in exercising self-help.

1. *Sol De Ibiza, LLC v. Panjo Realty*, 29 Misc.3d 72 (App Term 1st Dept. 2010).

2. *1414 Holdings, LLC v. BMS-PSO, LLC*, 116 AD3d 641 (1st Dept. 2014) (common law right to use self-help "can only be exercised if the lease expressly reserves that right.").

3. *Martinez v. Sixto Ulloa*, 50 Misc.3d 45 (App Term 2nd, 11th & 13th Jud Dist 2015).

4. Self-help, although typically limited to commercial occupants, when used peacefully, may be used to evict a residential squatter and/or licensee (see, *Tantaro v. Common Ground Community Hous. Dev. Fund*, 2015 WL 4514959 (Sup. Ct. N.Y. Co. 2015) ("appellate authority…makes clear that the common-law remedy of peaceful self-help in evicting nontenants, who have not established that they are lawful occupants or permanent tenants, applies equally to residential and commercial landlords alike.") However, an owner is cautioned that whether self-help can be used in residential matters depends on a variety of issues not addressed in this article.