

### LANDLORD-TENANT

# ‘Hamilton’: Enforcement Of Holdover Rent Provisions



By  
**Warren A.  
Estis**



And  
**Michael E.  
Feinstein**

Many leases contain “holdover rent” provisions providing that if the tenant holds over in possession of the demised premises after the expiration or earlier termination of the lease, the tenant is liable for “holdover rent,” which is typically some multiple of the last rent payable under the expired lease. These provisions are generally enforceable as valid, liquidated damages provisions. Indeed, the courts have frequently enforced such holdover liquidated damages provisions providing for two and a half, or even three times the last monthly lease rent in the event the tenant holds over. See, e.g., *Teri-Nichols Institutional Food Merchants v. Elk Horn Holding Corp.*, 64 AD3d 424 (1st Dept. 2009) (“holdover clause, providing for...three times the expired monthly rent...is enforceable”); *Thirty-Third Equities v. Americo Group*, 294 AD2d 222 (1st Dept. 2002) (holdover clause requiring the tenant to pay holdover damages at the rate of two

and a half times the monthly rent was enforceable).

### ‘Hamilton’

Sometimes, however, an imprudent landlord can, by its own actions, prevent itself from taking advantage of an otherwise enforceable holdover rent provision. A noteworthy decision handed down in October of this year by Justice Saliann Scarpulla of the Commercial Division, Supreme Court, New York County in *Hamilton 65th Partners v. Smallbone Inc.*, NYLJ 1202770648871 (Oct. 26, 2016) (*Hamilton*) presented just such a case.

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In *Hamilton*, the subject lease contained a holdover provision which entitled the landlord to collect holdover rent in the amount of 2½ times the last monthly rent under the lease. While this provision would have been enforceable, entitling the landlord to recover over \$3 million in holdover damages, the

court denied the landlord such relief based on the landlord having (1) taken an inconsistent position as to the tenant’s status in prior proceedings against the tenant, and (2) accepted rent after the expiration of the lease, thereby constituting a waiver of the landlord’s right to holdover rent.

The facts as recited by the court in *Hamilton* were as follows. In April, 2009, the tenant, Smallbone, Inc., entered into a lease with the plaintiff-landlord Hamilton 65th Partners, for the first and second floors in the building located at 135 East 65th Street in Manhattan. The lease expired on March 31, 2010. The lease provided that if Smallbone continued to occupy the premises after the lease expired, it would pay use and occupancy charges “at the rate of two and one-half (2½) times the daily rate of the fixed rent payable during the last month of the term.”

There was no dispute that after the lease expired in March 2010, Smallbone continued to occupy the premises for another four years, until March 2014.

In July 2015, Hamilton commenced the subject action in Supreme Court, New York County seeking a judgment for holdover rent due under the lease

WARREN A. ESTIS is a founding member at Rosenberg & Estis. MICHAEL E. FEINSTEIN is a member at the firm.

in the amount of \$3,399,999. Smallbone thereafter moved for summary judgment dismissing the complaint, maintaining that it did not owe any holdover rent to Hamilton because, among other things, (1) Smallbone was not a holdover tenant, but was instead a month-to-month tenant under Real Property Law (RPL) §232-c, (2) Hamilton was judicially estopped from denying Smallbone's status as a month-to-month tenant because it previously asserted this position in a prior summary holdover proceeding which Hamilton succeeded on, and (3) Hamilton waived its right to holdover rent because it accepted Smallbone's rent payments after the lease expired. Notably, in support of its contention that it was a month-to-month tenant and not a holdover, Smallbone established that it had paid monthly rent during certain months of the alleged holdover period, which had been accepted by Hamilton.

Hamilton opposed Smallbone's motion and cross-moved for summary judgment. Hamilton contended that Smallbone was not a month-to-month tenant under RPL §232-c, in that the existence of the lease agreement precluded the application of the statute. Hamilton further argued that the doctrine of judicial estoppel did not apply because it did not seek contract damages in the prior summary proceeding.

### Express Agreement, Estoppel

In Justice Scarpulla's decision issued on Oct. 26, 2016, the court granted Smallbone's motion for summary judgment and dismissed Hamilton's complaint.

Initially, the court rejected Smallbone's contention that it was a month-to-month tenant, despite the fact that Hamilton had accepted rent payments after the expiration of the lease. RPL §232-c provides that in the case of "a holding over by the tenant...if the landlord shall accept rent for any period subsequent to the expiration of such term, then, *unless an agreement either express or implied is made providing*

*otherwise*, the tenancy created by the acceptance of such rent shall be a tenancy from month to month commencing on the first day after the expiration of such term" (emphasis supplied).

The court found that the lease, which provided for holdover rent at the rate of 2½ times the last month's rent for the holdover period, constituted such an agreement "providing otherwise," thereby precluding any claim that Smallbone was a month-to-month tenant. The court held:

Although it is true that RPL §232-c may operate to create a month-to-month tenancy after a lease expires and the landlord continues to accept rent, this statute does not create such a tenancy when an express or implied agreement between the landlord and tenant provides otherwise. Here, the lease contained an express agreement that Smallbone would be liable for 2½ times the last month's rent for the holdover period. Given the existence of this agreement, RPL §232-c does not apply to create a month-to-month tenancy between Smallbone and Hamilton.

However, despite having rejected Smallbone's contention that it was a month-to-month, rather than a holdover tenant, the court nevertheless found that Hamilton was not entitled to recover holdover rent pursuant to the terms of the lease. The court based its ruling on the doctrine of judicial estoppel and waiver.

The court noted that in a prior holdover proceeding that Hamilton had commenced against Smallbone, in which Hamilton obtained a judgment of possession, Hamilton asserted that Smallbone was a month-to-month tenant. Further, the court observed that in that same proceeding, Hamilton never sought to collect holdover rent under the lease. Thus, the court concluded that:

Based on Hamilton's position that Smallbone was a month-to-month tenant throughout the prior proceeding, I find that Hamilton is judicially

estopped from denying Smallbone's status as a month-to-month tenant and from collecting holdover rent. To allow Hamilton to change its position now and seek holdover rent would be highly prejudicial to Smallbone.

In addition, the court found that Hamilton, by having accepted rent from Smallbone after the lease expired—without ever having asserted its right to collect holdover rent—waived its right to collect holdover rent. The court found that such conduct "amounts to waiver because it is a 'clear manifestation of intent to relinquish a contractual protection'—i.e., the right to collect holdover rent under the lease."

### Conclusion

As noted above, holdover rent provisions similar to the one at issue in *Hamilton* are generally enforceable and provide, among other things, a significant incentive to tenants to timely vacate and surrender the premises upon the expiration of the lease term. Landlords, however, must be careful not to act to put itself in a position where it precludes itself from recovering under such a provision. Thus, a landlord should generally not, as was done in *Hamilton*, accept monthly rent payments from the tenant after the expiration of the lease (without an express agreement between the parties permitting same to be accepted as use and occupancy, without prejudice), and certainly should not do so without clearly asserting that the tenant is holding over and that the landlord has the right to collect holdover rent. The consequences to a landlord for acting improvidently can be severe, as in *Hamilton*, where the landlord forfeited a claim against the tenant worth millions of dollars.