Electrical Shutoff

Self-Help Relief for Nonpayment of Bills

Warren A. Estis, a founding partner at Rosenberg & Estis, and William J. Robbins, a partner at the firm, write that in enforcing a lease, and in any resulting litigation, opportunities frequently arise when a strategic decision must be made whether to take what might be viewed as an aggressive approach. They analyze a recent decision as an example of a case where a landlord successfully used such a strategy.

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In enforcing a lease, and in any resulting litigation, opportunities frequently arise when a strategic decision must be made whether to take what might be viewed as an aggressive approach. A recent decision by New York County Supreme Court Justice Rolando T. Acosta in *Four Cees Jewelry Inc. v. 1527 Realty LLC*[1] is an example of a case where a landlord successfully used such a strategy, invoking a lease provision that permitted the landlord to discontinue the tenant's electric service for non-payment of electric bills, and then moving, at the pre-answer stage, to dismiss the resulting lawsuit. The court's thoughtful decision is a useful compendium of various legal principles applicable to issues of self-help, quiet enjoyment and pre-answer motions to dismiss.

The term "self-help" is commonly used to refer to a landlord re-entering and retaking possession from a tenant without prior court proceedings, provided it is done without breach of peace. The landlord's shutoff of electricity without court process might be analogized to self-help. Indeed, as discussed below, the court in *Four Cees Jewelry*, in addressing the lease clause at issue, expressly referred to self-help and its concerns about self-help.

We emphasize that in New York City, self-help in a residential context is severely restricted. (The *Four Cees Jewelry* case involved commercial use.) The New York City Administrative Code §26-521 (sometimes referred to as the "Illegal Eviction Law") is far-reaching in the category of persons it protects from self-help in such a context. That statute makes it unlawful to evict or attempt to evict, except pursuant to a warrant of eviction or other court order or a governmental vacate order, an occupant of a dwelling unit (i) who has lawfully occupied the unit for 30 consecutive days or longer, (ii) who has entered into a lease with respect to the unit, or (iii) who has made a request for a lease pursuant to the hotel stabilization provisions of the rent stabilization law.

In *Four Cees Jewelry*, Daryan Enterprises Inc. ("Daryan"), which is in the business of jewelry design, entered into a ten-year lease in January 1998 for the entire twelfth floor at 15 West 37th Street, New York, New York. When Daryan did not timely pay its electric bill, the landlord shut off electrical power to the premises on Nov. 23, 2004, and did not restore power for over 24 hours. Daryan, as well as Four Cees Jewelry Inc. and Filigio Inc., which "shared the premises with Daryan," sued the landlord and the managing agent for monetary damages allegedly suffered as a result of what they characterized as the wrongful disconnecting of electricity.

As summarized in the court's decision, the plaintiffs' allegations included the following: When the electricity was shut off, a "fatal interruption" supposedly occurred to a jewelry fabrication process, causing the total loss of the materials involved, i.e., Daryan's customer's diamonds valued at $75,000. Daryan also asserted that the landlord's security personnel denied Daryan's officers, directors and employees entry to the premises from Nov. 24, 2004 until Nov. 29, 2004 and thereafter permitted the employees to enter the premises "for the limited purpose of determining the extent of the damages allegedly

caused by defendants and to arrange for vacatur of the premises." The plaintiffs alleged that, in addition to the damage to the diamonds, they were effectively out of business as of Nov. 24, 2004, their customer relations and credibility were severely damaged and they lost significant business opportunities.

The complaint sought (i) on the claim for Daryan's customers' diamonds, damages in the amount of $75,000 (ii) "damages to the corporate Plaintiffs' business in the amount of $10,000,000.00 or in an amount to be determined at trial," and (iii) punitive damages "[o]n the claim for the illegal actions of Defendants in connection with the lockout," as well as attorneys' fees and costs.

The defendants moved, pursuant to CPLR §3211(a)(1), to dismiss the complaint based on documentary evidence, namely, the lease. Citing *Fern v. International Business Machines Corp*.,[2] *Goshen v. Mutual Life Ins. Co. of New York*,[3] *511 West 232nd Owners Corp. v. Jennifer Realty Co.*[4] and *Landeburg Thalmann & Co., Inc. v. Tim's Amusements, Inc.,*[5] the court stated the standard applicable on such a motion as follows:

. . . [T]he Court will construe every fact alleged by plaintiff as true . . . The motion will be granted only where the documentary evidence unequivocally contradicts plaintiff's factual allegations and conclusively establishes a defense as a matter of law.[6]

The court held that the lease established a defense to Daryan's claim. Paragraph 19 of the lease provided in relevant part:

In the event that such [electrical bills] are not paid within five (5) days after the same are rendered, Landlord, may, without further notice, discontinue the service of electric current to Demised Premises without releasing Tenant from any liability under this lease and without Landlord or its agent incurring any liability for any damage or loss sustained by Tenant by such discontinuance of service.[7]

The court rejected as without merit Daryan's contention that, notwithstanding the above-quoted provision, the disconnecting of electricity was a breach of the lease covenant of quiet enjoyment. Citing *Silken v. Farrell,*[8] the court stated that "a condition precedent to this covenant [of quiet enjoyment] was Daryan's obligation to fully perform all of its obligations under the lease." One of those obligations was payment of electrical bills pursuant to the lease terms. The court found no evidence of waiver of the lease requirement of payment of the electrical bills within five days after being rendered by the landlord. Accordingly, the court concluded that Daryan was precluded from maintaining an action for breach of the covenant of quiet enjoyment, stating:

Daryan cannot on the one hand negotiate a lease with 1537 which provides for 1537's unilateral right to disconnect electricity and then on the other hand claim a breach of the covenant of quiet enjoyment upon 1537's exercise of that same right.[9]

The court was guided by the principle of allowing the parties to chart their own course, even if it meant the landlord using self-help:

The Court is mindful of the fact that parties should be allowed to chart their own conduct and that the courts should enforce contract terms in the interest of not undermining the 'stability of contract obligations' . . . .Thus, once a landlord first makes a demand for rent, the landlord is permitted to exercise a lease provision permitting reentry when there is a breach by the tenant as long as the landlord reenters peacefully.[10]

The court cited the Court of Appeals decision in *First National Stores Inc. v. Yellowstone Shopping Center Inc.*[11] for the proposition of not undermining the stability of contract obligations. It relied on the Appellate Division, Third Department decision in *Jovana Spaghetti House v. Heritage Co. of Massena*[12] for its statement about a landlord exercising a lease-based right of reentry. In the *Jovana Spaghetti House* case, the tenant leased retail premises in a shopping center to be used as a restaurant. The lease provided for base monthly rent of $5,000, and additional rent, including percentage rent equal to six percent of the tenant's gross profits in excess of $1.2 million.

From the time the tenant commenced operating the restaurant, it paid only base rent. Its justification was that there was a dispute over the landlord's failure to proceed with the anticipated construction of a hotel in close proximity. As a result, the landlord advised the tenant that it was in default under the terms of the lease. Thereafter, on Dec. 3, 1991, the landlord served a notice of termination of the lease and demanded that the tenant surrender possession. During the early morning hours of Dec. 5, 1991, the landlord's manager "entered upon the premises and, after determining that no one was present, padlocked the doors to [the] restaurant and placed a temporary barricade in front of the main entrance to the restaurant."

The tenant then commenced a summary proceeding pursuant to Article 7 of the Real Property Actions and Proceedings Law to regain possession of the leased premises.[13] The Supreme Court, St. Lawrence County, dismissed the petition on the merits and the Third Department affirmed.

The appellate court rejected the tenant's contention that it had been a victim of forcible or unlawful entry. It noted that the tenant's version of events, contrary to that of the landlord's manager, was "contained in a mere attorney's affidavit, lacking evidentiary value."

The court stated as follows concerning the availability of self-help: "If a lease makes specific provision therefor, a lessor may re-enter premises upon breach of a condition subsequent so long as it is done peaceably and without force, and need not resort to an action or proceeding to regain possession."

The lease at issue in *Jovana Spaghetti House Inc.* provided that if the tenant failed to pay any installment of percentage or additional rent or any part thereof for ten days after receipt of written notice, then the landlord:

*shall have the right to immediately declare [the] Lease terminated *** [and] immediately or at any time thereafter re-enter the Premises and remove [petitioner], its agents, employees [or] licensees *** by any suitable action or proceeding at law* ***or otherwise*** (emphasis added).[14]

Despite recognizing the validity of self-help if the lease provides for it, and if force is not used, Justice Acosta in the *Four Cees Jewelry* case expressed a concern about such provisions:

[W]hile agreements between parties will be given deference, the Court is nonetheless weary when, as in the instant case, parties contract to engage in conduct which may lead to the breach of peace . . . . Landlords would be better served to seek judicial intervention to protect their contractual rights against uncooperative tenants rather than engaging in self-help.[15]

Thus, the court in *Four Cees Jewelry* found that the substance of the lease was a defense to tenant Daryan's claim of breach of contract. The court also held that the identity of the parties to the lease was a defense to the claim by co-plaintiffs *Four Cees* and *Filigio* of breach of lease. Those entities were not parties to the lease; only Daryan and the landlord were. The court concluded that neither Filigio nor Four Cees had a cause of action for breach of the contract to which they were not signatories, and they had provided the court with no viable legal theory which would render the defendants liable to them under such circumstances.

The court also dismissed Four Cees' and Filigio's claims based on two other grounds asserted by defendants, namely, failure to state a cause of action (CPLR 3211(a)(7)) and lack of legal capacity to sue (CPLR 3211(a)(3)). It found that the plaintiffs had "merely assert[ed] conclusorily that they were damaged . . . without specifying or providing any evidence of these alleged damages" and that such vague and conclusory allegations were insufficient to sustain a breach of contract cause of action.

As to the capacity to sue issue, the court noted, that, pursuant to BCL §1312(a), a foreign corporation lacks the capacity to maintain an action or special proceeding in New York State if that corporation is doing business in the state without authority. The court stated that the unverified complaint did not set forth any proof that these entities were foreign corporations authorized to do business in New York. As to the affirmation by the plaintiffs' attorney, and the affidavit of the president of these two entities, stating that the companies are incorporated in New York, the court rejected those as "insufficient to rebut documentary evidence provided by defendants that neither Filigio or Four Cees are domestic corporations or authorized to do business in New York."

In short, the *Four Cees Jewelry* case is an example of a situation where the landlord utilized a lease clause that the tenant probably never expected the landlord to invoke, a type of lease clause about which the court, even while enforcing it as what the parties had agreed to, expressed a certain discomfort. Self-help provisions empowering a landlord to retake possession, and self-help type provisions such as the electrical shut-off clause at issue in *Four Cees Jewelry*, may not be commonly relied on and may not be favored by the courts. As the *Four Cees Jewelry* case illustrates, however, a tenant that agrees to such a clause would be foolish to think it unenforceable.

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Endnotes:

1. NYLJ, Jan. 25, 2006, p. 18, col. 1, 34 HCR 81A (Sup. Ct. N.Y. Co.).

2. 204 A.D.2d 907, 612 N.Y.S.2d 492 (3rd Dep't 1994).

3. 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002).

4. 98 N.Y.2d 144, 746 N.Y.S.2d 131 (2002).

5. 275 A.D.2d 243, 712 N.Y.S.2d 526 (1st Dep't 2000).

6. NYLJ, Jan. 25, 2006 at p. 18, cols. 2-3, 34 HCR at 82.

7. NYLJ, Jan. 25, 2006 at p. 19, col. 1, 34 HCR at 83.

8. 281 A.D. 718, 118 N.Y.S.2d 16 (2nd Dep't 1952).

9. NYLJ, Jan. 25, 2006 at p. 19, col. 1, 34 HCR at 83.

10. NYLJ, Jan. 25, 2006 at p. 19, col. 2, 34 HCR at 83.

11. 21 N.Y.2d 630, 290 N.Y.S.2d 721 (1968).

12. 189 A.D.2d 1041, 592 N.Y.S.2d 879 (3rd Dep't 1993).

13. Real Property Actions and Proceedings Law §721(4) provides that a summary proceeding may be brought by the "person forcibly put out or kept out." RPAPL §713(10) provides for a special proceeding to be brought on the grounds that: "The person in possession has entered the property or remains in possession by force or unlawful means and he or his predecessor in interest was not in quiet possession for three years before the time of the forcible or unlawful entry or detainer and the petitioner was peaceably in actual possession at the time of the forcible or unlawful detainer."

14. 189 A.D.2d at 1042.

15. NYLJ, Jan. 25, 2006 at p. 19, col. 2, 34 HCR at 83. The reference in the quotation to "weary" is, we assume, actually to "wary."
