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Holdover Tenant Liability

Panel Upholds Incoming Tenant's Claim

Warren A. Estis, a founding partner at Rosenberg & Estis, and William J. Robbins, a partner at the firm, write that in the First Department, there is a cognizable claim for tortious interference with contract against a holdover tenant by a new tenant prevented from taking possession by the holdover. Whether such a claim will be viable in a given situation, however, will depend on the terms of the leases involved and the significance of those terms. That is a matter as to which judges may well differ.

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A new tenant is sometimes prevented from taking possession of premises it leased because the prior tenant is holding over. What claim does the incoming tenant have against the holdover tenant? Is the incoming tenant's claim in any way affected if the landlord includes in that tenant's lease provisions shielding the landlord from liability in such a holdover situation? In a recent decision in [Havana Central NY 2 LLC v. Lunney's Pub Inc.](#),¹ the Appellate Division, First Department, grappled with these issues.

In *Havana Central*, the holdover tenant, Lunney's, was admittedly aware approximately nine months in advance of the lease with the incoming tenant, Havana Central. It remained in the premises, however, in an attempt to obtain a renewal lease from the landlord or to avoid closing its business and losing clientele while it sought a new, nearby business location. It held over for approximately six months before being evicted as a result of summary proceedings.

The new tenant sued the holdover tenant, alleging damages attributable to the holdover delays and the inability to start up its business in a timely manner. It asserted a first cause of action for tortious interference with contract, a second cause of action for tortious interference with economic advantage and a third cause of action for prima facie tort.

The Supreme Court (Louis B. York, J.) [denied the holdover tenant's motion for summary judgment](#) seeking dismissal of the tortious interference with contract claim, and granted summary judgment dismissing the other two causes of action. On appeal, the Appellate Division, inter alia, affirmed the Supreme Court's holding as to these causes of action. All the judges on the panel (Justices Richard T. Andrias, David B. Saxe, Joseph P. Sullivan, Luis A. Gonzalez and James M. McGuire) agreed that the second and third causes of action should be dismissed. Justices McGuire and Saxe, in a dissent, concluded that the first cause of action also should be dismissed.

Relying on its 2006 decision in [Kronish Lieb Weiner & Hellman LLP v. Tahari, Ltd.](#),² the Appellate Division in *Havana Central* stated:

[T]his Court has clearly recognized a claim for tortious interference brought against a holdover tenant by a new tenant who is prevented from taking possession by the wrongful holdover.³

In *Kronos Inc. v. AVX Corp.*, the Court of Appeals stated that the four elements of a claim for tortious interference with contract are:

(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff.⁴

The court quoted the following passage from *Kronish Lieb Weiner & Hellman LLP v. Tahari, Ltd.* concerning the pleading of a tortious interference with contract claim against a holdover tenant:

A cognizable claim for tortious interference does not require an allegation that the defendant's conduct was the sole proximate cause of the alleged harm. The motion court's finding that the owner's commencement of a holdover proceeding precluded a finding of causation was incorrect where the trespass had already been committed and the proceeding was merely an effort at mitigating or remedying the owner's breach of its agreement to lease the space to plaintiff. Since the cause of action is for interference with an existing contract, rather than a prospective economic relationship, the defense of economic justification is inapplicable . . . and it is not necessary to allege that defendant used improper means or that its conduct was for the sole purpose of harming plaintiff.⁵

In *Havana Central*, the holdover tenant argued that, given two particular paragraphs of the incoming tenant's lease (i.e., paragraphs 24 and 91), the elements of a tortious interference with contract claim supposedly were not satisfied. Paragraph 24 of the incoming tenant's lease provided that:

If Owner is unable to give possession of the demised premises on the date of the commencement of the term hereof, because of the holding-over or retention of possession of any tenant . . . or if Owner has not completed any work required to be performed by Owner, or for any other reason, Owner shall not be subject to any liability for failure to give possession on said date."⁶

Paragraph 91 of that lease gave the incoming tenant the right to terminate the lease "[i]f landlord is unable to give possession of the demised premises to Tenant on the commencement date of the term hereof for any reason and such failure continues for a period of thirty (30) days."

In *Havana Central*, the holdover tenant argued that paragraphs 24 and 91 of the incoming tenant's lease demonstrated a conditional rather than an absolute promise by the landlord to deliver the premises on the commencement date. Accordingly, it contended, its holdover did not render performance impossible, the landlord's inability to deliver possession on the commencement date was not a breach of the lease and, since there was no breach, there could be no inducement to breach the holdover tenant.

The Appellate Division split 3 to 2 with respect to the holdover tenant's attack, based on paragraphs 24 and 91 of the incoming tenant's lease, on the viability of the incoming tenant's cause of action for tortious interference with contract. The majority opinion (written by Justice Robert T. Andrias) rejected the holdover tenant's argument. The majority opinion stated that "as in *Kronish Lieb*, Lunney's became a trespasser once it held over" and "there is no doubt that the landlord's failure to deliver possession of the premises to [the new tenant] at the commencement of its lease term constituted a material breach of [the new tenant's] lease." It continued that "the exculpatory language of paragraph 24, if asserted as a defense by the landlord, would deprive [the new tenant] of a remedy for such breach."

The majority expressly stated, however, that neither that circumstance nor the incoming tenant's option to terminate the lease after 30 days if the landlord were unable to deliver possession made the lease conditional or any less enforceable. It concluded that the incoming tenant's lease was "a lease that could be tortiously interfered with." It held that summary judgment dismissing the tortious interference with contract claim had been properly denied because "there are triable issues of fact as to whether the . . . [defendant] holdover tenant intentionally induced its landlord to breach a lease provision to timely deliver the leasehold premises to plaintiff."

Justice James M. McGuire wrote the dissenting opinion, which "respectfully disagree[d] with the majority with respect to the first cause of action for tortious interference with contract" and concluded that said cause of action should have been dismissed. According to the dissent's analysis, there was "no 'actual breach' of the lease on account of the landlord's inability to give possession of the premises" to the incoming tenant on the commencement date.

The dissent viewed the lease provision expressly relieving the landlord of any liability if it were unable for any reason to give possession on the commencement date (lease paragraph 24) as the "logical equivalent of a provision stating that the landlord is not required to give possession of the premises if it is unable for any reason to do so." (The dissent noted that the majority did not point to any language in the lease that imposed an obligation on the landlord to give possession on the commencement date even if it was unable to do so.) Therefore, since there was no contractual obligation to perform that act, the failure to perform that act could not have been a breach of the contract.

The dissent viewed it as "indisputable" that the incoming tenant "had no legally enforceable right against the landlord to

possession of the premises on the commencement date whenever the landlord was unable to give possession." Therefore, the dissent viewed the "ultimate issue" in the case as being "whether a valid cause of action for tortious interference with contract can be stated even if the plaintiff has no legally enforceable right to performance under the agreement."

In answering that question, the dissent relied on the Court of Appeals decision in *NBT Bancorp. v. Fleet/Norstar Financial Group Inc.*⁷ which, it concluded, "answer[ed] that question in the negative." In that case, plaintiff NBT and defendant Norstar each sought a merger with Central National Bank. NBT ultimately entered into a merger agreement with Central, subject to approval of two-thirds of the holders of Central's common stock. When the agreement failed to win shareholder approval, NBT filed suit against Norstar, alleging several varieties of tortious interference.

One of the issues on the appeal to the Court of Appeals was whether NBT's claim for tortious interference with contractual relations was properly dismissed on the pleadings pursuant to CPLR 3211. The Court of Appeals affirmed that dismissal. The Court of Appeals emphasized that breach of contract is an essential element of the claim of tortious interference with contractual relations, stating:

Ever since tortious interference with contractual relations made its first cautious appearance in the New York Reports . . . our Court has repeatedly linked availability of the remedy with a breach of contract Indeed, breach of contract has repeatedly been listed among the elements of a claim for tortious interference with contractual relations.⁸

The Court of Appeals in *NBT Bancorp* continued:

[W]here there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior Where there has been no breach of an existing contract, but only interference with prospective contract rights, however, plaintiff must show more culpable conduct on the part of the defendant.⁹

The Court of Appeals stated that, for NBT, consummation of the merger agreement "represented no more than a hope that Central shareholders holding at least two-thirds of the outstanding capital stock would in fact approve the transaction." The right that NBT sought to protect, the Court of Appeals stated, was "thus not entitled to the same protection that would have been accorded a legally enforceable right to performance under that agreement."

Applying that reasoning to the incoming tenant's claim in *Havana Central*, the dissent in *Havana Central* stated that so, too, the "right" that the incoming tenant sought to protect, i.e., "a right to possession of the premises on the commencement date of the lease," represented no more than a hope or a mere expectancy. For the same reason that the Court of Appeals upheld the dismissal of the plaintiff's cause of action for tortious interference with contract in the *NBT Bancorp* case, the dissent continued, the incoming tenant's cause of action for tortious interference with contract in the *Havana Central* case should also be dismissed.¹⁰

In *Havana Central*, the second cause of action alleged by the incoming tenant was for tortious interference with prospective economic advantage. The majority opinion held that the trial court had properly dismissed that cause of action "absent evidence that Lunney's had interfered with Havana Central's new lease by wrongful means or for the sole purpose of harming it." It pointed out that Lunney's held over "for multiple reasons, including to reap holiday profits, potentially obtain a renewal lease at the premises, and avoid shutting its business down and losing its clientele before it could relocate nearby."

As to the "wrongful means" issue, the incoming tenant argued that, based on the lease commencement date, it intended to book holiday parties in November and December, the busiest time of the year for restaurants and bars in the Times Square area. The incoming tenant alleged that the holdover tenant, by holding over, used unlawful means to interfere with the new tenant's prospective economic advantage by preventing it from booking holiday parties.

The majority opinion pointed out, however, that the "wrongful means" prong of a claim for tortious interference with prospective economic advantage required a showing that the challenged wrongful conduct was not directed at the incoming tenant, but at the parties with which that new tenant had or sought to have a business relationship, i.e., the prospective holiday party givers. The incoming tenant, however, the majority opinion noted, had not set forth evidence of any specific contracts or prospective contracts that it would have entered into but for the interference of the holdover tenant.

Justices McGuire and Saxe concurred with the majority as to the analysis of this second cause of action. Both the majority and the dissent in *Havana Central* agreed that the third cause of action, alleging prima facie tort, "was properly dismissed absent evidence that Lunney's holdover was without excuse as justification, i.e., 'disinterested malevolence'."

In short, as the *Havana Central* and *Kronish Lieb* cases demonstrate, in the First Department, there is a cognizable claim for tortious interference with contract against a holdover tenant by a new tenant that is prevented from taking possession by the holdover. Whether such a claim will be viable in a given situation, however, will depend, in part, on the terms of the leases involved and how judges will interpret the significance of those terms. That is a matter, as the *Havana Central* case shows, as to which judges may well differ.

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Endnotes:

1. NYLJ, Jan. 7, 2008, p. 18, col. 1 (1st Dep't).
 2. 35 A.D.3d 317, 829 N.Y.S.2d 7 (1st Dep't 2006).
 3. NYLJ, Jan. 7, 2008, p. 18 at col. 1.
 4. 81 N.Y.2d 90, 595 N.Y.S.2d 931 (1993).
 5. 35 A.D.2d at 318, 829 N.Y.S.2d at 9, quoted in NYLJ, Jan. 7, 2008, p. 18 at col. 1.
 6. NYLJ, Jan. 7, 2008, p. 18 at col. 3.
 7. 87 N.Y.2d at 614, 641 N.Y.S.2d 581 (1996).
 8. 87 N.Y.2d at 620, 641 N.Y.S.2d at 584.
 9. 87 N.Y.2d at 621, 641 N.Y.S.2d at 585.
 10. The dissent stated that if a landlord shields itself from contractual liability to an incoming tenant from a prior tenant's holding over based on provisions like lease paragraph 24, "it does not follow that the existing tenant thereby would be immunized from any liability in tort to the incoming tenant whenever it improperly holds over." The dissent pointed out that the incoming tenant might have a cause of action against the holdover tenant for tortious interference with prospective business relations on the theory that the holdover tenant interfered with its "prospective contract right" to possession on the commencement date. The dissent stated, however, that it "need not decide the matter" because the incoming tenant in *Havana Central* had not raised that argument.
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