

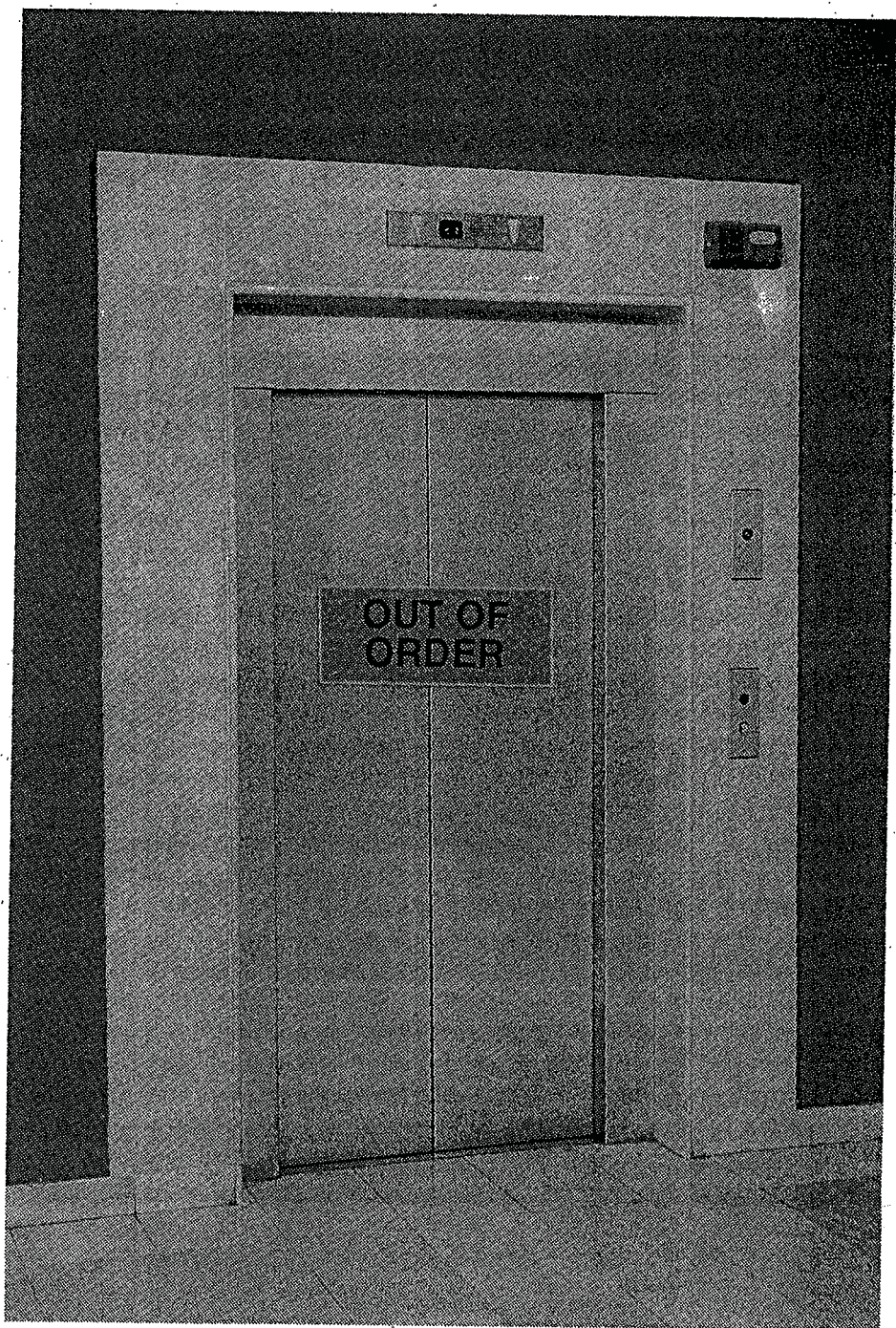
LANDLORD/TENANT

Parties' Rights When Elevator Service Is Delayed

A recent decision by the Appellate Division, First Department in *Pacific Coast Silks, LLC v. 247 Realty, LLC*¹ addressed the issue of the rights of an incoming commercial tenant when there is an approximate two-month delay in the completion of an ongoing elevator renovation. The court's analysis reflects a focus on what the lease delineates as the parties' rights and obligations and what evidentiary showing was made at trial. The decision was written by Justice David B. Saxe, with Justices Angela M. Mazzaelli, Richard T. Andrias, James M. Catterson and Rolando T. Acosta concurring.

On Sept. 5, 2006, the plaintiff-tenant and defendant-landlord entered into a commercial lease for seventh-floor premises in a Manhattan building, to be used "for silk garment fabric sales." When the lease was executed, the building's single elevator was undergoing a major renovation that had begun in July 2006, leaving the building without elevator service.

The lease was for a one year term from Oct. 1, 2006 through Sept. 30, 2007, with options to renew for five additional years. The lease included a provision that "in the event the elevator installation is not completed by Oct. 15, 2006, the Commencement Date [of] the lease shall be adjusted [from Oct. 1, 2006] to Oct. 15, 2006." The Appellate Division characterized this provision as an "acknowledge[ment]" by the parties of "the possibility that the elevator would not be in service by the lease's commencement date of



Oct. 1, 2006." In fact, the work on the elevator was not completed, and the elevator not functioning, until Dec. 4, 2006.

A work letter attached to the lease rider required the landlord to perform certain repairs to the premises, including the installation

of new hardwood flooring that the tenant would provide. It expressly provided that "the incompleteness of any item [in the lease or work letter requiring landlord to do work] shall not toll the Commencement Date and Tenant shall pay the entire Annual Rental Rate and additional

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rent without any offsets or abatement on the Commencement Date." The tenant had hardwood flooring materials delivered to the premises in early November 2006. Based on advice from the landlord that the new flooring would be stronger if the subfloor ran in a different direction, the tenant instructed the landlord to hold off on installing the new flooring, and plywood for new subflooring was subsequently delivered on Dec. 13, 2006.

Upon execution of the lease, the tenant paid the first month's rent and security deposit. The tenant made no further rent payments. On Dec. 18, 2006, the landlord sent a "Notice of Termination," demanding that the tenant vacate the premises by Dec. 27, 2006 for non-payment of rent, and demanding that the tenant pay the rent arrears.

The tenant responded by letter claiming that possession had never been delivered to it due to the lack of elevator service until Dec. 4, 2006. The tenant further claimed that the lack of elevator service would constitute a constructive eviction if it had been in possession, and that therefore no rent was due and there was no basis for termination of the lease. It nevertheless agreed to surrender the premises, but demanded return of its security deposit and first month's rent. The landlord rejected tenant's position, and the tenant commenced a lawsuit.

Trial Court

The trial court found that, based on the landlord's not providing elevator service for the first seven weeks of the term, the tenant had been constructively evicted from the premises.² It held that the tenant had been subjected to actual partial eviction due to

the denial of access to a necessary appurtenance, namely, the elevator as a means of ingress and egress. It concluded that the tenant had not been given possession within a reasonable time so its obligation to pay rent never arose, and awarded the tenant the return of the security deposit and first month's rent.

Insufficient Support

The Appellate Division reversed, and vacated that award. It stated that there was "insufficient support for the trial court's findings and conclusions." In its view, the fact that renovation of the building's elevator was not completed until Dec. 4, 2006 "did not justify treating the lease as canceled and relieving the tenant of all its obligations under the lease." It concluded that no claim for constructive eviction or partial actual eviction had been made out. Citing the Court of Appeals decision in *Barash v. Pennsylvania Terminal Real Estate Corp.*,³ the appellate court stated that "[t]o establish constructive eviction, a tenant need not prove physical expulsion, but must prove wrongful acts by the landlord that 'substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises'."

In the Appellate Division's view, the trial court had "extrapolated" from the description of the business as being "for silk garment fabric sales" that the tenant intended to use the premises as a showroom for selling such fabric to customers, and had assumed both that the tenant intended to proceed with those operations immediately upon commencement of the lease term (even before its flooring was installed) and that potential customers would not visit a seventh-floor showroom without an elevator. According to the Appellate Division, however, none of this had been proved. It stated that:

All this may have been true, but no evidentiary showing established these assumptions as facts or permitted their inference. Nor was there any evidence that the tenant lost any expected sales, revenue or customers.

... [the tenant] offered no evidence of items it was unable to convey to its premises and the way in which any such inability prevented it from proceeding with its operations.⁴

Therefore, the appellate court continued, the tenant had failed to establish that the lack of elevator service had actually caused it to be deprived of the expected and intended use of the premises during the period prior to the completion of the elevator renovation. Thus, the tenant had not established the showing required for constructive eviction.

The Appellate Division also found "insufficient support" for the trial court's conclusion that there had been an actual partial eviction because of the physical

inability to obtain ingress and egress to the premises through the elevator. It acknowledged that "the right to use an expected and usual means of ingress and egress is an appurtenance, the denial of which may constitute a partial eviction." Again, however, the appellate court found that there had been a lack of proof, stating:

Although we recognize that the availability of an elevator for access to a seventh-floor place of business seems important, perhaps critical, our own view that the lack of a working elevator would constitute a substantial or total interference with access cannot substitute for an evidentiary showing by the tenant that it was actually unable to access the premises as it needed to during that seven-week period.⁵

The trial court held that the tenant was entitled to rescind the lease pursuant to Real Property Law §223-a, which provides that:

In the absence of an express provision to the contrary, there shall be implied in every lease of real property a condition that the lessor will deliver possession at the beginning of the term. In the event of breach of such implied condition the lessee shall have the right to rescind the lease and to recover the consideration paid. Such right shall not be deemed inconsistent with any right of action he may have to recover damages.

'Hartwig' Distinguished

In reaching that conclusion, the trial court relied on *Hartwig v. 6465 Realty Co.*⁶ There, the lease had an express agreement to the contrary as referred to in RPL §223-a, specifically, a provision exculpating the landlord from liability where its failure to give possession was due to the incompleteness of a building under construction. The lease further provided that it was to remain in effect, with payment of rent postponed, until possession was actually delivered. The Appellate Term in *Hartwig* stated that such a clause, if strictly enforced, "would cause extreme hardship and the most undesirable results." It continued:

The law, in such cases, properly engrafts a rule of reason upon such clauses in order that they do not, contrary to the intention of the parties, become arbitrary and unreasonable. Implicit in this standard exculpation clause,

therefore, is a promise to deliver possession on the date fixed by the lease or within a reasonable time thereafter unless facts beyond the landlord's control make that event impossible.⁷

In *Pacific Coast Silks*, like *Hartwig*, there was an express provision to the contrary. The trial court relied on *Hartwig* to conclude that if possession of the premises had not been delivered within a reasonable time after the fixed date, then the lease term precluding application of the right to rescission under RPL §223-a (i.e., the provision to the contrary) would become inoperative. The trial court found that the landlord's delay in delivering possession of nine weeks after the original commencement date of Oct. 1, 2006, and seven weeks after the extended commencement date of Oct. 15, 2006, was unreasonable. Therefore, it applied the statutory RPL §223-a right to rescind.

The Appellate Division disagreed with the trial court. It found that the express term in the lease declaring RPL §223-a to be inapplicable was enforceable. It distinguished *Hartwig* on the grounds that *Hartwig* involved a residential tenant while *Pacific Coast Silks* concerned a commercial tenant, and noted that:

[W]hile residential tenants require protection from non-negotiable form leases containing terms that deprive them of statutory rights, commercial tenants...that are able to negotiate the terms of their leases, require no such protection.⁸

No Unreasonable Delay

The Appellate Division did not see any basis for concluding that there had been an unreasonable delay in delivering possession of the premises. Although there had been a seven-week delay in the availability of elevator service (calculated from the agreed-on delayed lease commencement date), the appellate court stated that it "appears that the tenant was given—and took—the degree of possession of the property that was contemplated when the lease was signed."

It pointed out that there was delivery and acceptance of the key to the premises and that, although the elevator was not operational, the "undisputed testimony" of the landlord's principal established that the tenant's principal, employees and contractors "could, and did, gain access to the leased premises from the stairway."

Furthermore, the appellate

court noted that the tenant's principal had accepted delivery of the elevator key on Dec. 4, which it viewed as "reflect[ing] that the tenant did not, at that time, take the position that the lease was a nullity due to a failure to deliver possession before then." It also viewed the tenant's acts concerning the flooring (summarized above and which included having plywood delivered in December 2006) as also "reflect[ing] that the tenant actively cooperated in the process of readying the place for the contemplated future business operations."

The Appellate Division also rejected the trial court's conclusion

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that rent was not payable for the period between Oct. 15, 2006 and Dec. 4, 2006. The appellate court focused on the lease provision that if the elevator installation was not completed by Oct. 15, 2006, then the commencement date of the lease would be postponed two weeks, from Oct. 1 to Oct. 15. It concluded that since that was the only provision protecting the tenant if the elevator installation was delayed, "the lease must be understood to provide that the tenant's obligations thereunder, including the obligations to pay rent and to notify the landlord of any claim of default, began as of Oct. 15, 2006, regardless of the lack of elevator service."

The lease contained a provision entitled "Failure to Give Possession," which provided for a rent abatement if the landlord's failure to complete contemplated work prevented it from giving possession of the premises to the tenant. However, as discussed above, the Appellate Division did not find support for a finding that the landlord had failed to give the tenant the contemplated possession of the premises, and therefore rejected that paragraph as a basis for a rent abatement. In any event, the Appellate Division stated, even if the "long delay in the completion of the elevator work" did support a claim for breach of the lease, the tenant was precluded from asserting such a claim because it did not comply with the lease paragraph requiring it to send written notice of the claimed default in order to give the landlord the opportunity to cure.

Landlord's Counterclaim

The landlord had counterclaimed for rent due through March 31, 2007, reimbursement of the broker's fee and attorney's fees. The trial court had dismissed the counterclaims. The Appellate Division reinstated them, but noted that its rejection of the trial court's finding of actual or constructive eviction did not necessarily entitle the landlord to the judgment it sought.

The appellate court further stated that to be entitled to rent after the tenant agreed to vacate, the landlord "must establish that it properly terminated the lease in accordance with its terms." An

issue had been raised as to whether the landlord's "Notice of Termination" was defective. The trial court has not reached that issue, or the issue of whether the landlord was entitled to attorney's fees. The Appellate Division remanded for further proceedings as to the counterclaims.

Conclusion

In short, the Appellate Division decision in *Pacific Coast Silks* makes clear that judicial assumptions about the importance of elevator service to a commercial tenant, and any judicial solitude for the tenant being without elevator service, must give way to the lease's delineation of the parties' rights and obligations and to the evidentiary proof.

1. NYLJ, July 12, 2010, at p. 18, col. 1, 2010 WL 2606342 (1st Dept. 2010).

2. All statements herein of what the trial court did are based on the Appellate Division's summary of the trial court's decision.

3. 26 N.Y.2d 77, 308 N.Y.S.2d 649 (1970).

4. NYLJ, July 12, 2010, at p. 18, col. 2.

5. *Id.*, at col. 3.

6. 67 Misc.2d 450, 324 N.Y.S.2d 567 (A.T. 1st Dept. 1971).

7. 67 Misc.2d at 450-451.

8. NYLJ, July 12, 2010, at p. 18, col. 3.