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LANDLORD-TENANT

Self-help: A Troublesome Doctrine for Some Judges?

By **Warren A. Estis** And **William J. Robbins**

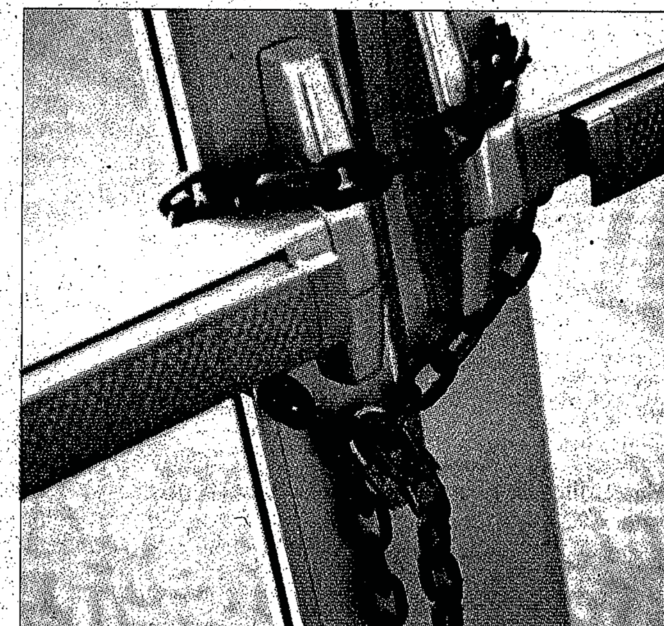
A recent decision by the New York County Civil Court in *Sol De Ibiza LLC v. Panjo Realty Inc.*[1] leads us to return to a subject, "self-help," that we addressed in this column many years ago.[2] That term is shorthand for the right of a landlord to re-enter and re-take possession from a commercial tenant without prior court proceedings, provided it is done without breach of peace. Such self-help against a residential tenant is not permissible.

In *Sol De Ibiza*, noting that his determination was reached "[a]fter much deliberation" and that "this Court does not reach this decision lightly," Judge Arthur F. Engoron held that the landlord there did not have the right to use self-help. In doing so, the court sought to distinguish—but, ultimately, was prepared to reject as "an aberration"—an Appellate Division, Third Department, decision involving similar facts. We discuss here the court's reasoning and the implications of the case for the issue of self-help as a remedy.

In *Sol De Ibiza*, the tenant leased commercial space, consisting of a ground floor store and basement, pursuant to a "Standard Form of Store Lease" issued by The Real Estate Board of New York Inc. When a dispute arose as to whether the tenant owed rent, on or about Sept. 15, 2009, the landlord mailed a rent demand to the tenant. That demand stated that if $270,493.21 was not paid by Sept. 25, 2009, "you will be evicted from the premises."

When the tenant did not pay, the landlord used "self-help" to evict the tenant by locking it out of the premises. The tenant then commenced a proceeding in Civil Court to be restored to possession and for treble damages pursuant to Section 853 of the Real Property Actions and Proceedings Law ("RPAPL"). That statutory section provides for treble damages for forcible or unlawful entry or detainer. The tenant alleged that the landlord had no right to use self-help, that the tenant owed no rent and, even if it did, that the rent demand was invalid because it demanded much more than the tenant owed.

The court held that, under the facts and circumstances present in the case, the landlord did not have the right to use self-help. It specified four grounds for its holding. First, it relied on Article 7 of the RPAPL, entitled "Summary Proceeding to Recover Possession of Real Property," which it described as "set[ting] forth a detailed system whereby landlords may use legal process to recover possession of real property from tenants." The court recognized that some cases, such as *Liberty Industrial Park Corp. v. Protective Packaging Corp.*,[3] had held that "the common-law right of re-entry is not abrogated by the statutory remedy of summary proceedings." However, the court characterized those cases as "mostly decades-old" and expressed its belief "that the legislature intended this [RPAPL Article 7 legal process] to be not just an 'option,' but, rather, the sole and exclusive remedy."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Second, Judge Engoron cited the specific language of RPAPL §711. That section specifies the grounds for bringing a summary proceeding where a landlord-tenant relationship exists, including, per §711(2), default in payment of rent. The court pointed out that the introductory paragraph to RPAPL §711 provides that "[a] tenant...shall not be removed from possession except in a special proceeding." The court commented that self-help is "the antithesis of a legal proceeding" and that, as a matter of hornbook law, "a lease or other contract may not override legislation."

The third ground for the court's holding was its conclusion that the lease did not clearly provide for self-help. The court considered the applicable lease provision to be paragraph 17(2), which stated in relevant part that:

> Owner may...re-enter the demised premises either by force or otherwise, and dispossess Tenant by summary proceedings or otherwise...

> [S]elf-help is not for the faint of heart. It may have immense allure, but it poses significant risks. It is potentially available as a remedy under proper circumstances in the commercial context but, for numerous cogent reasons, it is a rarely used remedy.

The court interpreted the language "re-enter...and dispossess" as implying that the right to re-enter is "conditional on a dispossession," which is to be by "summary proceedings or otherwise." The word "otherwise," in the court's view, "arguably refers to some other form of legal 'proceeding,' such as an ejectment action." The court further pointed out that nowhere in the lease was the term "self-help" used. It offered the following as its version of what a clear "self-help" provision might read like:

> Owner may use "self-help" to evict you, by force or otherwise, without instituting a legal proceeding; alternatively, owner may institute any form of legal proceeding allowed by law.

Finally, the court grounded its holding on its view that "as a matter of public policy, a tenant should not have to fear that failure to comply with a rent demand...can lead to its doors being locked shut, without having first had a chance to present a legal defense to the landlord's claims and calculations." That was especially so, the court stated, where the alleged authority for the landlord's use of self-help was "buried in" a lease provision (paragraph 17(2)) found "on the third page of fine print."

The court acknowledged that in *Jovana Spaghetti House Inc. v. Heritage Company of Massena*,[4] the Appellate Division, Third Department, had sustained the use of self-help pursuant to a lease provision which the court described as "somewhat similar" to the provision in *Sol De Ibiza*. In *Jovana*, the lease clause was as follows:

> [landlord] shall have the right to...re-enter the Premises and remove [tenant]...by any suitable action or proceeding at law or otherwise.

Judge Engoron differentiated the two cases by pointing out that in *Jovana*, the landlord had re-entered the premises "after the lease terminated due to the tenant's breach of a condition subsequent," whereas in *Sol De Ibiza*, there

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had been "no such termination of the tenancy before the landlord's re-entry." Perhaps tacitly conceding that there might be issues about the conclusiveness of that distinction—given the similarity in lease language and the fact that both cases involved a tenant's purported failure to pay rent—the court continued by stating:

> In the final analysis, *Jovana*, if it cannot be distinguished as above, should be viewed, in this Court's humble opinion, as an aberration.[5]

Pointing out that in New York City commercial landlords bring numerous non-payment proceedings on a daily basis, the court asked: "Could they all be ignoring the simple expedient of changing locks if it was legally available?" Rather, the court suggested, these landlords might be guided by the "thinking" in *Moran v. Orth*,[6] where the Appellate Division, Second Department, had stated that "[a]lthough Moran failed to pay rent, Orth was not entitled deliberately to resort to self-help." The court also noted that "most jurisdictions do not allow self-help."[7]

The viewpoint expressed in *Moran*, the court stated, "is certainly more in tune with the landlord-tenant world in New York City than is *Jovana*." The court then cited *Harley of New York Assocs. v. Republic 42nd St. George Corp.*,[8] noting that in that case "Judge Kornreich expressly declined to reach the issue of whether 'self-help' is available."

Ultimately, Judge Engoron concluded as follows on the matter of self-help:

> In sum, this Court concludes that the modern practice, the better practice, the exclusive practice for a landlord seeking to evict a tenant is to bring a summary proceeding, at least if the only arguable support for "self-help," a term not even used in the lease itself, is buried on the third page of the subject lease and is stated in equivocal, archaic, legalistic terms.[9]

Accordingly, the court ordered the landlord to restore the tenant to the subject premises immediately. The court further ordered that the tenant could file a Notice of Inquest "into the amount of damages resulting from the re-entry, if any, to which it is entitled pursuant to RPAPL §853."

The following are additional points to consider in reviewing the analysis of self-help set forth in *Sol De Ibiza*. There are cases more recent than *Liberty Industrial Park Corp.*, the case cited by the court, which continue to hold that the common-law remedy of self-help, where reserved in a lease, has not been abrogated by passage of RPAPL Article 7. See, e.g., the Appellate Division, Second Department's 1999 decision in *110-45 Queens Blvd. Garage Inc. v. Park Briar Owners Inc.*,[10] where the court stated that:

> ...[T]he appellant landlord reserved its common-law right to peaceably reenter the commercial premises in issue upon termination of the lease or default on the payment of rent. The law permits a commercial landlord to reserve that right, but only if the reentry can be effected peaceably.[11]

Similarly, in a 2001 decision in *Bozewicz v. Nash Metalwear Co. Inc.*,[12] the same court stated that a "landlord may peaceably re-enter commercial premises and regain possession pursuant to a right reserved in the lease if the tenant breaches its obligation to pay rent."

Thus, to the extent that *Sol De Ibiza* contains language suggesting that self-help is no longer an available remedy given the passage of RPAPL Article 7, and the language of RPAPL §711, we believe that any such conclusion is inconsistent with prevailing law in New York State. In any event, however, notwithstanding such language in the case, it seems that *Sol De Ibiza* itself does *not* hold that self-help is absolutely unavailable in New York State. Rather, the holding is that self-help is not available under the circumstances of the case before the court: "this Court concludes that respondent did not have the right to use 'self-help' in this instance."

The *Harley* case cited by the *Sol De Ibiza* court was a commercial holdover proceeding based on expiration of the respondent's alleged license for the subject premises. After the commencement of the proceeding, petitioner engaged in self-help. The respondent moved by order to show cause to be restored to possession of the subject premises. It alleged that the eviction was not peaceable and that, in the context of a pending summary proceeding, self-help was improper. The court agreed with the latter argument, stating:

> ...[A]lthough petitioner may have had a right to resort to self-help prior to instituting proceedings (the Court, however, has not reached this issue), once it commenced a holdover action, it waived this right.... Having elected its remedy, petitioner must abide by it.[13]

There is nothing in that passage which suggests that the *Harley* court had any doubt about the availability of self-help as a remedy in appropriate circumstances before bringing a summary proceeding. Rather, the specified issue was not reached because it was unnecessary to be reached, given the court's determination that by bringing the summary proceeding the petitioner had waived self-help as a remedy.

As *Harley* makes clear, bringing a summary proceeding may effect a waiver of any right to use self-help. The predicate notice itself may also be relevant to whether self-help has been waived. Is the language of that notice broad enough to preserve any right of self-help, or is it so restrictive as to limit the landlord's remedy to a court action or proceeding?

As the *Sol De Ibiza* and *Jovana* cases both demonstrate, however, the availability of self-help needs to be addressed by the parties long before the stage of a dispute under an existing lease. If the landlord wants to rely on self-help, it needs to be preserved as a remedy in the lease. Thus, it must be addressed at the very initial stage of lease negotiations. It is the transactional attorneys, perhaps more than the litigators, who will be responsible for whether self-help is in a landlord's arsenal.

Of course, the $64,000 is what lease language constitutes preserving the availability of self-help. Clearly, express mention of self-help, as Judge Engoran suggests, is the ideal way to remove any doubt. The discussion above shows a difference of opinion between *Jovana* and *Sol De Ibiza* as to whether reference to reentering and dispossessing the tenant by summary proceedings "or otherwise" is sufficient to reserve a right of self-help.

In *110-45 Queens Blvd. Garage*, the lease included the same Article 17(2) "or otherwise" language as in *Sol De Ibiza*. It also contained a separate paragraph which provided that:

> Tenant acknowledges that he has read and is fully familiar with Article 17(2) of the lease and that in the event of any default by said tenant with respect to payment of rent or additional rent, [landlord] may forthwith enter the premises, take possession and operate the premises.[14]

The Appellate Division, Second Department, concluded that the lease gave the landlord the right of self-help.

In our earlier columns, we showed why self-help is likely either not to be an available option or not to be the option of choice. The discussion here specifically illustrates one reason why self-help is a rarely used remedy, namely, uncertainty about whether the lease at issue preserves the right of self-help.

Then, too, the reasoning of *Sol De Ibiza* seems generally to be unsympathetic to the doctrine of self-help. Assuming this is an accurate reading of the tenor of the decision, a pertinent question is whether that attitude is shared by a significant percentage of judges. We do not know. However, concern by landlords that such an attitude might be held by many judges could also be a factor contributing to a reluctance to use self-help. Especially if the lease is not explicit about self-help, to use self-help risks a court challenge, with the uncertainty of whether the court will adopt a *Jovana* approach or a *Sol De Ibiza* approach. If the latter, it could mean treble damages.

In short, as we have stated before, self-help is not for the faint of heart. It may have immense allure, but it poses significant risks. It is potentially available as a remedy under proper circumstances in the commercial context but, for numerous cogent reasons, it is a rarely used remedy. That does not mean it should be a forgotten remedy. Both landlords and tenants, and their counsel, need to be aware of the doctrine of self-help and its scope and limitations.

1. NYLJ, Oct. 22, 2009, at p. 26, col. 3, 2009 WL 3763092 (Civ. Ct. N.Y. Co.).
2. Warren A. Estis and William J. Robbins, "Self-Help Evictions: The Allure Is Real but Be Aware of the Risks," NYLJ, Feb. 6, 2002 at p. 5; Estis and Robbins, "Self-Help Evictions: Appellate Court Restricts Tenant's Remedy," NYLJ, Dec. 1, 1999, at p. 5; Estis and Robbins, "Self-Help Evictions: Hearings May Be Required to Sort Out Rights and Obligations," NYLJ, Oct. 7, 1998 at p. 5; Estis and Robbins, "Self-Help Evictions: A Risky but Expedient Approach in the Commercial Context," NYLJ, June 4, 1997, at p. 5.
3. 71 Misc.2d 116, 335 N.Y.S.2d 333 (Sup. Ct. Kings Co. 1972), aff'd, 43 A.D.2d 1020, 351 N.Y.S.2d 944 (2d Dep't 1974).
4. 189 AD2d 1041, 592 N.Y.S.2d 879 (3d Dep't 1993).
5. NYLJ, Oct. 22, 2009, p. 26, at col. 4.
6. 36 AD3d 771, 828 N.Y.S.2d 516 (2d Dep't 2007).
7. The court based that statement on the text of Am Jur.2d, Landlord & Tenant §829 (online edition), which it quoted at length in the decision.
8. 28 HCR 164A, NYLJ, March 22, 2002, at p. 28, col. 2 (Civ. Ct. N.Y. Co.).
9. NYLJ, Oct. 22, 2009, p. 27, at cols. 1-2.
10. 265 A.D.2d 415, 696 N.Y.S.2d 490 (2d Dep't 1999).
11. 265 A.D.2d at 415, 696 N.Y.S.2d at 491.
12. 284 A.D.2d 288, 725 N.Y.S.2d 671 (2d Dep't 2001).
13. 28 HCR at 164.
14. NYLJ, April 21, 1997, at p. 31, col. 1 (Civ. Ct. Queens Co.).

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