

Stipulations

Appellate Division Splits on Enforcement

SUMMARY proceedings are frequently settled by stipulations whereby the landlord gets a judgment of possession but is stayed from enforcing it until after a specified future date that the parties have agreed to as the date when the tenant is to vacate. These stipulations usually describe what the tenant is to do upon vacating, including in what condition the tenant is to leave the premises. Sometimes, these stipulations provide for a payment to the tenant upon vacating.

In a 3-2 decision issued recently in *1029 Sixth, LLC v. Riniv Corp.*¹ (and three companion cases), the Appellate Division, First Department, grappled with the issue of enforcing such a stipulation, with the majority and dissent taking sharply divergent positions.² The majority opinion, which reversed the Appellate Term, was written by Justice David B. Saxe, with justices Richard T. Andrias and David Friedman concurring. Justice Angela M. Mazzarelli wrote the dissenting opinion, in which Justice Eugene Nardelli joined. The dissent essentially set forth verbatim the Appellate Term decision, after stating that it found the Appellate Term analysis to be "persuasive."

Specifically, the court addressed the question whether the landlord should be obligated to make the vacatur payments to the tenants provided for in the stipulations when (i) the stipulations required the premises to be delivered "broom clean" and specified that no delay in vacating would be de minimis, and (ii) the tenants conceded that they left garbage, refuse and shelving in the premises upon vacating. The majority held that the tenants had lost their right to receive the cash payments contemplated by the stipulations by failing to comply with the terms of the stipulations. The dissent adopted the Appellate Term's conclusion that "a forfeiture of the negotiated payout because of the scant remains cannot be sustained."

Ninety-Day Notice

These cases arise out of the landlord's exercise of its rights under a lease provision permitting the landlord to terminate the lease on ninety days written notice to the tenant when the landlord intended to "develop, sell or net lease the building of which the demised premises forms a part." In reliance on that provision, on Oct. 15, 1999, the landlord served these commercial tenants with notices of termination, advising that it had conveyed its interest in the building to 1029 Sixth LLC, which intended to develop the building, and was therefore exercising its option to terminate each tenant's lease as of Jan. 31, 2000.

The tenants remained in possession past the termination date, and the landlord brought holdover proceedings in March 2000. After more than six months, on Oct. 5, 2000, the holdover proceedings were settled by so-ordered stipulations. Pursuant to the stipulations, the tenants consented to the entry of final judgments of possession, which were stayed until Dec. 31, 2000. The landlord agreed to make cash payments of between \$25,000 and \$55,000 to the tenants. The payments, however, were "subject to ... compliance with the terms and conditions herein ... [and] on condition that [the tenant] vacates ... by no later than the Vacate Date."

Other clauses of the stipulations that the Appellate Division majority viewed as relevant were the following:

Time shall be of the essence with respect to all of Respondent's obligations under this Stipulation including, without limitation,

Respondent's obligation to vacate the Premises pursuant to the terms hereof ...

* * *

In the event Respondent (a) fails to timely vacate the Premises in accordance with the provisions of this Stipulation or otherwise ... [then,] (i) Petitioner shall have no obligation to pay, and Respondent shall be deemed to forfeit all right to receive the Payment and the Deposit. ...³

The Appellate Division majority stated that, "importantly," the stipulations also contained the following "de minimis" clause:

... [N]o partial payment no matter how substantial, nor any delay in vacating the Premises, shall be deemed to be substantial compliance, i.e., no shortage of payment or delay in vacating the Premises shall be considered to be de minimis.⁴

On the agreed-upon vacate date (which had been extended for two days beyond that specified in the stipulations), garbage bags, refuse and shelving had still not been removed from the premises. The landlord withheld the payments provided for by the stipulations on the grounds that the premises had not been delivered "broom clean" on the vacate date. The tenants moved to compel payment by the landlord pursuant to the stipulations, asserting that the failure to remove these items was de minimis, making it inequitable to permit the withholding of the payment.

The Civil Court (Debra A. James, J.) denied the tenants relief on the ground that the tenants had failed to surrender the premises as required under the stipulations (which incorporated the "broom clean" requirements of the lease). The Appellate Term reversed. It concluded that there had been no delay in the tenant's vacatur, and that the "landlord made no factual showing of the condition of the premises apart from adopting tenant's own reference to 'garbage bags/refuse' as 'a concession' that the stipulation had been violated."

Referring to the doctrine that courts do not favor a substantial forfeiture on the basis of a trivial or technical breach, the Appellate Term noted that it was "obvious that the items in dispute could have been expeditiously removed for a nominal sum." Further, stated the Appellate Term, "since the premises were expected to be demolished rather than re-rented, a forfeiture of the negotiated payout because of the scant remains cannot be sustained."⁵

The Appellate Division reversed the Appellate Term and held that the tenants' motion to compel payments under the stipulations should be denied. It viewed the Appellate Term as "improperly reliev[ing] these commercial tenants of the effect of their negotiated stipulations, which clearly required strict compliance as a condition for their receiving payment." The majority reiterated again and again that the stipulations had been negotiated and the terms agreed to by the tenants. Justice Saxe's decision referred to the "lengthy and detailed document, resulting from extensive negotiation."

The majority emphasized that this was "a situation completely of their [the tenants'] own making", i.e., they are "victims of a strict stipulation provision they agreed to" in order to obtain the advantage of the vacatur payment provision. [Emphasis added.] Therefore, the majority explained, even if inserting in the stipulations the provisions requiring strict compliance with the requirement to vacate the premises turned out to be harsh, "it was nevertheless an important, negotiated term of the agreement, and as such, must be enforced." The terms of the stipulations, the majority stated, "are clear and the parties were entitled to chart their own course by entering into it."

LANDLORD-TENANT



WARREN A. ESTIS



WILLIAM J. ROBBINS

A case showing that stipulations of settlement sometimes do not put an end to litigation between the parties.

In order to determine if there had been a lack of compliance with the requirement to vacate the premises, the majority addressed the issue of "whether the condition in which the tenants left the premises amounted to a real violation of the 'broom clean' provision [of the lease incorporated into the stipulation], so as to constitute a late vacatur of the premises." The tenants' contention that there was only a negligible difference between the condition in which the tenants left the premises and a "broom clean" condition was rejected.

It was undisputed, said the majority, that the tenants had left behind garbage bags, refuse and shelving. While the "exact quantities and qualities of these items [were] not established," the majority concluded that the "debris left behind was of a quantity that did not qualify as de minimis." Justice Saxe's opinion noted that the tenants' own counsel had indicated that to complete the clean-up of what had been left behind, the landlord would need to rent a dumpster and obtain the services of two laborers for approximately five or six hours. Since it "would concededly have cost thousands of dollars and required hours of labor to clear it away," it would "actually be a matter of days, at least," before the premises were in the condition it should have been upon their surrender to the landlord.⁶

Given these circumstances, the majority concluded, the materials left behind "unquestionably created" a violation of the provision requiring the tenants to vacate the premises by the specified date and of the provision incorporated from the lease that they leave the premises in "broom clean" condition. If this violation was ignored as too minor to justify the complete elimination of the tenants' right to the vacatur payment, the court "would in effect be ignoring the stipulation's explicit provision that no delay in vacating would be considered de minimis." Since the parties had intentionally included that provision, the majority reasoned, "this Court may not ignore that provision."

Further, the majority described the contractual provisions making time of the essence and specifying that no delay in vacating the premises would be considered to be de minimis as amounting to "the equivalent of a 'hell or high water clause' by which a contractual provision is made absolute and unconditional." Therefore, according to the majority, even if the refuse left behind had been limited to eight bags of trash that the landlord could have dragged out to the curb, the landlord "had the absolute right ... to decline to make the payments under the stipulation." In other words, the majority seemed to imply, even if the items left behind were viewed as a de minimis violation, given that "hell or high water clause," the landlord could still properly refuse to make the vacatur payments.

As to the equities of the situation, the majority stated that "[a]lthough at first glance the result might seem harsh, particularly if the failure to leave the premises broom clean is characterized as de minimis, upon closer examination the equities are not so weighted in the tenants' favor." The tenants, according to the majority opinion, offered no excuse for their non-compliance with the provision of the stipulations incorporating the lease's "broom clean" clause. Moreover, under the terms of the leases, the landlord was entitled to terminate the tenancies early, as the landlord did. The majority characterized the tenants' conduct, in the face of landlord's entitlement, as follows:

... [T]he tenants were able to strategically utilize the legal system in order to hold off their ouster for a full year, in the process wresting from the landlord the promise of a cash payment if they agreed to that which they were contractually bound to do twelve months earlier, namely, vacate the premises.⁷

The majority pointed out that the cash payments the tenants negotiated for vacating "bore no relation to any rights under the leases." In other words, the leases gave the landlord the right to terminate the tenancies early without paying anything. The vacatur payments were based in the stipulations, not the lease. The majority described those payments as follows:

... [T]he payments were a concession [the tenants] obtained in exchange for their agreement to vacate by an absolute date certain, with time of the essence, where no delay in vacating the premises would be considered to be de minimis. These tenants were entitled to these payments only if they vacated, properly, by the specified vacate date.⁸

Two other points raised by the majority should be mentioned, because they relate directly to issues raised by the Appellate Term decision quoted by the dissenting Appellate Division justices. The majority stated that since the tenants had conceded leaving garbage, refuse and shelving in the premises, the landlord "was entitled to rely on the lack of any factual dispute on this issue" and the landlord's failure to affirmatively and independently establish the condition of the premises was not a proper basis for granting the tenants' motions.

The majority also noted that the loss of the contemplated vacatur payments was not a "forfeiture" as that term is used in the phrase "the law abhors a forfeiture." Rather, according to the majority, it was "merely the contracted-for financial consequence of the tenants' own failure to do that which they promised to do."

As noted above, the dissent in the Appellate Division relied on the reasoning of the Appellate Term, and, indeed, as the substance of its dissent quoted practically the entirety of the Appellate Term decision. Their view was that there was a substantial, and unjustifiable, forfeiture of the vacatur payment here, where there were "scant remains" left in the premises and no delay in the tenants' vacatur. Further, they noted that the landlord had made no factual showing of the condition of the premises apart from adopting the tenants' own reference to "garbage bags/refuse" as supposedly being a concession that the stipulations had been violated.

Following are points to consider in reviewing the reasoning of the majority and dissent in the *1029 Sixth* case:

In balancing the equities, should the court have included in the calculus the fact that the dispute arose in the context of the landlord having terminated the leases before their intended expiration date, a matter of substantial benefit to the landlord and presumably detrimental to the tenants? Or, should that factor not be considered because in the leases the tenants had agreed to the provision allowing the landlord to terminate the lease at any time upon ninety days prior written notice if the landlord intended to develop the building and, presumably, each tenant had already negotiated consideration for that provision as part of the lease negotiation?

A key factor in the majority opinion is the fact that the stipulations had an express provision that no delay in

vacating would be de minimis. Does this factor pragmatically limit the precedential value of this case since stipulations of settlement often do not have such an express provision?

The stipulations in *1029 Sixth* also had a time is of the essence clause with respect to all of the tenants' obligations, including vacating. Does that clause, which is frequently found in stipulations of settlement, accomplish the same purpose as the clause providing that no delay would be considered de minimis? In other words, does stating that time is of the essence with respect to vacating implicitly mean that no delay in vacating would be considered de minimis, such that the holding here could be applicable in the context of a stipulation that had a time is of the essence clause without also having an express no delay is de minimis clause?

Another key factor in the majority opinion is the fact that the stipulations had resulted from extensive negotiation. As such, should the case holding properly be viewed as limited to situations where a stipulation has been extensively negotiated? If so, what constitutes the requisite negotiation? Is having counsel on both sides, "a two attorney stip" in the parlance of Civil Court, sufficient in and of itself to establish the requisite negotiation? Or, should it be necessary to have evidence introduced as to the exact nature and extent of negotiation of the settlement stipulation?

In *1029 Sixth*, all four companion proceedings were commercial holdover proceedings. Is the holding here equally applicable in a residential context, at least where the stipulation in that context has been extensively negotiated? A stipulation of settlement of a residential non-payment proceeding, for example, may provide for the tenant to vacate by a certain date and for the landlord, in return, to waive back rent that is owed. If the tenant vacates by the specified date but leaves garbage and refuse in the premises upon vacating, would the court view the landlord as relieved from the waiver of back rent? Or, the stipulation of settlement might provide for the landlord to waive certain past rent in return for the tenant's agreement to make payments going forward. If those going forward payments are not timely made (being late by a few days), would the court allow the landlord to take the position that the tenant would not be entitled to the benefits under the stipulation?

In short, this case shows that stipulations of settlement sometimes do not put an end to litigation between the parties, and may raise issues that are at least as challenging to the court as the underlying dispute that led to the settlement stipulation.

1. NYLJ, June 2, 2004, p. 18, col. 1, 2004 NY Slip Op. 04134 (1st Dep't).

2. There were in total four companion holdover proceedings, with the Appellate Division issuing a single decision and order bearing all four captions. In addition to the *1029 Sixth, LLC v. Riniv Corporation* caption referred to in the text, the other captions are *1029 Sixth, LLC v. Slip-On-Shoes Inc.*, *1029 Sixth, LLC v. Corona Grill Corp.* and *1029 Sixth LLC v. Guity Fashion Corp.*

3. NYLJ, June 2, 2004, at p. 18, cols. 2-3.

4. *Id.*, at cols. 3-4.

5. The substantive Appellate Term decision was issued in the case captioned *1029 Sixth, LLC v. Guity Fashion Corp.* The decisions in the three companion cases all referred to the decision in *Guity Fashion*. The Appellate Term decision was discussed in *Estis and Robbins*, "Stipulations: Court Finds No Forfeiture for Trivial Breach," NYLJ, April 2, 2003, p. 5.

6. The majority did comment that the situation before it did not involve as severe a state of disrepair as that in the case of *Akron-Meats Inc. v. 1418 Kitchens Inc.*, 160 A.D.2d 242, 553 N.Y.S.2d 355 (1st Dep't 1990). There, the court upheld the landlord's withholding of a payment to the tenant for the premature cancellation of the lease where the tenant had left the premises with exposed wiring and holes in the floor caused by the removal of trade fixtures, and in a general state of disrepair.

7. NYLJ, June 2, 2004, at p. 30, col. 4.

8. *Id.*