

ROSENBERG & ESTIS, P.C.

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ROSENBERG & ESTIS, P.C. SAVES LANDLORD FROM MORE THAN \$2 MILLION IN DAMAGES SOUGHT BY NATIONAL RETAIL TENANT

Rosenberg & Estis, P.C. prevailed at the Appellate Division, First Department over Free People of PA LLC, a national retail tenant claiming damages amounting to over \$3 million pursuant to a “rent credit” provision in the parties’ lease. Tenant argued it suffered substantial yet incalculable damages as a result of the landlord’s delivery of the premises a year late, and was entitled to recover those damages pursuant to a lease provision which provided for multiplying rent credits to the tenant, which increased as the delay continued.

Rosenberg & Estis, P.C. member Bradley S. Silverbush and associate Richard B. Corde represented Delshah 60 Ninth, LLC.

Representing the landlord, R&E argued that the rent credit clause constituted an impermissible penalty which bore no reasonable relationship to any damages the tenant may have suffered. R&E refuted Tenant’s claim that damages were incalculable and demonstrated that as a result of the delay, Tenant missed one of the worst retail cycles in recent history, thereby sparing Tenant significant losses.

In affirming the successful after-trial judgement R&E obtained, a five-member panel of the Court further agreed with R&E that the rent credits sought by Tenant under the lease were “grossly disproportionate to its estimated and actual loss,” and therefore, the lease provision constituted an unenforceable penalty. Court affirmed the award to Tenant of only \$650,000, as well as the award to R&E of attorneys’ fees pursuant to CPLR 3220 incurred from the date Tenant rejected the \$1.5 million settlement offered by R&E.

The unanimous affirmance of the Honorable Barry R. Ostrager’s favorable decision on February 28, 2019 demonstrates that Courts will not enforce a liquidated damages provision of a lease when it appears the sums due thereunder are a penalty for a breach of lease which bears no relationship to the actual damages incurred. The case also underscores the value of using an “offer to compromise” prior to trial as a way of obtaining legal fees.

“The fact is that this lease was fully negotiated and agreed to by sophisticated parties represented by counsel, and Landlord did deliver the premises a year late,” Silverbush said. “Under these circumstances, conventional wisdom suggested that there was no way for the landlord to avoid giving Tenant the rent credit in excess of \$3 million due under the lease. And that is exactly why people seek us out, and what makes R&E different. We have exceptionally bright people here, and

we go beyond the limitations of conventional wisdom to find creative solutions to our client's problems.”

About Rosenberg & Estis, P.C.

Founded in 1975, Rosenberg & Estis, P.C. is widely recognized as one of New York City's pre-eminent real estate law firms. Rosenberg & Estis, P.C. provides full service representation and advice in every aspect of real estate, from performing due diligence and evaluating financing, to handling joint ventures, acquisitions and leasing, construction and design team agreements, land use and zoning matters, co-op and condo offering plan filings, as well as the litigations and negotiations which sometimes ensue when deal making. Rosenberg & Estis' wealth of experience in New York real estate makes it the ideal thought partner for owners, developers, not-for-profit corporations, educational institutions, sponsors, equity investors and lenders in both real estate transactions and in all court venues.

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