Actual Partial Evictions

Appellate Court Recoils From 'Harsh' Result
Warren A. Estis, a founding partner at Rosenberg & Estis, and William J. Robbins, a partner at the firm, review the recent First Department decision which held that even though there was a partial eviction, it was so minimal that a total rent abatement would be a draconian sanction, in effect creating a de minimis exception to the thirty-five-year-old *Barash* rule.

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The doctrine of actual eviction applies to wrongful conduct by a landlord which deprives a tenant of physical possession of the demised premises. It can be total (from the entire premises) or partial (from a portion). A tenant that has been actually partially evicted can stop paying rent. Significantly, under Court of Appeals precedent, the remedy of ceasing to pay all rent applies even though the tenant has only actually been evicted from a portion of the premises. As the Court of Appeals stated thirty-five years ago in *Barash v. Pennsylvania Terminal Real Estate Corporation*,[1]

In the case of actual eviction, even where the tenant is only partially evicted, liability for all rent is suspended although the tenant remains in possession of the portion of the premises from which he was not evicted.[2]

In support of that principle, the Court of Appeals in *Barash* cited its own decision from 1917 in what it described as "the leading case" of *Fifth Avenue Building Company v. Kernochan*.[3]

In a recent case, *Eastside Exhibition Corp. v. 210 East 86th Street Corp.*,[4] the Appellate Division, First Department, however, held that a tenant was entitled only to a partial rent abatement for an actual partial eviction "of the minimal proportions here present," namely, where the tenant was deprived of the use of approximately 12 square feet of space out of a stipulated total of between 15,000 and 19,000 square feet. On the facts before it, the Appellate Division characterized a total abatement of rent as a "draconian sanction."

In *Eastside Exhibition*, the tenant leased a 2-story space configured as a "quad" movie theater. There was a ticket sales booth, a lobby, a concession stand and two movie theaters on the street level. On the second floor, there was a lobby, an "informal seating area," a concession stand and two additional theaters. As the facts were recited by the Appellate Division, in December 2002, without notice to or consent from the tenant, the landlord entered the premises and "installed steel floor-to-ceiling cross-bracing between two existing steel columns, in preparation for the construction of two additional stories to the building." On the first floor, this cross-bracing occupied space between the two theaters and the concession stand. On the second floor, the cross-bracing displaced a portion of the informal seating area for patrons waiting to enter the upstairs theaters.

In response to the landlord's conduct, the tenant ceased paying rent, as a remedy for a partial actual eviction. The tenant commenced a lawsuit seeking a permanent injunction barring the landlord from doing any further work in the theater and directing the removal of what had already been done, a full abatement of rent, compensatory damages exceeding $1,000,000 and punitive damages of $3,000,000.

The landlord then served a notice to cure alleging that the tenant had defaulted under the lease by not installing a

neutralization tank for spilled soda, by failing to provide books and records and by installing new doors in the upper theaters that allegedly violated the Building Code. The tenant then amended its complaint to include claims for injunctive and declaratory relief preventing the landlord from terminating the lease based on the default notice. The landlord amended its answer to include a counterclaim for attorneys' fees and for rent due after Jan. 1, 2003.

The lease permitted the landlord access to the demised premises at reasonable times to make repairs and improvements, and provided that there was to be no abatement of rent while such work was in progress and no damages by reason of loss or interruption of business. The lease further provided that there was to be no allowance to the tenant for diminution of rental value and no liability by the landlord for inconvenience, annoyance or injury to the tenant's business arising from the making of any repairs or improvements to the building or to the demised premises.

New York County Supreme Court Justice Edward H. Lehner found that although the lease permitted the landlord access to the tenant's premises to make the alterations at issue, the tenant was "correct that the Lease does not grant [landlord] the right to permanently deprive [tenant] of the use of any portion of the demised premises."[5] The trial court noted that a "landlord who permanently deprives a tenant of the use of a portion of leased premises has committed an actual partial eviction" which, pursuant to Barash, suspends liability for all rent.

The Supreme Court then addressed the central legal issue before it:

Based on this principle, plaintiff [tenant] argued at trial that any taking, no matter how small, results in an actual partial eviction and thus deprives the landlord of the right to collect any rent . . . However, an exception to this rule based on a de minimus taking has been recognized by the First Department.[6]

In support of that exception, the court cited the following appellate cases: *Cut-Outs, Inc. v. Man Yun Real Estate Corp.*,[7] *Camatron Sewing Machine, Inc. v. F. M. Ring Associates, Inc.*,[8] *Paine & Chriscott v. Blair House Associates*,[9] and *Two Park Avenue Company v. Intermediate Factors Corp.*[10]

Based on those cases, Justice Lehner stated that "the taking of a non-essential minute area of space does not mandate employing the normal rule applicable to an actual partial eviction." He concluded that the taking of approximately 12 square feet of lobby space involved in the Eastside Exhibition case was not of an area essential to the operation of the tenant's business and was a de minimis taking that did not justify depriving the landlord of the agreed rent. The Supreme Court dismissed the tenant's claim for a rent abatement and held that the landlord was entitled to judgment for the unpaid rent.

The Appellate Division modified the Supreme Court's judgment to the extent of holding that the tenant was entitled to be compensated, by a partial rent abatement, for what it found to be an unauthorized taking and thus an actual eviction. The court "remanded for a hearing to determine the actual damages." The Appellate Division's decision was written by Justice Betty Weinberg Ellerin. The other justices on the panel, who all concurred, were Angela M. Mazzarelli (presiding justice), Joseph P. Sullivan, Eugene L. Nardelli and Milton L. Williams.

The Appellate Division in *Eastside Exhibition* rejected the notion that there was a "de minimis" exception to the rule that any unauthorized taking is an actual eviction, stating:

. . . [T]he factual underpinnings of these decisions [relied on by the trial court] do not support the [trial] court's conclusion that this Court has recognized an exception, based on a de minimis taking, to the general rule that an unauthorized taking suspends the obligation to pay rent.[11]

Discussing the *Camatron* case, the Appellate Division in *Eastside Exhibition* pointed out that in that case it had in fact "permanently enjoined the landlord from commencing a planned alteration because it would have caused a partial taking of the tenant's space." Furthermore, the court pointed out that when it had rejected the landlord's argument in *Camatron*, it "took issue with [the landlord's] characterization of the taking as de minimis." (*Camatron* was a case where the landlord sought to knock down the lobby wall adjacent to the tenant's administrative office and move it inward three feet. That change would have eliminated 46.5 square from the tenant's store, constituting approximately 25 percent of the 201.5 square feet store space used for the tenant's administrative office.)

As for *Cut-Outs*, *Paine & Chriscott* and *Two Park Avenue Company*, the Appellate Division in *Eastside Exhibition* commented that in those cases the court "found that the complained-of activities were authorized in the respective leases." In Cut-Outs, the tenant leased an entire floor in a building. In connection with converting the building from light industrial use to office use, the landlord began making extensive renovations, including replacing the manually operated passenger elevator with a handicapped-accessible automatic elevator. That renovation contemplated permanently taking a 2.5-foot-wide portion of the vestibule outside the passenger elevator on the tenant's floor. The court held that the tenant had "failed to prove that this encroachment constituted anything more than a de minimis taking of inessential space" that was authorized by the lease provision permitting the landlord to change the arrangement and/or location of public entrances, passageways, doors, doorways, corridors, elevators, stairs, toilets or other parts of the building.

In *Paine & Chriscott*, the landlord, without the tenant's permission, entered the tenant's store, cut holes in the ceiling and floors and ran pipes and conduits through the opening in order to put a new building heating system into effect. In reversing the Supreme Court and denying the tenant's motion for a preliminary injunction with respect to that work, the Appellate Division, First Department in *Paine & Chriscott* noted that the lease permitted the landlord to erect, use, and maintain pipes and conduits in and through the demised premises and to make such improvements or additions as the landlord deemed necessary or desirable.

In *Two Park Avenue Company*, the landlord had workmen enter the tenant's premises and install, suspended from the ceiling, pipes as part of an air conditioning system for a tenant of another office suite. Measured in cubic feet of space, the pipes took up from 2-1/2 percent (landlord's calculation) to 5 percent (tenant's calculation) of the space. The parties' lease permitted the landlord to install pipes and conduits in the demised premises and to the floors above and below it, provided that it resulted "only in depriving Tenant of any insubstantial part of the demised premises."

After discussing these four cases, the Appellate Division in *Eastside Exhibition* stated that it was "constrained to hold that the instant defendant's alteration of a portion of plaintiff's premises, without authorization and without consent, was, however small, a taking." The court, however, continued as follows:

. . . [W]e understand the trial court's reluctance to order the unpalatable remedy of a total rent abatement under the facts of this case, and believe that there is an appropriate remedy short of total rent abatement.[12]

The court viewed the principle of discharging a partially evicted tenant from payment of the whole rent as feudal in origin, and stated that:

In light of current landlord/tenant realities and policies, it appears particularly untoward automatically to apply harsh and oppressive strictures derived from feudal law that mirror the policies and concerns of that earlier society.[13]

The "more realistic remedy" that the Appellate Division concluded should be imposed "for a partial eviction of the minimal proportions" present in *Eastside Exhibition* was "money damages proportionate to the injury involved." Accordingly, the Appellate Division held that the tenant "has been partially evicted and is entitled to compensation by way of a partial rent abatement for the injury it has suffered and will continue to suffer." It remanded for a hearing to determine the extent of the abatement.

The appellate court cited the following cases as "authority indicating that a more proportionate remedy than a total abatement of the rent may be fashioned for the compensation of a tenant who has been partially evicted": *Paine & Chriscott*, supra; *Appliance Giant, Inc. v. Columbia 90 Assocs.*,[14] and *81 Franklin Co. v. Ginaccini*.[15] Specifically, the court cited to the statement in *Appliance Giant* that a partially evicted tenant "is entitled to recover that part of the rent attributable to the portion of the premises from which it was evicted." There is similar language in *81 Franklin Co*. The passage from *Paine & Chriscott* that the court used to support its argument was that court's statement that "[t]o the extent that the pipes and conduits might constitute a partial eviction, this can easily be compensated by money damages."

In short, it appears that both the Supreme Court and the Appellate Division had the same result in mind in *Eastside Exhibition*, i.e., that it would be inappropriate on the facts of the case for the tenant to receive a total abatement of rent. The Court of Appeals precedent from *Barash*, however, is that in a case of actual eviction, even where the tenant is only partially evicted, liability for all rent is suspended. Each court dealt differently with this concept.

The Supreme Court concluded, incorrectly according to the Appellate Division, that the taking was so de minimis as not to be an actual partial eviction. (By so concluding, the Supreme Court avoided having to apply *Barash*.)

In contrast to the Supreme Court, the Appellate Division specifically found that an actual partial eviction had occurred, but that it was so de minimis as to justify only a partial rent abatement. This in effect creates a de minimis exception to the *Barash* rule. It will be interesting to see whether other courts will follow the Appellate Division's reasoning and, if the Court of Appeals reviews *Eastside Exhibition*, whether the Court of Appeals will view any exception to the absolute rule set forth in *Barash* as appropriate.

The question also arises whether this decision opens the gates for landlords to take space from tenants, leaving it to the courts to determine whether the taking was merely de minimis. It would seem that, in setting forth an absolute rule that any actual eviction, even if only partial, results in a total rent abatement, the Court of Appeals had in mind that anything less than an absolute rule might encourage landlords arbitrarily and unilaterally to take space from tenants' demised premises. We can only wait and see whether *Eastside Exhibition* will result in an increase in unauthorized takings.

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Endnotes:

1. 26 N.Y.2d 77, 308 N.Y.S.2d 649 (1970).

2. 26 N.Y.2d at 83, 308 N.Y.S.2d at 654.

3. 221 N.Y. 370 (1917).

4. NYLJ, Sept. 22, 2005, p. 18, col. 1 (1st Dep't).

5. Eastside Exhibition Corp. v. 210 East 86th St. Corp., NYLJ, June 7, 2004, p. 18, col. 3, 32 HCR 355B (Sup. Ct. N.Y. Co.).

6. 32 HCR at 356.

7. 286 A.D.2d 258, 729 N.Y.S.2d 107 (1st Dep't 2001).

8. 179 A.D.2d 165, 582 N.Y.S.2d 396 (1st Dep't 1992).

9. 70 A.D.2d 571, 417 N.Y.S.2d 68 (1st Dep't 1979).

10. 17 Misc.2d 442, 187 N.Y.S.2d 149 (A.T. 1st Dep't 1958).

11. NYLJ, Sept. 22, 2005, p. 18, cols. 5-6.

12. Id., at p. 30, col. 1.

13. Id., at p. 30, col. 2.

14. 8 A.D.3d 932, 779 N.Y.S.2d 611 (3d Dep't 2004).

15. 160 A.D.2d 558, 554 N.Y.S.2d 207 (1st Dep't 1990).
