Eviction Denied

Judge Confronts Multi-Faceted Issues After Fire, Repairs

BY WARREN A. ESTIS
AND WILLIAM J. ROBBINS

Leases usually contain a clause captioned "Destruction, Fire and Other Casualty" (or similar terminology) dealing with the respective rights of the landlord and tenant under such circumstances. In a recent decision by New York County Housing Court Judge Kevin C. McClanahan in *McKinsey v. Calla*,[1] the court dealt with an attempt by a landlord who purchased a building after a fire to terminate a tenancy based on the fire clause. The court held that where the premises had been repaired by the prior landlord before the new landlord's attempt at terminating the tenancy, the tenant in possession when the fire occurred (who had relocated while the repairs were being made) was entitled to be restored to possession. The court further held that the tenant was entitled to a judgment of possession against a subsequent tenant to whom the new landlord had leased the premises.

LANDLORD-TENANT

Warren A. Estis

William J. Robbins

Vera McKinsey ("McKinsey") and her family moved into the subject duplex apartment at 259 West 132nd Street in Manhattan (the "Duplex" or the "Premises") pursuant to a lease for a four-year term commencing Sept. 1, 2003 and expiring Aug. 31, 2007, with an option to renew for another two year period. They moved into the Duplex as part of a surrender agreement whereby they had surrendered possession of an apartment in another building owned by the same landlord or a related entity. The lease provided for a fair market rent of $3,000 per month, but McKinsey was given a preferential rent of $1 per month for the lease term as long as she resided in the Duplex. The lease also provided for a preferential rent for the renewal period.

On February 28, 2006, a fire occurred in the Duplex. After the fire, McKinsey and her family were relocated by the American Red Cross to a homeless shelter operated by the Brooklyn YMCA. The landlord sold the building to a new owner, Stephanie Calla.

Paragraph 9 of McKinsey's lease for the Duplex, the fire clause, provides in relevant part that:

> If the demised premises are rendered wholly unusable or (whether or not the demised premises are damaged in whole or in part) if the building shall be so damaged that Owner shall decide to demolish it or to rebuild it, then, in any of such events, Owner may elect to terminate this lease by written notice to Tenant, given within 90 days after such fire or casualty, or 30 days after adjustment of the insurance claim for such fire or casualty, whichever is sooner, specifying a date for the expiration of the lease, which date shall not be more than 60 days after the giving of such notice, and upon the date specified in such notice, the term of this lease shall expire...

In reliance on the fire clause, the new owner served a termination notice, dated May 26, 2006, purporting to terminate the lease as of June 12, 2006. The termination notice provided that if the tenant did not "remove from the Premises" by that date, then "the Landlord will commence summary eviction proceedings against you under applicable provisions of law to recover possession and remove you from the premises for the holding over after the expiration of the term..." In fact, however, the new owner did not thereafter commence a proceeding against McKinsey, but, instead, in late June 2006, put a new tenant and his family into the Duplex pursuant to a one year lease based on a market rate rent of $3,000 per month.

McKinsey, as petitioner-tenant, then commenced a summary proceeding, by order to show cause in lieu of notice of petition, pursuant to RPAPL §713(10) to be restored to possession of the Duplex. McKinsey also sought issuance of a warrant of eviction and an award of monetary damages. The court required McKinsey to serve a copy of the order to show cause on the current tenant, as a necessary party to the proceeding.

RPAPL §713(10) provides for a summary proceeding to be maintained where:

> The person in possession has entered the property or remains in possession by force or unlawful means and he or his predecessor in interest was not in quiet possession for three years before the time of the forcible or unlawful entry or detainer and the petitioner was peaceably in actual possession at the time of the forcible or unlawful entry or in constructive possession at the time of the forcible or unlawful detainer.

That statutory section further provides that no notice to quit is required in order to maintain a proceeding under RPAPL §713(10).

After trial, the court ruled in favor of McKinsey. It awarded her a judgment of possession against the current tenant, with issuance of the warrant forthwith, but its execution stayed for two weeks to allow the new tenant to vacate the premises. The court expressly stated that its determination was without prejudice to the new tenant's "right to sue in a plenary action for damages related to his lease with [the new owner]."

In its decision, the court stated the law applicable to fire clauses as follows:

> A lease provision that permits a landlord to terminate a tenancy if the premises are rendered wholly unusable by fire is enforceable. Under a fire clause, the landlord may not, although the other conditions be met, terminate the lease if he has in fact decided prior to termination to rebuild. Clauses providing that after specified damage the landlord may decide not to restore may not be invoked by a landlord without giving the tenant notice of his election to cancel. If the landlord repairs or restores in accordance with the clause, the lease continues and the rent resumes [citations omitted].[2]

The court also observed that the law "is settled" that "'a landlord's right to cancel after serious damage has been held to pass to a grantee of the landlord although the damage occurred before the conveyance.'"[3]

The court found that the prior owner had elected to repair the apartment instead of terminating the tenancy. It emphasized that the repairs were completed within the 90-day window period in the fire clause for terminating the tenancy. Citing the Court of Appeals decision in *Adams Drug Co., Inc. v. Knobel*,[4] the court stated that "[o]nce an owner repairs the fire damage in accordance with the lease clause, the lease continues, requiring the landlord to restore the tenant to possession." In other words, by exercising its contractual right to repair the Duplex and affirm the tenancy, the prior owner had negated any right the new owner may have had under the fire clause to terminate the tenancy.

The court also held that the termination notice was a legal nullity because the new owner did not have legal or equitable title to the Premises when the notice of termination was served. The court commented that there was "contradictory" testimony as to when the conveyance of the property took place. The court did not find credible the new owner's testimony that the conveyance had taken place on May 26, 2006, the date of the notice of termination. Rather, it stated that it found "most persuasive" of the proof at trial the sworn acknowledgment of the notary that the seller had appeared before him and signed the deed on June 25, 2006. Since that was "many days after the service of the Termination Notice," the court concluded that the termination notice "could not serve to terminate the petitioner's tenancy."

The court also commented that the prior owner had failed to comply with the termination notice. That notice expressly provided that if the tenant did not vacate, the new owner would commence legal proceedings. However, the new owner "did not commence a summary proceeding, instead

Warren A. Estis *is a founding partner at Rosenberg & Estis.* **William J. Robbins** *is a partner at the firm.*

electing to install a new tenant without due process of law."

The court also ruled against the new owner on the grounds of absence of good faith. The court stated that, assuming the new owner had a right to terminate the tenancy on May 26, 2006, the election to terminate "must have been grounded in good faith" —and here it was not. Any termination predicated on the fire clause required that the Premises have been rendered "wholly unusable" by the fire. However, the court concluded, the evidence did not support such a finding.

In reaching that conclusion, the court focused on the testimony of the new landlord, as well as that of the petitioner and her family. The new landlord testified that she had never inspected the entire Premises after the fire, never having gained access to the first floor on either of her inspections. Therefore, the court noted, the new landlord "could not persuasively testify to whether the entire Duplex apartment had been 'rendered wholly unusable.'"

Moreover, the petitioner and her family testified that the damage was limited to McKinsey's bedroom located on the top floor of the Duplex apartment and that the damage to the lower floor was limited to water damage to the walls and floors when the fire department extinguished the fire on the upper floor. The Fire Incident Report which had been admitted into evidence stated that the fire had originated "on the second floor, in the west bedroom" and that the fire was confined to that bedroom. Based on these various facts, the court found that "the fire damage was limited to the second floor of the Premises."

As a further basis for its finding that the termination had not been in good faith, the court noted that by the time the termination notice was served, "the facts that might have supported the prior owner's termination of the petitioner's tenancy did not exist." By then, the Premises had been repaired at no cost to the new owner. The court found that the new owner's election to terminate the petitioner's tenancy was not based on economic infeasibility, but rather on the "less salutary motive of ridding herself of [a] long-term tenant paying only $1.00 per month and the right to a preferential rent of $291.50 per month from September 1, 2007 through August 31, 2009."

Based on these various grounds, the court determined that the petitioner had been "wrongfully evicted from the Premises." The court then balanced the equities in deciding whether the petitioner should be restored to possession or the new tenant should be allowed to remain in possession, and concluded that the equities balanced in favor of the former.

The court summarized what it considered the pertinent facts about the petitioner. She was a 79-year-old woman in poor health, a diabetic suffering from a bad heart regulated by a pace maker. The total combined income of petitioner and her husband was $1,500 from Social Security. They had lived in Harlem for over thirty-one years "with substantial contacts in the neighborhood," had no savings and, "if not restored to possession, would be homeless."

The court also considered the "valuable tenancy" that McKinsey and her family would forfeit if they were not restored to possession, namely, the right to remain in possession under the current lease at a preferential rent, with the option for a two-year renewal at a preferential rent. The court concluded that these rights were "invaluable" to the long-term well-being of the petitioner and her family.

By contrast, the current tenant, the court noted, had resided in the Duplex only since late June of 2006, with a one-year lease at a market rate of $3,000 per month. He had a wife and two children, aged 2 and 6 months, and asserted the "inconvenience to his family if he were to be required to move."

The court concluded that the new tenant and his family had the "financial wherewithal to find other suitable apartments in the area," whereas petitioner and her husband could "ill afford to bear the adverse effects of losing such a valuable tenancy." The new tenant, the court emphasized, was young and "enjoys a successful job with a positive economic outlook," whereas the petitioner and her husband "have reached the end of their professional careers... [and] struggle with the issues of poor health and fixed-incomes."

The court succinctly stated the results of its balancing process, as follows:

> While the court is sympathetic to the concerns of this father who finds himself in the middle of an unfortunate situation [the new tenant], the equities are simply not in his favor.

Accordingly, the court held McKinsey entitled to be restored to possession.

In short, the *McKinsey* case is an excellent example of the multi-faceted issues—of lease language, legal principle, and economic and social considerations—which Civil Court judges frequently must confront in deciding cases arising under the Real Property Actions and Proceedings Law.

1. NYLJ, Nov. 6, 2006, p. 22, col. 3 (Civ. Ct. N.Y.Co.).

2. Id., at p. 23, col. 2. The cases cited by the court in support of this summary of what it called "the applicable law" include *Mawardi v. Purple Potato, Ltd.*, 187 A.D.2d 569, 590 N.Y.S.2d 132 (2nd Dep't 1992); *Adams Drug Co., Inc., v. Knobel*, 64 N.Y.2d 768, 485 N.Y.S.2d 983 (1985); *Constellation Holding Corporation v. Beckerman*, 180 Misc. 498, 42 N.Y.S.2d 143 (App T. 1st Dep't 1943); and *Roman v. Taylor*, 93 A.D. 449, 87 N.Y.S. 653 (2nd Dep't 1904).

3. In support of this proposition, the court cited *Jim, Jack & Joe Realty Corp. v. Rothenberg*, 78 A.D. 2d 634, 432 N.Y.S. 2d 110 (2nd Dep't 1980).

4. 64 N.Y.2d 768, 485 N.Y.S.2d 983 (1985).