Leasing Dinosaurs

By Adam Leitman Bailey and Dov Treiman

All of the commercially available form leases for rent-stabilized tenancies are admirable examples of attorney language crafting. They were in their day the latest brilliant word in what sorts of protections a landlord would want to have for the landlord and begrudge to the tenant.

They carefully walked the line between being so highly favorable to the landlord as to be unconscionable and being so highly favorable to the tenant as to be a give-away of rights the landlord had no business reason to yield.

Rent stabilization exists on the ongoing premise that there is a "housing emergency," meaning a shortage of reasonably priced housing for a hungry tenant market.[1] To the extent that this is true, it obviously means that the landlord has a seller's market and every reason to believe that it can retain for itself the full measure of rights the law will permit.

Yet, the current commercially available form leases do not take into account the developments in the law that have arisen since they were composed - some more than 20 years ago. In short, these form leases have become dinosaurs, as majestic as an allosaurus, but equally deserving of being relegated to a museum.

Of course, the law is always in a state of development. Any form lease devised today can find some of its provisions made questionable by a decision that can come down tomorrow. But so many decisions have come down since the composition of the currently commercially available rent-stabilization leases, that when looking through them, one does not find a whole lot of baby left in all that bath water.

Chronic Nonpayment

Consider, for example, chronic nonpayment. This is the phenomenon in which a tenant repeatedly in the space of a relatively small time interval pays the rent more than a month late. Early decisions struggled to determine whether this was a nuisance. Finally, the decisional law settled down in treating these situations as fundamentally violative of the tenancy in question. Why look to the tenancy and not to the lease? Because the form leases

are uniformly silent on defining chronic nonpayment as a ground for terminating the lease. When one examines the case law with regard to chronic nonpayment, the only thing really clear is that there is no clear set of standards. "Occasional" late payments are not enough to sustain the proceeding.[2] As many as three previous proceedings have been held insufficient to sustain a chronic nonpayment proceeding.[3] While six previous nonpayment proceedings may not be enough to sustain a chronic nonpayment proceeding if they took place over the course of six years,[4] if they took place over the course of six months, the chronic nonpayment proceeding does lie.[5]

While generally speaking the inability to pay rent is no defense to a chronic nonpayment proceeding, if that inability is shown to be temporary and remedied, the chronic nonpayment proceeding does not lie.[6] On the other hand, the acceptance of too many rent payments has been held a waiver by the landlord of the timely payment requirement.[7] Perhaps the worst feature of all this ambiguity as to just how bad the tenant has to be about payment to qualify as a chronic nonpayer is that the landlord has to expend significant funds in attorneys fees to get some sort of definition from the court. However, a well-written modern form lease, should set forth both a precise definition of how many delinquencies in a given period will give rise to a chronic nonpayment proceeding and that the landlord has the right to terminate the lease in the event that definition is met.[8] The presence of such a clause lends certainty to the relationship and saves the landlord both time and money in trying to determine when the chronic nonpayment threshold has been met.[9]

Pets

It is clear that the good intentions of the New York City Council in its passage of the Pet Law notwithstanding, pet ownership in New York City residential tenancies has become a game of cat and mouse. By its terms, the Pet Law[10] sets forth:

> Where a tenant in a multiple dwelling openly and notoriously for a period of three months or more following taking possession of a unit, harbors . . . a household pet . . . and the owner or his or her agent has knowledge of this fact, and such owner fails within this three-month period to commence a summary proceeding or action to enforce a lease provision prohibiting the keeping of such household pets, such lease provision shall be deemed waived.

The problem for landlords in the interpretation of this provision is that current case law recognizes everyone as an agent of the landlord for purposes of giving the landlord notice of

the presence of an improper pet.[11] Even the most casual observations by the landlord's workers, not necessarily of the pets themselves, but of the pets' accoutrements, have been held to bind the landlord to knowledge of the pet being kept "openly and notoriously."[12] Even without these legal doctrines, landlords' employees who are bribed to silence by holiday-season-tipping tenants remain a fertile source of tenants' claims that the landlord knew about the pet for more than the 30 days.

There is no way to write a no-pet clause in a lease to avoid these issues.

However, where the lease contains an additional clause requiring the tenants within certain time frames affirmatively to identify their pets to the landlord and sets the failure to furnish such identifying material as an independent breach of the lease, neither the wording of this ordinance nor its underlying purpose should frustrate the good faith actions of a landlord seeking to require equally good faith behavior by a tenant.

Delayed Possession

One reads in the case law a good deal of wrangling about the significance of the landlord being unable to deliver possession of the apartment on the date the lease sets forth as the start date of the tenancy.

Generally speaking, a landlord can be held in damages for the difference between market rent and lease rent[13] for failure to deliver possession on time.[14]

The reason for the wrangling is that the older form leases are generally silent on the subject of delayed delivery of possession. A well-written form would set forth specific parameters as to what conduct on the part of the landlord is excused, what the effect of the delay is to be, and when even the lease's allowances are exhausted, such as a delay in possession around the 90-day mark. Whatever date is selected as the drop dead date for delivery, the landlord is going to want the lease to contain a term limiting the tenant's recovery to being released from the lease and having all sums deposited with the landlord refunded. Since the most common cause for delayed possession is the tenant staying past term, the lease must contain some kind of penalty for the tenant staying late. The law does not imply damages above that of simple use and occupancy at the lease rental amount.[15] The holdover rental, however, should not be so stiff as to be stricken down by the courts as being a penalty.[16]

Automatic Renewal

Both the common law and the Rent Stabilization Code allow for procedures for automatic renewal of leases.[17] This is particularly important to a landlord in rent-stabilized housing because lease renewals carry governmentally determined increases. Since these increases piggyback on each other, each one is vital to the landlord's income stream. At common law, the procedure is the insertion into a lease of an automatic renewal clause. However, General Obligations Law §5-905 creates a procedure prohibiting automatic renewal of leases unless the landlord gives a notice personally or by certified or registered mail between 15 and 30 days before the automatic renewal period that the landlord intends to automatically renew. A well-written form rent-stabilized lease therefore will ensure that the landlord can exercise this option unimpeded by the GOL §5-905 provision.[18]

Technology Clauses

The commercially available form rent-stabilized leases were not, for the most part, written in the 21st century. Yet when one considers the technologies that have become commonplace in the past eight years, it takes little to realize that there is ample reason to deal with these technologies in the form lease. Consider the Internet. A tenant may very well have a wireless LAN in the apartment which is receiving interference from a neighbor. No landlord is going to want to be the electromagnetic traffic officer patrolling the airwaves to determine if one tenant's use of radio frequencies is interfering with another's.[19] So, the lease needs to contain a provision exempting the landlord from any interruptions in Internet service that the tenant may suffer.

Back in the day when dish antennas were the size of a studio apartment there was little cause for a landlord to worry about their installation. Nowadays, there is a very real concern that tenants will affix them to the fire escape or other places which may be less dangerous but no less unsightly.[20]

With the proliferation of electric and electronic devices drinking more electricity than ever before, the lease has to protect the building's circuitry. Of course, as ever, the lease has to make sure that plumbing is not overloaded either. To that end, it is most important that the lease restrict what can and cannot be sent down drains and which drains can be used for what.

Smoking

As with any form, a form lease must not only address the law as it stands now, but take intelligent guesses as to where the law is headed. Thus, while it may be a bit early in our cultural development to forbid smoking in an apartment, there is much to be said under the current case law for forbidding smoking that interferes with other tenants in the building.[21] Just how much greater protection this may give a landlord than current nuisance law, one cannot say. But it seems prudent to give the landlord some greater means for ridding the building of an offensive smoker if the landlord is itself subject to liability from a complaining tenant.

Aesthetic Issues

When one looks at the currently commercially available rent-stabilized leases, one realizes that they completely omit any consideration for the value to a landlord in preserving building aesthetics and ambiance. While many landlords simply may not care about such issues, a great many do.

It is true that form leases are used most frequently by laypersons, but they can be powerful tools in the hands of a sensitive attorney. Yet, for that attorney, the whole point of a form is to provide language that can be accepted, modified, or stricken. If the lease is silent on the issues of aesthetics and ambiance, the attorney is left to reinvent the wheel for the concerns of that kind of housing. It is therefore obviously much easier for an attorney to strike out aesthetics language for a client who sees no need for such matters than to try to insert it for one who feels such a need. That said, the attorney can certainly point out to the client that there is some correlation between buildings that are well-maintained by both the landlord and the tenants and the income such buildings produce.

Examples of these kinds of issue abound and are very much connected to the landlord who is seeking to maintain a certain kind of ambiance to the apartment house. Provisions of this kind include those forbidding hanging blankets and sheets in the windows, those restricting the use of laundry lines, those restricting holiday season lights to the final months of the year, and those regulating the size and shape of additional locks that can be placed on apartment doors.

Noise

In the classic case of *Louisiana Leasing Company v Sokolow,* 48 Misc2d 1014 (Civ Qns, 1966), the court wrote:

> This often forces one into an embarrassingly auditory intimacy with the surrounding tenants [as may be the case herein]. Such are the hazards of modern apartment house living . . . . [I]n this day in our large cities it is fruitless to expect the solitude of the sylvan glen . . .

In that case, there was the assumption that noise is an inescapable part of urban life. In more modern times, however, it is increasingly realized that noise is an escapable part of urban life, if certain reasonable precautions are taken. Therefore, the lease should be very specific about noise-producing devices, especially musical instruments and sound producing electronic devices of any kind.[22] These restrictions should specify times of day, days of the week, and gross duration. For similar reasons, rent-stabilized leases should contain the same kind of carpeting requirements commonly found in coop proprietary leases, but should limit the materials that can be used to affix the carpeting to the floors. The proliferation of readily available water-soluble glues leaves little excuse for insoluble glue or even more old-fashioned nails and tacks.

Along similar lines, the wall-to-wall carpeting that was all the rage in the 1960s has become something of a controversy. While its heat and sound insulating qualities cannot be denied, its attraction for allergens and difficulty in cleaning in more remote places have almost relegated it to the status of quaintness. Classic hardwood floors have therefore once again come into vogue, but not without a penalty to the general ambiance of the building. For that reason, nearly all cooperative leases require carpeting in at least 80 percent of an apartment and the modern rent-stabilized lease should as well.[23]

Mold

With the rise of environmentalism and generalized international concerns for conservation, it is now generally recognized that all homes, including apartments, should be well-insulated against the loss of heat. What is substantially less recognized in this opening decade of the 21st century is that the more we seal off every possible crack that allows for the exchange of apartment air with fresh air, the more we turn our apartments into terrariums.

As a direct result of the laudable vogue in insulation, the proliferation of mold has taken on frightening proportions, leaving many tenants sickened and many landlords threatened with

expensive lawsuits.

While no lease can or should insulate a landlord from its own negligence in preventing sources of unwanted water penetrating apartments, a proper modern lease places on the tenant the responsibility for ordinary maintenance chores recognized to prevent the proliferation and spread of mold. Most basic of these are the simple requirement that the tenant prevent the accumulation of moisture, particularly in the bathrooms and kitchen and that the tenant not block any of the heating ducts. More vigorously, the tenant must be required to attack mold with standard methods like household cleaners and bleach. The lease must also require the tenant to report leaks and mold accumulations to the landlord. While we must recognize that relatively few tenants actually read their leases, at least the presence in the lease of these kinds of requirements gives the landlord a defense to legal actions the tenants may bring against it for this very modern problem.

Riders

In a simpler, more naïve time, leases were relatively brief documents. However, in the four decades of rent-stabilization, we have seen a proliferation of forms and riders of various kinds that by law have to be attached to them. It is therefore useful for the lease to contain an inventory of just what riders are attached. This serves three purposes: it helps ensure that clerical staff actually does attach all the riders that are supposed to be there; it helps ensure the enforceability of those riders; and it helps prevent the insertion of language one side claims was there all along, but of which the other side was unaware.

Big Problems: Big Leases

The presence of all these riders and the need for all the kinds of clauses we have described in this article makes a modern rent-stabilized lease a very bulky document. There are now so many pages the law requires be attached to the lease that the chances of a tenant actually reading those pages dwindles towards zero. To that problem, we offer no solution. With all those required riders, modern rent-stabilized leases would be bulky even if the actual lease itself were contained on a single page. But as the complexities of the landlord-tenant relationship in New York City proliferate day by day, short, succinct leases are a luxury any landlord with a desire for self-protection can no longer afford. Any form lease that makes any pretense of getting the job done is just going to have to be big.

Adam Leitman Bailey *is the founding partner and* **Dov Treiman** *is the landlord-tenant managing partner of Adam Leitman Bailey P.C. Disclosure: They recently collaborated to produce the first 21st-century rent-stabilized form lease for Blumberg-Excelsior. This article reflects some concerns addressed in the devising of that form.*

Endnotes:

1. These assumptions have been most famously criticized in classic studies like Salins and Mildner, "Scarcity by Design," Cambridge, Mass. 1992.

2. *Ninth Ave. Eqts. Co. Inc. v. Alonay Bags Inc.,* NYLJ April 10, 1987, 20:4, 15 HCR 110A (Civ Qns Harbater).

3. *Glenn Gardens Assocs. LP v. Peck*, 34 HCR 820A, NYLJ Oct. 4, 2006, 23:1, HCR Serial #00016096, TLC Chronic Nonpayment 18, TLC Serial #0403 (Civ NY Schreiber) Commentary at: 34 HCRComm 111.

4. *Riverton Assocs. v. Garland*, 34 HCR 890A, 13 Misc3d 133(A), 831 NYS2d 349, HCR Serial #00016135 (AT1 2006) (Nine proceedings in 10 years held sufficient to sustain a proceeding).

5. *Halper v. Foster,* 13 HCR 263D, NYLJ 8/2/85, 13:3, HCR Serial #00005832 (AT 2&11 Kassoff; Monteleone and Lerner).

6. *Anthony Assocs v. Reyes*, 16 HCR 238C, NYLJ June 28, 1988 21:2, HCR Serial #00005971 (A.T. 1 Sandifer; Parness and Miller).

7. *Stepping Stone Assocs. v. Litt,* NYLJ March 29. 1989 26:3, 17 HCR 95C (AT 9 & 10 DiPaola; Rubenfeld, Collins).

8. See, *Paperclip International, LLC v. Espanal*, Decision at: 31 HCR 321A, NYLJ June 18, 2003, 20:2, HCR Serial #00013786 (Civ NY Thomas).

9. Experience has taught that when there are such clauses in leases, some tenants adjust their conduct so that they never actually are chronically delinquent.

10. NYC Administrative Code §27-2009.1(b).

11. *Metropolitan Life Insurance Co. v. Datta*, 30 HCR 77A, NYLJ 1/29/02, 18:1, HCR Serial #00012984 (AT1 McCooe; Suarez) (independently contracted security company's employees held agent of landlord for purpose of knowledge of tenants having pets).

12. *184 W. 10th St. Corp. v. Marvits*, 33 HCR 454A, NYLJ June 8, 2005, 22:1, HCR Serial #00015023 (Civ NY Cavallo).

13. In a rent-stabilized apartment, that difference can be as much as $1,000 per month or more.

14. *Stasyszyn v. Sutton East Assocs.,* 21 HCR 410A, NYLJ Aug. 18, 1993, 22:1 (Sup NY Cahn) HCR Serial #00001224.

15. *1009 2nd Ave. Assocs. v. NYC OTB Corp.,* 26 HCR 101A, NYLJ March 6, 1998, 25:4 (AD1 Ellerin; Nardelli, Wallach, Rubin) HCR Serial #00009465.

16. *156 Fifth Ave. Corp. v. Edlund & Mulcrone Inc.,* 23 HCR 720A, NYLJ Nov. 29, 1995, 27:2 (Civ NY Madden) HCR Serial #00007937 (double rent during holdover upheld). Even if the amount would normally be stricken down as a penalty, if the tenant actually pays it, the tenant cannot succeed in a suit to get it back.

17. Rent Stabilization Code §2523.5(c)(2) reads:

> Where the tenant fails to timely renew an expiring lease or rental agreement offered pursuant to this section, and remains in occupancy after expiration of the lease, such lease or rental agreement may be deemed to have been renewed upon the same terms and conditions, at the legal regulated rent, together with any guidelines adjustments that would have been applicable had the offer of a renewal lease been timely accepted. The effective date of the rent adjustment under the "deemed" renewal lease shall commence on the first rent payment date occurring no less than 90 days after such offer is made by the owner.

18. There is no current case law exploring the potential interplay of the GOL and RSC provisions. Thus, this is one of those places where a form lease anticipates the landlord's worst case scenario without knowing whether that scenario will indeed play out.

19. Note: Interference can be with respect to all kinds of devices that use radio frequencies such as wireless telephones, remote controls for everything from air conditioners to stereo equipment, microwave ovens, and cell phones. Even common place appliances not normally thought of as electromagnetic in character can also be sources of electromagnetic interference, such as hair dryers, paper shredders, ionic air cleaners, vacuum cleaners, certain types of lighting, and garbage disposals.

20. Buildings lacking a southern exposure need not worry. All satellite dishes in New York State point south.

21. Consider *Poyck v. Bryant*, 34 HCR 750A, 13 Misc3d 699, 820 NYS2d 774, NYLJ Sept. 1, 2006, 22:1, HCR Serial #00016046, TLC Abatements 17, TLC Serial #0401, TLC Nuisance 17, TLC Serial #0406 (Civ NY Hagler) which found a violation of the warranty of habitability caused by second hand smoke coming into an apartment from a neighboring apartment.

22. Gone are the days when sound for purposes of entertainment was produced solely by radios, televisions, and phonographs. Countless are the devices equipped nowadays to reproduce music or what passes for it.

23. Low traffic areas like kitchens, pantries, and bathrooms need not be carpeted. Carpeting is, in any event, problematic in kitchens for risk of fire and in both kitchens and bathrooms because of water issues.