The 'De Minimis' Exception to Actual Partial Eviction

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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). It has long been the law that a tenant that has been actually evicted can stop paying rent. Significantly, the Court of Appeals decided almost 100 years ago, in a decision by Judge Benjamin Cardozo in *The Fifth Ave. Bldg. Co. v. Kernochan*,[1] that 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 in *Kernochan*:

Eviction…suspends the obligation of payment…because it involves a failure of the consideration for which rent is paid. …If such an eviction, though partial only, is the act of the landlord, it suspends the entire rent because the landlord is not permitted to apportion his own wrong.[2]

The Court of Appeals reiterated this principle in *Barash v. Pennsylvania Terminal Real Estate Corp.* in which, citing its prior decision in *Kernochan*, the court stated:

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.[3]

Thus, in what commentators have referred to as the "one inch rule,"[4] the well-settled law of this state has been that where the landlord physically excludes the tenant from any portion of the leased premises, no matter how trivial, such constitutes an actual partial eviction entitling the tenant to a full abatement of rent as the tenant's remedy.

A recent decision by the Court of Appeals in *Eastside Exhibition Corp. v. 210 East 86th Street Corp.*[5] has now held that where "the interference by landlord is small and has no demonstrable effect on the tenant's use and enjoyment of the space," such does not constitute an actual partial eviction for which the tenant is entitled to any remedy.[6]

'Eastside Exhibition'

In *Eastside Exhibition* (as the facts are recited in the Court of Appeals decision), the tenant leased a two-story space configured as a multiplex movie theater with 1,150 seats and four screens. In December 2002, without notice to or consent from the tenant, the landlord entered the premises and installed:

cross-bracing between two existing steel support columns on both of plaintiff's leased floors causing a change in the flow of patron foot traffic on the first floor and a slight diminution of the second floor waiting area. The concededly unaesthetic cross-bracing was placed in preparation for the construction of two additional floors to the building.[7]

In response to the landlord's conduct, the tenant ceased paying rent as a remedy for an actual partial eviction and commenced a lawsuit seeking a permanent injunction barring the landlord from doing any further work in the premises, and directing the removal of the cross-bracing. At trial, the parties stipulated that the total area of the premises was between 15,000 and 19,000 square feet and that the cross-bracing occupied approximately 12 square feet.[8]

New York County Supreme Court (Justice Edward H. Lehner) dismissed the tenant's claim and entered judgment for the landlord for unpaid rent. In its decision, the court stated that although the lease did not allow the landlord to permanently deprive the tenant of any portion of the demised premises and that, citing *Barash*, such a deprivation would normally result in liability for all rent being suspended, the taking of 12 square feet of non-essential space constituted a "de minimis" taking not justifying a full rent abatement.[9]

On appeal, the Appellate Division, in its Sept. 15, 2005 decision, 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.[10]

Thus, the Appellate Division 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."[11] The court, however, continued as follows:

we 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 "appropriate 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."[13] 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."[14] It remanded for a hearing to determine the extent of the abatement.

With respect to the Appellate Division's decision, we observed in our Oct. 5, 2005 New York Law Journal column "Actual Partial Evictions" that the "question…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."[15] We also wrote that it seemed that the Court of Appeals (in *Kernochan* and *Barash*), in setting forth the rule that any actual partial eviction results in a total rent abatement, "had in mind that anything less than an absolute rule might encourage landlords arbitrarily and unilaterally to take space from tenants' demised premises."[16]

In accordance with the Appellate Division's decision, the matter was remanded for a hearing. After a hearing, the Supreme Court found that the tenant failed to establish any damages and made no award to tenant. The Appellate Division affirmed and the Court of Appeals granted leave to appeal.

Court of Appeals Affirms

The Court of Appeals affirmed, but on different grounds, in a six-one decision signed by Justice Carmen Ciparick, with Chief Judge Jonathan Lippman, and Judges Victoria Graffeo, Robert Smith, Eugene Pigott and Theodore Jones concurring. Judge Susan Read was the sole dissenter.

At the outset, the court acknowledged that the "remedy of total abatement of rent for an actual partial eviction is one of very long standing in New York and we do not, herein, jettison or overrule it…."[17] The question before the Court of Appeals, however, was "whether there can be an intrusion on the demised premises that is of such trifling amount that imposition of the draconian remedy of total rent abatement is unjustified."[18]

The court answered that question in the affirmative, holding that not every intrusion into a tenant's premises constitutes an actual partial eviction:

[f]or an intrusion to be considered an actual partial eviction it must interfere in some, more than trivial, manner with the tenant's use and enjoyment of the premises.[19]

In reaching this conclusion, the court observed that the requirement that a partial eviction must intrude on the tenant's use and enjoyment of the premises was supported by prior Court of Appeals precedent:

That a partial eviction must intrude on the enjoyment of the premises was implicated early on in *Dyett* [*v. Pendleton*, 8 Cow 727 (1826)] where the court noted that the tenant, having retained some portion of the premises, nonetheless was not required to pay for the part of the premises retained because there existed "such a disturbance, such an injury to its beneficial enjoyment, such a diminution of the consideration upon which the contract is founded, that the law refuses its aid to coerce the payment of any rent." Similarly, in *Edgarton* [*v. Page*, 20 N.Y. 281 (1859)], we stated that "there must be an entry and expulsion of the tenant by the landlord, or some deliberate disturbance of the possession depriving the tenant of the beneficial enjoyment of the demised premises, to operate a suspension or extinguishment of the rent."[20]

The court further observed that the "rule that any minimal intrusion warrants a total abatement to a case such as this, involving only a trivial taking, 'has little but age and inertia to recommend it'" and that "[s]cholars have criticized an all or nothing rule that is 'more talismanic than rational'" and that "courts in other jurisdictions have rejected such a harsh rule" (citing to a decision from the U.S. Court of Appeals for the Seventh Circuit and one from the California Court of Appeals). [21]

The court thus explained that:

[g]iven the inherent inequity of a full rent abatement under the circumstances presented here and modern realities that a commercial lessee is free to negotiate appropriate lease terms, we see no need to apply a rule, derived from feudal concepts, that any intrusion—no matter how small—on the demised premises must result in full rent abatement. Rather, we recognize that there can be an intrusion so minimal that it does not prescribe such a harsh remedy.[22]

The court concluded that the tenant in *Eastside Exhibition* had failed to establish any right to relief:

on the record before us plaintiff has totally failed to demonstrate any actual damages or loss of enjoyment of the premises due to the landlord's erection of the cross-bracing occupying 12 square feet in a 15,000 to 19,000 square foot space. That the flow of foot traffic was minimally impeded and the cross-bracing was unattractive was merely a trivial interference with the tenant's use and enjoyment of the premises. The interference by the landlord here is thus de minimis and "neither injunctive nor monetary relief is warranted."[23]

The Dissent

Read, in a lengthy dissenting opinion, criticized the majority opinion on several fronts.

Read explained that the majority was incorrect in its reliance on the Court of Appeals' prior decisions in *Dyett* and *Edgarton*, which Read found did not support the majority's conclusion that a partial actual eviction must impair the tenant's use and enjoyment of the demised premises beyond the mere fact of a physical expulsion or exclusion. Read, in analyzing the passages from *Dyett* and *Edgarton* recited by the majority, found that these decisions actually stand for the proposition that "a physical expulsion or exclusion is, by definition, non-trivial."[24]

Read also criticized the fact that the majority "has overruled an easy to understand, easy to apply bright-line rule in favor of a new

de minimis rule that affords no predictability of outcome."[25] Read observed:

Under *Kernochan*, it was very risky for a landlord to intrude on leased space in disregard of the tenant's right to the whole of the property because the tenant might withhold rent. Now it is very risky for a tenant to withhold rent where the landlord wrongfully appropriates any portion of the leased premises because it is left up to the courts to determine whether the ouster is merely trifling in amount and trivial in effect. This determination will inevitably require expensive, protracted litigation with an uncertain resolution.[26]

We note that Read, in making the above-quoted observation, specifically cited to our Oct. 5, 2005 column in this newspaper, in which, as discussed above, we stated that the "de minimis exception to the *Barash* rule" created by the Appellate Division's decision posed "the question whether this decision opens the [flood]gates for landlords to take space from tenants, leaving it to the courts to determine whether the taking was merely de minimis."[27]

Finally, Read implored that the "new de minimus rule" should not apply in *Eastside Exhibition* or any other litigation "arising out of commercial leases entered into *before* today's decision" (italics in original).[28] Read noted that the tenant in *Eastside Exhibition*:

which justifiably relied on clear and longstanding New York law, now faces the prospect of paying landlord nine years' worth of rent (perhaps escrowed, perhaps not), presumably along with [nine] [percent] interest, as a consequence of its confidence in our fidelity to the "certainty of settled rules" governing property rights.[29]

Read also recited the Court of Appeals' admonition in *Gager v. White* that:

"when adherence to the traditional course" of applying a change in decisional law retrospectively is "strongly contra-indicated by powerful factors, including *strong elements of reliance on law superseded by the new pronouncement*, a court may direct that it operate prospectively alone."[30]

Read concluded that this is just such "an unusual case where there has been such a sharp break in the continuity of law that retroactive application should be eschewed."[31]

Conclusion

As observed by Read's dissent, the majority opinion in *Eastside Exhibition* has traded a well-settled, bright-line rule—i.e., that the full abatement of rent is the remedy whenever a landlord physically excludes the tenant from any portion of the premises—for a new "de minimis" rule that depends on the degree of the physical exclusion and its impact on the tenant's use and enjoyment of the premises. There is no doubt that this new rule will lead to much litigation over whether the physical taking was only "de minimis." Needless to say, landlords and tenants would be wise to negotiate specific provisions in any new leases to deal with the impact of this decision.

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Endnotes:

1. 221 N.Y. 370 (1917).

2. Id. at 372-73.

3. 26 N.Y.2d 77, 83, 308 N.Y.S.2d 649 (1970).

4. Friedman on Leases, §29:2.3 at 29-13 [5th ed.].

5. No. 21, NYLJ 1202543034033 (Ct. of App., Decided Feb. 21, 2012).

6. Id. at 1-2.

7. Id. at 2.

8. Id. at 3.

9. Id. at 3-4.

10. 23 A.D.3d 100, 103, 801 N.Y.S.2d 568 (1st Dept. 2005).

11. Id. at 104.

12. Id.

13. Id. at 105.

14. Id.

15 . Warren A. Estis and William J. Robbins, Actual Partial Evictions, NYLJ, Oct. 5, 2005, at 31, col. 5.

16. Id.

17. No. 21, NYLJ, 1202543034033, at 6.

18. Id.

19. Id. at 8.

20. Id. (internal citations omitted).

21. Id. at 7 (internal citation omitted).

22. Id. at 7-8.

23. Id. at 9 (citation omitted).

24. Id.

25. Id. at 17.

26. Id.

27. Id. at 21-22, citing to, Warren A. Estis and William J. Robbins, Actual Partial Evictions, NYLJ, Oct. 5, 2005, at 31, col. 5.

28. Id. at 22.

29. Id. at 22-23.

30. Id. at 23, citing to *Gager v. White*, 53 N.Y.2d 475, 483-84 (1981) (italics in original).

31. Id. at 23.
