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Fees on Fees

Collecting the Legal Fees It Cost You to Collect Legal Fees

By Joseph I. Farca

Does your New York commercial lease form expressly provide that the landlord may recover the legal fees it incurs to recover legal fees from its tenant? If not, then the landlord may be out of luck trying to recover such "fees on fees," as they are known. But it wasn't always this way.

New York law provides that a prevailing party in litigation may recover attorneys' fees from the losing party only where such recovery is authorized by an agreement between the parties, by statute or by court rule. *See*, *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 NY2d 487, 491 (1989), *followed by TAG 380, LLC v. ComMet 380, Inc.*, 10 NY3d 507, 515-16 (2008); *A.G. Ship Maint. Corp. v. Lezak*, 69 NY2d 1, 5 (1986). To be entitled to recover legal fees, the party seeking such fees must be the prevailing party with respect to the central relief it sought in such action or proceeding. *See*, *Nestor v. McDowell*, 81 NY2d 410, 415-16 (1993), and *25 East 83 Corp. v. 83rd Street Assocs.*, 213 AD2d 269 (1st Dept. 1995), *both followed by Vanchiro v. Powells Cove Owners Corp.*, 135 AD3d 851, 852-53 (2nd Dept. 2016).

One benefit to the landlord-client of employing widely-used preprinted commercial lease

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A Tenant's Perspective on SNDAs: Non-Disturbance Is Not Enough

Part One of a Two-Part Article

By James O'Brien

The subordination, non-disturbance and attornment agreement (SNDA) is common to most commercial leasing and real estate financing transactions. The SNDA regulates two competing interests in the same property — tenant's right to possess its premises pursuant to its lease and mortgage lender's security interest in that same premises.

Despite the agreement's title, the most important provision of a subordination, non-disturbance and attornment agreement from a tenant's perspective is neither subordination, non-disturbance nor attornment. The most consequential provisions of the SNDA deal with the recognition of tenant's lease agreement. Though an agreement by mortgage lender not to disturb tenant's possession following a foreclosure is certainly beneficial to the tenant, non-disturbance alone is not enough. The savvy tenant will want the full terms and conditions of its lease to be recognized.

This article outlines the basic elements of an SNDA and will explain the differences between the concepts of "non-disturbance" and "recognition," while contending that lease recognition is more important to the tenant than not having its possession disturbed. In making that argument, we will explore the differences between covenants that "run with the land" and those that are personal to the person who makes them. This article will also discuss SNDA provisions that limit full recognition of a tenant's lease and will offer practical tips on negotiating those provisions.

The Basic Elements of an SNDA

The SNDA contains three basic elements:

1. Subordination;

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2. Non-disturbance; and

3. Attornment.

The subordination provision of an SNDA subordinates tenant's leasehold interest in its premises to the mortgage lender's security interest in the same premises. The first party to possess an interest in real property has a right to that property that is prior to the rights of those who acquire interests in the property thereafter. If a lease is in place before a mortgage is granted, then the lease will survive a foreclosure of that mortgage and the foreclosing lender will take title to the real property subject to the lease. If the mortgage predates the lease, then, in most states, a foreclosure of the mortgage will extinguish the lease. Tenant's agreement to subordinate ensures that its lease will be subordinate to a competing mortgage even if the lease came first.

Non-disturbance refers to an agreement by mortgage lender not to disturb tenant's possession of its premises following any foreclosure, even though tenant has agreed to subordinate its leasehold to the mortgage lender's security interest.

Attornment is an agreement by tenant to recognize the mortgage lender as its successor landlord, but absent an express agreement by successor landlord to recognize all of the terms and conditions of the existing lease, attornment alone will not necessarily ensure that tenant will receive the full benefit of its lease.

If the parties agree to an SNDA when the lease predates the mortgage, then the SNDA effectively preserves the status quo. Even though the tenant has subordinated its otherwise superior leasehold interest, the non-disturbance and attornment agreements that follow that subordination will result in tenant remaining in possession of its premises following any foreclosure, which is the same position that tenant would have been in had it never agreed to subordinate its leasehold interest.

If, however, tenant leases a property that is already subject to a mortgage, its leasehold interest is already subordinate to the lien of the mortgage lender and its lease may be terminated by a foreclosure of the mortgage. In this instance, it would be wise for tenant to seek an SNDA to protect its occupancy rights. Even without an SNDA, however, tenant may not lose possession of its premises.

Leases and the cash flow they produce are the engines that power real estate finance. A property that is not generating cash flow is not desirable as either an investment or as security for a loan. A foreclosing lender is not likely to dispossess existing tenants, because it wants to preserve the cash flow they generate and, consequently, the value of its collateral. There may be exceptions — *e.g.*, where a lease is at a below-market rental rate or where a lease occupies a small area of the building that impedes the execution of a larger, more valuable lease — but, for the most part, tenants under-performing leases are likely to survive a foreclosure, even if their leases are otherwise subordinate to the mortgage being foreclosed.

Some commentators, notably Joshua Stein, in his article, "Needless Disturbances — Do Nondisturbance Agreements Justify all the Time and Trouble?," have argued that SNDAs are not necessary to achieve their intended result, namely an in-place, rent-paying tenant following foreclosure. *See*, 37 REAL PROP. PROB. & TR. J. 701, 707 & 768 (2003) (http://bit.ly/2YOTQt5). The economic realities present when a loan is foreclosed and the business incentives of both lender and tenant will likely lead to this result without the need of an SNDA.

But the question for a tenant is whether being allowed to remain in possession of its premises

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New York's 2019 Rent Laws: Impact on Commercial Landlords

By Daniel J. Ansell

On June 14, 2019, Gov. Andrew Cuomo signed legislation modifying existing rent laws and enacting significant landlord-tenant reforms including the Statewide Housing Security and Tenant Protection Act of 2019 (collectively, the 2019 Rent Laws) (http://bit.ly/2YQKjSm). To date, the real estate industry has focused primarily on the sweeping impact the new laws will have on residential tenancies and the deregulation of rent-stabilized apartments. The reforms, however, also dramatically impact commercial tenancies by altering non-residential summary proceedings and significantly hampering the ability of commercial landlords to respond effectively and quickly to tenant defaults.

New York Summary Proceedings: Background

Summary proceedings were intended to provide landlords with a simple and expeditious method of regaining possession of leased space without the need for a lengthy ejectment action. There are two primary types of summary proceedings-non-payments and holdovers. Prior to commencing a non-payment proceeding, a landlord must serve a statutory rent demand setting forth a good-faith estimate of the rent due. To commence a holdover proceeding, a landlord must first terminate the lease by serving a notice of termination based on a breach by a tenant of a lease provision known as a conditional limitation. Both proceedings can ultimately result in a tenant's eviction and entry of a monetary judgment for unpaid arrears.

Effect of 2019 Rent Laws

Delay

The 2019 Rent Laws significantly delay resolution of both non-payment and holdover proceedings. For example, under prior law, a three-day rent demand was required before commencing a non-payment case. The amended laws now mandate a 14-day notice. RPAPL §711(2). In addition, the deadline for a tenant to answer a non-payment petition has been extended from five to 10 days. RPAPL §732(3).

The 2019 Rent Laws also add a new requirement that "if a [landlord] fails to receive payment of rent within five days of the date specified in the lease agreement, such [landlord] shall send the [tenant], by certified mail, a written notice stating the failure to receive such rent payment." RPL §235-e(d). If a landlord fails to send this additional notice prior to commencing a proceeding based upon the failure to pay rent, the tenant can raise such omission as an affirmative defense. Id. It is unclear, however, if this new notice is required as a predicate to commercial summary proceedings because the requirement is contained in a section that appears to deal exclusively with residential issues. Furthermore, it is uncertain whether this additional notice must be sent prior to service of rent demands and notices to cure. Until these ambiguities are resolved, landlords should send this additional notice prior to serving predicate notices for non-payment of rent.

Under the revised laws, after issue is joined in a summary proceeding, the court is required to grant an adjournment of at least 14 days upon request by either party. RPAPL §745(1). The court also has discretion to grant subsequent adjournments without limitation. Id. Although under prior law the court ostensibly only had discretion to adjourn the trial of a summary proceeding for a maximum of 10 days, additional adjournments were routinely granted. Nonetheless, the extended timeframes under the 2019 Rent Laws will likely result in even further delays.

Use and Occupancy

The 2019 Rent Laws make it more difficult for a landlord to obtain an interim order requiring payment of use and occupancy during the pendency of a summary proceeding. In the past, use and occupancy orders were not discretionary. Instead, the court was required to direct payment of use and occupancy if the necessary conditions were satisfied. Now, the court in its discretion, "upon consideration of the equities," can determine whether a use and occupancy order should be issued. RPAPL §745(2)(a). Moreover, under prior law, the request for a use and occupancy order was traditionally made in court by oral application. Pursuant to the 2019 Rent Laws, a landlord must serve a written motion on notice. *Id*.

Under prior law, the court was required to issue a use and occupancy order upon the earlier of: 1) a tenant's second adjournment request; or 2) 30 days after the parties' first court appearance. The 30-day threshold has now been extended to 60 days. *Id*. Moreover, unlike the prior law, an adjournment requested by a tenant to retain counsel is not counted towards these timeframes. *Id*.

The RPAPL previously required that deposits of use and occupancy be completed within five days of the court's directive. The 2019 Rent Laws eliminate this requirement. *Id*. The prior law also mandated that the deposit be comprised of rent or use and occupancy accrued from the date that the petition was served. Under the 2019 Rent Laws, the tenant is only required to pay use and occupancy that becomes due subsequent to the order. *Id*. Significantly, a tenant's failure to comply with a use and occupancy order no longer results in dismissal of its defenses and counterclaims or issuance of judgment in favor of the landlord. Rather, the 2019 Rent Laws prohibit the court from striking a tenant's defenses or counterclaims and provide that the court,

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in its discretion, can only order an immediate trial. RPAPL §745(2)(d)(i).

Post-Judgment Relief

The 2019 Rent Laws significantly increase a tenant's post-judgment rights. For example, under the former RPAPL §749(3), the court could vacate a warrant of eviction for good cause at any time prior to the eviction. The modified law allows the court to restore the tenant to possession even after eviction. The 2019 Rent Laws also require the court to vacate the warrant of eviction in a non-payment proceeding if the tenant tenders or deposits the rent due at any time prior to the warrant's execution unless the landlord establishes that the tenant withheld rent in bad faith. RPAPL §749(3).

Furthermore, pursuant to the revised RPAPL §749(2), the time limit specified in a pre-eviction notice served by a city marshal, sheriff or other authorized official has been extended from 72 hours to 14 days. Accordingly, even if a landlord obtains a judgment of possession after trial in a non-payment proceeding and a warrant of eviction issues, the tenant has at least two weeks to pay the arrears, stop the eviction and continue its tenancy. Finally, RPAPL §749(1) permits the court, upon a showing of good cause, to enjoin a landlord from reletting or renovating the premises for a reasonable amount of time.

Bankruptcy Implications

In bankruptcy proceedings, landlords often contend that a debtor-tenant may not assume or assign a lease that was terminated prior to the bankruptcy filing. 11 U.S.C. §365(c)(3). Unlike the prerequisite termination notice in a holdover proceeding, however, the predicate rent demand in a non-payment proceeding does not purport to terminate the tenancy. Until the enactment of the 2019 Rent Laws, in a nonpayment proceeding, the tenancy was deemed terminated upon the issuance of the warrant of eviction pursuant to RPAPL §749(3) which provided, in pertinent part, as follows: "[t]he issuing of a warrant for the removal of a tenant cancels the agreement under which the person removed held the premises, and annuls the relation of landlord and tenant …." The 2019 Rent Laws have eliminated this language.

Accordingly, under the revised statute, it is unclear when a lease is deemed terminated in a non-payment proceeding and whether such lese may be assumed or assigned in a bankruptcy proceeding notwithstanding issuance and even execution upon the warrant of eviction. This issue is less relevant in holdover proceedings where the tenancy is cancelled upon service of a termination notice in accordance with the lease's conditional limitation provision.

Unanswered Questions

The 2019 Rent Laws afford housing and civil court judges significant discretion to determine use and occupancy, adjournments and post-warrant stays. It remains to be seen how courts will exercise this discretion and whether legal challenges will be interposed. It is also unclear when a lease will be deemed canceled in a non-payment proceeding and lease termination damages accrue. The application of RPL §235-e(d), which requires notice upon a tenant's failure to timely pay rent, is also uncertain. For example, does this provision apply to commercial proceedings? Can the additional notice be served simultaneously with a rent demand or notice to cure? Will the courts enforce contractual waivers of RPL §235-e(d) and other provisions of the new law?

Landlord Strategies

In light of the 2019 Rent Laws, holdover proceedings may be the best option to address significant tenant defaults. Landlords should ensure that lease contain conditional limitations for non-payment of rent and bolster provisions pertaining to damages, bankruptcy, security deposits, self-help, holdover and legal fees. It is inadvisable to compromise on these protections during lease negotiations because the revised statutory remedies may no longer serve as a sufficient deterrent to tenant defaults.

Analysis

The 2019 Rent Laws adversely impact the rights of commercial landlords in both holdover and non-payment proceedings by extending time periods, adding additional notice requirements, authorizing protracted adjournments, drastically curtailing the right to compel a tenant's payment of use and occupancy and codifying pro-tenant post-judgment relief. The new laws have an even greater adverse impact on non-payment proceedings because they extend the predicate demand from three days to 14 days, the time to answer the petition from five to 10 days and grant a right of redemption until execution on the warrant.

These statutory changes could significantly hamper expeditious resolution of commercial lease disputes. The non-payment proceeding is now of questionable value to landlords and the holdover proceeding may be the better alternative in most circumstances. To the extent practicable, landlords should strengthen relevant lease provisions so that contractual remedies can offer protections no longer provided by statute.

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forms is that the landlord's right to recover legal fees under the provisions of such lease forms have been litigated so frequently that courts can and do cite to the applicable lease articles by rote. *See*, *e.g.*, *Bergman v. Kleinfeld Bridal Corp.*, 14 Misc3d 1229(A), 836 NYS2d 491 (Sup. Ct. Kings Co. 2007) (citing the Real Estate Board of New York's (REBNY) "standard form store lease provisions" simply by reference to their article numbers and header titles).

For example, Article 19 of REBNY's preprinted commercial lease forms provide, with minor variation, as follows:

> If Tenant shall default in the observance or performance of any term or covenant on Tenant's

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CASE NOTES

Despite State Law, Merger Extinguishes Renewal Rights of Successor in Interest

The Court of Appeals of Tennessee, at Nashville, has determined that, despite the general rule that a successor tenant fully takes on the rights and responsibilities of the previous tenant, a successor tenant does not have the right to exercise an option to extend its lease if the lease between the landlord and the original tenant specifically reserved that right for the signing tenant only. *Simmons Bank v. Vastland Dev. P'ship*, 2019 Tenn. App. LEXIS 321 (6/27/2019).

In 2003, First State Bank (original tenant) entered into a lease with Vastland Development Partnership (Vastland or landlord) for a portion of Vastland's building in Nashville. The lease specifically defined "Tenant" as "First State Bank." An addendum to the lease granted First State Bank a renewal option under the following conditions:

> Provided that as of the time of the giving of the First Extension Notice and the Commencement Date of the First Extension Term, (x) Tenant is the Tenant originally named herein, (y) Tenant actually occupies all of the Premises initially demised under this Lease and any space added to the Premises, and (z) no Event of Default exists or would exist but for the passage of time or the giving of notice, or both; then Tenant shall have the right to extend the Lease Term for an additional term of five (5) years (such additional term is hereinafter called the "First Extension Term") …. Adhering to same above, the Tenant shall have the right to extend the Lease term for an additional term of two (2) five (5) year options, hereinafter called the "Second Extension Term" and the "Third Extension Term." (Emphasis added).

The contract also contained a provision stating that original tenant First State Bank would be considered to be in default of the lease if it was "dissolved or otherwise fail[ed] to maintain its legal existence," or upon "any assignment, subleasing or other transfer of Tenant's interest … except as otherwise permitted in [the] Lease."

First State Bank exercised its first extension option in May of 2011, extending the lease term to Aug. 17, 2016.

In September of 2015, during this first extension period, First State Bank merged into Simmons Bank. Thereafter, Simmons Bank continued to pay rent to the landlord.

In January of 2016, successor tenant Simmons Bank informed landlord Vastland in writing that it intended to exercise a second extension of the lease. Vastland responded that because the right to extend the lease was granted in the contract addendum *only* to original tenant First State Bank, Simmons Bank, as the successor tenant, had no contractual right to demand extension of the lease term.

Simmons Bank filed for injunctive relief and a declaratory judgment in Chancery Court on Aug. 5, 2016, seeking the court's determination that it was entitled to exercise the second renewal option under the lease. To make its case, Simmons Bank relied on Tenn. Code Ann. Section 48-21-108(a), which provides in pertinent part that when a merger goes into effect:

> **1.** The corporation or eligible entity that is designated in the plan of merger as an entity surviving the merger shall survive, and the separate existence of every other corporation or eligible entity that is a party to the merger shall cease;
>
> **2.** All property owned by, and every contract right possessed by, each corporation or eligible entity that is merged into the survivor shall be vested in the survivor without reversion or impairment[.]

Based on this statute, Simmons Bank claimed it had acquired the contract rights of First State Bank "without reversion or impairment" when the two banks merged, and Simmons Bank thereby became the "original tenant" named in the lease. Simmons Bank also contended that, while First State Bank lost its "separate existence" following the merger, it continued to exist as a part of Simmons Bank, so that the "legal existence" default provision of the lease did not apply in this situation.

Landlord Vastland countered that Simmons Bank was not entitled to exercise the renewal option because Simmons Bank was not the original tenant named in the lease and the lease extended the option only to the original tenant. Alternatively, should the court find that Simmons Bank met the "original tenant" condition for renewal, Vastland argued that Simmons Bank could not exercise the renewal option because two tenant defaults of the lease terms (failure to remain in legal existence, and transference of the tenant's rights under the lease) occurred prior to renewal, extinguishing the renewal option.

The trial court sided with the successor tenant Simmons Bank, concluding that it had the better argument. The trial court explained: "When the merger occurred, all of First State Bank's contract rights under the Lease were automatically, by operation of law, vested in the surviving corporation, Simmons Bank. First State Bank did not cease to exist, even though its separate legal existence ceased. First State Bank continues to exist, not separately, but as part of Simmons Bank. Consequently, there is no breach under the 'legal existence' default provision in the Lease. Consequently, Simmons Bank, by operation of the Tennessee merger statute, as amended in 2013,

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is the automatically vested Tenant originally named in the Lease."

As to the fact that the merger effected a transfer of the leasehold that, under the terms of the lease, nullified any tenant's ability to compel an extension, the trial court determined that Tennessee's general law providing that successor companies take the rights and responsibilities of their predecessors expressed the legislature's public policy intentions — intentions the court said should not be superseded and "rendered surplusage by the general language of the lease." In other words, it did not matter to the trial court that the lease itself limited the option to extend the lease's term to the signing tenant, because the state's legislature had, for public policy reasons, declared that successor entities take on the contract rights and responsibilities of their predecessors — period. Because under Tennessee law Simmons Bank stood in the shoes of the predecessor tenant First State Bank, it could exercise the option to extend the lease term despite language in the original parties' contract to the contrary. Therefore, the trial court granted Simmons Bank's motion for summary judgment, granting it the right to exercise the contractual option to extend the term of the lease. Vastland appealed.

Reviewing the evidence *de novo*, the appellate court noted at the outset that, as a rule of construction, applicable statutes that "subsist at the time and place of the making of a contract and where it is to be performed become part of the contract — even where silent on this point — as fully as though expressly referred to or incorporated into the instrument." 21 Steven W. Feldman, Tennessee Practice Series Contract Law and Practice §8:23, Westlaw (database updated May 2019); 11 Richard A. Lord, Williston on Contracts, §30:19 (4th ed. 1999). However, also as stated in Feldman, such statutes generally are not applied to construe the contract when the parties to the contract express a contrary intention. Stated the court: "[T]he cardinal rule of contract construction is that the court must give effect to 'the intent of the contracting parties at the time of executing the agreement.' *Planters Gin Co. v. Fed. Comprss & Warehouse Co.*, 78 S.W.3d (Tenn. 2002). To ascertain that intent, we look to the plain and ordinary meaning of the contractual language. *Id.* at 889-90. '[O]ne of the bedrocks of Tennessee law is that our courts are without power to make another and different contract from the one executed by the parties themselves.' *Eberbach v. Eberbach*, 535 S.W.3d 467 (Tenn. 2017). And, '[i]n the absence of fraud or mistake, a contract must be interpreted and enforced as written.' *St. Paul Surplus Lines Ins. Co. v. Bishops Gate Ins. Co.*, 725 S.W.2d 948, 951 (Tenn. Ct. App. 1986)." Because of these principles, the appeals court concluded that the trial court erred in siding with tenant Simmons Bank based only on general legislative principles. "The Lease does not state that 'Tenant' may renew the Lease," it stated in reversing the trial court's grant of summary judgment. "To the contrary, the Lease contains a restrictive provision that expressly restricts the right of renewal to the 'Tenant originally named herein,' which is a clear contractual declaration that the right of renewal was restricted to 'First State Bank,' not its successors or assigns."

Court May Rely on Parole Evidence to Show Illegal Purpose of Sublease

Although a commercial property sublease was not illegal on its face, parole evidence of its illegal purpose was properly credited by the trial court in granting the sublessor a preliminary injunction to prevent the sublessee from enforcing the contract pending trial on the merits. *Sunset Hills Car Wash v. Barricade*, 2019 Cal. App. Unpub. LEXIS 5004 (7/26/19).

Sunset Hills Carwash, Inc. (Sunset), is the lessee of a commercial property. The lease is for a term of 30 years. In April of 2016, Sunset entered into a 10-year contract with General Barricade, LLC (General), allowing General it to build a 9-foot fence along the perimeter of the property. Under the terms of the contract, General would build, maintain and manage the fence, and Sunset would be forbidden to do anything with the fence. For this, General agreed to pay Sunset $9,000 per month.

The City of Los Angeles has in place height and sign laws pertaining to fences. No permit is required to build a fence of up to 10 feet in height. Signs that pertain to free-speech rights, such as political signs, may be displayed on such fences without limitation. However, other types of signs require a permit *unless* the fence or wall in question is a temporary one that has been erected around a construction site, in which case signs may be attached to it as long as the associated building permit for construction is active, or for two years, whichever is shorter. Los Angeles Municipal Code section 14.4.17, subd. (C).

General obtained a permit to build an awning on Sunset's leased property, but only did a portion of this job. It did, however, build the entire fence and then set about to contract to affix advertising signs to it that would be visible to passers-by. General obtained extensions to its building permit, but the permit lapsed in August of 2017. Soon thereafter, Sunset began receiving citations from the City for violation of its sign laws. Sunset paid the fine, but was also put on notice by the City that any continuing violation of the sign laws would subject Sunset to further fines and other punishments. Meanwhile, Sunset's landlord notified it that it was in breach of its lease for building the offending fence and displaying signs upon it. The landlord demanded that the fence be removed. Sunset therefore finished building the awning itself and tore down the fence, just as General was entering into contracts

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with Spotify and Ray Ban to place their advertisements on the fence.

The parties ended up in court, where Sunset sought and was granted a preliminary injunction preventing General from rebuilding the fence and placing advertisements on it. The trial court explained that it was likely the agreement was void as illegal — because its purpose was to circumvent Los Angeles' sign laws — and that the balance of hardships weighed in Sunset's favor, as it risked eviction and further trouble from the City should the fence be permitted to be replaced.

On appeal, General asserted that the contract was "simply to sublease land for a fence in exchange for rent — a very standard commercial lease," and contended that the lease should be enforced based on the maxim that a contract must be construed to be legal wherever possible. *See*, *e.g.*, *Kashani v. Tsann Kuen China Enterprise Co.,* 118 Cal. App.4th 531 (2004). General explained that it was not required by the parties' contract to place advertisements on the fence, so the contract did not compel any illegal action, and there was thus no basis for voiding the contract.

The appeals court noted that, even where a contract is legal on its face, the introduction of parole evidence to prove otherwise is permitted. *Homami v. Iranzadi*, 211 Cal. App.3d 1104 (1989). It found that the trial court had not abused its discretion in granting Sunset's request for preliminary injunction because it was implausible that a third party would simply desire to build a fence on someone else's leased property, and to pay that lessee $9,000 per month, for 10 years, for the privilege. The court explained: "[T]here was substantial evidence to suggest Sunset and General intended to profit by General placing the Fence on the Premises for 10 years for the purpose of displaying advertisements, and engaging in seriatim purported 'construction' projects to falsely suggest the barrier was only a temporary construction fence subject to section 14.4.17, subd. (C) of the Municipal Code rather than a more permanent fence displaying advertising subject to different and more onerous requirements in section 14.4.16, including separate permitting, size restrictions and time limitations on display."

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> part to be observed or performed under, or by virtue of, any of the terms or provisions in any article of this lease, after notice if required, and upon expiration of any applicable grace period, if any, (except in an emergency), then, unless otherwise provided elsewhere in this lease, Owner may immediately, or at any time thereafter, and without notice, perform the obligation of Tenant thereunder, and if Owner, in connection therewith or in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorneys' fees, in instituting, prosecuting or defending any actions or proceeding, and prevails in any such action or proceeding, such sums so paid or obligations incurred with interest and costs shall be deemed to be additional rent hereunder and shall be paid by Tenant to Owner within ten (10) of rendition of any bill or statement to Tenant therefor, and if Tenant's lease term shall have expired at the time of making of such expenditures or incurring of such obligations, such sums shall be recoverable by Owner as damages.

Another benefit of using a preprinted lease form is that the attorney need not worry about committing malpractice by accidentally giving a commercial tenant the right to recover its own legal fees. Whether a landlord should ever agree to a commercial tenant's negotiated request for same is another matter, but unless the lease provides for it, statutory reciprocity of legal fee lease provisions in New York only applies to residential tenants (*see*, Real Property Law §234). Yet another benefit of using preprinted lease forms is to save the client money, both for having to draft virtually identical provisions in a typed lease (or, as often, in a duplicative rider), and then if there is litigation, for having to convince the court that your costly lease should be interpreted just like the preprinted lease form.

But what about recovering "fees on fees" which have not historically been covered by preprinted forms? It used to be that they were recoverable as a matter of course, along with the underlying legal fees. *See*, *Senfeld v. I.S.T.A. Holding Co., Inc*., 235 AD2d 345 (1st Dept. 1997); *Troy v. Oberlander*, 181 AD2d 557 (1st Dept. 1992). This apparently liberal attitude in construing legal fee provisions correlated broadly with other New York appellate court rulings holding that fees incurred in settlement negotiations are also recoverable. *See*, *Tige Real Estate Dev. Co. v. Rankin-Smith*, 233 AD2d 227, 228 (1st Dept. 1996), *citing Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hartel*, 782 F.Supp. 22, 25 (SDNY 1992), *aff'd sub nom. Nat'l Union*

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Fire v. Carlie, 972 F2d 1328 (2d Cir. 1992).

More recently, however, New York courts have required that an award of such fees on fees must themselves "be based upon a specific contractual provision or statute." *See*, *IG Second Generation Partners, L.P. v. Kaygreen Realty Co.*, 114 AD3d 641, 643 (2nd Dept. 2014) (absent "unmistakably clear intent regarding the recovery of fees on fees, a right to recover those fees should not be implied); *546-552 W. 146th St. LLC v. Arfa*, 99 AD3d 117, 120 (1st Dept. 2012) ("In New York, "an award of fees on fees must be based on a statute or on an agreement"").

New York appellate courts have generally hewn to that holding. *See*, *Mulholland v. Moret*, 161 AD3d 883, 885 (2nd Dept. 2018), and *Batsidis v. Wallack Mgmt. Co.*, 126 AD3d 551, 553 (1st Dept. 2015); but *see*, *Katz Park Ave. Corp. v. Jagger*, 98 AD3d 921, 922 (1st Dept. 2012), *citing 1050 Tenants Corp. v. Lapidus*, 52 AD3d 248 (1st Dept. 2008), *citing Senfeld*, *supra*, in which the First Department, comprising Manhattan and the Bronx, sometimes continues to uphold awards of fees on fees. Given this fact, the time has come to update the preprinted forms to expressly include the recovery of fees on fees. While the amount in controversy for fees on fees may often pale in comparison to the sum of the underlying fees, the specter of having to pay fees on fees could discourage a losing party from challenging the underlying fee application in the hopes of gaining leverage to negotiate a lower fee award.

What can we learn from these cases? That leasing lawyers need to keep up with the case law as it evolves, sometimes rapidly, and that even preprinted forms can often use some lawyering to ensure that the client is made whole.

CONCLUSION

Until "fees on fees" are added to the preprinted forms, this is one area where the practitioner would be wise to add an express lease clause — either as an insert to the preprinted form or in a separate lease rider — which provides that recovery of legal fees and expenses shall include the recovery of "fees on fees." Language for such preprinted form insert or lease rider may include words to the effect that:

> "Supplementing Article XX of the lease, whenever this lease provides that the Owner may recover from the Tenant fees and expenses including attorneys' fees, it is expressly understood and agreed that such fees and expenses shall include also the fees and expenses incurred by the Owner to recover such fees and expenses from the Tenant, including 'fees on fees' which are attorneys' fees incurred to recover attorneys' fees."

For good measure, consider adding also provision for fees incurred for work short of litigation, such as for arbitrating, mediating and/or negotiating disputes by the parties under the lease. And if you feel the need to give the tenant a "bene" on legal fees, this could be where you do it. Instead of making legal fees reciprocal, which can eviscerate the landlord's advantage, counsel can negotiate a scaled-back recovery for landlord by "intentionally omitting" legal fees to landlord for arbitration, mediation and/or negotiation of lease disputes.

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SNDAs

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is enough. Does non-disturbance, whether arising due to a mortgage lender's agreement or due to the priority of tenant's leasehold interest, entitle tenant to the full benefit of its bargain following a foreclosure? In short, the answer is no. The reason lies in the somewhat obscure common law distinction between *in personam* and *in rem* covenants.

Non-disturbance permits a tenant to remain in possession of its premises, but does not entitle the tenant to every right and benefit under its lease. Only those covenants that "run with the land" will bind a successor landlord who does not expressly assume the lease. This may be true even if a tenant has attorned to the successor landlord. Attornment creates a lease between tenant and the successor landlord, but the terms of that lease are not necessarily the same as those under tenant's existing lease. Authorities differ as to whether attornment substitutes one landlord for another on the same terms as the existing lease or whether it creates a new tenancy. *See*, Morton P. Jr. Fisher; Richard H. Goldman, "The Ritual Dance between Lessee and Lender — Subordination, Nondisturbance, and Attornment," 30 REAL PROP. PROB. & TR. J. 355, 370 (1995) (http://bit.ly/2YJ1k0N). If a new tenancy is created, then, absent an agreement between the parties, the terms of that tenancy will include terms implied by the acts of the parties and those terms from the original lease that "run with the land." Covenants that are "in rem" will run with the land, whereas "in personam" will not.

The discussion on SNDAs continues in next month's edition of Commercial Leasing Law & Strategy.

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