Invading the Tenant's Space – A Perilous Step No More

by Benjamin Weinstock, Esq.

In many jurisdictions the law is very clear that a landlord's encroachment on the tenant's space, regardless of how minimal, justifies a complete abatement of all rent. In fact, the infamous "not one inch" rule has been New York's law for more than 150 years. However, a recent decision by New York's prestigious Appellate Division, First Department, overruled this longstanding precedent.

In Eastside Exhibition Corp. v. 210 East 86th St. Corp., the tenant leased between 15,000 and 19,000 square feet of space for a quad movie theatre in Manhattan for a term of almost 20 years. The lease permitted the landlord to enter the tenant's premises at reasonable times to make repairs and improvements, but it did not permit the landlord to permanently encroach on the tenant's floor area. Approximately five years into the term, the landlord, without prior notice or permission, entered the tenant's premises and installed floor-to-ceiling steel cross-bracing occupying about 12 square feet of floor area in preparation for construction of two additional floors on the building.

The tenant withheld all rent and brought an action to both enjoin the landlord from doing any future work in the premises and to compel the removal of the cross-bracing. The tenant also asked for compensatory and punitive damages. The landlord served a series of default notices on the tenant and counterclaimed for rent and legal fees in excess of $630,000.

The trial court held that the landlord's invasion was not material and, therefore, did not warrant a total rent abatement. The court also permitted the landlord to leave the encroaching cross-bracing. The Appellate Division affirmed the lower court's decision, but went even further by declaring that the "not one-inch" rule was no longer good law in NY. Instead, the court remanded the case for a hearing to determine the tenant's damages.

Awarding compensatory damages to the tenant for the landlord's breach seems like a very natural and logical holding when viewed from the perspective of contract law. When viewed under the lens of the common law of real property, however, the holding is surprising because of its abandonment of hundreds of years of history and rejection of legal precedent.

The Common Law Lease

The common law considered a leasehold a temporary ownership interest in the land and not merely a contract for possession. In exchange for this "ownership" right, a tenant paid rent. If the tenant's right to possess the land was disturbed by the landlord, the landlord forfeited his right to the rent.

That Was Then - This is Now

The geographic and economic conditions that fomented the development of the common law have been entirely transformed in the modern urban landscape. We are no longer a predominantly agrarian society. Tenants today generally do not occupy the land. Rather, they purchase for their monthly rent a service from the landlord that not only includes the walls that enclose the space they occupy, but also encompasses light, water, power, communications, air-conditioning, vertical transportation, parking and even joint marketing programs. Parties view commercial leases primarily as contracts and not estates in land. As such, the Appellate Division's reliance on contract law rather than real estate law principles is appropriate.

Moving Forward

The Court's holding in Eastside is not necessarily grounds for celebration by landlords. Although clearly intended to protect the landlord from the inequitable loss of its entire rent, it may be the first step on a slippery slope of leasing law reforms that will eventually benefit tenants. It is not far-fetched to imagine how this leniency could backfire. Will a landlord no longer be entitled to reject the tenant's $19,000 rent check because it is only $12 short? Does this holding suggest the possibility that a lease is not violated where the rent is only late by a de minimus amount of time? What if the tenant invades a portion of the common area or another tenant's space? Will the landlord lose the right to require the removal of the tenant? Under principles of contract law, these results are possible if not probable.

The ultimate result of Eastside is not a comforting sense of closure. To the contrary, it casts a pall of foreboding over what will come next. In fact, it is foreseeable that landlords will at some point during the life cycle of a lease encounter a problem whose solution requires permanent installations that encroach into a tenant's space. The landlord's need or desire to do this work is far too important to subject it to the vagaries of state law and the costs and delays of the adjudicatory process. Therefore, landlords will add to their leases additional clauses that expressly permit intrusions into the tenant's premises. Cautious tenants will seek to limit this newfound right

Continued on Page 4

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of landlords and relegate when, where and to what extent such invasion is permitted. This will undoubtedly contribute to making a lease negotiation even more contentious than it already is.

While it is certainly beneficial for landlords and tenants to keep Eastside in mind during lease negotiation, it would be wise not to rely too heavily on its decision. Eastside is certainly a landmark decision but its overturning of the "not one inch" rule has not yet been widely accepted. Just recently, in Sterling Investor Services, Inc. v. Nobo Associates, LLC, New York's Second Department issued a decision that also dealt with partial eviction and ignored Eastside (decided by the First Department). After being New York's law for more that 150 years, it is clear that getting rid of the "not one inch" rule might take some time.

(This article was previously published in The Retail Law Strategist, July 2006.)

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