RUSKIN MOSCOU FALTISCHEK P.C.
Counselors at Law

Not "One Inch"
A Vestige of Feudal Law Erodes in New York

by Benjamin Weinstock

It has been the law of New York for more than 150 years that a landlord's encroachment on the tenant's space, regardless of how minimal, justifies a complete abatement of all rent. Until recently. On September 15, 2005, the Appellate Division's First Department overruled that longstanding precedent.

Some commentators consider this a blockbuster ruling, while others disagree. Regardless of how one characterizes it, whenever precedent is changed so dramatically by the bench the bar is compelled to take a close look.

The facts in *Eastside Exhibition Corp. v. 210 East 86th St. Corp*., 801 NYS2d 568, (1st Dept. 2005) are not in dispute. 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 5 years into the term, the landlord, without prior notice or permission, entered the tenant's premises and installed floor-to-ceiling steel cross-bracing between columns in the tenant's premises in preparation for the landlord's construction of 2 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 that had been installed. 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 case was heard in a non-jury trial.

Ruskin Moscou Faltischek, P.C.
East Tower, 15th Floor
1425 RXR Plaza, Uniondale, NY 11556-1425
516.663.6600
www.rmfpc.com

The trial court found that the encroachment occupied approximately 12 square feet of floor area (between 0.06% and 0.08% of the tenant's total space) "that is not in an area essential to the operation of plaintiff's [tenant's] business and occupies so small a percentage of the total area as to be *de minimus*". Id at 570. The trial court held that "the taking of a non-essential minute area of space" was an exception to the rule that a partial eviction warrants a total rent abatement, id at 570, and the landlord is permitted to leave the encroachment without foregoing any of the agreed rent. Id at 571. In effect, the trial court held that a *de minimus* invasion of the tenant's space was not an illegal eviction by the landlord.

The Appellate Division affirmed the verdict but modified the holding on the law. Rather than declaring that a *de minimus* invasion of the tenant's space was not an eviction, the Appellate Division said ". . . we are constrained to hold that the instant defendant's alteration of plaintiff's premises, without authorization and without consent, was, however small, a taking . . ." id at 571. The Appellate Division further held that the encroachment could remain without molestation by the tenant but the tenant is entitled to be compensated for all its present and future damages. Instead of simply reducing the tenant's rent by the pro rata square foot cost of the area taken by the landlord, the Court remanded the case for a hearing on the extent of the tenant's damages.

The Court's holding seems very natural and logical when viewed from the perspective of contract law, viz., the landlord's breach entitles the tenant to compensatory damages. But when viewed under the lens of real property law, the holding is surprising because of its abandonment of hundreds of years of history and legal precedent.

The story begins in 1066 when William the Conqueror captured England from the Saxons and became the owner of all lands by force of arms. The country was too large for him to manage alone so he divided it up among approximately1500 of his closest friends in exchange for their money and obeisance. Rather than give his Lords full ownership of the land, he made them "tenants" holding of him. In this way they owned the land for the duration of their lives (which he could end at whim) but they could not transfer the land or devise it to their heirs. The land always reverted to the

King. This interest in the property they were given became known as a "leasehold" estate.

By 1650 the transformation from sovereign ownership of land to our allodial system of private ownership was complete and the Common Law was fully entrenched. The characteristics of leasehold estate continued to develop solely under principles of real estate law. The Common Law did not consider a leasehold a contract.

In feudal times and under Common Law, a leasehold estate was considered an ownership interest in land and the Lease was the instrument by which such estate was conveyed. It was far more than the "contractual right to possess another's land" that we generally assume a leasehold is today. It is not a coincidence that the ancient leases which grace the walls of law libraries and conference rooms begin with the recital "This Indenture of Lease" and closely resemble a deed, for in fact they were both considered conveyances, distinguishable only by the duration of the grantee's ownership.

In consideration for this ownership right, tenants paid rents. The right to possession of the land was essential to the landlord's right to receive payment. From this basic concept, Courts found that rents issued to landlords "out of the land" and that "the whole rent is charged on every part of the land". A Common Law landlord was entitled to collect the rents only so long as the tenant had peaceful possession of the land, undisturbed by the landlord or by anyone claiming through the landlord.

This inexorable link between rent and possession is a core principle. At a time when most covenants in a lease were independent, the tenant's covenant to pay rent and the landlord's duty to give possession were interdependent – meaning that a landlord could not collect any rent if the tenant's estate was interfered with in any way by the landlord. This is the origin of the "one inch" rule that the tenant is relieved from all responsibility for rent if the landlord takes even one inch of the tenant's space. As enunciated by Judge Cardozo in New York's leading case, *Fifth Ave. Bldg. Co. v. Kernochan*, 221 NY 370, 117 N.E. 579 (1917), a partial eviction by the landlord suspends the rent because "it involves failure of the consideration for which rent is paid." Id at 372. It cannot be apportioned, said Judge

Cardozo, because the "the landlord is not permitted to apportion his own wrong." Id at 373.
Students and clients find this concept difficult to understand because the geographic and economic conditions that characterized feudal times no longer exist. They have been entirely transformed in the modern urban landscape. We are no longer the agrarian society of the Middle Ages (certainly not the readers of this publication) where the primary value of a lease lay in the land itself. The tenant is no longer the "jack-of-all-trades" farmer. Shopping Center and retail 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.

Commercial leases are viewed by the parties primarily as contracts and not as estates in land. The New York Court of Appeals was even prompted to say in 1979, in a statement that remains almost unnoticed: "the obsolete doctrine of the lease as a conveyance of land was discarded." The same sentiment inspired one trial court Judge to declare :"Hornbook law to the contrary… there is no longer good reason -- if there ever was – why leases should be governed by rules different from those applying to contracts in general."

In the context of this changed reality, the Appellate Division's decision is entirely correct. The rule enunciated by the *Eastside* Court has been percolating for a while. It is surprising that it took this long for it to fully emerge. In fact, the trial court did not think it was making new law. It cited four prior Appellate Division cases going back to 1979 in support of its holding.

The First Department took a much bolder position than the trial court. It did not cloak its overruling of the "one inch" rule in the dicta of prior decisions. Rather, it clearly announced its departure from older law.

To begin, it rejected the trial court's determination that a de minimus invasion is not an eviction. The Court stated, to the contrary, that even a de minimus invasion of the tenant's space is a wrongful partial eviction. Then the Court said it would not follow established precedent and declare a

complete abatement of rent. Instead, it adopted a more proportionate remedy than a total abatement. The Court stated:

"In light of current landlord/tenant realities and policies, it appears particularly untoward automatically to apply harsh and oppressive strictures derived from feudal law that mirror the policies and concerns of that earlier society. Instead, we conclude that a more realistic remedy than total rent abatement should be imposed for a partial eviction of the minimal proportions here present . . . . While plaintiff certainly has a grievance, it is one that can and should be compensated by money damages proportionate to the injury involved. Thus, we hold that plaintiff 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 as a consequence . . ." id at 572.

The *Eastside* Court also referred to the "one inch" rule as a "draconian sanction of total abatement of rent for the actual partial eviction" of the tenant, id at 572. This criticism of the "one inch" rule is not new. The Restatement of Property supports a rent abatement as a more just result. In the words of the Restatement:

"The majority rule has permitted the tenant to refuse to pay any rent when he suffers partial actual eviction. E.g. *Royce v. Guggenheim*, 106 Mass. 201, 8Am.R. 322 (1870); *Kuschinsky v. Flanigan*, 170 Mich. 245, 136 N.W. 362 (1912); *Morris v. Kettle*, 57 N.J.L. 218, 30 A. 879 (1895). This view is the product of the old learning that the rent derives as from the entire leasehold; e.g. *Smith v. McEnany*, 170 Mass. 26, 48 N.E. 781 (1897), and perhaps an element of judicial outrage at the faithless landlord. See, e.g. *Royce V. Guggenheim*, supra. A small number of jurisdictions permit the landlord to collect an abated rent. E.G., *Warren v. Wagner*, 75 Ala. 188, 51 Am.R. 466 (1883). This seems the more just result and is consistent both with remedies for defects in the condition of the premises as set out in Chapter Five and with remedies for interference by a paramount titleholder. See § 4.2. An analogous point of contract law, the doctrine that defaulting party could not get restitution, has been rejected by the Restatement of the Law of Contracts, §357 (1932)."

It is interesting that the Appellate Division failed to cite two if its prior decisions upholding partial rent abatements for partial actual evictions. In *Wilfred Laboratories, Inc. v. Fifty-Second Street Hotel Associates, et al*., 519 NYS2d 220 (1st Dept. 1987), the landlord invaded 8 square feet of the tenant's 18,000 square foot space to construct a 26-story addition to its building. The Appellate Division affirmed the trial court's grant of a 15% rent abatement for the invasion, albeit on waiver grounds. Similarly, in *81 Franklin Co. v. Gianccini*, 554 NYS2d 207 (1st Dept. 1990), the Court found that the tenant had been deprived of about 1% of its total leased space. The tenant sued to recover rent it had paid for the period it was displaced by the landlord's renovation work. The "one inch" rule was not applied and the Court granted only a partial abatement stating: "The tenant may recover in damages the proportionate part of the rent of that portion of the premises from which he was evicted…."(emphasis supplied).

Eastside is also consistent with other changes that have occurred in landlord-tenant law. For example, Common Law cases involving constructive eviction required the landlord's wrongful conduct to deprive the tenant of the beneficial enjoyment or actual possession of the entire premises before rent would abate. A partial constructive eviction was not possible and the tenant had to vacate the entire space, not just a part of it. More recently, Courts have sanctioned abatements for partial constructive evictions in derogation of Common Law principles.

Another example is the implied warranty of habitability in residential leases. This rule was first judicially decreed in New York in 1971, and was subsequently codified by the legislature in August 1975 in RPL §235-b. At Common Law, the landlord had no duty to maintain or repair the tenant's premises. The doctrine of caveat emptor caused the tenant to assume full responsibility for the condition and fitness of the premises. Even where the landlord covenanted to make repairs, the landlord's breach did not justify the tenant's withholding of rent because the covenant to pay rent was independent of the landlord's covenant to repair. The obsolescence of this Common Law rule became apparent and courts concluded that the urban tenant leasing an apartment contracted for a place to live and not an estate in land. As such, the landlord's contractual duty is to ensure that it remains habitable.

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 check because it is only $12 short? Does this holding suggest the possibility that a lease will not terminate upon the occurrence of a conditional limitation where the rent is only late by a de minimus amount of time? Will all jurisdictions now require landlords to mitigate damages? 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. One could argue that unbridled speculation of this type is unwarranted but surely one needs to know where the line will be drawn. Otherwise the parties may try to anticipate solutions for such contingencies. This will surely make the drafting and negotiation of leases more time consuming and may even result in claims against counsel if they do not attempt to cover every remote contingency.

As with all matters involving transactional real estate, one should not rely solely on precedent. Practitioners should be careful to specifically address this issue in the lease. Landlords' counsel should provide that intrusions in the floor area of the tenant's premises for columns, risers, wires, pipes, stairwells, elevators, shafts and other building systems, neither violate the covenant of quiet enjoyment nor constitute a partial eviction provided they do not materially interfere with the tenant's occupancy and business. Likewise, tenants' lawyers must be wary that where the lease is silent, a landlord may intentionally invade their client's premises in derogation of the "one inch" rule. Therefore, they should seek to limit this newfound right of landlords and relegate when, where and to what extent such invasion is permitted In addition, tenants should try to limit such invasions to specific purposes, such as the enlargement of the Center or for permanent structural repairs. A back door to recapture part of a tenant's space for the purpose of leasing it to others, does not belong in the alteration or maintenance sections of a lease. It should be addressed directly, it at all, in a separate provision.

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. Has Professor Randolph warns tenants that: "The court here would sanction the landlord's simply moving in for its own convenience and redoing the lease on a 'no harm, no fault' rationale."? We will have to wait to find out.

---

*Benjamin Weinstock is co-chair of the Real Estate Department of Ruskin Moscou Faltischek, P.C., Secretary of the New York State Board of Real Estate, adjunct professor of real estate law at Yeshiva University and a member of the Executive Committee of the New York State Bar Association Real Property Law Section. The author acknowledges the research assistance of Theresa Kraker, a Real Estate Associate at Ruskin Moscou Faltischek, P.C. (*bweinstock@rmfpc.com*)

[1] Cristopher v. Austin, 11 NY 216 (1854), *Peck v. Hiler*, 24 Barb. 178 (1850), *Johnson v. Oppenheim*, 2 Jones & S. 416 (1872), WL 9166.

[2] Professor Patrick Randolph of the University of Missouri – Kansas City School of Law and moderator of the American Bar Association's Daily DIRT discussion board is irritated by the New York Bar's apathy toward this decision. He writes in one posting: " The editor urges the New York leasing bar to seek an amicus appearance and encourage an appeal to reestablish the very important principle that landlords cannot invade leased space with impunity any more than anyone else can – de minimus consequences or not . . . New York Bar – get busy!!! This is wrong." Posting of Patrick Randolph, DIRT@umkc.edu to DIRT@listserv.umkc.edu (September 20, 2005, EST)[hereinafter *DD Listserv*] copy on file with author.

Professor Randolph is right about the apathy. The author was able to find only one article discussing this case. It is a short summary of the facts and holding in the *N.Y. Real Property Law Journal. See* Nicholas Malito, 33 *N.Y. Real Property Law Journal,* No. 4, 192 (Fall 2005).

In the course of this case analysis, the author will endeavor to show that this holding is neither shocking nor unexpected. To the contrary, the author believes that it is overdue and much needed to prevent giving tenants a

windfall by allowing them to occupy the premises rent free when they have been deprived of only the tiniest fraction of their space.

[3] The author assumes the differential is the variance between usable and rentable square footage but the decision does not explain why the stipulated square footage of the demised premises is not exact.

[4] The decision does not explain why permanent cross-bracing was needed in the tenant's premises on the first and second floors of the landlord's 7-story building other than to say it was intended to support the addition of an eighth and ninth floor to the building.

[5] This point sounds very much like the principle of "*de minimus non curat lex*" – the law does not concern itself with trifles. The notion that not every trivial wrong is worthy of legal redress and judicial attention, however, is precisely contrary to the "one inch" rule.

[6] Lords had to take an oath of fealty to the King. Hence, the name "feudal" system.

[7] Christopher, 11 NY at 218; Armstrong v. Cummings, 58 How Pr 331 (1880).

[8] Real estate principles crystallized before the development of mutually dependent covenants as a principle of contract law. This is no longer the case and in addition to the interpendancy of rent and possession, courts have found that the tenant's obligation to pay rent is likewise suspended when the landlord breaches his contractual duty to maintain and repair the premises, maintain its habitability, or provide other contractual services. These cases are more in line with contemporary social conditions and modern legal values. *Green v. Superior Court*, 517 P2d 1168 (Sup.Ct.Ca. 1974).

[9] *Park West Management Cop. v. Mitchell*, 418 NYS2d 310 (1979) This declaration is consistent with the position advocated by some scholars. See id. and the sources cited at p. 1173. Even scholars who criticize the Court's holding, acknowledge the changed reality. For example, Professor Randolph chides the *Eastside* decision saying, "New York leases have been

removed from their status as property and have been reduced to mere contracts." *DD Listserv*. Further support for the notion that leases are contracts and not property is found in New York RPL §235-c which states that if a court finds any lease clause unconscionable as a matter of law, the court may refuse to enforce the lease or may "blue pencil" the clause and enforce the balance of the lease. Surely this reformation is only possible because a lease is viewed as a contract rather than a property right.

[10] *Parkwood Realty Company v. Marcano*, 353 NYS2d 623, 624 (Civ.Ct. 1974).

[11] Restatement (Second) of Property, Landlord and Tenant §6.1 (Reporter's Note 6 1977).

[12] *Fifth Ave. Bldg. Co., v. Kernochan*, 221 NY 370, 117 N.E. 579 (1917).

[13] *Manhattan Mansions v. Moe's Pizza*, 561 NYS2d 331 (Civ. Ct. 1990). Arbern Realty Co. v. Clay Craft Planters, Inc., 727 NYS2d 236 (2nd Dept. 2001). In *Manhattan Mansions*, the landlord permitted a persistent water leak in a portion of the tenant's store to remain unrepaired for almost one year, causing the tenant to close its pizza shop periodically to clean up the mess. The Court extended the constructive eviction rule, which theretofore required the tenant to vacate the entire premises, to a partial constructive eviction where only a portion of the premises was vacated. Rather than abating all rent, the tenant received only a partial abatement commensurate with the period its occupancy was disturbed. Likewise, in *Arbern Realty*, the tenant was constructively evicted from several loading docks, a small part of the leased premises, when the landlord permitted a reduction in the number of parking spaces (not part of the leased premises) adjacent to the building. The Appellate Term upheld a 25% rent reduction.

See also *Kipsborough Realty Corp. v. Goldbetter*, 367 NYS2d 916 (Civ.Ct. 1975), and *Meinken v. Levinson*, 267 NYS 612 (1st Dept. 1933).

[14] *Jackson v. Rivera*, 318 NYS2d 7 (Civ.Ct. 1971).

[15] *Green*, 517 P2d at 1172.

[16] *Park West Management Corp. v. Mitchell*, supra at 323.

[17]Green v. Superior Court, supra at 1172.

[18] *Ferris v. Rashbaum*, 42 NYS2d 363 (1943).

[19] "Upon the occurrence of a conditional limitation, the lease has come to an end. There is nothing the tenant can do to revive it. He cannot recoup any rights by curing the default, because the landlord is not proceeding on a default. Nor can equity relieve the tenant from the default; for, the lease is at an end." 2 *New York Real Property Practice, Rasch's Landlord & Tenant* § 23.25 (Patrick A. Randolph, Jr. ed.) [4th ed. 1998].

[20] A limited number of jurisdictions including, notably, New York, Massachusetts and Pennsylvania do not require a landlord to mitigate damages in commercial leases or prevent a landlord from accelerating rents when a tenant breaches the lease. ***Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.***, 637 N.Y.S.2d 964 (1995); *Fifty States Management Corp. v. Pioneer Auto Parks*, 415 NYS2d 800 (1979). A thorough state-by-state analysis regarding mitigation of damages is found in 2 Milton Friedman, *Friedman on Leases*, app. 16A [5th ed. 2005].

[21] The author was unable to find a case that adjudicates the rights and remedies of a landlord in this situation. However, in cases involving minor encroachments by adjacent landowners, the general rule states that where the encroachment is minor and unintentional or where the expense of removing the encroachment exceeds the benefit that would accrue from its removal, the appropriate remedy is monetary damages. See *Christopher et.al. v. Rosse et. al.*, 458 NYS2d 8 (3d Dept. 1982); *Lawrence et al. v. Mullen*, 338 NYS2d 15 (2nd Dept. 1972); *Goldbacher v. Eggers*, 76 NYS 881 (Sup Ct 1902); 6 Warrens Weed New York Real Property, Injunctions § 67.34 [5th ed.]. In other words, if, after weighing the equities, the court determines that the injunction (the type of relief typically sought in these circumstances) would unfairly prejudice the encroacher, the court will grant money damages in lieu of the injunction.

By analogy, this suggests that under the appropriate circumstances a court would reach the same result involving landlords and tenants. Where the tenant's occupation of space belonging to the landlord is minor and unintentional, or where the cost to the tenant for removal exceeds the

benefit to the landlord from its removal, the landlord would be unable to force the tenant to remove the encroachment. The sole remedy available to landlord would be damages for the encroachment in the form of rent for that space.

[22] *DD Listserv*.