COMMERCIAL LANDLORD TENANT LAW 2022

2022 Seminar Material

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COMMERCIAL LANDLORD TENANT LAW 2022

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Commercial Landlord Tenant Law 2022

Bruce E. Gudin, Esq.

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Introduction

I have moderated and presented this, and similar programs for NJ ICLE for over 25 years. Ordinarily, we simply introduce the speakers or panelists, talk a little about what we're going to "talk about," and break into the rote seminar materials in the hope of imparting some useful information while earning the mandatory CLE credits that we are obligated to obtain to maintain our good standing in the Bar.

Today, we are presenting this seminar both live and remotely. As our State, and effectively the world, emerges from the mandatory "lockdowns" and global chaos that has resulted because of the COVID-19 Virus Pandemic, it will likely be quite some time before we get back to a "new" normal as our Courts continue to operate remotely, and as many people continue to work-from-home. Governor Phillip Murphy declared a State of Emergency over two years ago, and that declaration has still not been lifted.

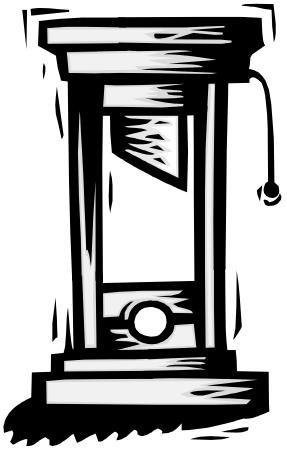
The situation in the real estate market and in the Courts is still "fluid." The legal changes due to the pandemic has affected our clients and how they do business in the Commercial Real Estate world, and how we, as attorneys, have had to modify our practices. The current economy, the availability of commercial space, the shift to "work-from-home," as well as other considerations have led to a growth in the number of commercial landlord tenant cases that attorneys are involved with. Usually, a tremendous amount of time, effort, and money is spent establishing a new tenancy. However, things may occur (or not occur) which results in a decision to terminate the tenancy. In our current economic climate, the decision to pursue repossession of a demised premises is not always an easy one. It is now commonplace for landlords to spend a lot of time discussing "workouts" and alternatives to sustain a failing tenancy. Certainly, in the event of a monetary default by the tenant, the decision to terminate might be easier. In the event of a non-monetary default, a landlord may elect to overlook (read "waive") one or more events of default. We hope to engage with you today in a mutually thought-provoking discussion on these, and related topics.

I hope you find the presentation materials and information useful.

Bruce E. Gudin, Esq.

Bruce E. Gudin, Esq.

AFTER TRIAL



ENTRY OF A JUDGMENT AND EXECUTION

After trial, there can only be one of two results, (1) possession is awarded to the landlord, or (2) possession remains with the tenant, i.e. "case dismissed!" If judgment is awarded in favor of the landlord, the landlord has 30 days to request a "Warrant of Removal" to be issued by the court clerk.

No Warrant of Removal shall issue until the expiration of three business days after entry of a Judgment of Possession in both residential AND commercial eviction cases. (R.6:7-1(d). In a commercial setting the judgment may be executed immediately after it is issued. A landlord in New Jersey CANNOT use "self-help" and conduct the lock out themselves at any time. A Superior Court Officer, commonly referred to as a Constable, must be used. If more than 30 days have elapsed since the date the judgment of possession was entered, and the parties have not entered into a post-judgment agreement, the Warrant may only be obtained with the consent of the tenant or by Order of the Court after notice is given to the tenant that the landlord is so applying.

(B) STAYS OF EXECUTION - BY COURT ORDER

New Jersey statutes permit the court to "stay" (postpone) the issuance and/or execution of a warrant of removal for up to 6 months after judgment of possession is entered in favor of a residential landlord. The stay may be granted if it appears that the tenant will "suffer a hardship because of the unavailability of other dwelling accommodations." The relief lies with the discretion of the judge. Pursuant to statutes, the stay may be granted so long as:

(a) all rent and court costs are paid;
(b) the tenant is not disorderly;
(c) the tenant does not willfully damage the premises; and
(d) rent is paid as it becomes due.

The court, as a matter of course, does not issue a stay of eviction on the initial return date. Rather, it forces the tenant to go home and try to secure alternative living quarters. If they are unsuccessful, the tenant must then return to court and file an application for an Order to Show Cause. An Order to Show Cause filed by the tenant, if granted, directs the landlord to appear in court to be heard as to why the tenant should not be relieved from the effects of the judgment of possession. The application by the tenant requires them to submit a certification. The court considers the certification of the tenant and either grants the application for the Order to Show Cause or signs an Order for Orderly Removal which gives the tenant a "few" extra days to vacate the premises.

VACATING A JUDGMENT

On the return date of an Order to Show Cause, the court will consider whether to vacate the judgment of possession. If the judgment of possession was based upon nonpayment of rent, and the tenant deposits into court all of the rent and court costs due, the judgment must be vacated by statute. But what if the tenant has the money a few days later? In that case, the court can consider extraneous factors the landlord may present regarding the tenant. A suggested strategy to defeat a tenant's applications to vacate a judgment, even when they have all the rent money, is by showing that the tenant has been brought to court before. It is even more favorable to the landlord when the tenant has brought Orders to Show Cause in the past. A court may be constrained to give the tenant another "break."

An application for relief must be made within a reasonable time after judgment is entered. Tenants seeking relief from the effects of a judgment may rely upon both the statutes and Court Rules to sway the court to find favor with their position.

DISPOSING OF TENANT'S PERSONAL PROPERTY

A concise set of statutes that deal with the disposition of a former tenant's personal property known as the Abandoned Property Act. **NJ ST 2A:18-72.** Pursuant to the Act a landlord of commercial or residential property may dispose of any tangible goods, chattels, manufactured or mobile homes or other personal property left upon a premises by a tenant after giving notice as required by (.2A:18-73), only if the landlord reasonably believes under all the circumstances that the tenant has left the property upon the premises with no intention of asserting any further claim to the premises or the property and:

a. A warrant for removal has been executed and possession of the premises has been restored to the landlord; or

b. The tenant has given written notice that he or she is voluntarily relinquishing possession of the premises. The provisions of P.L.1999, c. 340 (C.2A:18-72 et al.) shall not apply to the disposal of tenant property left on nonresidential rental property if there is a lease in effect which has been duly executed by all parties which contains specific terms and conditions for the disposal of tenant property.

Amended by L.2001, c. 51, § 1, eff. April 9, 2001 Legislation, in sub sec. b., added "The provisions of P.L.1999, c.340 (C.2A:18-72 et al.) shall not apply to the disposal of tenant property left on nonresidential rental property if there is a lease in effect which has been duly executed by all parties which contains specific terms and conditions for the disposal of tenant property."

Landlords are still prohibited by statute from seizing a residential tenant's property. Prior to the enactment of the law against "distraint," landlords would often take a tenant's property to offset rent monies owed.

CHAPTER 340
ASSEMBLY No. 1706
ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE--ABANDONED TENANT PROPERTY

AN ACT concerning the disposition of personal property abandoned by tenants, supplementing chapter 18 of Title 2A of the New Jersey Statutes, chapter 10 of Title 39 of the Revised Statutes and amending P.L.1973, c. 137.

Be It Enacted by the Senate and General Assembly of the State of New Jersey:

NJ ST 2A:18-72. Disposal of remaining property abandoned by tenant

A landlord of commercial or residential property, in the manner provided by P.L.1999, c. 340 (C.2A:18-72 et al.), may dispose of any tangible goods, chattels, manufactured or mobile homes or other personal property left upon a premises by a tenant after giving notice as required by section 2 of P.L.1999, c. 340 (C.2A:18-73), only if the landlord reasonably believes under all the circumstances that the tenant has left the property upon the premises with no intention of asserting any further claim to the premises or the property and:

- **a. A warrant for removal has been executed and possession of the premises has been restored to the landlord; or**
- **b. The tenant has given written notice that he or she is voluntarily relinquishing possession of the premises.**

The provisions of P.L.1999, c. 340 (C.2A:18-72 et al.) shall not apply to the disposal of tenant property left on nonresidential rental property if there is a lease in effect which has been duly executed by all parties which contains specific terms and conditions for the disposal of tenant property.

NJ ST 2A:18-73 Notice to tenant prior to disposition

To dispose of a tenant's property under this act, a landlord shall first give written notice to the tenant, which shall be sent by certified mail, return receipt requested or by receipted first class mail addressed to the tenant, at the tenant's last known address (which may be the address of the premises) and at any alternate address or addresses known to the landlord, in an envelope endorsed "Please Forward."

"Receipted first class mail" for purposes of this section means first class mail for which a certificate of mailing has been obtained by the sender but does not include certified or registered mail."

When the property subject to disposal is a manufactured or mobile home, a copy of the notice required pursuant to this section shall also be sent to the Director of the Division of Motor Vehicles and to any lien holders with security interests in the property which have been recorded with the Division of Motor Vehicles.

NJ ST 2A:18-74 Contents of notice

The notice required under section 2 of P.L.1999, c. 340 (C.2A:18-73) shall state as follows:

a. That the property is considered abandoned and must be removed from the premises or from the place of safekeeping, if the landlord has stored the property as provided in section 4 of P.L.1999, c. 340 (C.2A:18-75), by a date as follows;

(i) for all property other than manufactured or mobile homes not less than 30 days after delivery of the notice, or not less than 33 days after the date of mailing, whichever comes first, or

(i) for property which consists solely of manufactured or mobile homes, not less than 75 days after the delivery of the notice, or not less than 78 days after the date of

mailing, whichever comes first, or the property will be sold or otherwise disposed of; and

b. That if the abandoned property is not removed:

i. The landlord may sell the property at a public or private sale; or

ii. The landlord may destroy or otherwise dispose of the property if the landlord reasonably determines that the value of the property is so low that the cost of storage and conducting a public sale would probably exceed the amount that would be realized from the sale; or

iii. The landlord may sell items of value and destroy or otherwise dispose of the remaining property.

c. That in the case of a residential tenant, if the tenant claims the property within the time provided in the notice, the landlord must make the property available for removal by the tenant without payment by the tenant of any unpaid rent.

NJ ST 2A:18-75 Storing abandoned property

After notifying a tenant as required by sections 2 and 3 of P.L.1999, c. 340 (C.2A:18-73 et seq.), a landlord shall store all goods, chattels, manufactured or mobile homes and other personal property of the tenant in a place of safekeeping and shall exercise reasonable care for the property, except that the landlord may promptly dispose of perishable food and shall allow an animal control agency or humane society to remove any abandoned pets or livestock. A landlord may store a tenant's manufactured dwelling or residential vehicle on the space previously rented, elsewhere on the premises or in a safe location off the premises. A landlord shall be entitled to reasonable storage charges and costs incidental to storage. A landlord may store property in a commercial storage facility, in which case the storage cost shall include the actual storage charge plus the reasonable cost of removal of the property to the place of storage.

NJ ST 2A:18-76 Conditions under which the property is deemed abandoned

a. If a tenant responds in writing or orally to the landlord, on or before the day specified in the required notice, that the tenant intends to remove the property from the premises, or from the place of safekeeping if the landlord has stored the property as provided in section 4 of P.L.1999, c. 340 (C.2A:18-75), and does not do so within the time specified in the notice or within 15 days after the written response, whichever is later, the tenant's property shall be conclusively presumed to be abandoned.

b. If a lienholder responds in writing to the landlord concerning a security interest in any manufactured or mobile home, and the lienholder indicates an intent to remove the property from the premises, or from the place of safekeeping, or to pay rent as a condition of leaving the property on the premises, but fails to remove the property or make rental payments within the time specified in the notice or within 15 days after the written response, whichever is later, then the landlord may proceed as if the lienholder had not responded.

c. If no response is received from a tenant or lienholder within the time period provided under section 3 of P.L.1999, c. 340 (C.2A:18-74), then the tenant's property shall be conclusively presumed to be abandoned.

NJ ST 2A:18-77 Tenants reimbursement for storage costs

Upon removal of his property, a tenant shall reimburse the landlord for the reasonable cost of storage for the period the property was in the landlord's safekeeping, including the reasonable cost of removal of the property to a place of storage. A landlord shall not be entitled to reimbursement for storage and removal costs which are greater than the fair market value of such costs in the locale of the rental property. A landlord shall not be responsible for any loss to a tenant resulting from storage of property in compliance with this act unless the loss was caused by the landlord's deliberate or negligent act or omission.

NJ ST 2A:18-78 Disposal of property, options

Property that has been conclusively presumed to be abandoned may be disposed of in any of the following ways:

a. The landlord may sell the property at a public or private sale;

b. The landlord may destroy or otherwise dispose of the property if the landlord reasonably determines that the value of the property is so low that the cost of storage and conducting a public sale would probably exceed the amount that would be realized from the sale; or

c. The landlord may sell certain items and destroy or otherwise dispose of the remaining property, in accordance with subsections a. and b. of this section. A public or private sale authorized by this section shall be conducted in accordance with the provisions of section 12A:9-504 of the "Uniform Commercial Code" (C.12A:9-504).

NJ ST 2A:18-79 Immunity

Nothing in P.L.1999, c. 340 (C.2A:18-72 et al.) shall diminish the right of a landlord of a nonresidential property to use distraint when authorized by law.

NJ ST 2A:18-80 Deductions from sale proceeds

A landlord may deduct from the proceeds of any sale the reasonable costs of notice, storage and sale and any unpaid rent and charges not covered by a security deposit. After deducting these amounts, the landlord shall remit to the tenant the remaining proceeds, if any, together with an itemized accounting. If the tenant, after due diligence, cannot be found the remaining proceeds shall be deposited into the Superior Court and, if not claimed within 10 years, shall escheat to the State.

NJ ST 2A:18-81 Compliance with act constitutes complete defense

Compliance in good faith with all the requirements of this act shall constitute a complete defense in any action brought by a tenant against a landlord for loss or damage to personal property disposed of pursuant to this act.

NJ ST 2A:18-82 Noncompliance with act; tenants recovery

If a landlord seizes and retains a tenant's personal property without complying with this act, the tenant shall be relieved of any liability for reimbursement to the landlord for storage and removal costs and shall be entitled to recover up to twice the actual damages sustained by the tenant.

NJ ST 2A:18-83 Applicability of act

This act shall not be applicable to any unclaimed property which must be disposed of in accordance with the "Uniform Unclaimed Property Act," P.L.1989, c. 58 (C.46:30B-1 et seq.).

NJ ST 2A:18-84 Nonapplicability to motor vehicles

This act shall not be applicable to abandoned motor vehicles.

This act shall take effect immediately.

Approved January 10, 2000.

Effective January 10, 2000.

Other statutes modified or added by P.L. 1999 c.340

NJ ST 39:10-15.1 Sale of a manufactured (mobile) home

If a manufactured home is sold or otherwise disposed of pursuant to P.L.1999, c. 340 (C.2A:18-72 et al.), the Director of the Division of Motor Vehicles shall issue, upon proof of purchase, a certificate of ownership to the purchaser, with no encumbrances listed thereon.

Section 1 of P.L.1973, c. 137 (C.39:4-56.6) is amended to read as follows:

NJ ST 39:4-56.6 Unattended vehicles

No person shall park or leave unattended a vehicle on private property without the consent of the owner or other person in control or possession of the property or for a period in excess of that for which consent was given, except in the case of emergency or disablement of the vehicle in which case the owner or operator thereof shall arrange for the expeditious removal of the vehicle. This section shall not apply to manufactured or mobile

homes left unattended and for which there exists or existed a rental agreement to occupy a space on the property.

The owner or other person in control or possession of the property on which a vehicle is parked or left unattended in violation of this section may remove or hire another person to remove and store the vehicle. It shall be the obligation of the owner of the vehicle to pay the reasonable costs for the removal and for any storage which may result from such removal before he shall be entitled to recover the possession of the vehicle. If the owner of the vehicle refuses to pay such costs or fails to make any claim for the return of the vehicle within 90 days after such removal, the vehicle may be sold at public auction in accordance with the provisions of N.J.S.2A:44-20 through N.J.S. 2A:44-31.

Prior to this new law, a landlord was under no duty to care for property that a tenant left behind.

Landlords are still prohibited by statute from seizing a residential tenant's property. Prior to the enactment of the law against "distraint," landlords would often take a tenant's property in an effort to offset rent monies owed.

Notice to tenant prior to disposition
Via Certified Mail/RRR

[tenant's name & address]

Re: [property address]

Dear _____:

A Judgment for Possession of the above referenced premises was awarded to your landlord, and possession has been secured as of _____. This letter shall constitute notice to you that all of the personal property you may have left in the premises is considered abandoned and it must be removed no later than 33 days from the date of this notice.

If you do not retrieve all of the property within 33 days of the date of this letter, the landlord will conclusively presume that it is abandoned and may: (a) sell all of the property at a public or private sale: (b) dispose of the property if they determine that the value of the property is so low that the cost of storage and conducting a public sale would probably exceed the amount that would be realized from the sale; or (c) sell some of the items of value and destroy or dispose of the remaining property. Under New Jersey law, if you claim the property by the date set forth above, they must make the property available to you and the law requires that you pay the landlord for the storage costs and costs incidental to storage. Payment must be made by money order only.

You may contact _____ at tel. # _____ between the hours of _____ Monday through Friday to make the necessary arrangements.

Very truly yours,

_____,Landlord

A Landlord cannot simply assume that because a tenant has vacated that return of legal possession of the premises has been tendered.

If any tenant vacates premises owing rent or breaching the lease, the landlord is under a **duty to mitigate damages** by making a reasonable effort to relet the premises. Being a matter of contract law, this applies to both residential and commercial tenancies, and it is the lessor who bears the burden of showing the efforts made to mitigate the damages. If the landlord relets the property at a **higher rental,** the tenant who breached the lease by vacating prematurely is **not** entitled to a credit for the "excess" rent. Pursuant **to N.J.S.A. 2A:42-5 and 2A:42-6,** which are reproduced below, a lessor is entitled to receive double the rent from a tenant that either holds over after they have given notice of their intention to vacate the premises, or after the expiration of the lease term.

2A:42-5. Holding over by tenant after giving notice of quitting; double rent recoverable

If a tenant of real estate shall give notice of his intention to quit the premises by him held at a time specified in such notice, and shall not deliver up the possession of such real estate at the time specified in the notice, such tenant, his executors or administrators, shall, from such time, pay to his landlord or lessor, his heirs or assigns, double the rent which he should otherwise have paid, to be levied, sued for and recovered at the same times and in the same manner as the single rent before the giving of such notice could be levied, sued for and recovered. Such double rent shall continue to be paid during all the time such tenant shall continue in possession after the giving of such notice.

2A:42-6. Willful holding over by tenant after expiration of term; notice to deliver possession; penalty

When a tenant for any term or any other person coming into possession of any real estate by, from or under, or by collusion with such tenant, willfully holds over any such real estate after the determination of such term and after demand made and notice in writing for delivering the possession thereof, given by his landlord or lessor, or by the person to whom the remainder or reversion of such real estate shall belong, the person so holding over shall, for and during the time he so holds over or keeps the person entitled out of possession of such real estate pay to the person so kept out of possession, his executors, administrators or assigns, at the rate of double the yearly value of the real estate so detained, for so long a time as the same is detained. Such amount shall be recoverable by an action in any court of competent jurisdiction.

COMMERCIAL LEASING CONSIDERATIONS

Lauren A. Perrella, Esq.

Letter of Intent (LOI)

- Premises (Type/Use/Description)
- Term (Lease vs. Rent Commencement)
- Rent (Base Rent - Additional Rent - Abatement)
- Build-Out (TIA and Deadlines)
- Assignment & Subletting
- Security Deposit/Guaranty

PREMISES

- **Types**
  - Retail
  - Office
  - Warehouse/Industrial
  - Ground Leases
- **Description**
  - Common Areas
  - Parking
  - Measurements (BOMA, Usable vs Rentable)
- **Use**
  - Zoning Approvals/Certificates of Occupancy
  - Exclusivity

TERM

- Commencement Date vs. Rent Commencement Date
- Delivery of Premises
- Substantial Completion
- Tenant Delay

RENT

- Rent Structure
  - Gross
  - Triple Net
  - Modified Gross
- Base Rent
- Free Rent vs. Rent Abatement
- Additional Rent
  - Operating Expenses = CAM/Insurance/Taxes
    - Capital Expenses (GAAP / Amortization)
    - Controllable Expenses
    - Exclusions

BUILD-OUTS & WORK LETTERS

- Landlord's Work vs. Tenant Improvement Work
- Scope of Work
- Tenant Improvement Allowance (TIA)
- Approval of Plans
- Selection of Contractors
- Performance Schedule and Delivery Timeline

ADDITIONAL LEASE CLAUSES

- Assignment and Subletting
- Security Deposit/Guaranty
- Continuous Operation
- Relocation
- ROFR/ROFO

HOW HAS NEGOTIATING A COMMERCIAL LEASE CHANGED DUE TO COVID-19?

COVID-19 CONCERNS

- Tenant Concerns
  - Shut-Downs
  - Restricted capacity and/or operating hours
- Landlord Concerns
  - Build-Out Delays
  - Construction Costs

HOW ARE THESE CONCERNS BEING ADDRESSED IN THE LEASE?

- Rent Abatement/Deferment Provisions
  - Contingent upon governmental order
  - Pay back periods vs lump sum
  - Lender approval
- Beefed up Force Majeure Clauses
  - Epidemics, pandemics, quarantine restrictions
  - "Passage of time while awaiting action by a utility company or delays in excess of four (4) weeks while waiting for receipt of necessary permits or approvals from governmental agency"
  - "or any other clause beyond a Party's reasonable control, **whether or not such other cause shall be similar in nature to those hereinbefore enumerated**."
  - Specify what is NOT included (i.e. Inability of either party to make a payment due under the Lease)

QUESTIONS??

Feel free to reach out with any questions.

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Force Majeure Clauses in Commercial Real Estate Transactions (NJ)

A Practical Guidance® Practice Note by
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This practice note discusses force majeure clauses in commercial real estate transactions and their application under New Jersey law. This note provides a definition of force majeure and details the elements of a force majeure claim in New Jersey. It also examines how New Jersey courts might interpret and apply force majeure clauses and offers practical tips on how to draft and negotiate force majeure clauses in contracts governed by New Jersey law. Additionally, this note includes guidance on common law principles of impracticability, impossibility, and frustration of purpose, which a party may turn to if its contract does not include a force majeure provision. Finally, this note discusses force majeure clauses in the context of the COVID-19 pandemic.

For further guidance on drafting force majeure clauses, see Force Majeure Clause Drafting. For guidance on force majeure clauses in construction contracts, see Force Majeure Clauses in Construction Contracts. For additional resources on force majeure clauses and the impact of COVID-19, see Coronavirus (COVID-19) Resource Kit: Force Majeure, Contract Performance, and Dispute Resolution.

For guidance on commercial real estate acquisition transactions in New Jersey, see Choice of Ownership Structure of Real Property (NJ), Commercial Real Estate Ownership (NJ), and Purchase and Sale of Commercial Real Property (NJ). For guidance on commercial real estate acquisition financing transactions in New Jersey, see Commercial Real Estate Acquisition Loan Resource Kit (NJ). For guidance on commercial real estate leasing in New Jersey, see Commercial Real Estate Leasing (NJ).

Introduction to Force Majeure

The fundamental purpose of entering into any contract is to set forth the terms and conditions of the parties' performance obligations. When entering into a contract, parties assume certain risks that intervening economic or business challenges may arise that could impact performance. Although many risks can be contemplated for, sometimes unanticipated and uncontrollable events may render performance under the contract impracticable or impossible. The COVID-19 pandemic has caused innumerable business disruptions throughout New Jersey, the United States, and the rest of the world, including, but not limited to, supply chain disruptions, governmental moratoriums and closures, and significant labor shortages. COVID-19 delays resulting from these circumstances have often caused significant damages to parties dependent

upon the provision of contractual goods and services. In order to avoid contractual liability, the providers of goods and services have looked to duly negotiated force majeure contractual provisions to toll or excuse performance or, in the absence of such a clause, were forced to rely upon common law equitable concepts such as impracticability, impossibility, or frustration of purpose to excuse their failure to timely perform.

Definition of Force Majeure

Force majeure is defined as "[a]n event or effect that can be neither anticipated nor controlled; [especially] an unexpected event that prevents someone from doing or completing something that he or she had agreed or officially planned to do." Black's Law Dictionary (11th ed. 2019). Specifically, a force majeure clause is "a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, [especially] as a result of an event or effect that the parties could not have anticipated or controlled." Id. Accordingly, a force majeure contractual provision serves to establish "a means by which the parties may anticipate in advance a condition that will make [contractual] performance" impracticable or impossible. Facto v. Pantagis, 390 N.J. Super. 227, 231–32 (App. Div. 2007).

While force majeure is by definition an unforeseeable or unexpected event, a force majeure clause is a contractual tool that allows parties to anticipate in advance certain conditions that will make performance of a contract impracticable (Facto, 390 N.J. Super. at 231) and then predetermine liability, allocate risk of loss, and provide for specific remedies in the event such a condition arises. In other words, parties can contractually negotiate their own specific definition of force majeure and establish a contingency plan for a party's performance obligations should a specified force majeure event occur that materially interferes with and impedes a party's performance. Facto, 390 N.J. Super. at 232.

Elements of Force Majeure

When assessing the viability of a party's claim for relief under a force majeure provision, certain factors should be established:

- An intervening event
- Causation
- Mitigation –and–
- Remedy

Below is a discussion of each of these factors.

An Intervening Event

The party seeking relief under the principle of force majeure will first need to establish the existence of a qualifying intervening event.

A court will assess if the circumstances of the event meet the definition of force majeure as contemplated by the particular contract at issue.

Causation

The second element to be established is a causal link between the qualifying intervening event and the party's inability to perform. The affected party must show that its performance is prevented, impeded, or hindered as a direct result of the force majeure event. It is not enough to show that the intervening event has made performance more difficult, costly, or time-consuming, even if it means the affected party must forfeit its profit. Seitz v. Mark-O-Lite Sign Contractors, 210 N.J. Super. 646, 653 (Law Div. 1986) ("Any claim by defendant that its obligation of performance should be excused, because to assume the higher cost of [performance] would have resulted in a marginal profit or even a loss must fail.").

Mitigation

The third element asks if the affected party made all commercially reasonable efforts to avoid or mitigate the intervening event and/or the resulting damages. Under New Jersey law, parties whose performance obligations are impacted by a force majeure event have a legal obligation to mitigate their damages. O'Brien (Newark) Cogeneration, Inc. v. Automatic Sprinkler Corp. of America, 361 N.J. Super. 264, 273 (App. Div. 2003).

Remedy

The fourth element of a claim for relief under the principle of force majeure asks what relief, if any, is provided for in the contract. Force majeure provisions can set forth the relief available and provide for specific remedies or revised performance obligations upon the occurrence of a force majeure event. This can include anything from fully excusing performance, partially excusing performance, permitted delay in performance, specific monetary damages, return/retainment of deposit, etc. It is important

to remember to include a contingency plan in your force majeure provision which sets forth exactly what should occur when a force majeure event is triggered.

Creature of Contract

In New Jersey, force majeure is governed by contract law, not common law or statutes. Accordingly, New Jersey courts will rely almost exclusively on the specific wording of a force majeure clause and strictly construe those provisions against the facts of a case when determining applicability. Therefore, how parties phrase their force majeure clause is critical in every contract.

A force majeure clause can be stated broadly in hopes of qualifying a wide array of possible circumstances in the pool of triggering events, or it can be specific and personalized to the contract, in which case the events specifically listed in the provision (but only those events specifically included) will trigger the provision regardless of foreseeability. Often times, drafters will set forth their contract-specific list of force majeure events and cap the clause off with catch-all language to expand the scope of the triggering events beyond only those explicitly listed. While a contract-specific definition of force majeure may be beneficial in instances where parties want to ensure certain triggering events are included and applicable, the risk parties take (even when including additional catch-all language at the end of their clause) is that courts will exclude unrelated events (that may be equally unpredictable and uncontrollable) under the principle of *ejusdem generis*.

Ejusdem generis is a rule of interpretation used by courts when a statute or contract clause includes both specific language and broad general language, which narrows the broad general language so that it is "construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Circuit City Stores Inc. v. Adams, 532 U.S. 105, 114–15 (2001). That being said, the Appellate Division has indicated that when a force majeure provision specifically enumerates examples of what is considered an "act of God" followed by the phrase "or other unforeseen events or circumstances," the phrase "act of God" would be more broadly interpreted to include circumstances outside of those specifically listed. Facto, 390 N.J. Super. at 232. Additionally, some drafting attorneys have been known to evade the rule of *ejusdem generis* by using the phrase "including but not limited to" rather than simply "including," and courts have upheld the broader interpretation. Corbin on Contracts § 74.19 (citing Eastern Air lines v. McDonnell Douglas Corp., 532 F.2d 957 (5th Cir. 1976)).

Commercial Real Estate Transactions

Commercial Lease Agreements

Force majeure clauses are included in most commercial lease agreements to excuse or delay certain obligations under the lease due to unforeseen circumstances beyond the parties' control. These clauses are most commonly invoked in the context of construction-related delays to a unit buildout and any consequential delay in delivery of possession. See Duane Reade v. TPK of NJ Dev. Corp., No. A6704-03T5, 2006 N.J. Super. Unpub. LEXIS 929, at *17 (App. Div. Sep. 26, 2006). It is important to note, however, that the vast majority of force majeure clauses in commercial leases expressly exclude payment of rent as one of the obligations excused.

Purchase and Sale Agreements

Purchase and sale agreements do not often include a force majeure provision because these agreements are typically structured in phases, each phase with its own built-in performance/action deadlines and extension contingencies. Purchase and sale agreements also often provide for casualty-level events in a casualty clause.

Common Law Concepts

In New Jersey, if a contract does not contain a force majeure provision, courts may still excuse performance or provide other equitable relief under the common law doctrines of impracticability, impossibility, and frustration of purpose when an unforeseen and uncontrollable event arises that makes performance impracticable or impossible to perform. Facto, 390 N.J. Super. at 231. Thus, "where performance has become literally impossible, or at least inordinately difficult, because of the occurrence of a supervening event that was not within the original contemplation of the parties," New Jersey courts may be willing to grant equitable relief. JB Pool Management, LLC v. Four Seasons at Smithville Homeowners Ass'n, 431 N.J. Super. 233, 246 (App. Div. 2013). Be mindful, however, that equitable relief may not be available in the event a court concludes that the contracting party assumed the risk of impossibility.

Similarly, New Jersey courts may be willing to apply the equitable concept of frustration of purpose when "[t]he obligor's performance can still be carried out, but the supervening event fundamentally has changed the nature of the parties' overall bargain." Capparelli v. Lopatin, 459 N.J. Super. 584 (App. Div. 2019) (citations omitted). "The

frustration must be so severe that it is not fairly to be regarded as the risks that the party invoking the doctrine assumed under the contract. Relief from performance of contractual obligations on the theory of frustration of purpose will not be lightly granted." Id. (citations and quotations omitted). Clear, convincing, and adequate evidence must be provided in order to warrant such equitable relief.

Force Majeure and COVID-19

Since March 2020, there has been ongoing debate throughout the legal community regarding whether or not COVID-19 constitutes a force majeure event. However, it seems unlikely that COVID-19 would not be considered a qualifying event under most force majeure clauses, even if said clause does not specifically include reference to "pandemics" or "epidemics" in its definition. If the clause at issue includes reference to government shutdowns, acts of God, or natural disasters, strong arguments can be made that COVID-19 constitutes a triggering event under any of those names. Ultimately, the answer will depend on the wording of the force majeure clause at issue and the specific facts of each case. While there are numerous cases throughout the country that have analyzed the applicability of force majeure provisions to COVID-19 delays, there has yet to be a reported New Jersey case that addresses the applicability of force majeure provisions to the COVID-19 pandemic.

Conclusion

While force majeure was once largely considered a boilerplate provision, COVID-19 has heighted the need to review and negotiate force majeure provisions in leases and contracts. The numerous disturbances and challenges resulting from the pandemic illustrates the importance of paying careful attention and giving scrutiny to the parties' rights and obligations should unanticipated, intervening events impede performance, regardless of the remoteness that such an event will occur. While courts may be willing to apply equitable concepts to forgive performance in very limited circumstances, proactively addressing the handling of such delays via negotiated contractual provisions can help avoid reliance upon equitable concepts and the unpredictability of courts.

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Matthew J. Schiller represents clients in a wide range of transactional and litigation matters throughout New Jersey, New York, Connecticut, and elsewhere throughout the country. His work includes the acquisition, disposition, leasing, and management of all kinds of commercial properties, including office, medical office, industrial, retail, and multi-family developments. Matt has also developed significant experience concerning the formation and operation of Qualified Opportunity Funds and Qualified Opportunity Zone Businesses as well as the numerous real estate transactional, leasing, and development issues associated therewith. In addition, Matt's practice involves obtaining municipal and state land use approvals for commercial and residential developments, as well as the representation of clients in connection with foreclosure litigation, landlord-tenant disputes, prerogative writ actions, and breach of contract matters. He also represents special servicers in connection with loan workouts and modifications, REO sales, and loan sales. As the leader of the firm's Leasing, Opportunity Zone and Distressed Real Estate practice groups, Matt has substantial experience guiding his clients through complicated transactions, including some of the largest leasing and transactional matters in the country.

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COMMON AND NOT-SO-COMMON TENANT DEFENSES–INCLUDING A DISCUSSION OF ISSUES INVOLVING UPKEEP, REPAIR AND MAINTENANCE.

Thomas M. Pohle, Esq.

1. Landlord's Breach of the Implied Covenant of Habitability: The Marini Doctrine

The Marini Doctrine is an implied warranty that **there are no latent defects in facilities vital to the use of residential premises because of faulty construction, deterioration from age or normal use at the inception of the tenancy, and that the facilities will remain in usable condition throughout the term of the lease. In performance of this covenant the landlord is required to maintain such facilities in a condition which renders the property livable. See** *Marini v Ireland*, 56 NJ 130 (1970).

New Jersey Courts have applied the Marini Doctrine to non-residential tenancies in several cases including: *Reste Realty Corporation v. Cooper,* 53 N.J. 444 (1969), *Demirci v Burns,* 124 NJ Super. 272 (App. Div.1973), and *Harel Associates v Cooper Healthcare*, 271 N.J. Super. 405 App. Div. 1994)

In *Reste Realty Corporation v. Cooper,* 53 *N.J.* 444 (1969), the Court stated at *p.* 45:

> "It has come to be recognized that ordinarily the lessee does not have as much knowledge of the condition of the premises as the lessor. Building code requirements and violations are known or made known to the lessor, not the lessee. He is in a better position to know of latent defects, structural and otherwise, in a building which might go unnoticed by a lessee who rarely has sufficient knowledge or expertise to see or to discover them. A prospective lessee, such as a small businessman, cannot be expected to know if the plumbing or wiring systems are adequate or conform to local codes. Nor should he be expected to hire experts to advise him. Ordinarily all this information should be considered readily available to the lessor who in turn can inform the prospective lessee. **These factors have produced persuasive arguments for reevaluation of the *caveat emptor* doctrine and for imposition of an implied warranty that the premises are suitable for the leased purposes and conform to local codes and zoning laws.**

In, *Berzito v. Gambino*, 63 N.J. 460 (1973), the Court set forth the following factors to be considered in determining whether there has been a breach of the implied warranty.

1. Has there been a violation of any applicable housing code or building or sanitary regulations?
2. Is the nature of the deficiency or defect such as to affect a vital facility?
3. What is its potential or actual effect upon safety and sanitation?
4. For what length of time has it persisted?
5. What is the age of the structure?
6. What is the amount of the rent?
7. Can the tenant be said to have waived the defect or be estopped to complain?
8. Was the tenant in any way responsible for the defective condition?

Tenant's remedies for Landlords breach of the implied covenant:

1. Treat the breach as a "constructive eviction" and vacate the premise without owing any more rent;

2. Give notice to the landlord of the defect, and if the landlord fails to remedy the condition, the tenant may do so, deducting the reasonable cost of repair from his rent;

3. In an action by a landlord for unpaid rent, a tenant may plead, by way of defense and set off, a breach by the landlord of his continuing obligation to maintain an adequate standard of habitability.

- If the tenant proves that the landlord breached the covenant, the **tenant will be charged only with the reasonable rental value of the property in its imperfect condition** during the period of occupancy as long as the tenant gave the landlord positive and seasonable **notice of the alleged defect and allowed the landlord a reasonable period of time to effect the repair** or replacement.

***Transfer of Summary Action**

In order to obtain affirmative relief, a tenant must file a motion to transfer to the law division or special civil part depending on the amount of damages or may institute a separate action seeking such relief.

Rule 6:4-1(g), the rule governing transfer motions, provides that a tenant seeking to transfer a summary dispossess action to the Law Division must file a motion with the clerk of the Special Civil Part "no later than the last court date prior to the date set for trial." The motion may be heard on the trial date, or, if additional time is sought by the landlord to prepare a response, on a date set by the court.

N.J.S.A. 2A:18-60, the statute governing transfer motions, provides that a summary dispossess action may be transferred if the court "deems it of sufficient importance 53 N.J. 444 (1969).

In *Morrocco v. Felton*, 112 N.J. Super. 226, 235 (Law. Div. 1970), the court proposed nine factors to be considered when evaluating whether a summary dispossession action should be transferred to the Law Division. These factors were adopted and revised by subsequent cases, including *Township of Bloomfield v. Rosanna's Figure Salon, Inc*., 253 N.J. Super. 551, 562-3 (App. Div. 1992), which set forth the following five factors

1. The complexity of the issues presented, where discovery or other pretrial procedures are necessary or appropriate;
2. The presence of multiple actions for possession arising out of the same transaction or series of transactions, such as where the dispossesses are based upon a concerted action by the tenants involved;
3 The appropriateness of class relief;
4. The need for uniformity of result, such as where separate proceedings are simultaneously pending in both the Superior Court and the County District Court arising from the same transaction or set of facts; and
5. The necessity of joining additional parties or claims in order to reach a final result.

The court in *Bloomfield* stated that "In general, a motion for transfer should be granted whenever the procedural limitations of a summary action (other than the unavailability of a jury trial) would significantly prejudice substantial interests either of the litigants or of the judicial system itself, and,

because of the particular facts and circumstances of a specific case, those prejudicial effects would outweigh the prejudice that would result from any delay caused by the transfer.

*** See also** *Benjoray, Inc. v. Academy House Child Development Center***,** 437 N.J. Super. 481 (the first published opinion to pick up where Bloomfield left off), wherein the Appellate Division relied upon the Bloomfield factors to reverse a lower court that had denied a motion to transfer. In *Benjoray*, the tenant withheld 15% of the rent when its architect calculated the leasehold as being 15% smaller than it was supposed to be. The tenant argued that the rent it agreed to pay in the lease was premised on the space being the size the lease said it was. The tenant asserted it was damaged, arguing negligent misrepresentation on the part of the landlord as well as breach of contract entitling it to rescission of the lease. The tenant offered to deposit the money being withheld into court. The landlord argued the issues before the motion judge were not complex - the tenant had agreed to pay a certain rent taking the property "as is," and the tenant was not paying that rent. The landlord's architect disputed the tenant's square footage calculation, and the landlord argued that the square footage set forth in the lease was only an approximation and that if there was a discrepancy with the actual square footage, the space was generally consistent with the lease figure. The motion court agreed with the landlord, and denied the motion to transfer. On review, the Appellate Division reversed, finding that the first Bloomfield factor applied insofar as the issues presented were complex. The appellate court noted that the tenant's claims of negligent misrepresentation and breach of contract were too complicated to be disposed of in a summary dispossession hearing. Further, given the nature of the allegations the parties should be permitted to conduct discovery The appellate court went on to observe that the tenant had not merely asserted a defense to the eviction action, but had also gone on to assert affirmative claims for breach of contract and negligent misrepresentation, for which the tenant was seeking damages and rescission of the lease.

2. Landlord's Failure to meet all Procedural Requirements (such as notice, service, or issues with the complaint)

a) Improper/Defective Notice or No Notice

A commercial eviction complaint can be dismissed if the landlord does not serve the tenant with a proper notice to quit before filing the complaint. The notice must describe the conduct upon which the complaint is based in specific detail and provide the correct amount of time before the complaint is filed. Landlords must "strictly comply" with notice requirements and, if they do not, the complaint may be dismissed.

Required time periods for Notice to Quit

Under 2A:18-53a for possession after expiration of the term, the time periods for a Notice to Quit are as follows:

i. **For tenancies at will or from year to year---- 3 months**
ii. For month-to- month tenancies---- 1 month
iii. For other tenancies--- 1 lease term

Under 2A:18-53c for possession based on: -disorderly conduct that affects the

landlord, other tenants, or occupants; willful destruction, damage, or injury to premises; constant violation of rules and regulations; and any violation of lease covenant or agreement where a right of reentry is reserved in the lease, the time period for a Notice to Quit is 3 days.

Specificity and Service Requirements

2A: 18-53c provides

"The notice shall specify the cause of the termination of the tenancy", and be served either personally upon the tenant or such person in possession by giving him a copy thereof, or by leaving a copy thereof at his usual place of abode with some member of his family above the age of 14 years.

In *Carteret Properties v. Variety Donuts Inc*., 49 N.J. 116 (1967), a commercial eviction case based on the tenant's alleged breach of the lease under 53c, the Court noted that the definition of "specify" includes "to state precisely or in detail" and that the notice in that case merely stated a conclusion. The Court stated at page 124-25:

> "… of more crucial significance in appraising the sufficiency of the notice is the failure to specify the nature of the alleged breach. It contains no particularization, no explicit or detailed statement as to the action or conduct of the defendant which allegedly constituted such a violation of the use covenant……..

In *Bayside Condo v Mahoney*, 254 N.J. Super. 323, 326 (App. Div. 1992), the Court citing Carteret interpreted the phrase "nature of the alleged breach" to mean "factually correct", and noted that "due process is more appropriately served by an allegation of the facts upon which the plaintiff intends to rely". The Court stated:

> This action for possession of the leased premises is a summary statutory proceeding based upon *N.J.S.* 2A:18-53 to -57. *Section* 53 provides that an order for possession may be entered by the appropriate county district court where a lessee "shall commit any breach or violation of any of the covenants * * * contained in the lease for the premises where a right of re-entry is reserved in the lease for a violation of such covenants * * *, and shall hold over and continue in possession of the demised premises * * * after the landlord or his agent for that purpose has caused a written notice of the termination of said tenancy to be served upon said tenant, and a demand that said tenant remove from said premises within 3 days from the service of such notice." The notice is required to "specify the cause of the termination of the tenancy," and proof that such notice has been served is prerequisite to judgment. *N.J.S.* 2A:18-56. **The cause of termination is jurisdictional, and if at trial evidence is adduced from which a finding could reasonably be made that a proper notice was served and that the specified statutory cause existed, a judgment for possession is conclusive**. *Vineland Shopping Center, Inc. v. De Marco,* 35 *N.J.* 459, 462-464 (1961); 18 *N.J. Practice* § 1568 (*Fulop-Kain, District and Municipal Courts*) (*Supp.* 1965).

Proof of the Notice to Quit is a prerequisite to entry of a judgement for possession. See 2A:18-56

3. Waiver

Waiver is the intentional relinquishment of a known right. This occurs where a party knows of right, and then abandons it. The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it. Accepting rent sometimes operates as a waiver of breach of a lease. Similarly, ignoring a tenant's violation of a rule can waive the right to evict for that violation.

For a discussion of waiver, see *Carteret Properties, Inc. v Variety Donuts, Inc.* 49 N.J. 116 (1967), *Jasontown Apartments v. Lynch*, supra, 155 N.J. Super. 254 at 263 (App. Div. 1978), and *AP Band Development v Band* 113 NJ 485 (1988).

In *Carteret Properties, Inc. v Variety Donuts, Inc.* 49 N.J. 116 (1967), the court ruled that as a matter of law, acceptance of rent by a landlord with knowledge of a breach of the lease on the part of the tenant may constitute a waiver of past breaches.

In *Jasontown Apartments v. Lynch*, 155 N.J. Super. 254 at 263 (App. Div. 1978) the Court stated the following with regard to the issue of waiver:

> Waiver has been defined as "the intentional relinquishment of a known right." * * * "Acceptance of rent after a notice changing tenancy or after [a] notice to quit does not necessarily operate to waive the notice. **While the unconditional acceptance by a landlord of moneys as rent, which rent as accrued after the time the tenant should have surrendered possession, will constitute strong evidence of the landlord's waiver of the notice to quit, waiver always rests on intent, and is ever a question of fact." ……..“We conclude that the stipulated facts of this case** do not, as in Carteret, establish waiver as a matter of law. Rather, receipt of the payments after the initiation of statutory dispossess proceedings provides only evidence of a waiver which should be considered together with all other existing circumstances in determining whether the defense of waiver has been sustained. If the trial judge concludes, from these facts, including the acceptance of payments in the amount of rent subsequent to initiation of the dispossess proceedings, that the landlord intended to waive the notice to quit and the breaches of lease upon which the notice to quit and the breaches of lease were based, then he should dismiss the complaint. If, however, he concludes that no such waiver was intended, then he should grant landlord the relief it seeks.”

In AP Band Development v Band, 113 NJ 485 (1988), the New Jersey Supreme Court stated the following with regard to the issue of waiver:

> Similarly, we are unpersuaded by the tenants' contention that the landlord's acceptance of the rent and the late charge constituted a "waiver," traditionally defined as "an intentional relinquishment of a known right." *Jasontown Apartments*

> *v. Lynch*, 155 N.J. Super. 254, 259 (App. Div. 1978). Before the landlord can initiate an eviction proceeding based on "habitual" late payment of rent, the landlord is obliged to accept a series of late payments in order to establish that the lateness is habitual. Accord *Jasontown Apartments v. Lynch*, supra, 155 N.J. Super. at (holding that acceptance of rent after termination proceeding poses fact question as to whether there has been a waiver, and limiting *Carteret Properties v. Variety Donuts, Inc.,* 49 N.J. 116, 129 (1967) to its facts).

The court in *AP Development, supra* noted that there was no evidence that the landlord made any affirmative representation to the tenants that they did not have to pay the rent on time.

The following questions are relevant as to whether a landlord has "waived" the right to evict based on accepting rent:

- Did the landlord inform the tenant that acceptance of rent **was not** a waiver?
- Did the lease contain any non-waiver clauses?
- How long did the landlord accept rent for after serving the notice to vacate?
- How long had the tenant's conduct at issue gone on for?
- Was a lease renewed while the grounds for eviction were continuing?

*Leases often explicitly contain a "non-waiver" provision that payment to the landlord for less than the full amount due shall not be considered settlement or satisfaction of the full amount due. New Jersey courts have found such "non-waiver" provisions to be effective. *See* Hilal v. Han, No. A-6004-17T2 (N.J. Super. Aug. 2, 2019) (landlord did not waive the right to overdue rent or late fees where lease contained a non-waiver clause).

4. Estoppel

In AP Band Development v Band, 113 NJ 485 (1988) the Court stated the following with regard to estoppel:

> To establish a claim of equitable estoppel, the party claiming the benefit of the estoppel must show that the alleged conduct was done, or representation was made, intentionally or under such circumstances that it was both natural and probable that it would induce action. Further, the conduct must be relied on, and the relying party must act so as to change his or her position to his or her detriment. [Miller v. Miller, 97 N.J. 154, 163 (1984) (citations omitted). See Royal Assocs. v. Concannon, 200 N.J. Super. 84, 93 (App. Div. 1985) (holding that both equitable and promissory estoppel justified preventing a landlord from evicting a tenant for keeping a dog, after he had given the tenant oral permission to have the dog, despite a no-pets lease provision).
>
> In this case, the doctrine of equitable estoppel is not applicable. No act or omission of the landlord induced the tenants not to pay their rent on time or caused them to change their position to their detriment. The tenants were already paying their rent late, in violation of the lease, when the landlord sent the Notice to Cease. Further,

> they consistently continued to pay their rent late after receipt of this Notice. Moreover, the lapse of time between the landlord's service of the Notice to Cease and the termination of the tenancy was not prejudicial to the tenant. To the contrary, it afforded them an opportunity to correct their habitual late payment of rent.

* See also: Royal Associates v. Concannon, 490 A.2d 357 (N.J. Super. App. Div. 1985) (promissory estoppel stopped an eviction based on violating a no-pet provision where the landlord previously gave oral permission to keep a dog.)

5. Laches

In AP Band Development v Band, 113 NJ 485 (1988) the Court stated the following with regard to the defense of laches:

> We accept Pomeroy's definition of laches as "`such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.'" Lavin v. Board of Educ. of Hackensack, 90 N.J. 145, 151 (1982) (quoting 2 Equity Jurisprudence § 419, at 171-72 (5th ed. 1941)). Here, the landlord's lapse of time in sending the Notice to Quit benefitted rather than prejudiced the defendant.

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About the Panelists…

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Admitted to practice in New Jersey and New York, Mr. Gudin has been Counsel to the New Jersey Property Owners Association (www.POANJ.Org), where he served two terms as President, and a member of the New Jersey Apartment Association, where he has regularly consulted on legislative issues affecting the multi-family housing industry. He has been an active commentator and worked closely with the New Jersey Law Revision Commission on rewriting the tenancy laws. He has been a member of the American, New Jersey State and New York State Bar Associations as well as the Commercial Law League of America.

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Admitted to practice in New Jersey, Mr. Rosen is Past Chair of the New Jersey State Bar Association's Real Property, Probate and Trust Law Section. He has registered thousands of condominium and cooperative units with the New Jersey Department of Community Affairs and the New York, Attorney General pursuant to the statutes governing the offering of units in both states. He is the recipient of the New Jersey State Bar Association Legislative Advocacy Award.

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Commercial Landlord-Tenant Law 2022
Terminating a Commercial Lease

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AGENDA

The Goal: To understand the statutory and contractual bases for commercial tenancy termination

The Route Forward:

(1) Statutory: N.J.S.A. 2A:18-53

(2) Contractual Considerations

(3) Termination "Mechanics"

(4) Putting it all together

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Attorneys At Law

Statutory Bases for Tenancy Termination

N.J.S.A. 2A:18-53

(a) Where such person holds over and continues in possession of all or any part of the demised premises after the expiration of his term, and after demand made and written notice given by the landlord…

(b) Where such person shall hold over after a default in the payment of rent, pursuant to the agreement under which the premises are held…

(c) (1) Where such person (1) shall be so disorderly as to destroy the peace and quiet of the landlord or the other tenants;

(c)(2) shall **willfully** destroy, damage or injure the premises;

(c)(3) shall constantly violate the landlord's rules and regulations governing said premises, provided, such rules have been accepted in writing by the tenant or are made a part of the lease;

(c) (4) shall commit any breach or violation of any of the covenants or agreements in the nature thereof contained in the lease for the premises where a right of re-entry is reserved in the lease for a violation of such covenants or agreements, and shall hold over and continue in possession of the demised premises or any part thereof, after the landlord or his agent for that purpose has caused a written notice of the termination of said tenancy to be served upon said tenant,

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A Closer Look at N.J.S.A. 2A:18-53

(1) Tenancy after expiration of term;

Judge Fast: "…very simple ground for eviction, N.J.S.A. 2A:18–53(a), month-to-month holdover tenancy, there is no real defense to it except deficient notice to quit, or failure to have service, or, perhaps … premature filing of the complaint." 34 Label Street Associates v. R.C. Search Co. 2010 WL 1425723

(2) Nonpayment of rent

Consider: N.J.S.A. 2A:18:55

"If, in actions instituted under paragraph "b" of section 2A:18-53 of this title, the tenant or person in possession of the demised premises shall at any time on or before entry of final judgment, pay to the clerk of the court the rent claimed to be in default, together with the accrued costs of the proceedings, all proceedings shall be stopped. "

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A Closer Look at N.J.S.A. 2A:18-53 *continued*

Breach of lease with reservation of right of re-entry.

No notice to cease is required (unless negotiated);

Notice to cease may be incorporated by reference in Notice to Quit.

Ivy Hill Park Apts. v. GNB Parking Corp. 236 N.J. Super. 565 (Law.Div.1989)

What is the "right of re-entry"?

"right reserved by a grantor to enter the premises on breach of a condition of the conveyance." Black's Law Dictionary 1280 (6th ed.1990).

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Right of Re-Entry & Magic Words

Kuzuri Kijiji, Inc. v. Bryan, 371 N.J. Super. 263, 273 (App. Div. 2004):

We conclude that words other than "right of re-entry" satisfy the letter and public policy of the statute as long as the words employed clearly convey that violation of covenants and agreements in the lease allow the landlord to seek a termination of the lease, the removal of the tenant from the leased premises, and a return of possession of the premises to the landlord. Although the statute is to be strictly construed, the enforcement and protection of the rights bestowed on both parties in the landlord-tenant relationship should not turn on the selection of a set of "magic words."

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Contractual Considerations

Lease creates the bases for eviction under (c)(4).

- Lease terms should be unambiguous
- Evidence of breach should be collected
- "Compliance with all laws"

Note: Municipal violations (Uniform Fire Code, Uniform Construction Code) are not "final" until appear rights exhausted.

Another Note: Difference between eviction for nonpayment and lease termination for nonpayment.

Contractual Considerations *Continued*

Lease Violations & Forfeiture

Mandia v. Applegate, 310 N.J. Super. 435 (App. Div. 1998)

- "The fact that the forfeiture clause is triggered by the lessee's default "in any of its obligations hereunder" could be interpreted to allow a forfeiture for any breach of the lease. "
- 49 *Am.Jur.2d Landlord and Tenant* § 339 (1995) ("[A] lessee who has breached a covenant of the lease providing for its termination because of such breach may, under some circumstances, avoid the forfeiture of the lease through intervention of equity, where it clearly appears necessary to prevent an unduly oppressive result, or to prevent an unconscionable advantage to the lessor or an unconscionable disadvantage to the lessee.").

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The Mechanics of a Tenancy Termination

Notice to Quit

- With Demand for Possession
- State Legal Basis for Termination
- Allege Sufficient Factual Basis (more on this later)
- Any Notice to Cease required prior?
- Note Lease Required Addresses for and Methods of Service
- Guarantors: Include them.

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Putting It All Together

Nonpayment is easy

Everything else:

- Start with the lease. Note lease-specific requirements
- Compare to statutory causes of action
- Assemble facts (avoid pettiness)
- Draft & Serve Notice to Quit

Selected Issues in Commercial Lease Negotiations

Joel M. Rosen, Esq
Ehrlich, Petriello, Gudin, Plaza & Reed

I. Net Lease versus Gross Lease

- A. The Myth of the Triple Net Lease
- B. Determining Proportionate Share
- C. Escalation Leases
- D. Gross Leases

II. Lease Guarantees

- A. Full and Unconditional
- B. Payment Only
- C. "Joint and Several"
- D. "Good Guy Guaranties"
- E. Good Guy versus early termination agreements

III. Tenant Rights to Purchase the Property

- A. Right of First Refusal
- B. Right of First Offer
- C. Option to Purchase
- D. Precise time periods
- E. Tenant not in default
- F. "one time use"

IV. Other frequently discussed issues

- A. Cross-indemnification

B. Covid Clauses and automatic rent abatements

C. Permitted Uses, Certificates of Occupancy and other governmental approvals

Commercial Landlord-Tenant Law 2022
Terminating a Commercial Lease

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AGENDA

The Goal: To understand the statutory and contractual bases for commercial tenancy termination

The Route Forward:

(1) Statutory: N.J.S.A. 2A:18-53

(2) Contractual Considerations

(3) Termination "Mechanics"

(4) Putting it all together

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Statutory Bases for Tenancy Termination

N.J.S.A. 2A:18-53

(a) Where such person holds over and continues in possession of all or any part of the demised premises after the expiration of his term, and after demand made and written notice given by the landlord…

(b) Where such person shall hold over after a default in the payment of rent, pursuant to the agreement under which the premises are held…

(c) (1) Where such person (1) shall be so disorderly as to destroy the peace and quiet of the landlord or the other tenants;

(c)(2) shall **willfully** destroy, damage or injure the premises;

(c)(3) shall constantly violate the landlord's rules and regulations governing said premises, provided, such rules have been accepted in writing by the tenant or are made a part of the lease;

(c) (4) shall commit any breach or violation of any of the covenants or agreements in the nature thereof contained in the lease for the premises where a right of re-entry is reserved in the lease for a violation of such covenants or agreements, and shall hold over and continue in possession of the demised premises or any part thereof, after the landlord or his agent for that purpose has caused a written notice of the termination of said tenancy to be served upon said tenant,

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A Closer Look at N.J.S.A. 2A:18-53

(1) Tenancy after expiration of term:

Judge Fast: "…very simple ground for eviction, N.J.S.A. 2A:18–53(a), month-to-month holdover tenancy, there is no real defense to it except deficient notice to quit, or failure to have service, or, perhaps … premature filing of the complaint." 34 Label Street Associates v. R.C. Search Co. 2010 WL 1425723

(2) Nonpayment of rent

Consider: N.J.S.A. 2A:18-55

"If, in actions instituted under paragraph "b" of section 2A:18-53 of this title, the tenant or person in possession of the demised premises shall at any time on or before entry of final judgment, pay to the clerk of the court the rent claimed to be in default, together with the accrued costs of the proceedings, all proceedings shall be stopped. "

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A Closer Look at N.J.S.A. 2A:18-53 *continued*

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Contractual Considerations

Lease creates the bases for eviction under (c)(4).

Lease terms should be unambiguous

"An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations. To determine the meaning of the terms of an agreement by the objective manifestations of the parties' intent, the terms of the contract must be given their 'plain and ordinary meaning.' " Kaufman v. Provident Life & Cas. Ins. Co., 828 F. Supp. 275 (D.N.J. 1992), aff'd, 993 F.2d 877 (3d Cir. 1993)

Catch All Terms- "Compliance with all laws"

Municipal violations (Uniform Fire Code, Uniform Construction Code) are not "final" until appeal rights exhausted. These issues present when tenant's build out or operation is potentially problematic.

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Contractual Considerations *Continued*

Lease Violations & Forfeiture

Mandia v. Applegate, 310 N.J. Super. 435 (App. Div. 1998) → Down the Shore! On the Boardwalk!

- "The fact that the forfeiture clause is triggered by the lessee's default "in any of its obligations hereunder" could be interpreted to allow a forfeiture for any breach of the lease. " Court strained to find a reason not to terminate lease.
- 49 *Am.Jur.2d Landlord and Tenant* § 339 (1995) ("[A] lessee who has breached a covenant of the lease providing for its termination because of such breach may, under some circumstances, avoid the forfeiture of the lease through intervention of equity, where it clearly appears necessary to prevent an unduly oppressive result, or to prevent an unconscionable advantage to the lessor or an unconscionable disadvantage to the lessee.").

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Contractual Considerations *Continued*

Covenant of Good Faith & Fair Dealing

- Implied in every contract
- Applies to course of performance of contract

- "good faith and fair dealing calls for parties to a contract to refrain from doing "anything which will have the effect of destroying or injuring the right of the other party to receive" the benefits of the contract."

- The party claiming a breach of the covenant of good faith and fair dealing "must provide evidence sufficient to support a conclusion that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties."

Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Associates, 182 N.J. 210, 225 (2005)

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- Notice to Quit
  - With Demand for Possession
  - State Legal Basis for Termination
  - Allege Sufficient Factual Basis (more on this later)
  - Any Notice to Cease required prior?
  - Method of Services & Addressees

Who Is Entitled To Notice?

Lease-Specified Addressee:

See Ivy Hill Park Apartments v. GNB Parking Corp., 236 N.J. Super. 565 (Law. Div. 1989), aff'd, 237 N.J. Super. 1 (App. Div. 1989)

Personal Service vs. Service by Mail

See Pennsylvania Railroad Co. v. L. Albert & Son, Inc., 26 N.J.Super. 508 (App.Div.1953):

"To hold that the requirements as to length of notice and the method of service of such notice cannot be altered by agreement of the parties is to read into the statutory provisions language which is not there. Had the Legislature intended that parties to a lease could not vary either the length or method of service of a notice to terminate the tenancy, it could readily and expressly have so provided....

Notice to Guarantors

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N.J.S.A. 2A:18-56

Is a Notice to Quit required? Consider N.J.S.A. 2A:18-56

"…enumerates particular types of tenancies and sets forth the corresponding requisite **notice** to **quit** for each such particular type of tenancy.**"** Mintz v. Metropolitan Life Ins. Co., 153 N.J.Super. 329 (N.J.Dist.Ct. 1977).

What about a tenancy for a fixed term with no right to renewal?

"It should be noted that N.J.S.A. 2A:18-56 applies only to renewable tenancies. This statute is not applicable to fixed-term, nonrenewable tenancies. If N.J.S.A. 2A:18-56(c) were read to apply to fixed-term, nonrenewable tenancies, as defendant suggests, the incongruous result would be that a landlord would have to give his tenant notice to quit immediately upon the execution of the lease."

Mintz v. Metro. Life Ins. Co., 153 N.J. Super. 329, 332 (Dist. Ct. 1977)

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Putting It All Together

Nonpayment is easy

Everything else:

- Start with the lease. Note lease-specific requirements
- Compare to statutory causes of action
- Assemble facts
- Draft & Serve Notice to Quit
- File Case & You're on Your Way

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