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Page 4

'Havana Central': Tort Liability and Holdover Tenants

A recent split decision by the Appellate Division, First Department in *Havana Central v. O'Lunney's Pub Inc.*¹ upholding an incoming tenant's claim against a prior tenant for failing to vacate premises at the expiration of its lease has generated substantial comment in the real estate bar.

According to the majority, the landlord's inability to give possession of the premises on the lease commencement date is not just an inconvenient, nonactionable delay. Simply holding over gives rise to a claim for tortious interference with contract.² The implication of this decision were it to be followed is sufficiently important to warrant examining the court's reasoning more critically.

This article will focus on the possible impact of the decision on the real estate leasing market, drafting appropriate lease provisions³ and settled landlord/tenant law particularly as it concerns end of lease issues.

'Havana' Facts

The facts in *Havana* could not be more simple. The defendant held over in the demised premises which prevented the plaintiff/new tenant from taking possession on the lease commencement date. *Havana Central* claimed to have incurred substantial damages. Not unusual in New York City, the commercial lease included a waiver by the incoming tenant of any contract remedy it may have had against the landlord on this issue.

In summary, the majority affirmed the trial court's denial of summary judgment dismissing the entire complaint and concluded that by holding over the defendant exposed itself to a claim by the incoming tenant for tort damages.⁴ The majority determined that "there are triable issues of fact as to whether the [defendant] intentionally induced its landlord to breach" the lease by preventing the landlord from delivering possession on the commencement date.⁵

Whereas the defendant argued that performance was merely delayed, the court, in dictum, went a step further: "there is no doubt that the landlord's failure to deliver possession of the premises to *Havana Central* at the commencement of its lease term constituted a material breach of their lease."⁶

The dissent responded to this assertion by pointing out that the majority was reading into the lease what was not there: "[U]nfortunately, the majority does not point to any language in the lease that imposes an obligation on the landlord to give possession on the commencement date even if it is unable to do so."⁷ On this note the case returned to the *nisi prius* court for

trial. As it happens, before the scheduled trial date the plaintiff decided not to proceed with the action and it was discontinued.

However, the appellate decision that a holdover tenant could be exposed to tortious interference with contract and that retaining possession "constituted a material breach" by preventing a new tenant from taking possession on the commencement date lays the basis for an extension of existing law. It is not uncommon for a sitting tenant to fail to vacate premises at the end of its lease term. Typically, a holdover commercial tenant is subject to a "penalty" to the landlord in the form of liquidated damages; and Article 7 of the RPAPL provides a statutory remedy for the landlord to obtain a warrant of eviction.

Threat of Tortious Interference

In effect, the majority's reasoning that the complaint stated a cause of action grants a new tenant a remedy of its own against a commonplace holdover. This is something new. It is an invitation to incoming tenants to use the threat of tortious interference with contract as a weapon against recalcitrant sitting tenants. This has never been the law in New York and raises a question

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as to what conduct a plaintiff would have to allege and prove to sustain a tort claim against a holdover. I do not mean to say that there are no factual circumstances that would justify sustaining a claim by a new tenant for tort liability against a holdover. There is, in fact, recent precedent for such a holding. The question is: To what extent should it be applied to holdovers in general?

The majority based its decision in *Havana* on another case from the First Department decided per curiam a year earlier entitled *Kronish Lieb Weiner & Hellman LLP v. Tahari*.⁸ However, the facts in *Kronish* are not those commonly encountered in landlord and tenant disputes. Indeed, they are highly unusual and so easily distinguishable from the commonplace holdover that a decision to extend the precedent is startling. Nevertheless, *Kronish* teaches the bar a valuable lesson, that there are circumstances under which a holdover tenant can be liable under one or more tort theories. Before looking at why *Kronish* is one of a kind, let us see why *Havana* is commonplace.

Havana Central signed a Standard Store Lease which contains a provision that new tenants take a risk that they will not get possession on the commencement date. Paragraph 24 reads that "[i]f the landlord is unable to give possession of the demised premises on the date of the commencement of the term hereof, because of the holding-over or retention of possession of any tenant...or for any other reason, Owner shall not be subject to any liability for failure to give possession on said date and the validity of the lease shall not be impaired under such circumstances." In addition, Paragraph 24 contains a statutory waiver of §223-a of the New York Real Property Law (NYPRL).⁹

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'Havana Central': Tort Liability and Holdover Tenants

Continued from page 4

A further provision, not in the standard form, but not atypical, gives Havana Central the right to terminate the lease "[i]f landlord is unable to give possession of the demised premises to Tenant on the commencement date of the term hereof for any reason and such failure continues for a period of 30 days." Havana Central did not exercise this right and, in the words of the dissent, was "not left on the hook." That is, it had a contract remedy, either to cancel the lease or accept possession at a later date, which it did.

The differences between the holdover in *Kronish* and the holdover in *Havana* are both factual and legal. They are not simply an advocate's arguments. In contrast to Havana Central's lease, Kronish Lieb's lease contained no equivalent to Paragraph 24 of the Standard Store Lease and no waiver under §223-a of the NYRPL. On these grounds alone, Kronish Lieb had the right to possession on its lease commencement date and the court so found: "[its] right to possession...was superior to Tahari's."¹⁰ In *Havana*, the lease commencement date was contingent until the landlord recovered possession.

The 'Kronish' Facts

The factual circumstances in *Kronish* are out of the ordinary. The defendant holdover had no direct privity with the landlord. It was a subtenant of a portion of larger premises demised to a prior prime tenant and its right to occupancy expired when the master lease terminated. As a result of the subtenant's refusal to vacate its part of the premises, the landlord commenced and obtained a judgment of ejectment against the prime tenant, W.R. Grace, and its subtenant. The judgment of ejectment was unanimously affirmed by the Appellate Division.¹¹ After *Kronish Lieb* received actual, physical control of the balance of the demised premises, it commenced its own action against Tahari for tort damages. On cross-appeals, the court held that *Kronish Lieb's* complaint stated a sufficient cause of action for trespass and reinstated a dismissed claim for tortious interference with contract.

In *Havana*, although the majority held that the landlord's inability to give possession "constituted a breach," indeed a material one, the landlord did, in fact, perform, albeit after a delay of five months and two days. Significantly, the new tenant did not give notice to the landlord that it had breached the lease, for the simple reason that it had waived that remedy.

In a tort context, the Court of Appeals has held that the "intentional inducement of the third party to breach" element of tortious interference is to be read in the alternative, that is "****to breach or otherwise render performance impossible" (Emphasis added).¹²

In *Havana*, performance of the contract was not rendered impossible. Parsing Paragraph 24 of the Standard Store Lease, the dissent citing *NBT Bancorp Inc. v. Fleet/Norstar Fin. Group Inc.*¹³ emphasized that Havana Central's right to possession on the commencement date "represented no more than a hope" or "a mere expectancy," and that "at most [the holdover tenant] caused the landlord to delay performance rather than render it impossible."¹⁴ Indeed, after the landlord recovered possession, Havana Central executed an amendment extending the lease to compensate it for the delay, thus calling into question whether Havana Central sustained any provable damages.

The fact that a new tenant is inconvenienced as a result of a prior tenant holding over does not, ipso facto, elevate a claim of interference to an actionable tort. After all, not all interferences are actionable under any theory, particularly when the contracting parties have expressly agreed to what the other's rights will be in the event of a contingency. In *NBT*, for example, the plaintiff argued that "as a matter of precedent and policy, a defendant's deliberate interference with plaintiff's contractual rights that causes damages should be punishable as tortious interference whether or not the contract is actually breached."¹⁵ The Court of Appeals expressly rejected this argument as not being the law in New York.

Yet, the majority in *Havana* made no allowance for the contract terms between the landlord and new tenant and equated the kind of nonmaterial interference that results in a temporary impediment to performance with conduct actionable in tort. This does not mean that in the abstract a landlord's failure to deliver possession on the lease commencement date without excuse is not a material breach. However, the inability of the landlord to perform cannot be elevated to a breach if the standard lease terms clearly provide otherwise. Tortious interference requires proof that the defendant has actually induced a breach which has caused damages; while damages without a breach does not state a claim.

The majority even suggested, resting its analysis on *Kronish*, that the *Havana* plaintiff/new tenant would have a claim for trespass, apparently overlooking the fact that in *Kronish* the new tenant had the right to possession of the whole space when its lease commenced and that the defendant was indeed a trespasser of *Kronish Lieb*. In contrast, in *Havana*, the new tenant was not given possession of the demised premises until after the defendant vacated. In fact, during Lunney's period of holding over it paid the landlord pursuant to its lease and the landlord accepted use and occupancy charges in an amount double the stipulated rent and operating costs for the premises.

Conclusion

Since *Kronish* is not typical of holdover cases, to apply it as precedent without discrimination to all holdovers would expose every holdover tenant to tort liability. If this is what the majority intended by its decision, it adds uncertainty to the real estate leasing market by giving more weight to the holdover and less or no significance to the terms of the new tenant's lease.

If the terms of an incoming tenant's lease do not provide a claim for breach if it does not receive possession on the commencement date, disappointed expectations cannot create a tort liability. It is for these reasons that *Kronish* is an inapposite precedent for commonplace holdovers. If the *Havana* holdover is the kind tried in landlord and tenant court every day and *Kronish* were precedential, all holdover tenants would be exposed to a claim for tortious interference with contract. This sounds suspiciously like strict liability. If it is, it would mark a significant change in New York law.



1. 49 AD3d 70, 852 NYS2d 32 (Dec. 27, 2007). The full bench affirmed an order of Justice Louis B. York granting summary judgment dismissing individual defendants as well as the other tort causes of action.

2. The decision was initially reported in a critical commentary in an ABA Blog by Patrick A. Randolph, Jr., Daily Development for Jan. 15, 2008, at http://dirt.umke.edu/JAN2008/DD_01-15-08.htm; followed by an article in the New York Law Journal by Warren A. Estis and William J. Robbins entitled "Holdover Tenant Liability: Panel Upholds Incoming Tenant's Claim," (Feb. 6, 2008), NYLJ at 5; and later by an article by Scott E. Mollen in his regular weekly column in the New York Law Journal of April 16, 2008 at 5.

3. See, S.H. Spencer Compton and Joshua Stein, "Landlord's Checklist of Silent Lease Issues," N.Y. Real Property Law Journal, Vol. 36:2 (Spring 2008), 13-44.

4. The trial court dismissed claims for tortious interference with prospective advantage and prima facie tort as well as individual named defendants.

5. *Havana*, 49 AD3d at 73.

6. *Ibid.*, at 78.

7. *Ibid.*, at 78.

8. 35 AD3d 317, 829 NYS2d 7 (1st Dept. 2006).

9. Section 223-a. Remedies of lessee when possession is not delivered. "In the absence of an express provision to the contrary, there shall be implied in every lease of real property a condition that the lessor will deliver possession at the beginning of the term."

10. *Kronish Lieb v. Tahari*, 11 Misc3d 1057A, 815 NYS2d 494 (NY Cty 2006).

11. *1114 Trizechahn v. W.R. Grace*, 13 AD3d 200, 785 NYS2d (2004).

12. The Court of Appeals held in *Kronos Inc. v. AVX Corp.*, 81 NY2d 90, 94 (1993) that the tort of inducement of breach of contract, now more broadly known as interference with contractual relations, consists of four elements: (1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible, and (4) damages to plaintiff. (Emphasis added).

13. 87 NY2d 614, 620, 641 NYS2d 581, 584 (1996). The Court of Appeals held further that not all interferences are actionable. Thus,

Where there has been no breach of an existing contract, but only interference with prospective contract rights, however, plaintiff must show more culpable conduct on the part of defendant (see, *Guard-Life*, 50 NY2d at 193-194).

14. *Havana*, at 79.

15. *NBT*, supra. at 623.