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Article 8

Landlord and Tenant - Availability to Landlord of Statutory Summary Proceeding for Breach of Condition in Lease

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Landlord and Tenant — Availability to Landlord of Statutory Summary Proceeding for Breach of Condition in Lease — Plaintiff leased to defendant certain commercial property for a term of years. The lease provided that if the tenant defaulted in the performance of any provision therein, and remained in default for 15 days after notice, then, *"at the option of the landlord,"* the lease would terminate, in which event the landlord might "re-enter the premises and remove all persons therefrom." Plaintiff landlord instituted a summary proceeding to evict defendant for alleged violations of the lease. *Held:* Provision in lease was a condition subsequent, and, on default of tenant, landlord's only remedy would be ejectment, not summary process. *Hayman v. Butler Bros., 196 Misc. 641, 92 N.Y.S. 2d 148 (1949).*

The summary proceeding to remove a tenant, known as such in New York, as unlawful detainer in Wisconsin, and by various other names in other jurisdictions, is entirely statutory.[1] The remedy provided is a speedy one and greatly advantageous to the landlord, who is not forced as at common law to an expensive, time-consuming action in ejectment. But because the proceeding is statutory, it is held that it can only be maintained for the causes specifically mentioned in the statute.[2]

In New York the courts hold that for breach of a provision in a lease which is merely a condition subsequent, the landlord cannot regain the premises by means of the summary remedy, precisely because the statute of that state has not provided that the proceeding is available to a landlord for such cause.[3]

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the employer is subject to an action for discriminatory discharge under Section 111.06 (1) (a) and (c) Wis.. Stats. of 1947. (Richard Planer v. Laundry and Dry Cleaning Drivers, Local No. 360, I.B. of T.C.S. and H. of A., Affiliated with AFL and others, Decision No. 127 (WERB, 1940); Maurice P. Kent v. Federal Labor Union 20741; and the Island Woolen Co., Decision No. 143 (WERB, 1940); Emily Horton v. C. A. Neuburger Co., Decision No. 378 (WERB, 1942); Rose Roberts v. Oshkosh Trunk and Luggage, Inc., Decision No. 392 (DERB, 1942); L. E. Tarrell v. Fox Head Waukesha Corp. and Local Union No. 102 International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, Decision No. 470 (WERB, 1942); William A. Myer v. Wisconsin Motor Corporation and International Union UAAAIW, Local No. 283 CIO, Decision No. 521 (WERB, 1943); Louis Nulju, Ray Bommert, August Harthun and Leonard Galbrecht v. International Harvester Co. and Federal Labor Union No. 22621 AFL, Decision No. 1179 (WERB, 1946); Victor Morran v. Algoma Plywood and Veneer Co., Decision No. 1291 (WERB, 1947); Robert C. Schroeder v. J. P. Cullen and Son, Decision No. 1329 (WERB, 1947); Myrtle Kellnahauser and Rosina Andreshak v. Mathie-Ruder Brewing Co., Decision No. 1506 (WERB, 1948).) However the contract cases of unfair labor practice, though not infrequent, can be avoided if employers are made aware of the procedural steps necessary to a valid union protective agreement and the import of the particular agreement that they become a party to, through adequate legal counseling.

[1] 52 C.J.S. 610: Hartnip v. Fields, 247 Wis. 473, 19 N.W. 2d 878 (1945).

[2] 52 C.J.S. 611; Beach v. Nixon, 9 N.Y. 35 (1853); Kramer v. Amberg, 15 Daly 205, 4 N.Y.S. 613 (1889), affirmed 115 N.Y. 655, 21 N.E. 1119 (1889); Risenfeld v. R-W Realty Co., 223 App. Div. 140, 228 N.Y.S. 145 (1928).

[3] Beach v. Nixon, supra note 2.

However, the New York statute does provide for the summary process in cases of the tenant's holding over after expiration of the term. This provision has been construed in New York to apply not only to cases where the lease has terminated by lapse of time, but also to where the lease has terminated by a conditional limitation.[4] A conditional limitation in a lease, as distinguished from a condition subsequent, is a provision under which the lease is to terminate, ipso facto, upon the happening of a contingency set forth in the lease.[5] Thus, if a lease provides that it shall be terminated by some future happening, and that event comes to pass, the term is absolutely ended, the tenant is a hold-over, and the summary proceeding may be maintained.[6]

On the other hand, a condition subsequent in a lease is a provision whereby, should the tenant breach the condition, the landlord at his option may terminate the lease by an action in ejectment.[7] The breach does not determine the tendency, it merely gives the landlord the right to do so, which right he can exercise or not, as he elects.[8] But he cannot maintain the summary proceeding because the tenant is not a hold-over.[9] In short, it may be said that the breach of a condition subsequent merely renders the lease voidable, while the operation of a conditional limitation renders it void.[10]

It would seem from the foregoing that the test to distinguish between a conditional limitation and a condition subsequent would be to determine whether or not the termination of the lease was at the option of the landlord. But the New York courts, in the course of over a century of litigation under the statute, have come to the view that such is not the test.[11] In *Reisberg v. Ownit Realty Corp.*[12] the court said:

> "The test, to distinguish between conditional limitation and condition subsequent, is not whether the termination is at the option of the landlord, but whether the lease evinces a clear intention that an event, even though its occurence is optional with the landlord, shall, when it transpires, end the lease as if it by its terms had been limited to that time."

The vast distinction is immediately apparent, as are the consequences of such a view. The landlord's use of the summary remedy

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[4] Miller v. Levi, 44 N.Y. 489 (1871); Martin v. Crossley, 46 Misc. 254, 91 N.Y.S. 712 (1905); Burnee Corp. v. Uneeda Pure Orange Drink Co., Inc., 132 Misc. 435, 230 N.Y.S. 239 (1928) (discussed in 38 Yale L.J. 262).
[5] 52 C.J.S. 630; Beach v. Nixon, supra note 2.
[6] Supra note 4.
[7] Niles, Conditional Limitations in Leases in New York, 11 N.Y.U.L.Q.Rev. 15 (1933).
[8] Supra note 7.
[9] Supra note 3.
[10] Supra note 7.
[11] Reisberg v. Ownit Realty Corp. et al, 133 Misc. 156, 231 N.Y.S. 42 (1928); Raywood v. Holden, 134 Misc. 443, 235 N.Y.S. 677 (1929).

is not restricted to cases where the lease is determined by an event provided for in the lease and thenceforward out of his control. The event may be at his option, and still the provision will be a conditional limitation, as long as the event, and not the landlord's option, operates to terminate the lease. Thus it is held in New York that where, under provisions of a lease, the landlord is to have the option of terminating the lease, for instance for breach of condition subsequent, by giving notice that it will terminate on a certain date, a conditional limitation is created, and the summary proceeding may be maintained, since the notice, and not the exercise of the landlord's option, terminates the lease, even though the landlord has exercised his option in causing that event to come about.[13] Such a holding would suggest the very fine dividing line between conditional limitations and conditions subsequent and the necessity of a carefully worded lease if the landlord is to preserve his ability to avoid an ejectment action and avail himself of the summary proceeding.[14]

In Wisconsin, the distinction between conditional limitations and conditions subsequent, a very real problem in New York because of the wording and interpretation of the statute of that state, is under our unlawful detainer statutes[15] unnecessary for the very reason that it is necessary in New York, i.e. the grounds for which the statutory proceedings may be maintained. The Wisconsin statute allows an unlawful detainer action for breach of condition subsequent by the tenant.[16] The cases show many actions brought for such cause where the provisions in the lease creating the condition subsequent would be precisely the type which would bar the action in New York.[17]

A comparison of the two statutes in this regard indicates that the legislative purpose in New York was to more closely guard the tenant's estate than in Wisconsin, for the breach of a condition subsequent and the re-entry by the landlord works a forfeiture of that estate before the term expires, while the working of a conditional limitation terminates the estate as if the lease had, by its terms, been limited to that time, and there is no forfeiture.[18] However, in the final analysis it would seem that, regardless of the legislative purpose a century and a quarter ago, both statutes now accomplish the same purpose, despite a different manner of approach. ROBERT F. BODEN

[12] 133 Misc. 156, 231 N.Y.S. 42 (1928).
[13] Burnee Corp. v. Uneeda Pure Orange Drink Co., Inc., supra note 4; Reisberg v. Ownit Realty Corp., supra note 11; Raywood v. Holden, supra note 11.
[14] Supra note 7.
[15] Wis. Stats., Ch. 291 (1949).
[16] Wis. Stats., 291.01(3) (1949).
[17] Tower Bldg. Corp. v. Andrew, 191 Wis. 269, 210 N.W. 842 (1926); Rupp v. Board of Directors of Assembly No. 58 of the Equitable Reserve Association, 244 Wis. 244, 12 N.W. 2d 26 (1943).
[18] Supra note 7.