Repair Covenants: The Jekyll and Hyde of Leases

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Probate & Property
January/February 1998

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Lawyers and courts often view a lease as both a conveyance and a contract. Nowhere is that Jekyll and Hyde nature of a lease more clearly reflected than in an enforcement of repair covenants. Courts have applied both conveyance and contract concepts to these covenants, requiring lawyers for both landlords and tenants to be cautious in drafting repair covenants.

Background

The concept of a lease as a conveyance dates back to agrarian societies that viewed a lease as a sale by a landlord to a tenant of all rights to the land for a limited term. A landlord did not retain any rights beyond its reversionary interest. Leases were primarily for agricultural purposes. Physical structures on the land were considered subordinate to a tenant's primary purpose of using the land. A tenant could readily inspect the land to learn about its condition. Under these circumstances, the conveyance concept was appropriate and the doctrine of caveat emptor prevailed.

As society became more urban and industrialized, courts whittled away at the perceived harshness of the caveat emptor doctrine. Courts more frequently regarded leases as contracts built on dependent covenants between landlords and tenants. Courts employed contract theories to imply warranties by landlords about the condition of real estate and to grant tenants rights of setoff. Courts thereby transferred the obligation for certain property conditions from tenants to landlords.

Property Condition at Delivery

As a general rule, absent a covenant to the contrary, a tenant under a commercial lease takes the leased property "as is," with all of its problems and benefits. A landlord has no responsibility for the condition of the property at the beginning of the lease term. See 1 Milton R. Friedman, Friedman on Leases § 10.101, at 604 (4th ed. 1997); *Hatfield v. Palles*, 537 F.2d 1245, 1247-49 (4th Cir. 1976); see also *Faberv.Creswick*, 156 A.2d 252, 254 (N.J. 1959) (discussing common law principles). There is no implied covenant that leased property is safe, usable and fit for the purpose rented or that it is in compliance with governmental requirements. This rule is predicated on the tenant's common law obligation to inspect the property before signing a lease. The rule flows from the real estate notion that, absent fraud, a lease is a conveyance of an interest in real estate. The buyer should beware.

This rule has been abolished in residential settings and is eroding in commercial settings. Courts increasingly display a reluctance to apply the conveyance concept to a lease and instead favor the application of contract law. See Friedman § 10.101, at 604, 610; *Javinsv. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074-75 (D.C. Cir.), cert. denied, 91 S. Ct. 186 (1970); *Marini*

v. Ireland, 265 A.2d 526, 532-34 (N.J. 1970); see also *McGuire v. City of Jersey City*, 593 A.2d 309, 315 (N.J. 1991). Depending on the jurisdiction, a landlord may be subject to an implied warranty of habitability, an implied warranty against latent defects, an implied warranty of fitness for the purpose leased and an obligation to deliver the leased property free from latent defects that the landlord's exercise of ordinary diligence would disclose. See Friedman § 10.101, at 610-14; *Davidowv.Inwood North Prof'l Group-Phase I*, 747 S.W.2d 373, 376-77 (Tex. 1988); *Reste Realty Corp. v. Cooper*, 251 A.2d 268 (N.J. 1969).

Even in a jurisdiction that subjects a landlord to implied warranties, a landlord may not be bound by those warranties. That result may depend on several factors, including the relationship of the parties, the nature of the tenant's business and the nature of the commercial premises. Davidow, 747 S.W.2d at 376-77. When a landlord has severely neglected a building's roof or heating system, for example, a court may imply a warranty. Yet, when a tenant's operations cause the building condition, a court may be more reluctant to hold a landlord responsible through an implied warranty. See Friedman § 10.101, at 616.

In light of increasing uncertainty over which legal theory a court will apply, landlord's counsel should negotiate for a lease in which the tenant accepts the leased property in an "as is" condition and acknowledges that the landlord has made no representations or express or implied warranties, other than as set forth in the lease.

Repair Obligation

It should come as no surprise that the common law favored the commercial landlord after the lease term began. Courts held that the landlord had no duty to make repairs or to keep the leased property in repair. See Friedman § 10.501, at 694, *Bellikkav.Green*, 762 P.2d 997, 1004-05 (Or. 1988); *Colemanv.Steinberg*, 253 A.2d 167, 170 (N.J. 1969); *DelPinov.Gualtieri*, 71 Cal. Rptr. 716, 721 (Cal. Ct. App. 1968); but see *Gardensv. CityofPassaic*, 327 A.2d 250, 253-54 (N.J. Super. Ct. Law Div. 1974), aff'd sub nom. *Iafelicev.CityofPassaic*, 358 A.2d 805 (N.J. 1976). In fact, even an agreement by the landlord to pay for repairs did not amount to an implied covenant that the landlord would actually perform the repair work. *NationalLivingCtrs.,Inc.v. CitiesRealtyCorp.*, 619 S.W.2d 422, 424 (Tex. Civ. App. 1981). This common law rule stemmed from the notion of a lease as a conveyance. Because the landlord had no right to enter the leased property during the lease term, the landlord was not able to effect any repairs.

The common law imposed repair duties on the tenant. This duty was limited, however. The tenant was responsible only for those ordinary repairs that would prevent injury, waste or decay. *Western Assets Corp. v. Goodyear Tire & Rubber Co.*, 759 F.2d 595, 602 (7th Cir. 1985); *Dolid v. Leatherkraft Corp.*, 120 A.2d 617, 619 (N.J. Super. Ct. App. Div. 1956). There was also no implied requirement that a tenant make repairs necessitated by reasonable wear and tear. *Santillanes v. Property Mgmt. Servs., Inc.*, 716 P.2d 1360, 1364 (Idaho Ct. App. 1986). The tenant was not obligated to make replacements or substantial repairs -- those

that were extraordinary and costly -- or to make repairs that resulted from the tenant's ordinary use of the leased property. As a result, landlords began inserting express repair covenants in leases. Unfortunately, various jurisdictions have construed repair covenants differently. Counsel should fully explore the law of the property location before inserting a repair covenant in a lease.

Some authorities suggest that a tenant's covenant to repair is no greater than the common law duty to effect ordinary repairs and does not obligate the tenant to make structural changes or repairs or to make improvements. *Mayfair Merchandise Co.*

v. Wayne, 415 F.2d 23, 25 (2d Cir. 1969); *Kaufman v. Shoe Corp. of Am.*, 164 N.E.2d 617, 619 (Ill. Ct. App. 1960). In some jurisdictions, it is a longstanding proposition that a general covenant to keep premises in the same condition as when taken does not require ordinary repairs during the lease term. *Vincent v. Crane*, 97 N.W. 34, 36 (Mich. 1903).

In contrast, other courts have held that a repair covenant requires a tenant continually to keep the leased property in repair. *Longi v. Raymond-Commerce Corp.*, 113 A.2d 69, 72 (N.J. Super. Ct. App. Div. 1955). Sometimes the extent of such an obligation on the part of a tenant is limited by the age and class of the premises. See *In re Royal Yarn Dyeing Corp.*, 114 B.R. 852, 857 (Bankr. E.D.N.Y. 1990). Other courts limit the obligation to those repairs required for the tenant's use of the leased property. *Zoslow v. National Sav. & Trust Co.*, 201 F.2d 208, 209 (D.C.Cir. 1952). Finally, some cases hold that, although a tenant need not make repairs that result from ordinary wear and tear, the tenant must make repairs that will prevent injury, waste and decay of the property. See Dolid, 120 A.2d at 619.

The precise language in a repair covenant is critical to determine the extent of the tenant's obligations. Courts have interpreted specific terms in repair covenants to impose more expansive requirements on the tenant. For example, use of the word "maintain" in a covenant may require a tenant to make repairs that preserve the leased property from failure or decline and to return the property in as good a condition as when received. See *Jacobi v. Timmers Chevrolet, Inc.*, 296 S.E.2d 777, 779 (Ga. Ct. App. 1982). The words "necessary repairs" may require a tenant to make all repairs necessary for it to use the leased property for the purpose leased. *United States v. 15.3 Acres of Land*, 154 F.Supp. 770, 781 (M.D.Pa. 1957), rev'd on other grounds sub nom. *United States v. Delaware, L. & W.R.R.*, 264 F.2d 112 (3d Cir.), cert. denied, 80 S. Ct. 63 (1959). Surprisingly, the term "first class state of repair" has no specifically recognized meaning that would require a tenant to take any repair actions beyond those that a general covenant would normally require. See *Puget Inv. Co. v. Wenck*, 221 P.2d 459, 463-64 (Wash. 1951).

In light of the schizophrenic interpretations courts have given to repair covenants, a properly crafted covenant will expressly address responsibility for each of the following: the interior and exterior of the leased property; the roof; the structure; the systems; alterations, additions, improvements and replacements; and responsibility for conditions that the lease does not assign to either party.

Unfortunately, even when the parties clearly assign repair responsibilities under the lease, courts can find ways to avoid tenant responsibility. See Mayfair, 415 F.2d at 25. Despite a well crafted clause, courts may still consider the length of the lease, the character of the building and its condition at lease

commencement, the age of the building and its construction, the nature of the tenant's business and the parties' subsequent conduct in performing the agreement to determine whether the tenant is obligated to make repairs or replacements. See *Black & Yates, Inc. v. A.R. Fuels, Inc.*, 210 N.Y.S.2d 171, 173 (N.Y. Sup. Ct. 1960); *Michaels v. Brookchester, Inc.*, 140 A.2d 199, 205 (N.J. 1958).

Conclusion

Although courts continue to apply contract law to chip away at the perceived harshness of real estate law, real estate concepts still figure in the commercial lease setting. The more closely a lease approximates that agrarian setting in which the landlord divested itself of all interest in the leased property except the right of reversion (as with many industrial leases), the more likely the tenant will have leased the premises "as is" with few landlord repair obligations. Regardless of whether contract or real property principles apply, courts must enforce an agreement as written and not provide one party with an advantage not bargained for by the parties. Counsel for landlords and tenants should try to craft clear and unambiguous repair and maintenance covenants so that their clients can enjoy the benefits of their agreements and avoid being forced to accept Hyde-like interpretations through court intervention.