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To Eject or Evict - a Lease's 'Conditional' Dilemma

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If I give you a thousand dollars and say, "here is a thousand dollars, it is a gift," it is a gift and, by definition, does not have to be repaid. If I give you a thousand dollars and say, "here is a thousand dollars, it is a loan," it is a loan and, by law, it is payable on demand. However, if I give you a thousand dollars and say, "here is a gift of a thousand dollars, you must repay it on demand," the operative word is not "gift," it is "repay" because my intent is to make a loan. Conversely, if I give you a thousand dollars and say, "here is a loan of a thousand dollars, you can keep it," the operative word is not "loan," it is "keep," because my intent is to make a gift.[1]

Employing language that furthers a client's goals is a skill that, if mastered, affords the practitioner peace of mind and the client a tactical advantage in conducting its affairs. Conversely, carelessness in this regard could cause the practitioner embarrassment and the client unnecessary expense.

This article addresses the drafting and interpretation of a provision found in all leases: the "default provision." Specifically, this article provides an analysis of the ultra-subtle and "age-old distinction"[2] between the "conditional limitation" and the "condition subsequent" (the latter sometimes referred to as a "condition").[3] The U.S. District Court for the Eastern District of New York has noted that, when it comes to distinguishing between these two types of default provisions, New York courts have been "far from consistent."[4]

The Eastern District's assessment notwithstanding, this article endeavors to highlight the theoretical and practical distinctions between a "conditional limitation" and a "condition subsequent."

The Challenge

Below are two default provisions; the challenge of this article lies in being able to discern why Example "A" is a "conditional limitation" and Example "B" is a "condition subsequent," as well as the significance of this distinction:

A. If tenant shall make default in fulfilling any of the covenants of this lease, the landlord may give tenant 10 days' notice of intention to end the term of this lease, and thereupon at the expiration of said 10 days (if said condition shall continue to exist) the term under this lease shall expire as fully and completely as if that day were the date herein fixed for the expiration of the term.

B. Tenant's failure to meet any of the conditions of this lease, including any monetary or non-monetary covenants herein, shall result in tenant's immediate forfeiture of the security deposit and immediate termination of the lease.

Subject Matter Jurisdiction

Before delving into what distinguishes a "conditional limitation" from a "condition subsequent," the practitioner should first note why the distinction matters.

Simply put, the distinction implicates the issue of a court's "subject matter jurisdiction," which, if lacking, could take a case out of the Civil Court's jurisdiction and into Supreme Court's jurisdiction (or vice versa). To wit, if a court were to find that the language of the lease's default provision constitutes a "condition subsequent," then the Civil Court lacks jurisdiction to hear the case, and a landlord would be forced to pursue its "ejectment" remedies in Supreme Court, a much longer and more expensive route. If, on the other hand, a court finds that the language of the lease's default provision constitutes a "conditional limitation," then the landlord would have the right to pursue its "eviction" remedies in Civil Court.

This issue of forum between Civil Court and Supreme Court is crucial.

Civil v. Supreme Court

The Civil Court offers landlords and tenants swift resolution of their cases in the form of a "summary proceeding." The procedures governing summary proceedings are designed to afford the parties speedy resolution with limited access to discovery. In contrast, the Supreme Court offers resolution by way of "plenary action." The procedures and due process rights governing a plenary action ensure that the wheels of justice turn more methodically in that court as, for example, the parties all have a statutory right to discovery.

In addition to the differences in speed, there is also a substantial difference in costs. Resolution of summary proceedings in Civil Court, as opposed to plenary actions in Supreme Court, tends to cost clients much less money—especially when that client is a landlord who is simply seeking possession of a space.

Thus, it is easy to see why landlords invariably desire and expect that the default provisions in their leases be construed as "conditional limitations" and not as "conditions subsequent."

By paying attention to what follows, drafters can understand how to draft a default provision that is in the client's best interests. Similarly, litigators can understand how to identify whether the provision in question is a "conditional limitation" or a "condition subsequent," and can chart their litigation courses accordingly.

The 'Conditional Limitation'

Under RPAPL §711, a landlord may commence a summary proceeding to remove a tenant from the premises only if that tenant "continues in possession of any portion of the premises after the expiration of his term, without permission…." Thus, for a landlord to avail itself of a summary proceeding under RPAPL §711, the tenancy in question must first be terminated.

However, in order to terminate the tenancy in question, the lease must first afford the landlord the extrajudicial power to so terminate once the tenant defaults (note: summary proceedings are for removing tenants from possession not for terminating their tenancies).

Where a lease does not put the power to terminate in the landlord's hands, and since the Civil Court does not have the jurisdiction to declare a lease terminated, the landlord must go through the arduous process of a Supreme Court plenary action to ask, first, that the subject lease be adjudicated as terminated and, second, that the court "eject" (rather than "evict") the tenant—this is the effect of a provision drafted as a "condition subsequent."

If properly drafted, the lease would give the landlord the power itself to declare the tenancy and lease terminated, and then, under RPAPL 711, the landlord would only need to bring a swifter and less costly Civil Court summary proceeding to ask that the tenant be evicted—this is the effect of a provision drafted as a "conditional limitation."

So how can a landlord be sure that its lease provides for a "conditional limitation" and not a "condition subsequent"? The answer lies in the language of the default provision.

For the default provision to qualify as a "conditional limitation," it must first grant the landlord the unfettered right to terminate the tenancy as a result of a breach. Second, the default provision should set forth a sequence of steps which the landlord must put in motion in order to effectuate such termination, which then happens automatically upon the mere passage of time. Only after both of these prerequisites are met will the landlord have in its hands the power to terminate a tenancy.

The First Requirement. As to the first requirement, i.e. granting the landlord the right to terminate the tenancy in case of default by the tenant, the language could be as simple as the following: "'the Landlord may, if the Landlord so elects' terminate the lease 'and this lease and the term hereof shall expire and come to an end on the date fixed in such notice as if the said date were the date originally fixed in this lease for the expiration hereof.'"[5] A pivotal phrase courts look for provides that the "term of the tenancy shall expire as fully and completely as if that day were the date fixed in the lease for the expiration of the term." This language puts the tenant on notice that the lease will expire on its own terms and no further action is required from the landlord to bring the tenancy to an end.

A common error is a default provision that only permits the landlord to "choose," "elect" or "opt" to terminate upon the happening of some event of default. Such language falls short of a "conditional limitation" because, although this language reserves to the landlord a right to terminate the tenancy upon the happening of some contingency (e.g. a tenant's breach), it fails to specify precisely how the landlord is to go about objectively conveying to the tenant that it is "choosing, electing or opting" to terminate the tenancy. Stated otherwise, while the landlord has the right to terminate, it does not hold the power of termination in its hands, and must appear before the Supreme Court to exercise this right to terminate.

Note, just because a tenant may have breached the lease, that breach, in and of itself, does not impact the continuity of the landlord-tenant relationship.[6] This means that RPAPL §711 does not apply (inasmuch as there has only been a breach and not an "expiration of [the tenant's] term"). This also means that the landlord/tenant relationship remains viable until a court of competent jurisdiction (i.e., the Supreme Court) declares otherwise.

The Second Requirement. As to the second requirement—i.e. setting forth the sequence of steps which, once put in motion by the landlord, puts the tenant on notice, objectively and unambiguously, that its tenancy is terminated—the language can be as simple as the following: "[i]f upon, or at any time after, the happening of any of the events mentioned in subdivisions (a) to (h) [and after the passage of the ten-day cure period], the Lessor may give to the Lessee a notice that the term of this Agreement will expire at a date not less than ten days thereafter; this Agreement shall expire on the date so fixed in

such notice."[7]

Courts have generally found that the most objective event is the passage of time. Thus, most conditional limitations are drafted so as to afford the tenant a certain amount of time by which it must cure the alleged breach.[8] If that time passes without the tenant having cured, the tenancy is not yet terminated. Rather, "conditional limitation" provisions then afford the tenant a second time frame, upon the expiration of which the tenancy will be terminated and the lease expired. After the passage of this second time frame, the landlord and the tenant will both be on notice of the fact that the tenant failed to cure its breach and that the tenancy has come to an end.[9]

Note that it is only upon the landlord's accomplishing of this sequence of steps meant to "objectively and unambiguously" put the tenant on notice of the termination of its tenancy, and upon the tenant's failure to vacate, that a summary proceeding can be commenced to evict the tenant.

Example Provisions

A default provision drafted as a "condition subsequent" affords a landlord the right to terminate, but it does not instruct the parties to the lease of the steps that the landlord must take to bring about an objective termination. This relegates the landlord to seek a termination of the lease via the Supreme Court. On the other hand, a default provision drafted as a "conditional limitation" not only affords a landlord the right to terminate, it also instructs the parties of the steps that the landlord must take to put the tenant on notice of the termination. The most commonly used method for providing objective notice to the tenant is the service of time sensitive notices, the expiration of which trigger the lease termination without any further action by the landlord.

In *451 Rescue LLC v. Rodriguez*,[10] ¶17 of the lease contained the following language which succinctly meets all of the minimum requirements of a "conditional limitation."

[if] tenant defaults other than in paying rent, the landlord may serve a 15-day notice to cure; and if the tenant fails to cure within that period, the landlord may serve a 5-day notice of termination, at the end of which the lease shall expire.[11] [Note that like Example A above, this provision affords landlords not only the right to terminate, but also instructs the parties to the lease about how the landlord is to go about objectively effecting such termination, putting the power to terminate in the landlord's hands].

Paragraph 55 of that same lease was structured as a "condition subsequent:"

[i]In the event of a default by Tenant of any term of the lease, breach of lease or violation of lease, Landlord shall have the unconditional right to terminate the lease on (3) days written notice. [Note that like Example B above, this provision provides for a right of termination upon default, but fails to instruct how the landlord is to go about actually terminating the landlord/tenant relationship—leaving the landlord with no alternative but to commence a plenary action seeking an order terminating the lease in case of default].

In Judge Arthur Engoron's words, ¶17 constitutes a "classic conditional limitation" while ¶55 constitutes a "classic condition subsequent." Id. For extra protection, the drafter should add to the conditional limitation "and the lease will terminate and expire on the date set forth in the notice as is that date were the expiration date set forth in the lease."

Conclusion

As New York courts generally go to great lengths to rescue a tenant from having to forfeit a leasehold, it is crucial that an attorney arm himself with a detailed understanding of the rights and responsibilities that accompany "conditional limitations" and "conditions subsequent."[12] The difference translates into substantial savings in time, money and, for the attorney involved, the "unconditional subsequent" write-offs of fees.

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Endnotes:

1. *VNO 100 West 33rd Street LLC v. Square One of Manhattan, Inc.*, 22 Misc.3d 560, 562-63, 874 N.Y.S.2d 683, 685 (Civ. Ct. N.Y. Co. 2008) (Engoron, J.).

2. See *Chuang v. Quezada*, 6 Misc.3d 1023(A), 800 N.Y.S.2d 344 (Civ. Ct. N.Y. Co. 2005) (Battaglia, J.) citing *Beach v. Nixon*, 9 N.Y. 35, 36 (1853).

3. Significantly, under New York law, "conditional limitations" in a residential context based on a tenant's failure to pay rent are generally not enforceable. See *Queen Art Publishers, Inc. v. Animazing Gallery, Inc.*, 2002 N.Y. Slip Op. 40033(U), 2002 WL 452207 (Civ. Ct. N.Y. Co. 2002) (Rakower, J.).

4. *Matter of Family Showtime Theatres, Inc.*, 72 BR 38, 42 (EDNY), aff'd 818 F.2d 1130 (2d Cir. 1987).

5. See *Blue Point Assocs. v. Pic's Laundromat Inc.,* N.Y.L.J., Aug. 27, 1997, p. 26, col. 5 (Civ. Ct. Suffolk Co.) (Barton, J.)

6. See Rasch, New York Landlord and Tenant, Termination of Relations, 2d ed., §23:21, p. 182.

7. See *Gouveneur Gardens Housing Corporation v. Lee*, 2 Misc.3d 525, 769 N.Y.S.2d 829 (Civ. Ct. N.Y. Co. 2003) (Lebovits, J.)

8. Notably, in a commercial setting, courts have upheld termination of leases which are not preceded by a notice to cure, thereby terminating a lease without the opportunity to cure. See, e.g., *Queen Art Publishers, Inc.*, 2002 N.Y. Slip Op. 40033(U), 2002 N.Y. Misc. LEXIS 159.

9. Notably, for purposes of *Yellowstone* injunctions, the lease is deemed terminated if the cure period expires without the tenant undertaking to cure its default. There is no right to a *Yellowstone* Injunction during the "notice of termination" time period where the tenant failed to cure during the "notice to cure" time period. See *B. Bowman & Co., Inc. v. Professional Data Management Inc.*, 218 A.D.2d 637, 631 N.Y.S.2d 19 (1st Dept. 1995).

10. 15 Misc.3d 1140(A), 841 N.Y.S.2d 819 (Civ. Ct. N.Y. Co. 2007).

11. Judge Engoron paraphrased the language of ¶17.

12. See, most recently, *Pacific Coast Silk, LLC v. 247 Realty, LLC*, 2010 NY Slip Op 05887 (1st Dept., July 1, 2010), where the court discusses the attorney's service of a Notice of Termination, without providing the predicate Notice to Cure required by the lease.