New York Law Journal
Real Estate Trends
WWW.NYLJ.COM
An ALM Publication
VOLUME 254—NO. 34
WEDNESDAY, AUGUST 19, 2015

REAL ESTATE LITIGATION

Using Self-Help to Remove Unwanted Hotel Management

By Todd E. Soloway And Joshua D. Bernstein

The term "self-help" reflexively sends shivers down the spines of practitioners and judges alike. Engrained in our collective legal-psyches is the sense that every consequential act performed by our clients while in the throes of litigation requires the imprimatur of the court. Perhaps it is time for another perspective. Rights of self-help regularly make appearances in various contexts including commonly in commercial leases and have become a regular adjunct to a hotel owner's right to remove an unwanted hotel management company even with years remaining on the parties' management agreement.[1]

The concept is not novel: A hotel owner whose business is suffering is entitled to chart her own course irrespective of any contract claims she might face or assert against the manager. Just as with the removal of an unwanted employee or contractor, the right and the ability to remove quickly an unwanted manager is of critical importance to hotel owners in order to gain control over their own business, to ensure that loyalty to the owner prevails, and to provide a smooth and peaceful transition of the hotel operation with the least possible disruption to the business.

All too often, despite having been terminated, hotel management companies refuse to leave and continue to commandeer the operation of the hotel against the owner's wishes and even while acting with disloyalty (shocking as that may be). Hotel management companies take this position even after the hotel owner has (i) exercised her absolute right to terminate the management contract under personal services contract and agency theories; and/or (ii) exercised her contractual right to terminate the contract after the management company failed to cure a noticed material default. In both circumstances, the hotel management company may refuse to comply with a termination notice, refuse to comply with subsequent demands that they vacate, and refuse to comply with contractual procedures for transitioning the business of the hotel following a termination of the contract. Although not articulated, the apparent reason is to leverage the hotel owner in the context of litigation and negotiations even where the management company has no defense to removal.

Faced with this scenario, why should an owner be obligated to go to court to seek an order requiring the manager to leave? As we have seen, from Hawaii, to Florida, to New York and the Caribbean, more and more hotel owners faced with this scenario opt to use their absolute right of self-help to remove an intransigent manager.

Even though the right of self-help is firmly entrenched in both New York and national hospitality law, the initial reaction of many practitioners and courts is that self-help is a risky and legally questionable act.

Yet, even though the right of self-help is firmly entrenched in both New York and national hospitality law, the initial reaction of many practitioners and courts is that self-help is a risky and legally questionable act. In fact, in many hospitality industry cases, motion courts have initially granted temporary restraining orders to the terminated hotel manager despite clear case law to the contrary, on the grounds that the hotel owner should have sought judicial intervention instead of exercising self-help. In so doing, the courts force the owner to continue to employ an unwanted operator managing what are usually complex businesses with substantial amounts of money at stake. To these authors, any form of injunctive relief—temporary or otherwise—should not issue.

Law Allows Self-Help

Though hotel managers typically argue otherwise, under New York law hotel owners are permitted to effectuate the removal of their managers by using self-help without the need for judicial intervention. Indeed, it has been the law in New York for more than 100 years that an owner of real property has the right to eject a licensee, such as a hotel manager, utilizing self-help and is not required to bring a legal action to effect the ouster or to resort to statutory remedies for effecting such removal.[2] And, even where a tenant holds a commercial lease, a landlord may, in certain circumstances, utilize self-help to regain possession of the premises following uncured defaults.[3]

In *Napier v. Spielmann*, the First Department expressly recognized that if real property was being occupied by mere licensees, the owner of the property had the right to eject them from the property by self-help and did not have to bring a legal action for forcible entry and detainer. There, the defendant, Spielmann & Co. was the tenant of real property from which it operated its business. Thomas Napier, a salesman, entered into a contract with Spielmann by which Napier would sell manufactured silks that had been consigned to Spielmann out of Spielmann's leased premises. When the relationship soured a few years later, Spielmann entered the premises, ordered Napier to vacate and thereafter refused to permit Napier to re-enter.

In analyzing whether Spielmann was permitted to utilize self-help to remove the salesman, the court first analyzed whether Napier had any leasehold interest in the property. Finding that, as a salesman providing services to his employer whose occupancy of the property was merely incidental to the employment agreement, the court held that Napier was not a tenant but a mere licensee and therefore did not have any right to legal possession of the premises. In so holding, the court distinguished Napier from a tenant that could only be removed through legal process, holding that "[if] the plaintiffs were occupying as servants or occupying as licensees of Spielmann & Co., their possession of the premises was the possession of Spielmann & Co., who had the right to eject them on their refusal to vacate."[4]

A similar result was reached in *P&A Bros v. New York Dept. of Parks & Recreation*. There, the Parks Department issued a permit to the plaintiff to operate a newsstand in Manhattan. When the

TODD E. SOLOWAY *and* JOSHUA D. BERNSTEIN *are partners at Pryor Cashman. Cecilia M. Orlando Stighetti, an associate the firm, assisted in the preparation of this article.*

permit expired, the department solicited competitive bids and accepted an offer of a successor. Plaintiff, however, refused to vacate the newsstand and commenced an action seeking to compel the department to accept its bid and allow it to continue its operations or, alternatively, to bar its removal without legal process.

As in *Spielmann*, the First Department in *P&A Bros* permitted the removal of the licensee without resort to a summary proceeding as the plaintiff had no tenancy rights in the newsstand. Specifically, holding that the Supreme Court erred in requiring the Parks Department to proceed by way of a summary proceeding, the First Department explained that the lower court had failed to "distinguish between those whose interest in property rises to the status of tenancy and must be evicted by legal process and those situations in which non-tenants may be removed summarily so long as it is done without violence."[5] The P&A Bros court thus determined that plaintiff "[a]s a licensee involved in an arms-length commercial relationship with the Parks Department" was "subject to ouster by the city without legal process in the latter's exercise of its rights as a landowner."[6]

The right to self-help is not limited to licensees. Instead, New York law fully recognizes the right of a commercial landlord to exercise self-help after certain defaults where the lease so permits. In *Sol De Ibiza v. Panjo Realty,* the occupant of the property was a commercial tenant under a written lease agreement. As most do, the lease reserved to the landlord the right to re-enter and regain possession of the demised premises upon the tenant's breach of its obligation to pay rent. Following several breaches of that obligation, the landlord exercised self-help by padlocking the door to the premises and the tenant commenced a proceeding to restore it to possession and for treble damages for wrongful eviction.

On appeal, the Appellate Term, First Department held that a commercial landlord is entitled to use self-help where (i) the lease provides for it upon the tenant's failure to pay rent; (ii) prior to exercising self-help, the landlord served a valid rent demand; (iii) re-entry was effected peaceably; and (iv) the tenant is in default of its obligation to pay rent. In so holding, the Appellate Term explained that "it is well established that a landlord may, under certain circumstances, utilize self-help to regain possession of demised commercial premises."[7]

Hotel Owner's Rights

Hotel management contracts are, by design, not lease agreements and do not afford the management companies any tenancy rights. Rather, such agreements are mere personal services contracts by which the occupancy of the hotel is incidental to the services the manager is hired to perform on behalf of the hotel owner.

With respect to such personal services contracts "if the occupancy of the employer's premises is incidental to, and connected with the employee's services, or if the occupancy is required either expressly or impliedly by the employer for the necessary or better performance of the services to be rendered, then the occupancy is for the master's benefit, and the occupant is a servant or agent, and not a tenant."[8]

For that reason, courts have rejected claims by hotel managers that hotel management agreements afford managers a real property interest. In *FHR TB v. TB Isle Resort*,[9] the owner of the former Fairmont Turnberry Hotel in Florida terminated its hotel management contract with Fairmont and exercised its right of self-help. Fairmont argued that provisions of the hotel management agreement that granted Fairmont a right "of quiet enjoyment" and use of the hotel facilities during the term of the management contract gave Fairmont a real property interest that could not be terminated at will. Rejecting Fairmont's argument, the Southern District of Florida, applying New York law, held that, at best, such clauses granted Fairmont a license to use the real property. Thus, the court held, because "a license, like an agency relationship, may be revoked at will under New York law," Fairmont was not entitled to an injunction enjoining the hotel owner from using self-help or terminating the management agreement.[10]

> All too often, despite having been terminated, hotel management companies refuse to leave and continue to commandeer the operation of the hotel against the owner's wishes and even while acting with disloyalty (shocking as that may be).

Injunctions Continue

Nevertheless, courts continue to issue injunctions against a hotel owner's right of self-help.

In *Marriott International v. Eden Roc*, the owner terminated Marriott's hotel management contract and, when the manager refused to vacate, attempted to remove Marriott from its hotel using self-help. The trial court, concerned about the owner's use of self-help, initially enjoined the owner from removing Marriott from the hotel, forcing the owner to continue to employ its terminated manager until the issue could be resolved on appeal.[11] The First Department vacated the injunction because the parties' hotel management contract "is a classic example of a personal services contract that may not be enforced by injunction."[12] Following the First Department's decision, the trial court directed Marriott to vacate the property, holding that, consistent with all of the case law above on the use of self-help, as the owner of the hotel "Eden Roc has the authority to remove and eject Marriott Renaissance as manager of the Eden Roc hotel forthwith or on whatever other timetable it chooses for the orderly transition of business to a new manager."[13] Similarly, in *M Waikiki v. Marriott Hotel Services*, the court initially granted Marriott a temporary restraining order on the grounds that, among other things, the hotel owner should have sought judicial relief rather than using self-help.[14] As a result, the hotel owner filed for bankruptcy and rejected the management contract within the bankruptcy proceeding.

As the case law set forth above establishes, there is no question that a hotel owner has the absolute right to exercise self-help in removing an unwanted, terminated manager from its hotel.

Conclusion

Though hotel managers may refuse to vacate the hotels they operate even after termination of their management contracts, under New York law hotel owners are not required to go through a lengthy and costly eviction process in order to remove a hotel management company from occupancy of their hotels. Rather, under long-standing New York law, hotel owners have the absolute right to use self-help to peacefully evict a manager without the need to seek judicial intervention.

In issuing temporary restraining orders and, in some cases, preliminary injunctions against the use of self-help on the grounds that hotel owners are required to seek judicial permission to oust a terminated hotel manager, courts have disregarded the long-standing, clear case law set forth above. By doing so, courts deprive owners of their absolute right of self-help and incentivize hotel management companies to flout the law, resulting in only further litigation.

1. See Todd E. Soloway and Joshua D. Bernstein, The Termination of Hotel Management Agreements, New York Law Journal, April 18, 2012; Todd E. Soloway and Joshua D. Bernstein, The Termination of Hotel Management Agreements: Part II, New York Law Journal, April 17, 2013; see also *Marriott Int'l. v. Eden Roc*, 104 A.D.3d 583 (1st Dept. 2013).
2. *Napier v. Spielmann*, 127 A.D. 567, 569-70 (1st Dept. 1908), aff'd, 196 N.Y. 575 (1909); *P & A Bros., Inc. v. City of N.Y. Dept. of Parks & Recreation*, 184 A.D.2d 267, 268-69 (1st Dept. 1992); *Coppa v. LaSpina*, 41 A.D.3d 756 (2d Dept. 2007); *Paulino v. Wright*, 210 A.D.2d 171 (1st Dept. 1994).
3. *Sol De Ibiza v. Panjo Realty,* 29 Misc.3d 72 (1st Dept. 2010).
4. *Napier*, 127 A.D. at 569-70.
5. *P & A Bros.*, 184 A.D.2d at 268-69; Coppa, 41 A.D.3d at 756.
6. *P & A Bros.*, 184 A.D.2d at 269. Similarly, in *Paulino v. Wright,* the court held that licensees are not protected by the provisions of the RPAPL that require eviction through a lawful procedure. Instead, the court held that it is the licensor's option to act with or without a legal process: "RPAPL 713 merely permits a special proceeding as an additional means of effectuating the removal of nontenants, but it does not replace an owner's common-law right to oust an interloper without legal process." 210 A.D.2d at 172.
7. *Sol De Ibiza*, 29 Misc.3d at 75 (citations omitted).
8. 74 N.Y. Jur.2d Landlord and Tenant §12 (2010).
9. 865 F. Supp. 2d 1172 (S.D. Fla. 2011), aff'd, Case No. 11-23115-Civ-Graham/Goodman, 2011 U.S. Dist. LEXIS 155752 (S.D. Fla. 2011).
10. Id. at 1197.
11. *Marriott v. Eden Roc,* Index No. 653590/12, 2012 N.Y. Misc. LEXIS 6246, at *2-3 (Sup. Ct. N.Y. Co. Nov. 7, 2012), rev'd, 104 A.D.3d 583 (1st Dept. 2013).
12. *Marriott v. Eden Roc,* Index No. 653590/12, 2013 N.Y. Misc. LEXIS 5856, at *10-11 (Sup. Ct. N.Y. Co. Dec. 5, 2013), quoting 104 A.D.3d at 584.
13. Decision and Order, *Marriott v. Eden Roc*, Index No. 653590/2012 (Sup. Ct. N.Y. Co. May 24, 2013) (J. Melvin L. Schweitzer).
14. Transcript, *M Waikiki v. Marriott,* Index No. 651457/2011 (Sup. Ct. N.Y. Co. Aug. 30, 2011).

Reprinted with permission from the August 19, 2015 edition of the NEW YORK LAW JOURNAL © 2015 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. #070-08-15-33