

IN THE SPOTLIGHT

Fundamentals Of Constructive Eviction

By **David P. Resnick**
and **Erin Brechtelsbauer**

In market conditions that are favorable to tenants, landlords should be particularly vigilant with regard to the express and implied covenants under their leases. Historically, the tenant's obligation to pay rent and the landlord's obligation to maintain the condition of the premises were held to be independent of one another; thus, when the landlord failed to maintain the condition of its building properly or to provide a tenant with one or more building services as required under its lease, the tenant would be entitled only to sue for specific performance or damages. Over time, however, the doctrine of constructive eviction has developed under the law to allow a tenant the added remedy of terminating its lease when the landlord has failed to perform. Today, constructive eviction may present a commercial tenant with an effective means of both enforcing its rights under the lease and defending against landlord claims of breach.

At the core of a tenant's protection against untenable conditions in its premises is the landlord's covenant of quiet enjoyment. This covenant, which has sustained a long and meandering

evolution in the law, embodies a tenant's entitlement, notwithstanding the express provisions of the lease, to use and occupy its leased space without disturbance from insufferable conditions that are under the landlord's control, and to certain standards of maintenance of the premises by the landlord. Constructive eviction developed from the covenant of quiet enjoyment when courts sought to offer expanded relief to tenants who are facing the most severe landlord breaches.

CONSTRUCTIVE EVICTION DEFINED

A constructive eviction occurs when a tenant has surrendered possession of its leased premises as a result of a breach or disturbance by the landlord that is material and permanent enough to render the premises unfit for occupancy or deprive the tenant of the beneficial enjoyment of the premises. The doctrine may be used by a tenant both as a basis for a claim for relief against a landlord, and as an affirmative defense against a landlord that has sued for abandonment of the premises. Tenants have become increasingly aggressive in their use of constructive eviction as both an offensive and defensive legal tactic, and courts have adopted varying interpretations of the required elements. Consequently, the nuances of this definition merit a detailed discussion.

First, constructive eviction can only be maintained after the tenant has surrendered the premises. The foundation of constructive eviction is that the landlord's failure to perform under the lease forced the tenant to vacate. In some jurisdictions, the tenant owes the landlord prior notice

of the objectionable condition, following which the landlord may cure the violation. The tenant may remain in the premises while it waits for the landlord to cure. However, if the landlord fails to cure within a reasonable time, the tenant may — and often, must — abandon the space if conditions do not allow continued occupancy. A successful constructive eviction action absolves the tenant from its obligation to pay rent and fulfill its other obligations under the lease.

Second, the landlord's breach must render the premises unfit for occupancy or deprive the tenant of beneficial enjoyment of the premises. The most straightforward examples of the required "materiality" and "permanence" are those arising from a landlord's failure to provide heat, electricity or other essential utilities, failure to complete required repairs or improvements, and interference with the tenant's ingress and egress to the premises. More obscure examples include the presence of asbestos, toxic building materials and other adverse environmental conditions, the failure by the landlord to procure required permits or governmental approvals, harassment by the landlord and insufferable conduct of neighboring tenants. While courts are faced with questions of fact in each instance, the landlord's conduct must be so severe that the tenant is essentially denied occupancy of the physical space as agreed under the lease.

EXAMPLES OF CONSTRUCTIVE EVICTION

Recent court cases have highlighted the expanding margins of the doctrine of constructive eviction.

David Resnick, a member of this newsletter's Board of Editors, is a real estate attorney in the Chicago office of Edwards Wildman Palmer LLP. **Erin Brechtelsbauer** is a commercial litigation attorney in the same office.

Cigarette Smoke

Herbert Paul, CPA, PC, v. 370 Lex, L.L.C., involved a dispute over a commercial lease for office space for an accounting practice. After a successful initial lease period, the tenant agreed to an extension of its term, and it was then that the problems started. During the extended lease period, a new party moved into the adjacent premises, and shortly after the neighbor took possession, the tenant's employees began to smell cigarette smoke and suffer the ill effects therefrom. As a result of the smoke penetrating the tenant's leased premises, it was forced to incur great expense to seal off entire rooms from the smoke. The tenant complained multiple times to the landlord, both orally and in writing, and the landlord assured the tenant that the issue would be remedied. The landlord checked ductwork and inspected common walls, radiators and piping, and also (allegedly) notified the neighboring party of the complaints; however, despite the landlord's efforts, the problem continued. The tenant decided the problem was no longer bearable, and moved to new offices. Subsequently, the tenant sued the landlord for moving costs and its inability to use the rooms in its premises that it was forced to seal.

The tenant claimed that the landlord breached the implied covenant of quiet enjoyment, and constructively evicted it. Specifically, the tenant argued that the smoke infiltration inhibited its ability to use and enjoy the premises it had leased. The court found that the tenant had demonstrated that there was an issue of fact on this claim, and left it for trial. In particular, the court noted that while the tenant waited a long period of time before actually moving out, in sealing off and being unable to use rooms within its leased premises, the tenant could demonstrate at least partial constructive eviction.

Noxious Odors

In a similar case, *Italian Cowboy Partners, Ltd. v. Prudential Insurance Company of America*, a tenant also argued constructive eviction based on an unpleasant odor. In *Italian Cowboy*, a family that ran several small restaurants leased a commercial space to open a new restaurant. In ne-

gotiating the lease, the tenant was assured that the building was new and problem-free. Once the lease was signed and the tenant commenced its build-out, it learned of issues faced by the preceding tenant, also a restaurant, based on a persistent foul odor in the space. The landlord, however, disputed these claims and renovations continued. Immediately prior to the opening of the restaurant, when they were cleaning a drain in the premises, the odor became very apparent to the tenants. The restaurant opened, and the landlord attempted to eliminate the odor through various repairs and replacements, all to no avail. Indeed, following various customer complaints, the health department even temporarily shut down the restaurant. After further unsuccessful attempts by the landlord to resolve the issue and confirmation from the previous tenants that the landlord was aware of the issue during their lease, the tenant stopped paying rent and closed. The tenant then sued the landlord, claiming, among other things, that it was constructively evicted.

Texas law recognizes an implied warranty of suitability in commercial leases, and it was on this basis that the court granted rescission of the lease. Specifically, the Texas Supreme Court affirmed that the lease was properly rescinded based on the landlord's breach of the implied warranty of suitability, and as such, an award of damages to restore the tenant to the position it occupied before the lease was proper. Because the lease was rescinded based on this claim, the court did not address the constructive eviction claim, but did acknowledge that it was an alternative means to the same end.

CONCLUSION

While a large fraction of the case law concerning constructive eviction considers facts that the landlord in question never anticipated, there are measures a landlord can take in drafting the lease to ameliorate the risk of losing a constructive eviction action. Most sophisticated commercial tenants will require that the lease contain an express covenant of quiet enjoyment; however, this and other express covenants in the lease may be expanded to provide a statement of the landlord's responsibilities

in enforcing that covenant. Specificity and examples will not only benefit the parties by offering certainty as to their expectations, but the landlord will be well-positioned before a court in a legal dispute over its conduct. In each instance, the language may be limited to carve out from the respective covenant events that are outside of the landlord's control. For instance, following a provision detailing the landlord's responsibilities to provide services to the premises, the lease might state: "If Landlord elects to furnish any such services, Landlord shall not be liable to Tenant in damages, or otherwise, should the furnishing of any service be inadequate, interrupted or be terminated because of necessary repairs or improvements for any cause beyond Landlord's reasonable control."

While it is constantly evolving, awareness of the doctrine of constructive eviction offers parties to a lease the opportunity to crystallize their legal expectations of one another. Every commercial landlord can benefit from an understanding of its contours and the means by which it may be avoided.