4-26-2012

Landlord & Tenant Law in a Nutshell, Fifth Edition (Introduction)

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LANDLORD AND TENANT LAW

IN A NUTSHELL

FIFTH EDITION

By

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Mat #40915710

610 Opperman Drive
St. Paul, MN 55123
1–800–313–9378

Printed in the United States of America

ISBN: 978–0–314–22593–1

To Jane

—D.S.H

To the memory of my late parents,
Allen and Valerie Brown

—C.N.B.

PREFACE

Since 1979, when the first edition of this book was published, the movement of landlord-tenant law toward a greater emphasis on the contractual aspects of a lease has continued relatively unabated. The most notable development in this trend continues to be adoption of the implied warranty of habitability and the accompanying idea of dependence of covenants. At the present time, most jurisdictions have adopted the implied warranty of habitability as the principal doctrine controlling landlord-tenant relations in residential leases. The trend is also reflected in increased application of the doctrine of mitigation and retaliatory eviction. Particular attention has been given to these areas. And, of course, we have tried to make all the subjects covered by this book as current as possible.

The coverage and organization of this book remains essentially the same as that of the first four editions. With respect to the purpose of the book, perhaps the preface to the first edition bears repeating:

''It has been said, and it is probably true, that no first year law school course is as rule-laden and complex as Real Property. A substantial portion of the law of Real Property concerns the relationship of landlord and tenant. This book is intended as a

succinct presentation of landlord-tenant law, designed primarily to aid first year law students. It contains an exposition of most of the rules that govern the legal relations of landlords and tenants, and the exceptions thereto, and also encompasses some exploration of the underlying reasons for the rules. The policy-oriented discussions are included in the hope that they will help the student to better understand the rules and to begin to examine them from a more critical perspective. . . .''

Because of the limitations of the Nutshell format, we believe that this book should be merely the starting point of a student's study of landlord-tenant law. Within these limitations, we hope that we have provided a tool that students will find useful in their study of the law of landlord and tenant.

We thank the research librarians at the University of North Carolina School of Law for their invaluable research assistance with this Edition.

DAVID S. HILL
CAROL NECOLE BROWN

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CHAPTER I

INTRODUCTION

I. HISTORICAL BACKGROUND

A. Classification of the Lease as a Nonfreehold Estate

One of several ways which interests in land are classified is the division of such interests into freehold and nonfreehold estates. The freeholder is seized of the land and his interest descends to his heirs as real property. At common law, the freeholder's possessory interest was protected by use of the assize of novel disseisin, a writ which permitted a dispossessed freeholder to move against the wrongdoing disseisor. The nonfreeholder is not seized; his interest is personal property, a chattel real. A lease is classified as a nonfreehold estate.

The probable reason for the classification of leasehold interests as personal property lay in the origin of the term for years. By the end of the 12th century, when leasehold interests first began to appear in significant numbers, leases were entered into as a means of evading the ecclesiastical rules against usury and as security for the repayment of money loaned to the landlord by the tenant. As was to be expected, one who invested money in a premium lease or took a lease as security for a loan

would want some power of a testamentary disposition over his interest. Prior to enactment of the Statute of Wills in 1540, real property interests could not be devised by will. This prohibition did not extend to personal property. Thus, from an early date lawyers claimed leasehold interests to be personal property. The courts concurred and leaseholds were so classified. While a leasehold was an estate in real property, it was not real property for purposes of determining a leaseholder's property rights. The leasehold became a hybrid known as a chattel real.

B. Remedies Granted Tenants to Protect Their Possessory Rights

Since the leasehold interest of the tenant was characterized as personal rather than real property, the *assize of novel disseisin* and other forms of real actions were not available to him and adequate protection of his interest had to await the further development of the English common law. At the end of the 12th century the remedy of the tenant for a wrongful dispossession by the landlord was an action of covenant in which a prevailing tenant was permitted to recover possession of land. The tenant also had the right to use physical force to resist an attempted wrongful ouster by the landlord.

As against the world at large, including purchasers from the landlord, the tenant had no direct cause of action and was fearfully unprotected. However, in almost all cases a landlord was deemed to warrant the tenant's enjoyment of the land. This

warranty extended to cases of dispossession of the tenant by third parties. Thus, where the tenant was wrongfully evicted by a third party the tenant's remedy was an action for damages against the landlord, and the landlord's remedy was against the third party.

In 1235, tenants were given a new form of action that permitted them to recover possession from one who purchased from the landlord. By the middle of the 13th century the action of trespass had become common and a tenant was permitted to sue in trespass for damages against those who wrongfully disturbed his possession of the land. A special writ of trespass *de ejectione firmae* was developed to meet the tenant's particular needs. By the 16th century this action of ejectment had evolved to an action in which the tenant could recover, not only damages, but also possession of the land, in effect, the modern action of ejectment. After ejectment evolved into a possessory action, the tenant for years was in a better position, *vis-à-vis* ejectors, than the owners of estates in fee; so superior, in fact, that fee owners, through the use of fictional leases, began to use the action of ejectment to try title to land.

Today the fact that a tenant is not seized has relatively few practical consequences with regard to the tenant's possession, use and enjoyment of the premises. However, the lease has not completely outlived its historical classification as personal property. The fact that this interest may be classified as personal property has significant practical

consequences in those jurisdictions which have different schemes of intestate succession or taxation for real and personal property. Courts are also divided on the issue of whether a leasehold is real or personal property for purposes of determining if judgment, mechanic's and other liens against real property can attach to a leasehold estate.

II. THE LANDLORD AND TENANT RELATIONSHIP

The landlord and tenant relationship arises by reason of an agreement, express or implied, between the landlord and the tenant. A tenancy is created when an owner of an estate in land grants to another the right to exclusive possession of the land. Without such an agreement, there can be no landlord and tenant relationship. The agreement is called a lease, and the relationship may be referred to as lessor-lessee or landlord-tenant. Similarly, the parties may be referred to as lessor and lessee, or as landlord and tenant. The possession of the tenant must be in subordination to the interest of the landlord, as the owner of the supporting estate, and with the landlord's consent.

III. REQUISITES OF THE LEASE

No formal agreement is necessary to the creation of a tenancy, nor is any particular form of words necessary to create a tenancy. Whether a tenancy is created depends on the intention of the parties. The intent of the parties may be determined by the

language they have used or, in the absence of a clearly expressed intent, may be implied in fact from their conduct and surrounding circumstances.

The validity of oral leases has been limited by American versions of the English Statute of Frauds (1677) which provided, in effect, that leases for more than three years must be in writing to be enforceable. Most American jurisdictions follow this statutory pattern but reduce the term of valid oral leases to leases for a term not exceeding one year. Where the parties attempt to create an oral lease for a term longer than that permitted by the applicable Statute of Frauds, the agreement as to the duration of the lease is void. A tenancy at will is created which will become a periodic tenancy upon periodic payment of rent. The other terms and conditions of the oral lease will be enforceable.

One particularly troublesome question involving the Statute of Frauds is the validity of an oral lease for the term of a year, which term is to commence on a date subsequent to the making of the lease. The narrow, but majority, view is that if the end of the term is more than one year after the making of the lease, the lease must be in writing. A substantial minority of jurisdictions follows the English view holding that the Statute of Frauds requires a writing only when the term of the lease exceeds one year.

Where a writing is required, the lease must contain (i) the names of the parties, (ii) an adequate description of the property, (iii) the term of the

lease, and (iv) the rent reserved. By the better view the lease need only be signed by the party to be charged in a suit thereunder. There is substantial authority for the view that the lease need only be signed by the party creating it, i.e., the landlord. Under the latter view the tenant is bound by his acceptance of the leasehold.

IV. THE LEASE DISTINGUISHED FROM LICENSES, EASEMENTS AND PROFITS

The right to exclusive possession is the primary feature of a tenancy and is the feature which distinguishes a tenant's interest from a license, easement or profit. Estates in land, such as leases, convey the right of possession to the holder; licenses, easements and profits are not estates in land. Thus, they do not convey a right of possession to the holder, only a right of use. The term ''possession'' is a variable term which has been defined to mean many different things for many different purposes, but it is generally agreed that to constitute possession there must be some minimal amount of physical control over the premises and an intent to possess to the exclusion of others.

A license merely permits a person to enter and go upon the land in possession of another for a specific purpose, or to do an act or series of acts. For example, a landowner may permit a third party to hunt on his land or to use his land as a shortcut to get from one place to another. The license is nonex-

clusive; i.e., the landlord is entitled to concurrent use of the land and may grant additional licenses to others. Whether a license or tenancy exists is a matter of fact. The test is whether the owner of the property has retained control of and access to the premises. The provision of utilities, furnishings, and cleaning service; the owner's retention of access to the premises; and the owner's repair and maintenance of the premises are all factors indicating that the owner has retained control, and that the occupant has only received a license. As might be expected, there are areas in which the ideas of license and tenancy become blurred. For example, guests in hotels and rooming house occupants are usually considered to be licensees, not tenants. In contrast, there is substantial authority for the view that occupants of so-called ''apartment hotels'' are tenants, not licensees; and this is true even where the occupant is provided some of the services normally found in a hotel—e.g., cleaning services. The license is also generally deemed to be revocable at the will of the licensor.

An easement may be fairly defined as the right of one person to go onto land in possession of another and to make a limited use of the land (e.g., the right to string telephone wires across the owner's land); a profit is the right to take some part of the land itself or some product of the land (e.g., the right to cut timber or mine coal). Attached to every profit is either an express or implied easement to access the burdened land for the limited purpose of removing the product from the land. Easements (profits) are

distinguishable from licenses. Licenses are terminable at the will of the licensor; easements (profits) are not freely terminable. Also, easements (profits) are interests in land; they are rights to use or take something from the land of another. Licenses are not interests in land; they are privileges. Easements (profits) must also be distinguished from leases. Although the easement (profit), like the tenant's interest in his leasehold, is irrevocable, the easement (profit) holder's rights are not exclusive. The grantor may use the property encumbered by the easement (profit) in any manner he wishes so long as such use does not interfere with that of the easement (profit) holder. In contrast, in the absence of an agreement to the contrary, the tenant's right to possession is exclusive and the tenant may use the premises for any lawful purpose, subject, of course, to the common law prohibition against the commission of waste. (See ''The Duty to Repair in the Absence of an Express Covenant to Repair,'' page 92).

V. THE LEASE, A CONVEYANCE OR A CONTRACT

Although the authorities are not in complete agreement, a lease of real property may be fairly characterized as a blend of property and contract doctrines. Under the more traditional view a lease is treated as a conveyance of an interest in land to which the covenants are incidentally attached. Thus, a lease is generally considered to be a convey-

ance for purposes of execution and delivery. Leases also fall within the purview of the recording acts. With the exception of short-term leases, leases are usually required to be recorded to protect the tenant against a subsequent conveyance by the landlord. Generally, a subsequent purchaser from the landlord takes the property free and clear of all outstanding interests of which he has no notice. The tenant's possession of the leased property ordinarily gives a subsequent purchaser the requisite notice. In the absence of such possession, recordation of the lease serves as constructive notice of the tenant's leasehold interest to all subsequent purchasers, and they take the land subject to the prior rights of the tenant. It should be noted that recording of the lease is not necessary for the lease to be valid between the landlord and tenant.

Under the traditional view the covenants in the lease are usually considered to be independent of the parties' respective ''property'' interests unless expressly or impliedly made dependent. Thus, breach of a substantial covenant by one party will not justify nonperformance by the other unless the lease so specifies. An exception to this latter rule exists where the covenant is so important as to go to the whole of the consideration for the lease; for example, performance of a covenant not to compete has been held to be essential to the beneficial enjoyment of a commercial leasehold by the tenant. The landlord's breach of such a covenant is deemed to deprive the tenant of the beneficial enjoyment of the demised premises, causing a constructive evic-

tion of the tenant which entitles him to terminate the lease.

The transition from a predominantly rural, agrarian society to a predominantly urban, industrial society during the past 180 years has altered substantially the true subject matter of most modern day leases. In the majority of modern leases, the land is of minimal importance and the primary subject of the lease is the structure (or portion thereof) located on the land and the services which are to be provided to the tenant by the landlord. The myriad problems arising under this new landlord-tenant relationship are commonly handled by the insertion of specific clauses into the lease, thus reinforcing the contractual aspects of the lease. At present, following what many believe to be the better view, there is a substantial and growing judicial inclination toward implying mutual dependency to the important covenants of a lease. In addition, a majority of courts now hold that there is an ''implied warranty of habitability'' in a residential lease; and contract doctrines such as ''mitigation of damages'' and ''anticipatory repudiation'' are receiving recognition by a growing number of courts in landlord-tenant litigation. The most salient portion of this trend has evolved in the area of residential leases, but significant changes have also occurred in the commercial lease arena.

Although the trend toward emphasizing the contractual aspects of the lease has been accelerated by legislation in many jurisdictions, judicial modification of the common law is a time-consuming process

and new concepts may not necessarily meet with universal acceptance. Thus, the results in many cases will vary depending upon whether the court emphasizes the more traditional view of the lease as a conveyance of an interest in land, or follows the trend and places its emphasis on the contractual aspects of a lease.