

# LAW CURRENTS An informational newsletter from Richard A. Klass, Esq.

## Throw in the Towel!

### Ejection of Boxing Gym

COVID-19 has had a deleterious effect on New York's commercial landlords.

Due to the pandemic, many tenants have been unable to meet their lease obligations; in turn, this has resulted in the domino effect of landlords being unable to meet their mortgage obligations. Landlords have been hampered from evicting non-paying commercial tenants because of the Governor's executive orders placing a moratorium on commercial evictions for over a year.

Caught up in the current quagmire, landlords whose tenants have defaulted under their commercial leases for reasons other than nonpayment of rent have had a difficult time removing them from the premises.

#### **Boxing Gym with troubling lease violations**

According to the landlord, a fitness center specializing in boxing, martial arts and MMA-inspired workout routines was violating the terms of its lease prior to the pandemic. The allegations against the fitness center included:

- **Lack of special fitness center permit:** NYC Zoning Regulations §12-10 define a "physical culture or health establishment" as "any establishment or



facility, including commercial and non-commercial clubs, which is equipped and arranged to provide instruction, services, or activities which improve or affect a person's physical condition by physical exercise or by massage." The NYC Department of Buildings requires that businesses operating as a physical culture establishment or facility have a special permit in order to operate. The tenant never obtained the special permit and was alleged to have abandoned the application process;

- **Failure to obtain a health club license:** The tenant agreed in the lease to "file any and all applications for permits and licenses required by any local, federal, state or city municipal agency for the conduct of tenant's business and the operation and maintenance of the demised premises." The lack of the license was alleged to be a breach of the lease;
- **Dissolution of corporation:** The tenant was operating the fitness center despite the corporation

having been dissolved by the New York Secretary of State years ago;

- **Lack of insurance:** The lease required the tenant to maintain general liability insurance to cover any claims for bodily injury or death or property damage occurring on the premises of at least \$2 million per occurrence. The tenant did not provide the landlord with proof of insurance;
- **Non-payment of rent:** The landlord claimed substantial rent arrears were due from the tenant for many months' worth of rent and taxes owed.

## Immediate Request for Order of Ejectment

The landlord retained **Richard A. Klass, Esq.**, *Your Court Street Lawyer*, to bring an action against the fitness center to regain possession of the premises. An action for "ejectment" of the tenant from the premises was commenced and an Order to Show Cause was immediately filed, asking the judge to issue an Order of Ejectment.

## Preliminary injunction request

Under CPLR 6301, a court is authorized to grant a preliminary injunction where it appears that the defendant threatens or is about to do an act in violation of the plaintiff's rights regarding the subject of the action, which would tend to render any judgment ineffectual. The court may also grant a temporary restraining order ("TRO") where it appears that there is the potential for immediate and irreparable injury, loss or damage. The plaintiff must show that: (1) there is a likelihood of the plaintiff's success on the merits; (2) irreparable harm will occur without an injunction; and (3) a balancing of the equities tips in the plaintiff's favor. *See, Hoeffner v. John F. Frank Inc.*, 302 AD2d 428 [2 Dept. 2003].

- **Likelihood of success on the merits:** The landlord alleged that the tenant remained in possession of the premises, continuing to operate its fitness center, despite the lease having been terminated; the tenant owing substantial rent arrears; the corporation having been dissolved; there being no license or permit to

operate as a health club; and the lack of insurance coverage. The landlord made a *prima facie* showing of its right to relief. *See, Terrell v. Terrell*, 279 AD2d 301 [1 Dept. 2001].

- **Irreparable harm or injury:** The tenant allegedly continued operating as a fitness center to the detriment of not only the landlord but also its gym patrons and the general public. The landlord urged that the threats to the public included the lack of liability insurance, operating an unlicensed facility with lack of proper permits, and the potential exposure of bodily injury or damage claims. These were alleged to be of actual, imminent harms to be suffered and were not remote possibilities or speculation. *See, Khan v. State University of New York Health Science Center at Brooklyn*, 271 AD2d 656 [1 Dept. 2000].
- **Balancing of the equities:** The landlord asked the judge to consider the harms each side would suffer and that they would tilt in favor of ejecting the tenant. In balancing the equities of the situation, "it must be shown that the irreparable injury to be sustained ... is more burdensome [to the plaintiff] than the harm caused to the defendant through imposition of the injunction." *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co. Inc.*, 114 AD2d 165 [2 Dept. 1986].

The judge considered the landlord's request and granted the Order of Ejectment. The New York City Sheriff immediately issued process on the fitness center and, acting on the Order of Ejectment, delivered possession of the boxing gym to the landlord.

— *Richard A. Klass, Esq.*

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