

Real Estate Trends

TRANSACTIONAL REAL ESTATE

Differences Between Leases And Licenses of Real Property

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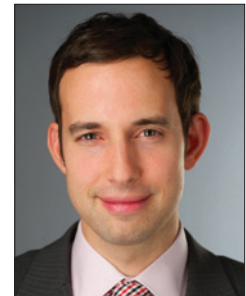
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Owners of real property seeking to give a third party the right to use all or a portion of their property may do so through the grant of a leasehold interest or a license. Leases are generally viewed as more appropriate for a longer-term occupancy on an exclusive basis, and licenses are generally viewed as more appropriate for shorter-term arrangements and for non-exclusive uses. In many cases, however, the distinction between the two interests can be blurred.

A lease typically grants to the lessee an exclusive right to specific property of the lessor for a set term of years, in consideration of the payment of rent. The lessee receives an interest in the property for that set term, and such interest is not revocable at will by the lessor (unless expressly provided for in the lease).



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In contrast, a license typically grants a right or privilege to conduct one or more activities of a temporary nature on the licensor's property. A license does not constitute a real property interest. A license will usually be non-exclusive, with the licensor and other parties also having a right to use the licensed property. Additionally, a license is generally revocable at will by the licensor unless the agreement provides otherwise.

Differences in Remedies

From a property owner's perspective, entering into a licensor-licensee relationship with a user of its property can offer important advan-

tages. It is easier to remove a licensee from the property than it is to remove a tenant. A licensee does not hold an estate in the property, so absent a contractual agreement to the contrary the property owner may terminate the license agreement at will (for any reason or no reason at all) regardless of whether the licensee has defaulted.

In New York, a property owner that revokes a license may elect to remove the licensee either by serving a ten-day notice to quit and commencing a special court proceeding or by using peaceable self-help (e.g., changing locks or disactivating a key card). If the court finds that the self-help was forcible and not peaceable, the licensee's only remedy will be

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damages. The licensee is generally not entitled to restoration of its right to use the property or to equitable remedies, like an injunction or specific performance.

In contrast, to remove a tenant and terminate a lease agreement prior to the expiration of the term, a landlord must generally go through an eviction process, which can involve drawn-out proceedings and is often expensive. The landlord must provide the tenant with notice and an opportunity to cure before the landlord may commence an eviction proceeding.

Tenants may have defenses to an eviction in New York. If an eviction is contested, the

process can take months, or even years—and a property owner may lose opportunities to relet the property and may not ultimately recoup lost rents and expenses incurred in connection with the eviction process.

Self-help rights against the holder of a leasehold interest are generally not available unless specifically provided for in the lease agreement. Moreover, courts are generally hostile to a property owner's use of self-help against a lessee, even when it is provided for in the lease.

When a lessee is wrongfully removed from a property, the lessee may be entitled to damages, and would also be entitled to restoration of its possession of the property (unless the court determines that the property owner would have nevertheless prevailed in proceedings to eject the lessee).

Even a license may be entitled to enhanced protection if it is coupled with a leasehold interest. For example, in *Blenheim LLC v. Il Posto LLC*, 827 N.Y.S. 2d 620 (N.Y. Civ. Ct. 2006), a building owner leased portions of the basement and ground floor to a restaurant operator for 25 years, and the lease agreement included a "revocable license" to use vault spaces in the building.

The property owner attempted to revoke such license and remove the tenant from the vault space. The restaurant operator argued that its use of the vault space was necessary to its restaurant business, and that the license was therefore appurtenant to its lease and could not be revoked.

The court agreed, holding that a right that is essential or reasonably necessary to the full beneficial use and enjoyment of the leased

property, may not be revoked or otherwise terminated until the lease expires.

The court relied on cases such as *Riccardo's Lounge Inc. v. Maggio*, 9 Misc.3d 1112(A) (N.Y. Sup. Ct. 2005), in which a restaurant-tenant's use of a basement from the commencement of the lease term to store plumbing, pipes and grease traps had created an appurtenance.

The court distinguished cases in which a tenant's mere convenience in its use and enjoyment of the space did not create an appurtenance, such as *Mammy's Inc. and Pappy's Inc. v. All Continent Corp.*, 106 N.Y.S.2d 635 (N.Y. Sup. Ct. 1951), where a restaurant-tenant's use of a parking garage to dispose of garbage had not created an appurtenance because the tenant had alternative means of disposing of the same.

The court in *Blenheim* found that the restaurant-tenant needed the vault for its compressors, hot water heaters and elevator machine equipment, which were necessary for the full beneficial use and enjoyment of its business, and so concluded that the license was actually not revocable.

Determination of Nature of Arrangement

Whether the parties characterize the agreement as a lease or a license is not always dispositive of how the agreement will be treated under the law. In determining whether an agreement is a license or lease, courts consider more than simply the name of the agreement. Courts seek to ascertain the intention of the parties in entering into the agreement. Courts consider whether the granted use is non-exclusive; whether the property owner retains controls over the property; and whether the property owner provides services essential to the other party's use of the property.

Courts also take into account the equities of the situation. In general, courts will conclude that an agreement is a lease if the document grants exclusive use for a set period of time, and a license if the document grants non-exclusive use and the property owner is expressly entitled to terminate the agreement at will.

For example, in *American Jewish Theatre, Inc. v. Roundabout Theatre, Inc.*, 610 N.Y.S.2d 256 (N.Y. App. Div. 1994), the court considered an agreement that was labeled a license agreement and held that it was, instead, a lease agreement. The plaintiff theater company in this case brought an action for injunctive relief in relation to a rental dispute. Generally, injunctive relief is only afforded to tenants, not licensees.

The court relied on the fact the agreement entered into by the parties gave the plaintiff a six-month fixed right to use the premises, which was not revocable at will. As such, the court found that the relationship between the parties was that of landlord and tenant, despite the styling of the agreement as a "license".

Similarly, in *Nextel of New York, Inc. v. Time Management Corp.*, 746 N.Y.S.2d 169 (N.Y. App. Div. 2002), the court affirmed injunctive relief where the parties had entered into an agreement labeled a license agreement because the court found that the agreement was really a lease agreement.

In *Nextel*, the defendant property owner appealed an injunction that was granted to the plaintiff, arguing that because the relationship between the parties was licensor-licensee, an injunction could not have been granted. The court, however, found that the rooftop cellular agreement entered into was a lease and not a

license, as the agreement contained many provisions typical of a lease.

The court emphasized certain factors, including the following: the agreement was for a term of five years, with five automatic renewal terms of five years each; Nextel's equipment would not become fixtures; Nextel retained title to its equipment; Nextel's employees had unlimited access to the premises; and Nextel was expressly granted the right to quiet enjoyment. Because these provisions were typical of a lease agreement, the court concluded, an injunction was an appropriate remedy.

More recently, in *Union Square Park Community Coalition, Inc. v. New York City Department of Parks and Recreation*, 22 N.Y.3d 648 (2014), the New York Court of Appeals considered whether the New York City Department of Parks and Recreation illegally leased parkland—a pavilion in Union Square Park—to a private restaurant company, as parkland could not be leased or alienated without legislative approval.

The agreement between the Parks Department and the company was labeled as a “license agreement” and permitted the company to operate a seasonal restaurant in the pavilion for a term of fifteen years.

Per the agreement, the restaurant was only permitted to be open from mid-April to mid-October from 7 a.m. until midnight each day. The company was obligated to pay an annual license fee and spend at least \$700,000 on capital improvements.

The court ultimately found that, despite a 15-year term and payment structure, the agreement was

what it purported to be—a revocable license agreement. The court relied on the fact that the agreement contained several provisions that illustrated the Parks Department's retention of extensive control over the daily operations of the restaurant.

For example, the Parks Department reserved the right to approve all menus, schedules, services, merchandise and prices, and required the company to use specific vendors as suppliers, offer outdoor seating to the general public and community programming, host at least ten annual charity fundraising events, and provide culinary internships for local students.

The court also emphasized that the agreement contained a broad termination clause permitting the Parks Department to terminate the license at will (so long as the termination was not “arbitrary or capricious”) upon twenty-five days' prior written notice, without any obligation to reimburse the company for the cost of its capital improvements.

Conclusion

Parties entering into an agreement for the use of real property should consider whether they intend to create a lease or a license because the nature of the arrangement may significantly affect the rights and remedies of the parties, and courts may look beyond the parties' characterization, and scrutinize the terms, of the arrangement in determining whether it constitutes a lease or a license. An owner that intends to create a license (or a user that intends to enter into a lease) should ensure that the provisions of the agreement reflect such intent.