

Commercial landlord can't evict defaulting tenant

Judge finds breach of lease 'not material'

By Eric T. Berkman

A Superior Court judge has found that a commercial landlord could not evict a tenant who breached his lease by repeatedly failing to pay his rent on time or maintain the premises according to strict lease terms.

Under the lease in question, plaintiff Nicola Varano, owner of Nico Ristorante in Boston's North End, was required to pay the rent "in advance in monthly installments" – meaning on or before the first of each month – and to comply with specific cleanliness and maintenance conditions while following "any applicable law, statute, ordinance, rule, regulation or code."

Varano, however, typically paid after the first of the month despite at least 15 written warnings from the landlord, defendant PDJM Land Trust, and did not comply at all times to the letter of the lease's maintenance and code requirements.

Following PDJM's issuance of a notice to quit, Varano filed an action



The commercial lease dispute involved the owner of Nico Ristorante in Boston's North End, who filed suit after the landlord issued a notice to quit. (ASSOCIATED PRESS)

challenging the eviction, asserting that PDJM contrived pretextual breaches in order to justify an eviction that would allow its own restaurant to expand into Nico's space.

Following a bench trial, Judge Robert B. Gordon found that Varano had, in fact, breached the lease but that eviction was improper because the breaches were not material under the factors articulated in the Appeals Court's 2005 *DiBella v. Fiumara* decision,

as taken from the Restatement (Second) of Contracts.

"To evict Nico from its tenancy with years remaining on the Lease would produce a seriously unfair forfeiture," Gordon wrote. "A commercial death penalty, for crimes as inconsequential as Nico's, is a result that equity simply will not countenance."

The 50-page decision is *Varano v. PDJM Land Trust, LLC, et al.*, Lawyers Weekly No. 12-036-22.



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— VINCENT J. PISEGNA, BOSTON

'EQUITY ABHORS A FORFEITURE'

Varano's attorney, Vincent J. Piseigna of Boston, said the decision sets out a thorough roadmap for the resolution of any dispute in which a landlord seeks to terminate a commercial lease.

"You will want to read this if you're involved in a commercial landlord dispute," Piseigna said. "These are very fact-specific cases, and it's not just a simple matter of [the tenant] having not paid the rent or having breached the lease. You have to go through the requirements of DiBella and the Restatement as far as analyzing whether a breach is material."

The landlord's counsel, Christopher J. Marino of Boston, could not be reached for comment prior to deadline.

Boston attorney Bruce E. Falby called the decision "a good reminder that the time-honored rule of Massachusetts law that

equity abhors a lease forfeiture is alive and well."

Default terms — even in heavily negotiated leases between sophisticated parties — do not necessarily control, Falby said.

"When representing landlords, lawyers should think twice about launching lease termination actions based on defaults, even willful failures to pay rent, that were soon cured and/or caused little or no harm or for which the lease gives the landlord a money damages remedy," Falby said. "Based on established [Supreme Judicial Court] and Appeals Court case law, the court's conclusion seems comfortably within the exercise of the court's equitable discretion."

Similarly, Boston attorney Liam J. Vesely said the case is noteworthy for the balancing test that Gordon applied, focusing on the impact that forfeiture would have on the tenant versus the impact of the tenant's conduct on the landlord.

"The court appropriately indicates that there were problems and these were not the ideal tenants," Vesely said. "But as the court also said, it's not that the rent wasn't paid; it's that it wasn't timely paid. The court focused on that and said, 'Look, the lease has a late-pay provision in it, so forfeiture would be a disproportionate remedy as opposed to the monetary remedy that the landlord would be entitled to by forcing the late fee'"

Meanwhile, Eric Labbe of Boston said the default provision at issue in the case, which had strong language stating that after two late payments the tenant would automatically be in default, is fairly typical.

"The practice point is for landlords to understand how a court will view these scenarios and the facts, and consider that when terminating the lease," he said. "Here, for example, if [the tenant's] late payment was going to have the effect of the landlord not being able to make its mortgage payment or being in breach of some other agreement it was subject to, I think the court might have viewed it differently."

LEASE DISPUTE

PDJM, a realty trust managed by Filippo Frattaroli, purchased 417-419 Hanover St. in 2016. Frattaroli and his wife, Anna, also own and operate Ristorante Lucia next door.

Upon making the purchase, PDJM assumed Nico's existing 10-year commercial lease, becoming Nico's landlord.

The lease required that Varano pay rent "in advance in monthly installments," which the landlord and later the court interpreted as obligating the payment to be made no later than the first of the month to which the rent applied.

The lease also required Varano to maintain the premises in good

Varano v. PDJM Land Trust, LLC, et al.

THE ISSUE: Could a commercial landlord evict a tenant that breached its lease by repeatedly failing to pay its rent on time or maintain the premises according to strict lease terms?

DECISION: No (Superior Court)

LAWYERS: Vincent J. Pisegna of Krokidas & Bluestein, Boston (plaintiff) Christopher J. Marino of Davis, Malm & D'Agostine, Boston (defense)

condition and, upon written notice from the landlord, to take whatever steps might be necessary to comply with necessary improvements.

Varano was further required to install grease traps and pre-treatment facilities and to clean and maintain them regularly in accordance with laws, regulations and codes.

The lease also contained a default clause entitling the landlord to evict Nico if a rent installment remained unpaid 10 days after the tenant received notice and empowered the landlord to terminate without notice or cure should the tenant fail to pay rent when due twice in a calendar year.

After PDJM took over the lease, however, Varano resumed his practice of paying rent in the middle of the month for which the rent was owed, as had been the understanding he had with PDJM's predecessor.

Varano continued to do so, despite at least 14 written communications in which PDJM cautioned him that rent was due the first of every month. Varano never responded or objected to the communications.

At the same time, payments were typically just a few days late, and on at least one occasion, PDJM collected late fees.

Regarding maintenance and use, PDJM claimed the tenant violated the lease by, among other things, storing supplies and equipment in the basement and courtyard in a disorderly manner, storing materials too close to boilers and heaters, and failing to seal a vent opening in the chimney that serviced the boilers and heaters.

In August 2018, PDJM issued a notice of termination of lease. Varano then filed an action in Superior Court seeking a declaration that the breaches were immaterial and did not justify eviction.

IMMATERIAL BREACHES

Following a bench trial, Gordon found that, based on the facts, Varano was, in fact, in breach of the rent provisions.

Applying the *DiBella* factors, however, he found that the violations did not justify eviction. *DiBella* called for an analysis as to whether relief from forfeiture would be "just and right" under the circumstances, taking into

account whether the breaching party was acting in bad faith and the extent to which the injured party would be deprived of benefit.

"To be sure, Nico has not been a perfect tenant," Gordon said. "The restaurant's cleanliness and maintenance have been ongoing concerns for PDJM since the first day it turned the key ... and this landlord has had to bird-dog untimely rent far more often than it should."

Nonetheless, the judge said, "Varano and his staff have endeavored to be responsive to the periodic concerns conveyed to them by PDJM, remitting rent payments promptly when alerted to their lateness and commissioning premises repairs whenever maintenance problems were brought to their attention."

To the extent the tenant failed short of the landlord's expectations, such failures were the result of a "challenging cash management environment" paired with the exacting demands of a new landlord, Gordon found.

Meanwhile, he concluded that eviction would cause Varano's restaurant to lose \$500,000 in site improvements and years of accumulated goodwill associated with that location, potentially putting it out of business, when the breaches themselves were not particularly injurious to the landlord. Thus it was a penalty too steep to justify under principles of equity, Gordon decided.