

Past Due Rent May Not Support A Claim For Eviction

By Jason Hirsh and Jamie Burns (September 6, 2018, 5:29 PM EDT)

In the context of a commercial real estate acquisition, are you advising clients that: (1) they will be unable to collect rent accruing prior to the date the client takes ownership of the property and (2) they will not be able to evict a tenant based upon the failure to pay rent accruing before the client takes ownership of the property? If not, you should be. On the flipside, in the context of an eviction proceeding, are you advising tenants that a new landlord lacks standing to demand or recover rent coming due before the landlord became owner of the property? Again, if not, you should be.



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Just weeks ago, in *1002 E. 87th Street LLC v. Midway Broadcasting Corp.*, the Illinois Appellate Court held: (1) a buyer of real estate lacks standing to sue for rent due and owing prior to closing of the real estate acquisition and (2) that a claim for past due rent is not assignable.[1]



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In *1002 E. 87th Street LLC v. Midway Broadcasting Corp.*, the landlord, 87th Street, purchased property that was subject to a commercial lease.[2] The tenant it inherited in the purchase, Midway, was behind on its rent at the time of the sale.[3] Based on Midway's failure to satisfy its obligation to pay rent, 87th Street sued Midway for possession and breach of the lease and also sued the guarantor of the lease for breach of the guaranty.[4] The trial court dismissed the complaint in its entirety based upon lack of standing.[5]

On appeal, 87th Street argued that the lease entitled it to demand strict compliance with past due rent provisions.[6] In support of this argument, 87th Street, explained that it had standing by virtue of the "nonwaiver clause" in the lease which stated that "[n]o failure of landlord to exercise any power *** or to insist upon strict compliance *** and no custom or practice of the parties *** shall constitute a waiver of Landlord's right to demand exact compliance with the terms ***." [7] Thus, 87th Street argued that based on the nonwaiver clause, it was entitled to pursue the past due rent despite any action or inaction of the prior owner.[8] The appellate court rejected this argument. Specifically, it said that 87th Street could not rely on the nonwaiver clause because a demand for exact compliance with the lease does not include a nonexistent right to collect rent due before it owned the property.[9]

87th Street also argued that rent accrual is a chose in action, which is freely assignable, and, here, the rent claim had been assigned by virtue of the assignment of the lease.[10] To make its argument, 87th

Street relied upon cases discussing debt assignments generally.[11] The appellate court rejected this argument as well, distinguishing a lease transfer after a conveyance of property from a debt assignment and noting that Illinois courts routinely hold that rent in arrears is not assignable.[12]

In affirming the trial court, the appellate court explained that if a landlord conveys property by warranty deed without reserving any rights, it conveys the leases attached to the property, as well as the right to receive unaccrued rent.[13] Thus, if the tenant fails to pay rent at any point after the transfer of ownership, the new landlord has standing to sue for that unpaid rent.[14] However, the appellate court made abundantly clear that the new landlord does not have the right to sue for unpaid rent that accrued prior to the transfer; rather, the original landlord retains this right.[15]

Because 87th Street lacked standing to sue the tenant for rent accruing prior to its ownership of the property, the appellate court necessarily concluded that the landlord also lacked standing to sue on the lease guaranty.[16] So, the new landlord was hit with a one-two punch. Not only was the landlord precluded from evicting a tenant who was in default under its lease, it also lacked any recourse against the guarantor.

1002 E. 87th Street LLC v. Midway Broadcasting Corp. should set off alarm bells for lawyers counseling clients with respect to commercial real estate. Imagine that your client is vetting a commercial real estate acquisition with an eye towards redeveloping a piece of real estate. In doing so, your client will likely review the rent rolls and, among other things, identify commercial tenants that are behind on rent and presumably subject to immediate eviction. Such considerations will certainly drive, in part, the purchase price. However, lawyers need to advise their clients that they are not going to be able to immediately evict tenants that are late on rent but will rather have to wait until the tenant defaults again after the deal closes. Assignment of the past due rent claim would, of course, be a wise strategy to circumnavigate the standing issue. But, as noted above, even if the purchase agreement purports to assign claims to past due rent, under Illinois law, rent in arrears is not assignable. On the seller's side, the seller retains the claim for rent arrearage against its former tenants after the sale, and lawyers should advise their clients as to whether it would be worthwhile to pursue those claims after the sale closes.

Finally, lawyers representing tenants should be equally aware of 1002 E. 87th Street LLC v. Midway Broadcasting Corp., and it should be a go-to first line defense when faced with a demand for possession and complaint for eviction predicated on rent accruing prior to the new landlord's ownership of the property.

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[1] 2018 IL App (1st) 171691 (June 5, 2018).

[2] Id. at ¶ 6.

[3] Id. at ¶ 7.

[4] Id. at ¶ 8.

[5] Id. at ¶ 9.

[6] Id. at ¶ 15.

[7] Id. at ¶ 18.

[8] Id.

[9] Id.

[10] Id. at ¶ 23 (internal citations omitted).

[11] Id.

[12] Id. at ¶ 24 (internal citations omitted).

[13] Id. at ¶ 17 (internal citations omitted).

[14] Id.

[15] Id.

[16] Id. at ¶ 27 (internal citations omitted).