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COMMENTS

ACCEPTANCE OF RENT AS WAIVER OF NOTICE

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Of no little concern to attorneys engaged in handling real estate matters today is the problem of advising clients who as landlords have served notices to quit but are confronted with delay in initiating summary proceedings. Where this delay is occasioned by administrative procedures related to the emergency rent laws a considerable period of time may elapse in which the landlord is unable to institute his action and in such instances the question of accepting rent from the tenant may well assume real significance. Recognition of the general problem is seen in the enactment of Section 1410, subdivision 8 of the Civil Practice Act,[1] but that this Section will afford protection to the landlord who accepts rent after notice but before service of the precept is, however, questionable.[2] Expressed differences of opinion among members of the bar as to the effect of acceptance of such rent, together with the apparent absence of clear authority on the subject, have prompted this analysis of case law with a view to ascertaining whether an historical approach to the problem would indicate a sound yet realistic solution.

The Presumption of Waiver

Firmly entrenched indeed is the notion that acceptance by the landlord of rent after the accrual of a right to repossession constitutes a waiver of that right. The most rigid application of this presumption is seen in matters relating to the right of entry for breach of covenant. An unqualified acceptance of rent accruing subsequent to a known breach of condition contained in the lease is, as a matter of law, a waiver of the right to declare a forfeiture and re-enter.[3] In like manner have the courts adopted the position that acceptance

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1. CIV. PRAC. ACT § 1410 (8): "The acceptance of rent during the pendency of any proceeding under the provisions of subdivision one of this section, or after judgment or an award of possession to the landlord, shall not of itself terminate such proceeding nor affect any award of possession of the landlord." Goldsmith v. Deitchman, 69 N. Y. S. 2d 148 (County Ct. 1947); Greenberg v. Karnetsky, 188 Misc. 674, 71 N. Y. S. 2d 535 (App. Term 2d Dep't 1947), *motion for leave to appeal denied,* 70 N. Y. S. 2d 575 (App. Div. 2d Dep't 1947).

2. Ward v. Ouderkirk, 70 N. Y. S. 2d 421 (Munic. Ct. 1947): "It is elementary that a notice of termination is not part of a summary proceeding. It does not begin the proceeding."

3. Westdale Realty Corp. v. Labella, 188 Misc. 738, 73 N. Y. S. 2d 31 (County Ct. 1947); Conger v. Duryee, 90 N. Y. 594 (1882). Exclusion of testimony offered to show receipt of rent with knowledge of the breach is therefore reversible error. Stuyvesant 5th Ave. Corp. v. Fine, 70 N. Y. S. 2d 97 (App. Term 1st Dep't 1947). Distraining for rent likewise waived the landlord's right of entry. Chase v. Knickerbocker Phosphate Co., 32 App. Div. 400, 53 N. Y. Supp. 220 (2d Dep't 1898).

of rent after the normal expiration of the term will generally effect a renewal of the tenancy.[4]

The application of the concept of waiver to the notice to quit seems to have had much support in legal thought even before the case of *Goodright* ex dem. *Charter v. Cordwent*[5] in 1795. With Lord Kenyon's rejection therein of the contrary position, however, the doctrine of waiver received general recognition. So in *Keith Prowse & Co. v. National Tel. Co.*[6] it was held that acceptance by the landlord of rent for but one day following the expiration of the term and after notice to quit operated as a waiver of the notice. The *Goodright* decision received express recognition in New York in the case of *Prindle v. Anderson*[7] where it was likewise decided that the unqualified acceptance of rent after the expiration of a notice to quit had the legal effect of a waiver thereof. Approval of the doctrine is seen also in a *dictum* in the recent case of *Ferraro v. Trifiro*[8] where it was said that the landlord, by accepting rent for a period subsequent to the time the monthly tenancy would otherwise have terminated by notice to vacate, recognized the continuance of the tenancy after the giving of the notice and could not rely on the latter as the notice required by statute as a prerequisite to initiating summary proceedings.

Nature of the Presumption

While loose statements are not lacking which tend to create the impression that the presumption of waiver is always a matter of law, the more carefully reasoned cases indicate that, as with other presumptions, the mere acceptance of money by the landlord from the tenant should not be considered apart from its attending circumstances. To some extent this appears even in the cases of breach of covenant. So the acceptance of rent which accrued prior to the right of entry will not be held to constitute a waiver of the forfeiture.[9] There is no waiver unless at the time of the acceptance of the rent the landlord has knowledge of the breach.[10] Nor will receipt of rent raise the presumption of a waiver where there is a continuing breach of covenant.[11] That even in these cases of forfeiture the courts are occasionally loath to apply the doctrine as a rigid presumption against a worthy landlord is seen in *Manice v. Millen*[12] where the court assumed the position that the question of waiver of forfeiture

4. Stern & Co. v. Avedon & Co., 194 App. Div. 433, 185 N. Y. Supp. 392 (1st Dep't 1920), *aff'd*, 231 N. Y. 546, 132 N. E. 882 (1921); Clarke v. Howland, 85 N. Y. 204 (1881).

5. 6 T. R. 219, 101 Eng. Rep. 520 (1795).

6. [1894] 2 Ch. 147.

7. 19 Wend. 391 (N. Y. 1838), *aff'd on other grounds without passing on this point*, 23 Wend. 616 (N. Y. 1840). See also Paddell v. Janes, 84 Misc. 212, 145 N. Y. Supp. 868 (Sup. Ct. 1914).

8. 60 N. Y. S. 2d 679 (Munic. Ct. 1946).

9. Bleecker v. Smith, 13 Wend. 530 (N. Y. 1835).

10. Fay v. Klots, 199 N. Y. Supp. 49 (Sup. Ct. 1923); Jackson *ex dem.* Church v. Brownson, 7 Johns. 227 (N. Y. 1810).

11. Jackson *ex dem.* Blanchard v. Allen, 3 Cow. 220 (N. Y. 1824).

12. 26 Barb. 41, 46 (N. Y. 1857).

through the acceptance of rent was one of intent: that although from the payment and acceptance of rent it will ordinarily be inferred that both parties recognized the lease as still valid, nevertheless the contrary may be shown by express proof. And, although rare, instances do exist in which the courts have refused to find in the mere acceptance of rent a waiver of the non-observance of covenants.[13]

The possible effect of clear manifestations of contrary intent upon the presumption of waiver has received express recognition in the case of holdover tenancies. Thus in *Cole v. Sanford*[14] the court observed that the presumption of renewal of the lease for another year which arises from allowing the tenant to retain possession and from the acceptance of rent is a rebuttable one and that the lessor may be able to show that the tenant held over under terms justifying eviction. The fact that the presumption emerging from the acceptance of rent from a holdover tenant is not conclusive but may be overcome by the attending circumstances has received lucid and forceful treatment in the recent case of *Kennedy v. Kenderian*.[15]

The hypothesis that a receipt of rent after notice to quit inevitably constitutes a waiver of that notice occasioned vigorous and thoughtful challenge from the very beginning. As early as 1775 Lord Mansfield, in *Doe* ex dem. *Cheny v. Batten*,[16] held that acceptance by the landlord of rent accruing after the expiration date of the notice of termination of a tenancy did not necessarily constitute as a matter of law a waiver by the landlord of his rights under the notice, even though the money had been accepted *eo nomine* as rent. He suggests instances in which the landlord accepted the rent "under terms" or with an express declaration that he did not intend to waive the notice and would still insist upon possession, or that fraud or contrivance existed on the part of the tenant in making the payment, and then states:[17] "Clearly under

13. Curtis Realties v. Industrial Mill Products, 71 N. Y. S. 2d 781 (App. Term 1st Dep't 1947); Importers and Traders' Ins. Co. v. Christie, 28 N. Y. Sup. Ct. 169 (1867).

14. 77 Hun 198, 200 (N. Y. 1894).

15. 187 Misc. 861, 863, 69 N. Y. S. 2d 121, 123 (City Ct. 1946): "It is undoubtedly true that sentences and phrases can be excerpted from a large number of cases in many jurisdictions, which, standing by themselves, sustain tenant's position [that by acceptance of rent for the month following expiration of the term the landlord exercised her option to treat the respondent as a tenant and that, therefore, the tenancy of the respondent was one for an additional year]. These statements, taken out of their context, would make it appear that an acceptance of rent, by itself, irrevocably binds the landlord despite any other considerations. . . . A careful reading of these cases shows that they do not actually hold as strongly as tenant contends. The rule, supported by strong authority, seems to be. . . . 'While . . . the payment by and acceptance of rent from a tenant holding over is generally held to create a tenancy for another term and to renew all rights and obligations incident to the relationship of landlord and tenant under the original lease, the presumption so raised is not conclusive but may be overcome by other circumstances attending the transaction which show that such was not the intention of the parties.'"

16. 1 Cowp. 243, 98 Eng. Rep. 1066 (1775).

17. *Id.* at 245, 98 Eng. Rep. at 1067.

such circumstances the plaintiff ought not to be barred of his right to recover: but all these are facts which ought to be left to the consideration of the jury." In the same case, Ashurst, J., observed that the question whether the acceptance of rent is a waiver of the notice is a matter of intention of the parties and, therefore, one of fact for the jury. Not only was the correctness of Lord Mansfield's position recognized in *Zouch* ex dem. *Ward v. Willingale,*[18] but even in the *Goodright*[19] decision, Lord Kenyon conceded that if the tenant had paid and the lessor received the money as satisfaction for the injury done in retaining possession of the land as a trespasser, the lessor might, nevertheless, have recovered in ejectment.

In *Prindle v. Anderson*[20] Cowan, J., expressly concedes the soundness of *Doe* ex dem. *Cheny v. Batten,* in recognizing the fact that attending circumstances may make of the receipt of rent an equivocal act to be left to the jury to determine whether it was intended as a waiver of the notice to quit, and observes:[21] "Had that been stated as a conditional or special receipt of rent, in terms saving and reserving all rights under the notice, clearly the latter would have remained good; for the landlord ought to have his rent for the wrongful occupation, or rather as it would then stand, his damages, for he would decline receiving it as rent *eo nomine.*" To a similar effect is the holding in *Bantjo v. Clark*[22] that the question whether or not a subsequent demand by the landlord for rent constitutes a waiver of the landlord's rights under a notice previously given to the tenant is a matter of intention, to be determined by the trial court in summary proceedings to oust the tenant. An intention not to waive was found in *Sunkenberg v. Jespersen:*[23] After the expiration of the thirty-day notice, rent which had accrued since the expiration date was accepted and the receipt therefor marked "without prejudice." It was held that such payment did not constitute a defense.

18. 1 H. Bl. 311, 126 Eng. Rep. 183 (1790). Gould, J., stated (at 312): "In the mere acceptance of rent, the *quo animo* is to be left to the jury agreeable to Lord Mansfield's doctrine in the case in Cowper."

19. See note 5 *supra.*

20. See note 7 *supra.*

21. 19 Wend. 391, 394 (N. Y. 1838).

22. 88 N. Y. Supp. 135 (App. Term 1904).

23. 191 N. Y. Supp. 689 (App. Term 1st Dep't 1922). In Rosenbaum v. Parnes, 111 Misc. 374, 181 N. Y. Supp. 452 (App. Term 1st Dep't 1920), the landlord, after accepting rent for the month of December, served on December 17 a notice of cancellation terminating the lease as of December 27th, pursuant to a provision in the lease giving the right to terminate by the giving of a 10-day notice. In Ginsburg v. Leit, 187 N. Y. Supp. 450 (App. Term 1st Dep't 1921), the landlord terminating a monthly tenancy did so by a notice of more than thirty days. During the period of the notice the monthly rent became due and was accepted. In both cases the right to maintain summary proceedings was recognized. See also George Ringler & Co. v. Schmelzeisen, 123 Misc. 394, 205 N. Y. Supp. 419 (App. Term 1st Dep't 1924), and *In re* Schoelkopf, 54 Misc. 31, 105 N. Y. Supp. 477 (County Ct. 1907).

Effect of Emergency Rent Laws

If, then, the presumption of waiver is essentially a matter of intention and should yield in the face of circumstances evidencing an actual contrary intent, there is immediately posed the question whether the effect of the emergency rent legislation upon the relation of landlord and tenant constitutes such "attending circumstances" as to affect the presumption.

A negative answer was given by an English court in *Hartell v. Blackler,*[24] only to be emphatically rejected in the case of *Davies v. Bristow,*[25] in which it was held that, in the case of a tenancy to which the emergency rent laws applied, the acceptance of rent after the expiration of a notice to quit did not constitute a waiver of the notice nor create a new tenancy.

The *Davies* decision was approved by the Court of Appeal in *Shuter v. Hersh,*[26] and also in the more recent case of *Morrison v. Jacobs,*[27] wherein MacKinnon, L. J., stated:[28]

"At common law, if at the expiration of a tenancy a landlord has acquired a right to claim possession against his tenant and instead of exercising that right he allows him to remain in the house and accepts rent from him as before, the parties . . . may, with reason, be held to have entered into a new contract of demise. But the essential factor in those circumstances is that the landlord voluntarily abstains from turning the tenant out. When the tenant remains in possession, not by reason of any such abstention by the landlord, but because the Rent and Mortgage Interest Restrictions Acts deprive the landlord of his former power of eviction, no such inference can properly be drawn. This is the very obvious and cogent basis of the decision in *Davies v. Bristow.*"

Recognition by the courts of the twin presumptions of waiver of notice and of renewal of tenancy arising from the acceptance of subsequently accruing rent should, therefore, depend upon the basic circumstances that the tenant has been occupying the premises with the consent of the landlord who at the time of receiving the rent has freedom to terminate the tenant's possession, the term of the lease having expired. Where these circumstances do not exist, no inference of intent may validly be drawn.

What, then, is the situation in New York under the present emergency rent legislation? An examination of relevant decisions reveals a view of the relation of landlord and tenant resulting from the rent laws in essence identical with that expressed in *Morrison v. Jacobs.* So in *Stern v. Equitable Trust Co.*[29] there appears a clear recognition that by suspending possessory remedies and extending the right of the tenant to retain possession of the premises against the will of the landlord, the emergency rent laws destroyed that option on the

24. [1920] 2 K. B. 161.
25. [1920] 3 K. B. 428.
26. [1922] 1 K. B. 438 (1921).
27. [1945] 1 K. B. 577 (C. A.).
28. *Id.* at 582.
29. 238 N. Y. 267, 144 N. E. 578 (1924).

part of the landlord which was essential to the existence of the presumption arising from the acceptance of rent accruing after termination of the lease. As the court so strikingly puts it:[30]

"The tenant does not offer to remain in possession of the premises. He insists upon doing so. The landlord does not accept his proposition. The law forces it upon him. The tenant does not offer any proposition to the landlord upon which the conventional relation of landlord and tenant . . . can be inferred. To this extent the landlord is optionless and the tenant stands on his statutory rights which become the measure of his term and of his liability."

Although the *Stern* decision involved the rent laws of 1920, the principles therein expressed have been recognized as equally applicable to tenancies controlled by the present rent legislation. Thus in *Haussman v. Rowland*,[31] the court, in holding that acceptance of rent accruing after the expiration of the term did not raise an implication of a new tenancy, declared that the federal rent regulations effecting leases in defense-rental areas had with respect to hold over tenancies created a situation similar to that under the emergency rent laws of 1920, and quoted as relevant from the *Stern* case to the effect that since the enactment of the emergency rent laws there is no such tenancy as a hold over as formerly understood but rather that a tenant remaining in possession after the expiration of his term becomes a "statutory tenant."

We see, then, in the New York statutory tenancy[32] exactly the same circumstances which caused the English courts to hold that the normally applicable presumption of waiver of notice through the acceptance of subsequently accruing rent did not arise: that the right of the statutory tenant to retain possession of the premises is independent of any consent or option on the part

30. *Id.* at 70, 144 N. E. at 578.

31. 183 Misc. 654, 53 N. Y. S. 2d 440 (Sup. Ct. 1944). See also Klipack v. Raymar Novelties, Inc., 75 N. Y. S. 2d 418 (App. Div 1st Dep't 1947); Shelton Bldg. Corp. v. Baggett, 188 Misc. 709, 71 N. Y. S. 2d 434 (App. Term 2d Dep't 1947); 130 West 57 Corp. v. Hyman, 188 Misc. 92, 66 N. Y. S. 2d 332 (App. Term 1st Dep't 1946). *But cf.* Irish American Loan Ass'n v. Stanfield, 182 Misc. 363, 50 N. Y. S. 2d 494 (Sup. Ct. 1943); Ferraro v. Trifiro, 60 N. Y. S. 2d 679 (Munic. Ct. 1946).

32. It is not contended that the mere existence of the emergency rent laws necessarily affects the presumption of waiver of notice where the purpose of the notice is to terminate a presently subsisting and effective lease before the date of its natural expiration. If in such a case the right of eviction still exists there is no need, in the absence of special qualifying conditions, for modification of the general rule. Where, therefore, the circumstances are such that the rent laws recognize the right of the landlord to removal of the tenant, the presumption may with reason be held to apply to the notice of termination for breach of covenant. Davies v. Bristow, [1920] 3 K. B. 428, 438; Westdale Realty Corp. v. Labella, 188 Misc. 738, 73 N. Y. S. 2d 31 (County Ct. 1947); and to the notice served pursuant to a provision of the lease giving the lessor the right, upon sale of the property, to terminate the lease before the normal expiration date. Levin v. 123 East 54th Street, Inc., 75 N. Y. S. 2d 792 (App. Term 1st Dep't 1947); John Melen, Inc. v. Acme Litho Plate Graining, Inc., 69 N. Y. S. 2d 647 (App. Term 1st Dep't 1947).

of the landlord; that, in fact, no option exists. Like those of the English courts, our decisions have recognized that in such a situation the acceptance of rent after the expiration of the term creates no presumption of a new tenancy. Yet the presumption of a waiver of notice traditionally arose on the same inference: that by the acceptance of rent after the notice the landlord was recognizing a new tenancy and thereby electing to create in himself and in the tenant the rights and liabilities of such tenancy.[33] But if under the emergency rent laws an acceptance of rent without a notice to quit gives rise to no such presumption of consent to a new tenancy, certainly it would border on the absurd to maintain that receipt of rent after a notice to quit does raise such an inference.

Conclusion

A sound approach on the part of the courts to the problem of waiver of notice through the acceptance of rent must, therefore, take into consideration the facts upon which the presumption is predicated: that in a free economy the rights of landlord and tenant are determined by contract, express or implied; that the right of the tenant to remain in possession of the demised premises ends either by natural expiration or, in a periodic tenancy, by notice to quit; that the notice to quit has, therefore, the effect of terminating the rightful possession of the tenant and of causing him to assume the status of a trespasser; that this status of trespasser was essential to the initiation by the landlord of an action in ejectment or of summary proceedings. The notice being revocable, and a receipt of rent *eo nomine* without reservation being inconsistent with a contention that the tenant continues in the status of trespasser, there exists every reason, under such circumstances, to hold that the receipt of rent raises an implication or presumption of waiver of the notice.

But if those facts and circumstances upon which the theory of waiver is predicated do not exist, adherence to the rule is unrealistic. And they do not exist. Under the emergency rent laws, the tenant, at the expiration of the term provided in his lease is not a trespasser. He is in rightful possession, a possession not determined by or related to the will of the landlord. And once the statutory tenancy has arisen, the notice to quit terminates nothing. It does not convert the tenant into a trespasser. It affects no rights or liabilities of the tenant. Its sole legal purpose would appear to be that of compliance[34] with statutory requirements designed to control possessory rights during periods of normal economy. Nor, finally, is there any inconsistency between the service of a notice to quit and the recognition, through the receipt

33. And it most assuredly was this creation of mutual rights and obligations which historically caused the courts to recognize the presumption. Under the present situation, however, while an actual waiver of the notice might deprive the landlord of a right it will create no rights or liabilities in the tenant since the latter are controlled by the relevant rent regulations.

34. But on this point see Lewittes & Sons v. Spielmann, 73 N. Y. S. 2d 552 (App. Term 1st Dep't 1947), to the effect that compliance with the provisions of Real Property Law, §§ 228 and 232-a is not necessary.

of rent thereafter accruing, that until the termination of the summary proceedings, the statutory tenant has, by reason of the emergency rent legislation, a lawful right to occupy the premises.[35]

In the recent case of *Boynton v. Bassford*[36] the emergency rent regulations prevented the landlord from commencing summary proceedings for several months following the expiration date specified in the notice of termination and the court held that since "he had no choice in the matter, no conclusion as to an intent to waive the notice or renew the tenancy can be drawn from the fact that he accepted rent during those months."[37] Although in its reference to the absence of choice the court was probably thinking particularly of the matter of time of initiating the proceedings, the decision, is, nevertheless, sound and should be followed, but, it is submitted, on the broader ground that in a statutory tenancy the nature of the holding and the status of the landlord relative thereto make unwarranted the implication of such intent from the mere fact of the acceptance of rent.

CORPORATIONS—STOCKHOLDERS' CONTROL BY AGREEMENT

Group business enterprises are conducted under various forms: the corporation, the partnership and unincorporated business associations such as the joint stock company and the business trust. The really distinctive feature about the corporation is that it is entirely the creature of the state.[1] The other forms of business endeavor result from the common law agreement of the members even though the state may require certain acts on their part not actually affecting their being.[2] For certain purposes the federal and state governments and the courts may even assimilate these business groups into the category of corporations;[3] yet the outstanding characteristic of the corporation is that the

35. In Morrison v. Jacobs, [1945] 1 K. B. 577 (C. A.), Scott, L. J., states (at 581): "The true view is that the landlord takes the rent, knowing that the tenant is granted a statutory tenancy by the Rent Restrictions Acts and that his right to gain possession of his dwelling-house depends entirely on his establishing that he brings himself within the conditions laid down by the Acts."

36. 188 Misc. 188, 67 N. Y. S. 2d 369 (App. Term 1st Dep't 1947).

37. *Id.* at 188, 67 N. Y. S. 2d at 370.

1. People *ex rel.* Winchester v. Coleman, 133 N. Y. 279, 287, 31 N. E. 96, 98 (1892). In pointing out the distinction between a joint stock association and a corporation, Judge Finch remarked: ". . . the one derives its existence from the contract of individuals, the other from the sovereignty of the state." Chief Judge Cullen, writing for the court in Ripin v. United States Woven Label Co., 205 N. Y. 442, 447, 98 N. E. 855, 856 (1912), speaks of the certificate of incorporation as the instrument "by which the corporation got life." In Benintendi v. Kenton Hotel, 294 N. Y. 112, 121, 126, 60 N. E. 2d 829, 832, 835 ((1945) (dissenting opinion), Judge Conway conceded that "Since corporations are creatures of statute, their charters and by-laws must conform to the will of the creating power."

2. See, *e.g.*, N. Y. GEN. ASS'NS LAW § 4; N. Y. PENAL LAW § 440-b.

3. "The term 'corporation' includes associations, joint-stock companies, and insurance