NYRPL § 226-b: No Right to Sublease Without Consent

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I. Introduction

New York City, like other major cities in the United States, suffers from a critical shortage of affordable rental housing. This shortage has created a landlord’s market, in which apartment owners can select or reject tenants on almost any basis. For this rea-

1. The vacancy rate in New York City is approximately 1%. Apartment Crunch Alters Manhattan Living, N.Y. Times, Jan. 21, 1980, at Al, col. 1. Housing experts say that a rental vacancy rate below 5% represents a housing crisis. Id. The national apartment vacancy rate in March 1979 was 4.8%, the lowest recorded figure. Id., Nov. 18, 1979, § 8, at 8, col. 5. In Washington, D.C., the vacancy rate has been as low as 1%, 1 United States Department of Housing and Urban Development Condominium/Cooperative Study II A-43 (1975), and it has been less than 2% in some areas of Chicago. Tamarkin, Condomania in Chicago, Forbes, Nov. 13, 1978, at 55.

Factors contributing to the depletion of the rental housing supply are: conversions to condominium and cooperative ownership; building abandonments; and reduced construction of rental buildings by private developers. N.Y. Times, Nov. 18, 1979, § 8, at 1, col. 2. For a discussion of rental apartment conversions, see Comment, The Regulation of Rental Apartment Conversions, 8 Fordham Urb. L.J. 507-62 (1980) [hereinafter cited as Regulation of Rental Apartment Conversions].

2. Even the tenant’s profession has been found to be a legitimate basis upon which a landlord can discriminate. Kramarsky v. Stahl Mgmt., 92 Misc. 2d 1030, 401 N.Y.S.2d 943 (Sup. Ct. 1977). An attorney filed a complaint under the Human Rights Law alleging unlawful discrimination based on race, sex and marital status. The court held that the landlord could refuse to rent to a lawyer because she was too intelligent and would be likely to enforce her rights as a tenant. The court stated “a landlord is free to do what he wishes with his property, and to rent or not to rent to any given person at his whim.... He can bar his premises to the lowest strata of society, should he choose, or to the highest, if that be his personal desire.” 92 Misc. 2d at 1032, 401 N.Y.S.2d at 945. A landlord’s right to choose tenants is limited only by federal, state and local fair-housing and civil-rights legislation. Civil Rights Act of 1968, 42 U.S.C. § 1982 (1976) (bars discrimination on the basis of race in the rental or purchase of privately owned real estate); Fair Housing Act of 1968, Civil Rights Act of 1968, tit. VIII, 42 U.S.C. §§ 3601-3631 (1976 & Supp. 1980) (extends to tenants protection against discrimination in the rental, sale or negotiation for housing on the basis of color, religion, national origin, and sex, although it excludes a substantial group of small property-owners from its coverage). Under Title VIII of the Civil Rights Act of 1968 those excluded include: 1) Landlords who live on premises which have four or fewer rental units; 2) Landlords who own or have an interest in three or fewer single-family houses and who do not sell more than one such house in a two-year period (personal residences are excluded); 3) Landlords who are religious or other private organizations who are renting to their own members on a noncommercial basis. 42 U.S.C. § 3603(b)(1)(2) (1976). For a comprehensive listing of state and local fair-housing and civil-rights acts and a discussion of federal housing discrimination legislation, see R. Blumberg & J. Grow, The Rights of Tenants 104-15 (1978).
son, tenants are in need of certain protections of their rights. The New York City Rent and Rehabilitation Law ("Rent Control Law")\(^3\) and the New York City Rent Stabilization Law ("Rent Stabilization Law")\(^4\) were created to protect tenants against unreasonable rent increases by strictly regulating the rents landlords could charge for their apartments. These laws are also intended to protect tenants from being forced to vacate their apartments by, in the case of rent controlled tenants, giving them a statutory lease, and in the case of rent stabilized tenants, guaranteeing them a renewal lease.\(^5\)

Under the present Rent Control Law, a tenant is guaranteed the right to remain in his apartment, subject to rent increases at the rate of seven and a half percent per year.\(^6\) When a tenant vacates a rent controlled apartment, the apartment becomes decontrolled and subject to the Rent Stabilization Law.\(^7\) As long as a tenant of a rent stabilized apartment occupies the apartment, the Rent Stabilization Code requires that the landlord must offer a renewal lease of one, two or three years, at the tenant’s option,\(^8\) at rent increases of eleven percent, fourteen percent and seventeen percent, respec-

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5. Buildings built on or before February 1, 1947 are subject to the Rent Control Law. Buildings built subsequent to this date are subject to the Rent Stabilization Law. All apartments in rent controlled buildings which became vacant after June 30, 1971 became decontrolled and subject to rent stabilization. Thus, almost every building built on or before February 1, 1947 is subject to both the rent control and rent stabilization laws. NEW YORK CITY CONCILIATION AND APPEALS BOARD, TENANT’S AND OWNER’S RIGHTS AND DUTIES UNDER THE RENT STABILIZATION LAW 3-8 (1979) [hereinafter cited as TENANT’S AND OWNER’S RIGHTS AND DUTIES]. Rent increases are limited to seven and a half percent per year for rent controlled apartments. N.Y.C. ADMIN. CODE § Y51-5.0(a)(5) (Supp. 1980). The Rent Guidelines Board establishes a scale of legal rent increases for buildings covered by the Rent Stabilization Law. For renewal leases taking effect between July 1, 1980 and September 30, 1981 the rates are: 11% for a one-year renewal; 14% for a two-year renewal; and 17% for a three-year renewal. New tenants must pay an additional 5% over the renewal for the initial lease. RENT GUIDELINES BOARD, ORDER No. 12 (eff. July 1, 1980). The Rent Guidelines Board also allows landlords to charge subtenants an additional 5% subleasing allowance. TENANT’S AND OWNER’S RIGHTS AND DUTIES, supra, at 22-25.


7. TENANT’S AND OWNER’S RIGHTS AND DUTIES, supra note 5, at 4.

tively. Increases for rent stabilized apartments are determined each year by the Rent Guidelines Board. The Rent Stabilization Law also permits landlords to charge more rent to a new tenant entering into a "vacancy" lease, than may be charged under a "renewal" lease. In addition, the Rent Stabilization Law permits landlords to charge additional increases for a sublease.

The New York State Legislature, recognizing that the right to sublease ensures a tenant's tenure for an apartment, enacted section 226-b of the New York Real Property Law in 1975. This statute gives tenants in a dwelling having four or more residential

13. The full text of Real Property Law § 226-b, as amended, provides:

1. A tenant renting a residence in a dwelling having four or more residential units shall have the right to sublease or assign his premises, subject to the written consent of the landlord given in advance of the sublease or assignment. Such consent shall not be unreasonably withheld. If the landlord unreasonably withholds consent for such sublease or assignment, the landlord must release the tenant from the lease upon request of the tenant.

2. The tenant shall inform the landlord of his intent to sublease or assign by mailing a notice of such intent by registered or certified mail. Such request shall be accompanied by the written consent thereto of any co-tenant or guarantor of such lease and a statement of the name, business and home address of the proposed sublessee or assignee. Within ten days after the mailing of such request, the landlord may ask the sender thereof for additional information as will enable the landlord to determine if rejection of such request shall be unreasonable. Within thirty days after the mailing of the request for consent, or of the additional information reasonably asked for by the landlord, whichever is later, the landlord shall send a notice to the sender thereof of his consent or, if he does not consent, his reasons therefor. Landlord's failure to send such a notice shall be deemed to be a consent to the proposed subletting or assignment. If the landlord consents, the premises may be sublet or assigned in accordance with the request, but the tenant thereunder shall nevertheless remain liable for the performance of tenant's obligations under said lease.

3. The provisions of this section shall not apply to leases entered into or renewed before the effective date of this section, nor to public housing and other units for which there are constitutional or statutory criteria covering admission thereto nor to a proprietary lease, viz.: a lease to, or held by, a tenant entitled thereto by reason of ownership of stock in a corporate owner of premises which operates the same on a cooperative basis.

units the right to sublease or assign their apartments, subject to the landlord's consent, which cannot be unreasonably withheld. Section 226-b provides that, "[i]f the landlord unreasonably with- holds consent for such sublease or assignment, the landlord must release the tenant from the lease upon the request of the tenant." Thus, the only remedies available to a tenant under section 226-b are the right to remain in occupancy or to elect to be released from further leasehold obligations. Some courts, however, have recently interpreted section 226-b to confer on tenants a broad statutory right to sublease their apartments upon compliance with the statute's procedural notification requirements and the landlord's unreasonable withholding of consent. This interpretation has caused many landlords and tenants to dispute the legislative intent of the statute for several reasons.

The basis for these disagreements lies in the economic reality of the landlord-tenant relationship. First, landlords do not want to lose their right to select tenants. Second, landlords do not want to lose the rent increases permitted under the Rent Stabilization Law for vacancy leases, which increases are higher than the rents chargeable to a subtenant under the sublease and subsequent renewal lease. If tenants are permitted to sublet, and thereby ob-

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14. The law originally gave tenants the right to sublease. The amendment in 1976 included provisions relating to the right to assign leases. 1976, N.Y. Laws ch. 198.
17. See note 2 supra.
18. See note 4 supra. The following examples show how a landlord loses rent increases on a sublease: Assume a rent-stabilized tenant has a three-year lease at a rent of $500 per month with one year remaining before expiration, and he wishes to sublet the apartment for the unexpired lease term. Assuming that the landlord consents to the sublease, he may charge the subtenant $500 plus a five percent subletting allowance, or $525 per month for the remainder of the term. RENT GUIDELINES BOARD, Order No. 12. When the lease expires after one year, the subtenant has the right to select a renewal lease for a term of one, two or
tain a guaranteed tenure for their apartments, a landlord cannot obtain the profits available when an apartment repeatedly changes hands.19 Third, tenants who must temporarily vacate their apartments want the right to sublet them in order to benefit from lower rental increases.20 Fourth, with critically low vacancy rates, affordable rental housing is almost impossible to find and an apartment becomes a valuable asset for tenants.21

This Note will discuss the legislative intent of section 226-b. Specifically it addresses the issue of whether, after a tenant complies with the statute’s procedural notification requirements and the landlord unreasonably withholds consent to the sublease, section 226-b gives a residential tenant the right to execute a valid sublease without the landlord’s consent. This Note will analyze the right to sublease at common law and the statutory right to sublease under section 226-b.22 It will be argued that the legislature

three years at percentage increases of 11%, 14% or 17% respectively. Rent Guidelines Board, Order No. 12. The new rent for a one year lease is calculated by using a base rent of $525 plus $57.75 (11% increase), or $582.75 per month.

Now assume that the subtenancy was not permitted, that the tenant chose to terminate the lease and that the landlord agreed to rent to the proposed subtenant, under a new two-year lease. (The option in this instance as to length of the lease term for a new tenancy is the landlord’s). The new rent is calculated by using the base rent of $500 plus $70 (14% increase) plus $25 (five percent vacancy allowance), or $595 per month. Rent Guidelines Board, Order No. 12. Not only is the rent under the new lease in this second example higher than in the first example, but it is also collectible one year earlier. The gross profit differential is $977.

<table>
<thead>
<tr>
<th>Year 1</th>
<th>Subtenancy Allowed</th>
<th>Year 2</th>
<th>Subtenancy Refused</th>
</tr>
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<tbody>
<tr>
<td>$525 x 12</td>
<td>= $6300</td>
<td>$595 x 12</td>
<td>= $7140</td>
</tr>
<tr>
<td>$582.75 x 12</td>
<td>= $6993</td>
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<td>= $7140</td>
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<tr>
<td>Total Rent Payable</td>
<td>$13,293</td>
<td></td>
<td>$14,280</td>
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<tr>
<td>for Two Years:</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Profit differential: $977

19. See notes 4, 18 supra; Regulation of Rental Apartment Conversions, supra note 1.
21. See note 1 supra. In Kruger v. Page Mgmt. Co., 105 Misc. 2d 14, 432 N.Y.S. 2d 295 (Sup. Ct. 1980), the court took judicial notice of the fact that in New York County, there has been, and still is, a serious shortage of well-maintained residential apartments at reasonable rents. The court used this fact to arrive at what it termed a fair result. The court allowed the subtenancy and found that the subject rent stabilized apartment was a valuable asset as well as a right in inflationary 1980. 105 Misc. 2d at 33, 432 N.Y.S.2d at 308.
22. An assignment and a sublease can be distinguished by what rights each transfers. An assignment is a transfer of all the demised premises for the full unexpired term of the lease.
never intended to give tenants the statutory right to sublease without landlord approval regardless of whether the landlord unreasonably withholds consent. Rather, the legislature intended to give a tenant the right to request permission to sublease, and if such permission is denied, the tenant, not the landlord, may choose to terminate the lease without penalty. The landlord's statutory obligation is not to consent to the sublease, but to re-let the premises and thereby eliminate the tenant's damages. A close analysis of the common law right to sublease, the legislative history of section 226-b, and the cases decided since enactment of the statute demonstrate that when consent to sublease has been unreasonably withheld, the tenant has the statutory remedies of terminating the lease or remaining in occupancy of the apartment, but not of subleasing without landlord approval.

II. The Non-Statutory Right to Sublease

The general common law rule was that in the absence of an express contractual or statutory restriction, a tenant under a lease for a definite term has the unrestricted right to assign or sublease his apartment at will. Courts have viewed restrictions in a lease against assignment or subletting as restraints on alienation which have traditionally been disfavored. This common law right, how-

A sublease is a transfer of less than all of the tenant's interest: a transfer for less than the unexpired term of the lease or a transfer of only part of the demised premises. The jurisdictions are divided as to what constitutes a reversion for the purpose of determining whether an agreement is a sublease or an assignment; and the two terms are often confused by tenants, landlords and judges. For a discussion of the distinctions between subleases and assignments, see Ferrier, Can There Be a Sublease for the Entire Unexpired Portion of a Term? 18 CALIF. L. REV. 1; Wallace, Assignment and Sublease, 8 IND. L.J. 359 (1933). See also 1 FRIEDMAN ON LEASES §§ 7.1-7.4 (1974 & Cum. Supp. 1980); 1 TIFFANY, REAL PROPERTY § 123, at 197 n.15 (3d ed. 1939); 51C C.J.S. Landlord and Tenant § 37[2] (1968).


24. A lease at common law was viewed as a conveyance of an estate in land. The covenants of the parties were independent, and therefore, any common law limitations upon the right to assign contracts did not limit the right to sublet and assign the leased estate. Fleisch v. Schnaier, 119 A.D. 815, 104 N.Y.S.2d 921 (1st Dep't 1907); Werber v. Weinstein, 207 Misc. 707, 138 N.Y.S.2d 196 (Civ. Ct. 1955). See 2 R. POWELL, THE LAW OF REAL PROPERTY § 246[1] at 372.86 (1977); MODEL RESIDENTIAL LANDLORD AND TENANT CODE § 2-403 (1969). The power of assignment and of subletting has been said to be incident to a leasehold estate in the absence of contractual restriction. Butterick Pub. Co. v. Fulton & Elm
ever, has been limited by the inclusion in leases of express provisions restricting a tenant’s right to sublease or assign. In fact, today it is common for leases to contain such contractual restrictions. Where a lease restricts a tenant’s right to sublease or assign by requiring the landlord’s consent, and it does not contain a qualification that consent shall not be unreasonably withheld, the landlord may arbitrarily refuse his consent for any reason. Some courts, however, have implied a requirement that consent shall not be unreasonably withheld. Where the lease provides that the landlord “shall not unreasonably withhold consent,” courts require that landlords comply with objective standards of reasonableness. Subjective, arbitrary and capricious criteria are insufficient to restrict a transfer. Regarding a lease provision requiring that a landlord shall not unreasonably withhold consent, one court, nevertheless, stated that

The purpose of the provision is to protect the lessee against liability for damages or risk of forfeiture if consent of the lessor is improperly withheld. . . . Nowhere does the lessor expressly covenant not to withhold his consent unreasonably. The only covenant is by [the tenant] not to sublet and it is [the tenant’s] own covenant that is qualified by the condition that the lessor shall not unreasonably withhold consent.


26. Id.


A provision requiring a landlord not to unreasonably withhold consent to a sublease may be construed as a covenant by the landlord breach of which gives the tenant an action for damages. In the alternative, such a provision may be deemed a negative qualification of the tenant’s covenant not to sublease or assign whereby the landlord can unreasonably refuse consent without incurring liability for damages.

In American Book Co. v. Yeshiva University Development Foundation, Inc., a decision concerning the non-statutory right to sublease, the lessor, an affiliate of an orthodox Jewish institution, refused to permit a sublease to the Planned Parenthood Foundation of America. The court held that the lessor was required to accept the Planned Parenthood Foundation as a sublessee because its reasons for refusal were subjective; rejection of a proposed tenant on the basis of the dislikes of a landlord could not be sanctioned by the court. In so doing, the court found that landlord’s refusal to consent fell into two broad categories: objective and subjective. Objective standards included: financial re-
sponsibility; the "identity" or "business character" of the subtenant, including his suitability for the particular building; legality of the proposed use; and the nature of the occupancy.\textsuperscript{38} Subjective criteria, such as the landlord's needs, dislikes, personal taste, sensitivity or convenience, however, were unacceptable bases upon which to predicate a refusal.\textsuperscript{39}

More recently, in \textit{Feldman v. Simon Brothers Management Co.},\textsuperscript{40} a New York court also applied the common law rule. In \textit{Feldman}, two tenants in the same building wished to exchange apartments for "sensible personal reasons" by subletting to each other.\textsuperscript{41} The landlord refused permission, without giving a "single factual reason" for its withholding of consent to the subleases.\textsuperscript{42} Both tenants had identical subletting provisions contained in riders to their leases, which required the landlord's consent to a subletting, which consent was not to be unreasonably withheld.\textsuperscript{43} The clauses provided:

Landlord agrees not to unreasonably withhold consent to subletting of premises. However, upon privilege of subletting the stabilization rent payable to landlord effective upon date of subletting shall be established as if renewal lease had been a vacancy lease.\textsuperscript{44}

The \textit{Feldman} court found that section 226-b did not apply in a case where the lease contained a covenant by the landlord expressly agreeing not to unreasonably withhold consent to subletting. Rather, the \textit{Feldman} court interpreted the meaning of the landlord's covenant relying on the common law rule:

Where a landlord has agreed not to withhold his consent unreasonably,
and violates such agreement, the courts have held that the tenant may either ignore the restrictive covenant and sublet the premises, or may sue for a declaratory judgment under the CPLR to determine whether or not the landlord's consent is being reasonably withheld.\footnote{45}

The landlord argued that notwithstanding the lease provisions, under section 226-b the tenant's only remedy when a subletting is unreasonably refused is to vacate the apartment and to terminate the lease.\footnote{46} The court disagreed with the landlord's contention, however, and granted the tenants a declaratory judgment permitting them to exchange apartments.\footnote{47}

Thus, absent any statutory restriction, where a landlord agrees in the lease not to unreasonably withhold consent to a sublease and violates such agreement, the tenant has several available remedies.\footnote{46} First, the tenant can ignore the landlord's refusal and sublet or assign the premises without approval.\footnote{48} If the landlord commences an action alleging an illegal sublease, the tenant has the burden of proof as to whether consent has been unreasonably withheld.\footnote{49} This is a question of fact and courts consider all of the circumstances, including, most importantly, the specific language of the lease provision.\footnote{50} Second, the tenant can sue for a declaratory judgment\footnote{51} to determine whether consent has been unreasonably

46. Id.
47. Id.
48. See generally 1 Rasch, New York Landlord and Tenant §§ 266-269 (2d ed. 1971) [hereinafter cited as New York Landlord and Tenant]. An example of a statutory restriction on the right to sublease is found in the Rent Control Law which prohibits rent controlled tenants from subleasing their apartments. N.Y.C. Rent and Eviction Regs. § 33.3 (these regulations may be found following N.Y. Unconsol. Laws § 8617 (McKinney 1974)); Emtico Assoc. v. Gabel, 47 Misc. 2d 577, 262 N.Y.S.2d 855 (Sup. Ct. 1965), aff'd, 25 A.D.2d 718, 269 N.Y.S.2d 675 (1st Dep't 1966).
52. The supreme court may render a declaratory judgment having the effect of a final
withheld. Third, some courts permit tenants to recover damages or maintain an action for specific performance of the agreement.

III. The Right to Sublease Under Section 226-b

Section 226-b provides that, "if the landlord unreasonably withholds consent for [the proposed] sublease or assignment, the landlord must release the tenant from the lease upon request of the tenant." Two recent decisions, *Pacer Realty Associates v.*
Lasky\textsuperscript{57} and 39 Remsen Co. v. Braune and Saccamano\textsuperscript{58} interpreted the right to sublease under section 226-b.

In Lasky, the subtenant moved into her apartment after the tenant vacated it.\textsuperscript{59} Both the tenant and the subtenant had contacted the managing agent to get approval for the change and were told that subletting in the building was forbidden.\textsuperscript{60} Nevertheless, the subtenant moved into the apartment because the tenant's lease had not expired and she believed she had the right to sublet.\textsuperscript{61}

The landlord commenced an action to evict the subtenant and to recover possession of the apartment on the ground that the sublet was in violation of the written lease.\textsuperscript{62} Because the lease was not part of the record, the facts did not indicate whether there was a lease provision in which the landlord agreed not to unreasonably withhold consent to a sublease.\textsuperscript{63} The court, relying on section 226-b,\textsuperscript{64} held that the subletting was illegal.\textsuperscript{65} In so doing, the court stated:

A careful reading of the statute is clear and unambiguous that in the event of a landlord who unreasonably withholds his consent to a sub-let, the tenant has the option to remain as the tenant, or be released from any further obligation under the lease. There can be no other logical interpretation of the statute.\textsuperscript{66}

The Lasky court followed 39 Remsen Co. v. Braune and Saccamano.\textsuperscript{57}
camano, where the lease contained the following provision:

Except as provided by section 226-b of the Real Property Law of New York, Tenant shall not assign the Lease, nor sublet the Apartment or any part thereof to be used by anyone other than the Tenant or members of the immediate family of the Tenant, without the prior written consent of the Landlord in each case.

The lease did not contain a covenant by the landlord not to unreasonably withhold consent to a sublease. The tenant in Braune, in compliance with the notice requirements of section 226-b(2), informed her landlord by certified mail of her intention to sublease. The landlord refused to consent to the proposed subletting on two grounds: first, that the landlord had not given permission, and second, that the tenant failed to comply with the law governing sublets and leases. Nevertheless, the tenant sublet and the landlord instituted a holdover proceeding against the tenant and the subtenant. The tenant moved for summary judgment, and the court granted the motion but terminated the subtenancy.

The threshold issue in Braune was whether the landlord had reasonably withheld consent to the subletting. Applying the "reasonableness test" set forth in American Book, the court found as a matter of law that the landlord unreasonably withheld its consent. The court, however, then applied section 226-b, and held that, despite its finding that the landlord had unreasonably withheld consent, the tenant's only remedies in such a situation are to remain as tenant under the lease, or to demand that the landlord

68. Id.
71. Id.
72. Id.
73. Id. at 12, col. 1.
74. Id. at 11, col. 6.
75. See notes 32-37 supra and accompanying text. The Braune court found that the reasons given by the landlord did not address any of the standards enunciated by American Book and that there was nothing in the record suggesting that the proposed subtenant would be manifestly objectionable under any of the American Book standards. N.Y.L.J., July 17, 1980, at 12, col. 1.
76. Id.
release the tenant from the lease.\textsuperscript{77} The court in \textit{Kruger v. Page Management Co.},\textsuperscript{78} however, interpreted section 226-b to permit a tenant to sublet when a landlord unreasonably withholds consent. In \textit{Kruger}, the tenant had a three-year lease for a rent stabilized apartment.\textsuperscript{79} The lease contained the following clauses respecting the tenant's occupancy of the apartment:

\textit{Clause 2}

The Apartment shall be occupied only by Tenant and immediate family of Tenant for living purposes only.\textsuperscript{80}

\textit{Clause 18}

Except as provided by section 226-b of the Real Property Law of New York, Tenant shall not . . . sublet the apartment . . . without the prior written consent of Owner.\textsuperscript{81}

\textit{Clause 31}

The demised premises are rented and shall be occupied in accordance with Clause #2 and the Tenant agrees to adhere to the restriction against assignment or subletting.\textsuperscript{82}

The lease did not impose on the landlord a duty not to unreasonably withhold consent to a sublease. On May 6, 1980, the tenant notified the landlord's managing agent of his intent to sublease the apartment to a married couple, commencing July 1, 1980.\textsuperscript{83} In compliance with section 226-b, the tenant included the names and home addresses of the proposed sublessees who were a medical stu-
dent and an elementary school teacher. On May 15, 1980, the landlord's managing agent advised the tenant by mail that "we do not grant you permission to sublet the apartment. We do not choose to have apartments passed from hand to hand." Five days later, the tenant commenced an action for a declaratory judgment and an injunction to compel the landlord and the managing agent to consent to the proposed sublease. The plaintiff asked the court to determine whether he could sublease: 1) pursuant to section 226-b; 2) pursuant to the lease between himself and the landlord; or 3) pursuant to both section 226-b and the lease.

The court held that under section 226-b, upon the tenant's satisfactory compliance with the statute's notice requirements, the landlord had thirty days to notify the tenant of consent, to reasonably request additional information, or to notify tenant of consent to the proposed sublease only, subject to tenant's timely compliance with all of the other terms, covenants and conditions of the subject lease."

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84. Id.
85. Id. at 17, 432 N.Y.S. at 298.
86. Id.
88. 105 Misc. 2d at 33-34, 432 N.Y.S. 2d at 308. The statute provides that a landlord may request additional information, or must notify tenant of consent to the sublease, within 30 days of the tenant's request. See N.Y. REAL PROP. LAW § 226-b (McKinney Supp. 1980-1981).
89. 105 Misc. 2d at 34, 432 N.Y.S.2d at 308.
90. Id. The Kruger court adopted the reasonableness test of American Book Co. v. Yeshiva Univ. Dev. Foundation, Inc., 59 Misc. 2d at 34, 297 N.Y.S.2d at 163, and found that to negate an unreasonable withholding of consent under § 226-b, "reasons shall be factual and objective, based upon the proposed sublessee(s), financial responsibility, identity or suitability for the particular apartment or building, legality of the proposed use or nature of the occupancy or any other sound real estate business, excepting loss of profit or property control." 105 Misc. 2d at 34, 432 N.Y.S.2d at 308. The court only allowed the tenant, however, to charge the rent that he was paying for the apartment. Id. This appears to be contrary to RENT GUIDELINES BOARD, Order No. 12 (eff. July 1, 1980) which provides that the landlord is entitled to a five percent subleasing allowance. It is unclear whether the court intended that the tenant should pay the landlord the extra five percent or whether, in fact, the court ruled that the landlord was not entitled to the five percent subleasing allowance.
The Kruger court also relied on Feldman,91 where the lease contained an express covenant by the landlord not to unreasonably withhold consent.92 The lease in Kruger, however, did not contain a similar provision. The common law rule followed by Feldman only applies when such a provision is present and is violated by the landlord.93 Therefore, the Kruger court arguably should not have relied on Feldman.

The Kruger court extended the provisions of section 226-b by holding that, in addition to the failure to send either a notice of consent or an explanation for the withholding of consent, a landlord's unreasonably withholding consent would be deemed to be consent to the sublease.94 In effect, the court held that landlords cannot unreasonably refuse tenants permission to sublease.

A. The Right of Assignment Under Section 226-b

A case interpreting the remedies available under section 226-b, but in the context of an assignment, is Grayshaw v. New Amsterdam Apartments Co.95 In Grayshaw, the tenant chose to assign his lease, which contained a provision and two riders limiting the tenant's rights to assign and sublease.96 The lease, a standard Real Estate Board form, provided that the tenant agreed:

[I]t shall not assign . . . this agreement, nor underlet, or suffer or permit the premises or any part thereof to be used by others, without the prior, written consent of the landlord in each instance.97

There was nothing in this provision requiring the landlord not to unreasonably withhold his consent. The first rider provided:

[T]he Landlord agree[s] to not unreasonably withhold approval of said subletting. Before this clause shall be binding on the Landlord, the Landlord shall have the right to issue a release to the Tenant and take back the apartment.98

The Kruger court limited its holding to subleases only, noting that it passed no decision on the assignment of leases. 105 Misc. 2d at 23, 432 N.Y.S.2d at 302.

91. Id. at 31-32, 432 N.Y.S. 2d 307.
92. See notes 38-45 supra and accompanying text.
93. See notes 23-31 supra and accompanying text.
94. 105 Misc. 2d at 34-35, 432 N.Y.S.2d at 308-09.
96. Id.
97. Id.
98. Id.
The second rider provided:

[N]otwithstanding anything to the contrary contained in the sublet and assignment clauses of this letter tenant’s right to sublet the premises shall be governed by section 226-b of the Real Property Law of the State of New York ... [landlord] reserves the right to reject any proposed subtenant and take back the apartment and release the tenant.99

The lease required, therefore, the landlord’s consent to an assignment or sublease but it did not burden him with a duty to reasonably consent to an assignment or sublease.100

The tenant notified the landlord, by letter, of his intention to assign the lease to a proposed assignee.101 The landlord had previously rejected another proposed subtenant or assignee, and again rejected the proposed assignment, offering instead to terminate the tenant’s lease and to enter into a new lease with the “prospective subtenant.”102 The tenant subsequently notified the landlord that he had assigned the remainder of the lease term to the proposed assignee and enclosed the assignee’s check for the rent.103 The tenant commenced an action for a declaratory judgment and moved for summary judgment before joinder of issue.104 The court held that although the landlord unreasonably withheld consent, the tenant did not have the right to assign the lease. The court stated:

99. Id.
100. “Clearly then the lease creates no right to assign or sublet ‘without landlord’s prior, written consent’ and the landlord’s consent is not subject to a test of reasonableness.” Id. (quoting the tenant’s lease).
101. Id.
102. The correspondence of the parties relating to the first proposed subtenant or assignee was not made available to the court. Id. at 5, col. 4 n.1. The landlord’s letter rejecting the second proposed assignment invited the tenant to test § 226-b in court, stating:

As we indicated in our letter to you of Oct. 10, 1980, we must reiterate our position wherein we rejected your subtenant and released you from your lease effective 11-30-80. If you desire to test 226-b in a court of law, we are certainly prepared to meet you in court. We are prepared to offer your prospective subtenant the right to enter into a new lease effective Dec. 1, 1980 at the approved Rent Stabilization increase.

Id. at 5, col. 2. The landlord also confused the terms subtenant and assignee, because the tenant requested an assignment of the lease, but the landlord in the above correspondence twice referred to the proposed assignee as a subtenant. Id.
103. Id.
104. The court allowed the parties to chart their own course of litigation. Because the landlord (defendants) did not oppose the procedure and acknowledged that the issues in the motion were solely legal issues, the court stated that there was no reason not to declare the rights of the parties as was demanded in the complaint. Id.
Unreasonable as he was, the landlord had the arbitrary right to consent or withhold consent to the assignment. The consequences of its unreasonableness is [sic] that [the tenant] may stay or [the tenant] may leave, but [the assignee] has no rights in the premises.105

In so ruling, the court followed the First Department's rulings in *Lexann Realty Co. v. Deitchman*106 and *Pacer Realty Associates v. Lasky*107 regarding the tenant's remedies under section 226-b.108

The *Grayshaw* court found the facts in *Kruger* to be in no material way distinguishable from the case at bar. The court, however, did not follow *Kruger*'s interpretation of section 226-b, nor did it follow *Lexann*'s interpretation that the statute was intended to limit a tenant's contractual right to sublet at common law.109 In seeking to interpret the legislative intent of a statute which was "less than clear," the *Grayshaw* court resorted to rules of statutory interpretation.110 In dicta, the court stated that had the parties agreed on how to deal with assignment and subletting, the court would have attempted to enforce their agreement as made, thereby protecting the tenant's contractual rights.111

In interpreting section 226-b, the court found that the statute's purpose was clearly remedial.112 Finding it apparent from the history of the statute, as well as from section 236 of the Real Property Law, which concerns the assignment of leaseholds of deceased tenants, the court stated:

[Section 226-b] was enacted to permit a tenant who no longer had use for an apartment to obtain reasonable relief by either finding a suitable subtenant or assignee or by procuring his own release from further obligation.113

105. *Id.* at 5, col. 3.
109. *Id.* at 5, cols. 2, 4 n.2.
110. *Id.* at 5, col. 2.
111. *Id.* at 5, col. 2, 4 n.2.
112. *Id.* at 5, col. 2.
113. *Id.* at 5, col. 3. Section 236 provides:

Notwithstanding any contrary provision contained in any lease hereafter made which affects premises demised for residential use, or partly for residential and partly for professional use, the executor, administrator or legal representative of a deceased tenant under such a lease, may request the landlord thereunder to consent to the assignment of such a lease, or to the subletting of the premises demised thereby. Such request shall be accompanied by the written consent thereto of any co-tenant or guar-
If the legislature had intended that landlords be required to consent to subleases and assignments, this intention would have been made clear. The court found, however, that the legislature provided the tenant with the statutory remedies of remaining as tenant or being released from the lease. Therefore, under section 226-b when a landlord unreasonably withholds consent, the intent of the legislature was not to give tenants the right to "trade in leases despite their contracts to the contrary."

IV. Cases Interpreting the Right to Sublease Under Section 226-b Following Kruger

A. Lower Courts

Kruger held that section 226-b, as amended, prohibits a landlord from unreasonably withholding consent to a sublease. The court
decided that, as a matter of law, a landlord’s unreasonable refusal of tenant’s request to a sublease operated as a consent to the sublease.\textsuperscript{117} The court held that under section 226-b, where a landlord unreasonably withholds consent to a sublease, the tenant’s remedies are: 1) to remain as tenant under the lease; 2) to demand that the landlord release the tenant from the lease; or 3) execute a valid sublease.\textsuperscript{118} Subsequent decisions agree with \textit{Kruger} that section 226-b permits a tenant to obtain a release from the lease or to remain as tenant under the lease.\textsuperscript{119} All of these cases, however, are not in agreement that section 226-b gives a tenant the option of executing a valid sublease upon a landlord’s unreasonable refusal.\textsuperscript{120}

The \textit{Kruger} court’s interpretation of section 226-b was followed in \textit{68th Street Co. v. Fyjis-Walker},\textsuperscript{121} where the tenant wished to sublet the apartment to a proposed subtenant for the remainder of the lease, which was to expire in February, 1980.\textsuperscript{122} The facts do not indicate whether there was a subletting provision of any kind in the tenant’s lease.

The tenant notified the landlord in writing that he expected to leave the apartment and requested that the landlord accept the subtenant as a sublessee or as a new lessee.\textsuperscript{123} The landlord never responded.\textsuperscript{124} The tenant then advised the landlord that he had

\begin{footnotes}
\item[117] \textit{Kruger v. Page Mgmt. Co.}, 105 Misc. 2d at 34-35, 432 N.Y.S.2d at 308-09.
\item[118] \textit{Id.} at 33-35, 432 N.Y.S. 2d at 308-09.
\item[121] N.Y.L.J., Oct. 29, 1980, at 10, col. 6 (Civ. Ct.).
\item[122] \textit{Id.} at 11, col. 1.
\item[123] \textit{Id.}
\item[124] \textit{Id.}
\end{footnotes}
sublet the apartment. An additional notice was sent to the landlord by the tenant's attorneys. The landlord notified the tenant's attorneys that he would not consent to the sublet and gave no reason for his decision. The landlord rejected the subtenant's tender of rent and the landlord's attorneys notified the tenant that the lease would be cancelled upon thirty days' written notice, stating, "the landlord makes it a policy not to accept subleases or assignment of leases." The landlord brought an action to evict the subtenant on the grounds of an alleged illegal subtenancy.

The court held that the subtenant was entitled to a renewal lease because the landlord's reason for refusing consent to the sublease was unreasonable per se, and that under section 226-b, the unreasonable withholding of consent is prohibited and is deemed to be consent to the sublease. Relying on Kruger and Feldman as authority, the Fyjis-Walker court stated:

[Real Property Law] section 226-b is designed to afford relief to a tenant who wants to discontinue his/her tenancy during the term of the lease. It permits tenants to find suitable subtenants as replacements. Where [the] landlord, by action or inaction, consents to the sublet, the original tenant continues to remain 'liable for the performance of tenant's obligations under said lease.' Where the landlord unreasonably withholds permission to sublet, [the] tenant has the option of treating this as a consent to sublet or of notifying landlord that he/she chooses to be released from the lease.

In so ruling, the Fyjis-Walker court, like the Kruger court, erred in its reliance on Feldman. Feldman construed a lease provision

125. Id.
126. Id.
127. Id.
128. Id.
129. The court found that although the notice sent by the tenant to the landlord may have been insufficient, the notice sent by the tenant's attorneys satisfied the requirements of § 226-b. Id.
130. Pursuant to the Rent Stabilization Code, supra note 8, § 54(e) (1973), the landlord had applied to the New York City Conciliation and Appeals Board ("CAB") for a determination that the apartment was no longer the tenant's primary residence. The landlord obtained a decision in his favor based solely upon information which he had submitted, and the CAB excused the landlord from renewing the tenant's lease. The court held, however, that the subtenant became a legal subtenant before the landlord filed its application with the CAB. Because the landlord failed to notify the subtenant of the proceeding, the decision of the Board could have no effect on his tenancy. Id.
131. Id.
132. See notes 40-47 supra and accompanying text.
which required the landlord not to unreasonably withhold consent to a sublease, but the courts in Kruger and Fyjis-Walker were not presented with similar provisions and the cases should have been governed solely by section 226-b and its statutory remedies.

B. The Appellate Term

In Lexann Realty Co. v. Deitchman, the First Department was confronted with a lease provision that prohibited subletting without the landlord’s consent, which consent was not to be unreasonably withheld. The lease provided:

Tenant shall not assign this agreement, or sublet the premises, or any part thereof, without the landlord’s consent in writing. . . . Landlord shall not unreasonably withhold consent to subletting.

The tenant sought permission to sublease but the landlord refused. Despite the landlord’s refusal to consent, the tenant sublet the apartment. The landlord brought an action for use and occupancy.

The lower court had found that the landlord, by refusing to consent to the sublease to either the proffered subtenant or any other subtenant, unreasonably withheld consent. The trial court, however, held that under section 226-b, where a landlord unreasonably withholds consent to a sublease the tenant’s sole remedies are to terminate the lease or to remain in occupancy.

As a consequence of the court’s decision the landlord was awarded possession of the apartment and a monetary award of

133. Id.
134. See notes 78-94 supra and accompanying text. In fact, the First Department has reversed Fyjis-Walker on precisely these grounds. The court held that a landlord can refuse to permit a sublease for any reason, provided it offers to release the primary tenant from the lease. 68th St. Co. v. Fyjis-Walker, N.Y.L.J., Apr. 1, 1981, at 10, col. 6 (1st Dep’t). See notes 135-152 infra and accompanying text.
136. Id. at 12, col. 1 (Asch, J., dissenting).
137. Id. at 11, col. 3.
138. Id.
139. Id. “Use and occupation” is a term used to define a quasi-contractual action by a landlord against one who occupies an apartment under an express or implied contract to pay for the same, but not under a lease which would support an action for rent. See Thackray v. Ritz, 130 Misc. 403, 403, 223 N.Y.S. 668, 669 (Sup. Ct. 1927).
141. Id.
four month’s rent based on a vacancy lease increase. The tenant appealed and the First Department affirmed the judgment but reduced the award holding that although the tenant sublet the apartment illegally, the landlord could not charge the tenant rent for the period of illegal occupancy at a rate equal to a vacancy increase. Rather, the landlord was only entitled to rent for this period in an amount equal to the rent chargeable for a renewal lease. The court found section 226-b to be governing, regardless of the fact that the lease contained a covenant by the landlord not to unreasonably withhold consent held:

We believe that a careful textual analysis of [Real Property Law] 226-b points ineluctably to one and only one acceptable interpretation of the remedies available to a tenant when a landlord unreasonably withholds consent to sublet, that is: the tenant may decide to forego the subletting and remain in occupancy or may elect to be released from further leasehold obligations.

The court found that section 226-b overrode the common law remedies and therefore a tenant did not have an absolute right to sublet over a landlord’s objection, stating:

[W]hatever rights there may have been before the enactment of [Real Property Law] 226-b the statute clearly enunciates a limited right as here set forth, consequent on a finding of landlord’s unreasonable refusal to consent to subletting.

The First Department analogized section 226-b to section 236 of the Real Property Law, which protects the estate of a deceased tenant from a residential leasehold liability when the landlord unreasonably refuses consent to an assignment. Section 236, however, does not give the tenant a right to impose a new tenant on a landlord, regardless of his unreasonable refusal to accept the proposed assignee and similarly section 226-b bestows no such duty on a landlord to accept a proposed sublessee.

142. Id. at 12, col. 1.
143. Id.
144. Id.
145. Id. at 11, col. 4.
146. Id. at 12, col. 1.
147. See N.Y. REAL PROP. LAW § 236 (McKinney 1968). See also note 109 supra.
The dissent in *Lexann* disagreed with the majority's application of 226-b as eliminating the common law and statutory remedies previously available to a tenant and substituting therefore a single right to terminate the lease.\(^\text{150}\) The dissent stated that in the absence of a clear directive from the legislature that section 226-b was designed to curtail the common law and statutory rights of tenants, the section provided additional remedies rather than limited alternatives previously in existence, and the tenant in *Lexann* should have had the option of terminating the lease, or subletting despite the landlord's unreasonable refusal.\(^\text{151}\) Neither the majority nor the dissent in *Lexann* recognized the importance of the lease provision in which the landlord covenanted not to unreasonably withhold consent and which the landlord violated. In such a case the common law rule and remedies should apply enforcing the lease provision and not section 226-b and its remedies.\(^\text{152}\) The First Department should have enforced the provision as was done in *Feldman* and presumably allowed the subtenant to remain in possession.

The First Department again considered the scope of the rights afforded to residential tenants by section 226-b, in the appeal of *Pacer Realty Associates v. Lasky*. \(^\text{153}\) Although the court was not presented with a lease containing a covenant by the landlord not to unreasonably withhold consent to a sublease, it found its determination in *Lexann* to be dispositive authority for the determination of *Lasky*. \(^\text{154}\) The First Department affirmed the lower court's holding that pursuant to section 226-b, where a landlord unreasonably withholds consent to a sublease, the tenant has the right to request that he be released from the lease, but he has no right to put a subtenant in possession.\(^\text{155}\)

A concurring opinion, written by the same judge who dissented in *Lexann*, distinguished *Lasky* from *Lexann* pointing out that in *Lexann* the tenants there expressly relied on a lease provision

\(^{150}\) See notes 48-55 *supra* and accompanying text.


\(^{152}\) See notes 38-45 *supra* and accompanying text.


\(^{154}\) Pacer Realty Assocs. v. Lasky, No. 80-436, slip op. at ii (1st Dep't Jan. 22, 1981).

\(^{155}\) Id.
which obligated the landlord not to unreasonably withhold his consent to a sublease.\textsuperscript{184} The concurring opinion in \textit{Lasky} stated that section 226-b should not be construed to restrict the rights of the tenant suing for breach of such a lease provision.\textsuperscript{187} Although the concurrence deferred to the precedent of \textit{Lexann}, it stated that the statute, if interpreted to annul a tenant's common law right to sublease, would reward landlords who unreasonably deny consent by increasing the possibility that they will be able to obtain vacancies.\textsuperscript{188} Judge Asch wrote that the statute should be interpreted to confirm tenants' pre-existing rights, and listed these rights as being: "the tenant may sublet, or he may sue for damages, or bring an action for declaratory judgment or (now by virtue of the statute) he may request that landlord release him from the lease."\textsuperscript{189}

When a lease has a covenant by a landlord not to unreasonably withhold consent to a sublease, then as the \textit{Feldman} court held,\textsuperscript{180} the common law rules and remedies should be applied.

As the concurring opinion in \textit{Lasky} cogently noted, section 226-b was not intended to limit the common law rights and remedies of tenants by substituting a statutory cause of action.\textsuperscript{161} Where the landlord covenants to give a tenant more rights than the statute provides, the statute should not be applied in lieu of the lease provision.\textsuperscript{162} A landlord, however, cannot limit a tenant's rights under section 226-b.\textsuperscript{163} Section 226-b was not intended to give tenants the right to sublease where a landlord unreasonably withholds consent. The tenant has the right to sublease under the common law if the landlord violates a leasehold covenant not to unreasonably withhold consent to a sublease or if the lease contains no subletting provision of any kind.\textsuperscript{164}

\textsuperscript{156} \textit{Id.}, slip op. at 1 (Asch, J., concurring).
\textsuperscript{157} \textit{Id.}
\textsuperscript{158} \textit{Id.} at 4 (Asch, J., concurring).
\textsuperscript{159} \textit{Id.} at 4-5 (Asch, J., concurring).
\textsuperscript{160} \textit{Feldman} v. Simon Bros. Mgmt. Co., N.Y.L.J., July 9, 1980, at 6, col. 6 (Sup. Ct.).
\textsuperscript{161} \textit{Pacer Realty Assocs. v. Lasky}, No. 80-436, slip op. at 4 (Asch, J., concurring).
\textsuperscript{162} See notes 21-55 \textit{supra} and accompanying text.
\textsuperscript{164} See notes 23-55 \textit{supra} and accompanying text.
V. Legislative History and Statutory Construction of Section 226-b

A. Legislative History of Section 226-b

The original version of section 226-b was jointly introduced by Assemblyman Charles E. Schumer and Senator Donald M. Halperin on January 8, 1975. The supporting memorandum of Senator Halperin stated: "[t]his bill provides that a tenant shall have the right to sublease his premises with the consent of the landlord. Housing shortages and inequities to tenants may be alleviated by this bill through the allowance of a tenant to sublease his premises when they are not in his use." Following three amendments to the bill by the Judiciary Committees in both the Assembly and Senate, the bill was signed into law by Governor Hugh L. Carey on June 3, 1975, and it took effect immediately. On June 18, 1975, amended section 226-b was jointly introduced by the same Assembly and Senate sponsors. The supporting memorandum of Senator Halperin, entitled, "Subleasing Clarification," explained, "the amendment is to make certain additions to the statute as originally enacted. Chapter 146 of the laws of 1975 added section 226-b to the Real Property Law and granted tenants the right to sublease. The amendments would benefit both tenant and landlord by stating in clearer language the obligations of both parties."

Subdivision one of the original version was amended to substitute the following language: "If the landlord unreasonably withholds consent for such sublease, the landlord must release the tenant from the lease upon request of the tenant." [italics indicates substituted text] for: "If the landlord unreasonably withholds consent for such sublease, he must agree to release the tenant from the lease or accept the sublessee [italics indicates deleted text]." Other changes in the bill included clarifications of the tenant's obligation to notify the landlord of intent to sublease and an exemp-

166. N.Y. LEGIS. ANNUAL 305 (1975).
168. Id.
169. N.Y. LEGIS. ANNUAL 305 (1975).
tion of proprietary leases from the section.\textsuperscript{171}

In neither of Senator Halperin’s legislative memoranda was there a reference to the fact that the original version of section 226-b included a requirement that a landlord who unreasonably withheld consent to a sublease must “accept the sublessee” and the amended version deleted this important language,\textsuperscript{172} effectively changing the statutory remedy. The \textit{Kruger} court relied on Senator Halperin’s legislative memoranda to interpret the legislative intent of this deletion.\textsuperscript{178} The \textit{Kruger} court erred in de-emphasizing the importance of the amendment of section 226-b, which excluded the language that “the landlord must accept the sublessee” if the landlord unreasonably withholds consent, and thereby eliminated this remedy.\textsuperscript{174} The fact that Senator Halperin’s memoranda failed to mention the remedial change cannot be used to undermine the significance.\textsuperscript{178}

\textbf{B. Statutory Construction of Section 226-b}

\textit{1. Plain Meaning Rule}

The \textit{Kruger} court applied the “plain meaning” rule of statutory construction to determine the legislative intent underlying section 226-b: “Where statutory language is clear and unambiguous the

\begin{itemize}
\item Subdivision 2 was amended to provide that any request to sublet must be accompanied by the written consent of any co-tenant or guarantor and the name, business and home address of the proposed sublessee, and within ten days after such request is mailed, the landlord may ask the sender for additional information so that the landlord can determine if rejection of such request would be unreasonable. Subdivision 3 was amended to include that the section shall not apply to a proprietary lease and defined proprietary. Amended section 226-b became law on July 29, 1975. \textit{Id.}
\item N.Y. LEGIS. ANNUAL 305 (1975). A second amendment to section 226-b, effective on May 26, 1976, included provisions relating to the right to assign leases. N.Y. LEGIS. ANN. 281 (1976).
\item As one legislative historian has stated:
\begin{quote}
The absence of discussion of an issue in the legislative materials may be less decisive than other legislative history, but it is sometimes a factor in statutory construction and may be “pregnant with significance,” particularly where some striking change is claimed without support in the legislative history.
\end{quote}
\textit{G. FOLSOM, LEGISLATIVE HISTORY 40 (1979).}
court should construe the plain meaning of the words used."\textsuperscript{176} In so doing, the \textit{Kruger} court found that the language of section 226-b meant that where the landlord unreasonably withheld consent to a sublease, the legislature intended that the tenant should have the option of subleasing or terminating the lease.\textsuperscript{177} \textit{Lexann} correctly found the plain meaning of the statute was not to provide the remedy of subleasing without valid consent.\textsuperscript{178} Because of the landlord’s covenant, however, \textit{Lexann} should not have applied section 226-b.

Rather, \textit{Lexann} should have applied the common law rights and remedies of tenants.\textsuperscript{179} \textit{Kruger}, on the other hand, because there was no express covenant by the landlord in the lease, found section 226-b applicable.\textsuperscript{180} But, \textit{Kruger} should have followed \textit{Lasky’s} correct interpretation\textsuperscript{181} of the statutory remedies available under section 226-b.

2. Mitigation of Damages

The \textit{Kruger} court suggested that the statutory requirement that consent could not be unreasonably withheld may have been intended to impose a duty on the landlord to mitigate the tenant’s damages by releasing him from the lease.\textsuperscript{182} By not holding the tenant liable for the remainder of the rent for the unexpired term of the lease, a tenant’s damages are mitigated.\textsuperscript{183} At common law the landlord had no duty to mitigate a tenant’s damages.\textsuperscript{184} In view of the developing recognition of a landlord’s duty to mitigate damages occurring in New York at the time section 226-b was enacted,\textsuperscript{185} mitigation of damages may have been a remedial intent of

\textsuperscript{177} Kruger v. Page Mgmt. Co., 105 Misc. 2d at 29-32, 432 N.Y.S.2d at 305-07.
\textsuperscript{178} Lexann Realty Co. v. Deitchman, N.Y.L.J., Dec. 18, 1980, at 12, col. 1 (1st Dep’t).
\textsuperscript{179} See notes 23-55 supra and accompanying text.
\textsuperscript{180} See notes 80-92 supra and accompanying text.
\textsuperscript{181} See notes 57-66 supra and accompanying text.
\textsuperscript{183} See Posner & Gallet, \textit{Mitigation of Damages in Residential Lease Breaches}, N.Y.L.J., Apr. 5, 1978, at 1, col. 3.
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} Courts are modernizing concepts of landlord and tenant law and some courts have held that a landlord has some obligation to relet premises when a tenant vacates before the
the statute. In 1975, when original section 226-b was enacted, New York common law did not generally recognize a landlord’s duty to mitigate a tenant’s damages, although such a duty is more widely recognized today. In 1980, there still had been neither a statutory enactment nor a judicial interpretation that expressly mandated mitigation of damages where a tenant vacated before the expiration of a lease.  

In *Lefrak v. Lambert,* a New York court held that landlords are under a duty to mitigate a tenant’s damages by making a good faith attempt to re-let vacated apartments. The court awarded the landlord only three months’ rent because of a failure to mitigate the tenant’s damages following the tenant’s abandonment of the apartment prior to the expiration of the three-year term of the lease. The Second Department, however, modified the judgment on appeal to allow the landlord to recover rent for the entire seventeen-month period the apartment remained vacant. The court found that because the landlord made reasonable and diligent efforts to re-let the apartment, and eventually did so, there was no need to decide whether a rule should be adopted which would modernize the common law by obligating a landlord to mitigate damages by reletting abandoned premises.

The rule established in *Lefrak* imposed substantial hardship on the tenant. This hardship is eliminated by section 226-b which places on the landlord a duty to mitigate damages when a tenant terminates the lease before expiration of the term. Although the
Kruger court noted "the subject rent-stabilized apartment is a valuable asset,"\textsuperscript{194} the purpose of the statute was to help a tenant who needed to vacate an apartment before the expiration of the lease term.\textsuperscript{195} As a corollary to the growing recognition of a landlord's duty to mitigate a tenant's damages, the legislature in section 226-b codified a landlord's duty to eliminate tenant's damages. Where consent to a sublease is unreasonably withheld, the tenant has the option of terminating the lease without further liability or remaining as the tenant under the lease.\textsuperscript{196}

VI. Conclusion

If a landlord and tenant contract to allow subleasing with the landlord's consent and the landlord agrees not to withhold consent unreasonably, the contract between the parties should be enforced. Where the lease contains no provision requiring reasonableness on the part of the landlord the remedies provided by section 226-b should be applied. If a landlord unreasonably withholds consent to a sublease under section 226-b, the tenant's remedy is clearly provided by the statute: the tenant may continue his tenancy or may terminate the lease without further obligation.\textsuperscript{197} Although the statute purports to give tenants the right to sublease it does not give that right without landlord consent.

Section 226-b, however, was not intended to limit a tenant's common law right to sublet. The common law right to sublet is available to a tenant where the lease contains no subletting provision or where the landlord expressly covenants not to unreasonably withhold consent to a sublease. In this instance, a tenant's remedies are to: 1) sublease the apartment in spite of the landlord's refusal; or 2) sue for a declaratory judgment to determine whether consent has been unreasonably withheld and either obtain specific

\textsuperscript{194} Kruger v. Page Mgmt. Co., 105 Misc. 2d at 33, 432 N.Y.S.2d at 308.

\textsuperscript{195} "The intent, and I think the effect, of the law is not to allow tenants to hang on to their apartments but rather to help the tenant who is hard pressed to get out. . . . It puts the obligation on the tenant to find a sublessee but it doesn't require the landlord to take him." To Sublet or Leave is a Right by Law, N.Y. Times, Oct. 26, 1976, at B1, col. 5 (quoting Assemblyman Charles E. Schumer, co-sponsor of § 226-b).

\textsuperscript{196} Lexann Realty Co. v. Deitchman, N.Y.L.J., Dec. 18, 1980, at 11, cols. 4-5.

\textsuperscript{197} See note 145 supra and accompanying text.
performance or recover damages. In addition, the remedial provisions of section 226-b are available to a tenant with such a lease. Section 226-b, however, is not a statutory restriction on a tenant's common law right to sublease.

Courts are not in agreement as to when section 226-b applies, particularly in instances where the lease contains a subleasing provision, nor are they in accord as to whether the statute gives a tenant the right to sublease if a landlord unreasonably refuses consent. As the Grayshaw court found, section 226-b's purpose is clearly remedial and courts, when confronted with subleasing and assignment disputes, should distinguish the statute's application from the operation of leasehold provisions and common law remedies.

Carolyn Debra Karp

198. See notes 48-55 supra and accompanying text.
199. N.Y.L.J., Feb. 6, 1981, at 5, col. 2 (Sup. Ct.).