

## Original Content

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### Important Lease Language Defeats Dismissal Of A Holdover Proceeding



In *M & B Prop. Conv. LLC v. The Meisner Gallery, Inc.*, this firm successfully defeated a motion to dismiss a holdover summary proceeding, based on certain language in a commercial lease. This language should be in all leases in New York to protect the landlord from dismissal of a holdover proceeding should a landlord inadvertently accept the tenant's rent payment for the period subsequent to the termination date and prior to the holdover proceeding. This period is often referred to by the courts as the "window period"

which some courts hold sends a "mixed message" to the tenant that "vitiates" the notice to terminate.

In this proceeding, a lease was terminated on February 26, 2017, upon the landlord giving the tenant five days written notice after the tenant failed to timely cure a default under the lease. The landlord commenced a holdover summary proceeding when the tenant was still in possession on March 1<sup>st</sup>. The tenant moved to dismiss the petition on the ground that its payment of rent by check dated February 15, 2017, for the month of March 2017, created a month-to-month tenancy, thereby requiring the service of a 30 days' notice to quit before the holdover proceeding may be commenced, relying upon Real Property Law § 232-c.

New York's Real Property Law § 232-c provides as follows:

Where a tenant whose term is longer than one month holds over after the expiration of such term, such holding over shall not give to the landlord the option to hold the tenant for a new term solely by virtue of the tenant's holding over. In the case of such a holding over by the tenant, the landlord may proceed, in any manner permitted by law, to remove the tenant, or, if the landlord shall accept rent for

any period subsequent to the expiration of such term, then, *unless an agreement either express or implied is made providing otherwise*, the tenancy created by the acceptance of such rent shall be a tenancy from month to month commencing on the first day after the expiration of such term.

(Emphasis added)

In New York, once a month-to-month tenancy is created under Real Property Law § 232-c, that tenancy, in any building outside the City of New York, may only be terminated by the landlord on at least one full month's notice of the election to terminate. In other words, the tenant here argued that the termination notice was vitiated by the acceptance of rent and the creation of a month-to-month tenancy, thereby requiring a second notice to quit giving the tenant a full month's notice before a holdover proceeding may be commenced against it.

However, a month-to-month tenancy was not created under Real Property Law § 232-c, because Section 29(e) of the lease between the parties is an express agreement providing otherwise, within the meaning of the Real Property Law. Specifically, it provides as follows:

Notwithstanding anything in this Article contained to the contrary, acceptance of any Rent paid by Tenant pursuant to this Article, shall not preclude Landlord from commencing and prosecuting a holdover or eviction action or proceeding or any action or proceeding in the nature thereof. The preceding sentence shall be deemed to be an "agreement expressly providing otherwise" within the meaning of Section 232-c of the Real Property Law of the State of New York and any successor law of like import.

Thus, we argued that the payment of rent by check dated February 15, 2017, for the month of March, when the termination notice came afterwards and ended the lease on February 26, 2017, and landlord's retention of that check, did not create a statutory month-to-month tenancy. The Court agreed stating as follows:

"The respondent next contends that prior to the Lease effective termination date of February 26, 2017 it paid the rent due for the month of March 2017 and petitioner's acceptance thereof created a month-to-month tenancy which required a thirty (30) day notice of termination pursuant to RPL §232-c. Such argument is specifically addressed under the terms of the Lease. Under paragraph 29(e) of the Lease it provides in pertinent part that the acceptance of any rent shall not preclude the landlord from commencing a holdover proceeding as it shall be deemed to be an agreement expressly provided otherwise within the meaning of RPL §232-c. Hence, dismissal is not warranted as a month-to-month tenancy was not

created by the acceptance of March rent under the terms of the Lease.”

Landlords should check their form leases for this type of language.

### **No Municipal Liability for EMT’s Refusal to Offer Medical Assistance In Restaurant**



In *Rennix v. Melissa Jackson*, administrators of the estates of Eutisha Rennix and her baby appealed an order of the Supreme Court, Kings County, that granted summary judgment dismissing her amended complaint against defendants New York City Fire Department, New York City Emergency Medical Services, and the City of New York. The plaintiffs had sought to recover damages for her wrongful death and her baby.

According to the decision on appeal, on December 9, 2009, while working at an Au Bon Pain restaurant in Brooklyn, Eutisha Rennix became ill and had difficulty breathing. She was six months pregnant and suffered from asthma. A co-worker escorted Rennix to a back room, and Rennix stated that she wanted to go to the hospital. The co-worker returned to the sandwich bar in the customer area, where she had seen two Emergency Medical Technicians, Jason Green and Melissa Jackson. The co-worker approached the EMTs and asked for assistance. Neither responded, but Jackson called 911 from her cell phone and requested an ambulance. Both EMTs were on duty, in uniform, and assigned to the nearby Emergency Medical Dispatch Center. Jackson, however, was not authorized to be on break or away from the Dispatch Center at the time. The EMTs left the restaurant before an ambulance arrived, without ever going to the back room to check on Rennix. An ambulance arrived 13 minutes after Jackson placed the 911 call. During that time, Rennix had lost consciousness and stopped breathing. Paramedics were unable to resuscitate her, and she was later pronounced dead at the hospital. Rennix’s baby was delivered through an emergency cesarean section, but died shortly thereafter.

The plaintiffs, alleged that the deaths of Rennix and her baby were caused by the negligence of Jackson and Green in “failing or refusing to render emergency medical aid to Rennix in violation of their official duties.” The defendants moved for summary judgment dismissing the complaint on the ground that they could not be liable in negligence to the plaintiffs unless they owed a special duty to Rennix, and no such duty was owed here. While the motion was pending, the plaintiffs served an amended complaint, which, *inter alia*, alleged that Jackson and Green were grossly negligent. In the order appealed from, the Supreme Court, *inter alia*, awarded summary judgment to the City defendants, dismissing the amended complaint insofar as asserted against them. The plaintiffs appeal.

The Appellate Court affirmed the dismissal stating that a “municipal emergency response system is a governmental function, and thus where an emergency medical technician is alleged to have been negligent while acting in this governmental capacity, the municipality cannot be held liable unless it owed a “special duty” to the injured party. There are three recognized situations in which a special duty may arise: ‘(1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation.’”

The plaintiffs had argued that the first category applies to the circumstances here, and a special duty arose from Jackson’s violation of Penal Law § 195.00(2), which criminalizes official misconduct. Under that penal law, a public servant is guilty of official misconduct when, with intent to obtain a benefit, she or he “knowingly refrains from performing a duty which is imposed upon [her or] him by law or is clearly inherent in the nature of [her or] his office.” The plaintiffs alleged that Jackson violated the statute because “pursuant to the regulations of her department or inherent in the nature of her office, she had a duty to render assistance to Rennix, but knowingly refrained from so doing so as not to be caught on an unauthorized break outside of the Dispatch Center.”

However, the Court held that “even assuming the plaintiffs could establish that Jackson was guilty of misconduct, the violation of Penal Law § 195.00(2) does not give rise to a special duty so as to impose tort liability. For a special duty to arise from the breach of a statutory duty, the governing statute must authorize a private right of action. A private right of action ‘may be fairly implied when (1) the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose of the governing statute; and (3) to do so would be consistent with the legislative scheme.’”

“Here, the plaintiffs’ claim fails at the first step of the analysis, as Rennix was not of a class for whose particular benefit the statute was enacted. Penal Law § 195.00 ‘replaced more than 30 prior crimes, all of which dealt with specific malfeasance or nonfeasance in the accomplishment of official duties.’” Penal Law § 195.00 ‘applies to all public servants.’ It criminalizes public corruption, which impacts every citizen. Consequently, it cannot be said that Rennix was a person for whose special benefit the statute was enacted.”

The “motion is predicated on the public duty rule, which ‘relates to the fundamental obligation of a plaintiff pursuing a negligence cause of action to prove that the putative defendant owed a duty of care.’ ‘Without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm.’ Thus, whether Jackson was negligent or grossly negligent, in the absence of a special duty there can be no liability on the part of the City defendants.”

## Medical Record Defeated Disability Claim



In *Bull v. Metropolitan Jewish Health System, Inc.*, Nancy Bull, a former employee, brought an action against her former employer to recover damages for discrimination on the basis of, among other things, disability in violation of the New York State Human Rights Law and the New York City Human Rights Law. The Supreme Court, Kings County, denied the employer's motion for summary judgment and on appeal, the Second Department of the Appellate Division reversed, holding that the employee did not suffer a disability requiring any accommodation at the

time her employment was terminated.

The former employee alleged that the former employer discriminated against her on the basis of her age and disability by terminating her employment because "she was physically restricted from performing a certain filing task, as she had recently undergone surgery and was still recovering." She also alleged that after she was discharged, her former employer "misrepresented the facts" regarding the circumstances of her discharge to the New York State Department of Labor in order to prevent her from obtaining unemployment benefits.

The Appellate Court held that the Supreme Court should have granted the former employer's motion for summary judgment dismissing her disability discrimination cause of action, because the medical documentation the former employee had provided her employer when she returned to work following her surgery, stated that she was cleared for work "without restrictions." "This evidence established, *prima facie*, that the plaintiff did not suffer a disability requiring any accommodation at the time her employment was terminated. In addition, the defendant met its burden of offering a legitimate, nondiscriminatory reason for terminating the plaintiff's employment (refusal to perform certain of her required significant tasks) and demonstrated that there were no material issues of fact as to whether the reason was pretextual. In opposition to this showing, the plaintiff failed to raise a triable issue of fact, *inter alia*, as to whether the defendant's proffered explanations for the termination of her employment were merely pretextual." The same was true for her age discrimination claim.

As for the denial of the former employer's motion relating to the cause of action based on testimony its employees gave before the New York State Department of Labor, "the testimony at issue was absolutely privileged" and the Court concluded the Supreme Court should have granted summary judgment here, too.

In a separate appeal to the Third Department from the denial of her claim for unemployment insurance benefits, that Court upheld the denial based on the law that an "employee's failure to comply with an employer's reasonable request may constitute insubordination rising to the level of disqualifying misconduct." According to the employer's representatives' testimonies before

the Unemployment Insurance Appeal Board, filing “constituted a significant part of her job duties.”

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