

# Landlord Can Constructively Evict Tenant by Filing Frivolous Lawsuit

BY ALAN NOCHUMSON

Special to the Legal

Every lease in Pennsylvania contains an implied covenant of quiet enjoyment. A landlord breaches the covenant when he physically or constructively evicts his tenant from the leased premises.

In *Kohl v. PNC Bank National Association*, the Pennsylvania Superior Court recently held that a tenant may be constructively evicted from a property if his landlord wrongfully pursues eviction proceedings against him.

## TENANT DEFAULTS

William and Marilyn Schmidt were tenants in a commercial building owned by Carl Kohl. In order to make improvements to the building, the Schmidts obtained a loan from PNC Bank's predecessor-in-interest. The loan was secured by a mortgage on the Schmidts' leasehold interest. As part of the transaction, Kohl, the Schmidts and the bank also entered into a nondisturbance and attornment agreement to further secure the bank's rights.

After the Schmidts defaulted on the loan, the bank confessed judgment in ejectment and filed a mortgage foreclosure action against the Schmidts.

Around the time of the bank's foreclosure and ejectment actions, Kohl terminated the lease and filed his own complaint in ejectment and for damages against the Schmidts based on their failure to pay the real estate taxes due under the lease.

After Kohl obtained a default judgment against the Schmidts, he filed a declaratory judgment action against the bank seeking a determination that the bank had no interest in the leasehold given his termination of the lease prior to the bank's possession of the



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premises. The trial court ultimately held that the lease did not provide for automatic termination for a failure to pay real estate taxes, and the bank's rights were nonetheless protected under the nondisturbance and attornment agreement. The Pennsylvania Superior Court subsequently upheld the trial court decision.

Kohl thereafter commenced an action for ejectment and breach of contract against the bank as a result of the bank's failure to pay property taxes and for its abandonment of the premises. Kohl also filed a lis pendens against the bank's leasehold interest.

The bank then filed a counterclaim, claiming that Kohl breached the implied covenant of quiet enjoyment, relieving it of any of its obligation under the lease, by pursuing, in bad faith, lawsuits against the bank's leasehold interest.

The trial court found in favor of Kohl with respect to the ejectment claim because the bank had abandoned the property. However, the trial court refused to award damages to Kohl on the breach of contract claim on the grounds that Kohl breached the implied covenant of quiet enjoyment by pursuing the lawsuits against the bank in bad faith. Rejecting Kohl's argument that the lawsuits were an exercise of his rights under the lease, the trial court pointed out that the lawsuits

and, notably, the lis pendens indexed against the bank's leasehold interest were an "effective death knell" because "banks are generally in the business of selling their leasehold interests and that the litigation impaired this right."

## APPELLATE REVIEW

On appeal, the Superior Court focused on whether the trial court erred in concluding that Kohl breached the implied covenant of quiet enjoyment and constructively evicted the bank from the leased premises simply by bringing the lawsuits.

The Superior Court first pointed out there was only one reported Pennsylvania case touching upon the issue of whether litigation affecting a tenant's leasehold interest may by itself constitute breach of the implied covenant of quiet enjoyment.

In *Raker v. G.C. Murphy Company*, the Pennsylvania Supreme Court, relying upon the implied covenant of quiet enjoyment, refused to allow heirs of an estate to clear a commercial property owned by the estate of a lease through foreclosure of a mortgage which was purchased by the heirs after the landlord's death. In affirming the judgment against the heirs in their ejectment action, the Supreme Court held that "neither law nor equity will give countenance to such an attempt but will protect the right of the tenant to retain undisturbed possession for the term of the lease."

In *Kohl*, the Superior Court interpreted the Supreme Court's holding in *Raker* to "stand for the proposition that wrongful litigation impairing a tenant's possessory interests can breach the covenant of quiet enjoyment."

The Superior Court found its interpretation of *Raker* was in accord with how courts in other jurisdictions have handled wrongful attacks on leasehold interests. Citing to cases from Montana, California, Iowa, Massachusetts, Oregon and Indiana, the Superior Court in *Kohl* noted the courts in these jurisdictions "focus on whether the litigation was brought in bad faith, maliciously or without probable cause."

Disagreeing with the commentary of the *Restatement (Second) of Property*, which provides that the institution of foreclosure proceedings or the beginning of an action of ejectment does not constitute an eviction, the Superior Court concluded that the intention behind bringing such litigation is relevant to

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determining whether the implied covenant of quiet enjoyment is breached.

The Superior Court was nevertheless concerned about imposing a "chilling effect" on landlords who pursue legitimate claims against tenants. Limiting a breach to "bad faith" litigation, the Superior Court

believed, struck a proper balance between a policy allowing substantially unfettered access to the courts with the rights of tenants to undisturbed possession.

Although the Superior Court concluded that litigation brought by a landlord which substantially impairs a tenant's possessory interests can constitute a breach of the implied covenant of quiet enjoyment where such litigation is pursued in bad faith, maliciously or without probable cause, it disagreed with the trial court's finding that the litigation by Kohl was brought in bad faith.

The Superior Court did not believe there

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## AREA MORTGAGE RATES

Lender	Fixed Rates		Adjustable Rates	Jumbo Rates*	Commercial
	30 yr.	15 yr.	1 yr.	30 yr. fixed	Yes/No**

## Real Estate

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was any indication that the declaratory judgment action was wrongfully brought. Although the trial court and the Superior Court on appeal in the first suit concluded that the lease did not automatically terminate as Kohl contended, and that the bank's interests were additionally protected under the nondisturbance and attornment agreement between the bank and Kohl, there was no allegation in that suit, or any suggestion by the trial court or the Superior Court that Kohl's claim was brought in bad faith.

The Superior Court then pointed out that the record did not support the trial court's bad faith inference with respect to the second suit. Unlike the first suit, the Superior Court noted that second suit was related to the bank's performance, i.e., failure to pay the

real estate taxes due under the lease.

Moreover, the Superior Court emphasized that Kohl prevailed in his ejectment action below and such finding was not challenged on appeal by the bank. Finally, the lis pendens, the crux of the trial court's finding of bad faith, was lodged in conjunction with the successful suit, not the earlier unsuccessful one.

### LESSONS LEARNED

Time will only tell whether *Kohl* will be a warning shot to landlords or a shot in the dark for tenants. Although the Superior Court recognized that "bad faith" litigation is actionable, it has placed the bar high in order to make sure that landlords will not be dissuaded from bringing legitimate lawsuits against tenants in the future.

Landlords should nonetheless expect tenants to use *Kohl* as both a shield and a sword against overly zealous landlords. Most com-

mercial leases in Pennsylvania, for example, contain warrants of attorney allowing the landlord to confess judgment against the tenant for the accelerated amount due under the lease. If the confessed judgment was wrongfully obtained, the tenant could attempt to strike or open the judgment and dissolve its future obligations under the lease based upon the "bad faith" filing.

Given the general distaste for confessed judgments in this commonwealth, the landlord may lose years of guaranteed rental payments if the court determines that the landlord had no legitimate basis under the terms of the lease for confessing judgment against the tenant.

*Kohl* could thus turn the tables on landlords who improvidently interpret the lease terms and file frivolous lawsuits against tenants. As a result, attorneys representing landlords should cautiously tread water prior to filing any action against the tenant.

## Litigation

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In point of fact, however, these statutes only provide for a mediation privilege, assuring that what is stated at the mediation may not be introduced into evidence at a subsequent adjudicatory or other formal proceeding. They do not assure that material divulged during the mediation will, in fact, be kept confidential from the public, from business competitors or from the media.

If a party is desirous of true confidentiali-

mediation period?

Parties contemplating mediation are often confronted with deadlines. These may include statutes of limitations, dates by which pleadings or motions must be filed or answered, or orders designating when lists of witnesses, expert and otherwise, must be provided to the opposition. These deadlines, in addition, are often court-imposed. Consideration should be given, therefore, as to whether the parties can agree that such time limits will be tolled. And, assuming that there is such an agreement, is it contingent upon the expectation that such a stay will be approved by the court.

the mediator. But, occasionally, particularly when one of the parties is much stronger (e.g., disputes between consumers and large corporations) or one party is more eager to engage in mediation, a single party may assume responsibility for all of the associated costs. Similarly, where there are multiple parties (e.g., two plaintiffs and four defendants) the parties should clarify whether each of the parties will be paying one-sixth of the expense or the plaintiffs will pay one-half of the fees and the defendants the other half.

• What prior conditions should be considered regarding time, place and length of the mediation?

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