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Articles

The City of Chicago Elevator Inspection Program: What Every Landlord Must Know

By: Robert D. Tepper and Phillip N. Coover

The City of Chicago is aggressively enforcing elevator inspections violations stemming from the relatively new AIC: The Annual Inspection Certification Program. Landlords are getting hit with substantial fines in the $4,000-$5,000 range (with the City allowing some $500.00 fines in leniency to Buildings that are first time offenders, can show attempts at compliance, and are operating at a loss). Although the certification requirements were originally enacted in 2009, the City promulgated its Rules and Regulations to aggressively enforce the AIC program in 2013, presumably in response to news reports criticizing the City for uninspected elevators resulting in potentially dangerous and conditions and lost revenue.

The AIC requires all building owners to create an online account documenting existing conditions of the elevators and escalators, which are located within the city's Central Business District (CBD): the area bordered by Roosevelt Road in the South, Halsted Street on the West, Chicago Avenue on the North (except to Division when east of LaSalle Street), and the Lake on the East. Each Landlord must do the following on a yearly basis which must be completed before the end of each year: (1) hire an authorized technician; (2) have the technician complete inspection; (3) the authorized technician must then complete the required report online; (4) the landlord must "certify" the report and upload the report on the web portal and pay the City certification fee; and (5) the City will then issue the certificate of compliance; and (6) the landlord must logon and download the certificate of compliance and display the certificate in the elevators themselves. Depending on the elevators' condition, the inspectors can give out grades such as compliant, work in progress, permit required, or under modernization; so it is important to get the inspection early in case landlord needs to obtain permits and perform repairs before they can obtain the necessary certificate.

The City is now reviewing 2014 records and filing numerous administrative hearing lawsuits. The City simply has to review the online portals to determine who has, or has not, obtained the necessary certificates. It then files lawsuits against landlords who failed to obtain the certificates online. If the landlord has not obtained the inspections, had the reports completed by their Authorized Technician, and obtained the required certificates, they are subject to substantial fines. It is easy for the City to identify the buildings which have failed to comply, and easy for them to prove.

We are finding that many property managers are not aware of this requirement and they are finding out through the administrative hearing process. We urge landlords to conduct these inspections and get the required certificates early in each calendar year to avoid fines.

If you would like to discuss these issues, please contact Robert D. Tepper at (312)554-3116 rtepper@satcltd.com, or Philip N. Coover at (312) 554-3103 or pcoover@satcltd.com.

The Whoopsie Statute - Foreclosure and the Mistakenly Omitted Subordinate Interests

By: Phillip N. Coover

When you were young, and you missed a play in a game, you could yell "do-over" and take another swing with the bat. Well, a new Illinois statute (Public Act 098-1099735, now ILCS 5/15-1603.5), allows parties who take title to foreclosed properties at judicial sale (or even hold the certificate of sale) do just that when there is a subordinate property interest mistakenly or inadvertently omitted from the original foreclosure lawsuit. If the foreclosure lawsuit missed foreclosing the subordinate interest, the purchaser at sale (whether that be the bank or a third party), can now file a simple strict foreclosure lawsuit to terminate that interest. The subordinate interest holder has a right to object to strict foreclosure, but the Court will terminate the subordinate interest, unless the subordinate interest redeems the property (i.e. buys) for the amount sold at the judicial sale plus fees and costs incurred subsequently to preserve the property. This does mean that the subordinate interest will have an opportunity to redeem (i.e. purchase) the property for the amount bid at sale plus the additional costs.

This statute is a significant safety net which provides security to purchasers at judicial sales, and also greatly alleviates foreclosing attorneys' stress levels. This topic reminds us of an underutilized best practice. Foreclosing lenders have an option to work with the title company to draw down a policy which protects the lender after taking title. Some foreclosure firms will only order "minutes of foreclosure" at the outset of the case to determine interested parties—and those minutes do not provide any representations, warranties, insurance, and do not protect against error. However, for only a marginal increase in cost, you can have the title insurance company prepare a title commitment, which will give you the same disclosure of interested parties, and will allow the attorneys to work with the title company through the process to keep the commitment up to date, verify that the correct parties have been named, and at the end of the case, provide the lender with a title policy which adds value and makes the property more marketable. This practice provides additional assurances that the correct parties have been foreclosed, provides title insurance in case the title company made an error, and makes the property more marketable for the final disposition.

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What about Future Rent?

By: Diane M. Crary-Fleming and Robert D. Tepper

It is a question we hear often from landlords during an eviction proceeding: can we also collect future rent for the remaining lease term? The answer is the frustrating "it depends" on a few different circumstances. Courts struggle to balance granting landlords the remedies provided under other types of contracts, which include foreseeable damages (in this case, future rent), and the view that if the right to possession has been terminated, the tenant is under no further obligation because the landlord can reuse and relet the space.

The ability to collect future rent as part of an eviction action is determined by the state law where the property is located. California, for example, has codified the handling of future rent claims absent written provisions in the lease which allows for recovery of the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award (future rent) exceeds the amount of such rental loss that the lessee proves could be reasonably avoided (mitigation of damages). This amount is computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus 1 percent. Some states allow for accelerated rent provisions; others find them impermissible penalties.

In Illinois, absent a provision in the lease allowing for accelerated rent, recovery for breach of a lease is limited to the amount due at the time of trial. Payment of future rent is not considered a present obligation. As such, it cannot be automatically added to a landlord's damages at the time of judgment in an eviction trial. If a lease includes an acceleration provision, however, a landlord may be able to recover all amounts due in one lawsuit, though courts may apply judicial deductions to account for the duty to mitigate, credits for rent later received by a new tenant, or the reduction of future rent to the present value. A landlord's duty to mitigate its rental loss has been recognized in 42 states plus the District of Columbia.

If your Illinois lease does not include an acceleration provision, a landlord has the option of suing for rent installments as they come due, suing for several accrued installments, or suing for the entire amount at the end of the lease term. New actions may be brought annually for each year's rent payment, and judgment for one year's rent is no bar to each subsequent year's rent. Of course, mitigation may eventually cut-off subsequent years' claims, should the landlord relet or could have relet the space.

A recent unpublished decision, Stillwell Real Estate Limited Partnership v. Deluxe Auto, Inc., holds that an eviction/forcible suit is an action for possession and, if also alleged, rent owed through the date of trial. Such an action does not in and of itself terminate a lease, and thus a landlord is able to bring a second action for breach of contract to seek damages accruing after the date of trial. It is important to note that Stillwell could be read to hold that if the lease is terminated pursuant to the required terms of the lease prior to the expiration of the lease, any future rent claims may be cut off at the moment of termination.

Based on current case law, the suggested approach for a landlord is to include at the outset of the lease a written acceleration provision that states exactly how future rent loss damages will be calculated, with a present value discount rate and mitigation clause built-in. The courts may accept such a provision—finding it relatively equitable.

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Lease or License? That is the Question

By: Lisa Ann Murphy

Frequently, the words "lease" and "license" are used interchangeably, although they have vastly different legal meanings. As with most matters law related, the distinction is never so simple and the two differing concepts can become easily blurred. So what is the difference?

A lease is an agreement that conveys an exclusive possessory leasehold interest in property; whereas, a license is a mere privilege to act on another's property for a specific purpose and does not confer a possessory interest in the property. The notions of "exclusive possession" and "control" are critical in examining the key components of a lease in comparison to a license. The ultimate distinguishing characteristic of a lease is that the landlord surrenders exclusive possession of the premises to the tenant for a specific term or period. Further, a lease is generally only terminable upon either (i) the expiration of the term of the lease; or (ii) a tenant act constituting a lease default for which the landlord has the right to terminate the lease as a remedy. In contrast, a license is, under most circumstances, revocable at any time by the licensor and is otherwise terminable by either party. While a lease is transferable, a license is personal to the licensee. Thus, a grant of permission does not extend to anyone beyond the person to which the licensor has bestowed with such privilege.

The Illinois Supreme Court has iterated that a document must contain four essential elements to be construed a lease: (1) the extent and bounds of the property; (2) the term of the lease; (3) the amount of rent; and (4) the time and manner of payment. However, the mere inclusion of the aforementioned components will not necessarily cause a license to be deemed a lease. Conversely, a license agreement must have at a minimum the following: (1) a clause allowing the licensor to revoke the license "at will"; (2) the licensor's retention of absolute control over the property; and (iii) the licensor supplying all essential services (i.e. utilities) required for the licensee's permitted use of the property.

Simply captioning an agreement as a "lease" or a "license" will not necessarily make it so. Thus, Illinois courts will focus on the character of the agreement itself and the intent of the parties, rather than the phraseology set forth in the document, to determine whether a possessory interest was intended to be conveyed by the parties.

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