Buffalo Law Review

Volume 6 | Number 1 Article 35

10-1-1956

Real Property—Licensee

John G. Putnam Jr.

REAL PROPERTY

Licenses

Defendant was indicted for grand larceny for misappropriating funds deposited by complainant as advance rental and security for the performance of an agreement, whereby a concessionaire contracted to install vending machines in the defendant's theaters. In unanimously affirming the Appellate Division and the trial court, the Court of Appeals, in *People v. Horowitz*,[1] approved a construction of Section 233 of the Real Property Law which excludes licenses from its scope.

Prior to the enactment of Section 233, money deposited by a tenant with his landlord as security for performance created merely the relationship of debtor and creditor, and the landlord's insolvency or misappropriation of the funds gave rise only to an action for debt.[2] This section, however, causes such deposit to become a trust fund, remaining the property of the tenant, although in the custody of the landlord. The landlord is liable in conversion at the time of misappropriation and the tenant does not have to wait until the term expires.[3] The landlord is also subject to criminal prosecution.

The section, by its terms, is limited in its application to funds deposited "for the use or rental of real property." Two questions which arose in the instant case were whether the section included licenses within its scope, and if not, whether in fact complainant and defendant had a lease or a license. The Court held that the language used in the statute imported the ordinary landlord and tenant relationship involving the transfer of possession of a designated space of real estate; hence, a mere license is not within the scope of the statute.[4] A license is differentiated from a lease in that it does not operate to confer on, or vest in, the licensee any title, interest, or estate in such property.[5]

In holding that the instrument here created a license only, the Court drew on analogous cases arising under the emergency rent control laws that a concessionaire, *in the absence of a demise of specific space* in a building,[6] or where he

1. 309 N. Y. 426, 131 N.E. 2d 715 (1956).
2. *Mallory Associates v. Barving Realty Co.*, 300 N. Y. 297, 90 N.E. 2d 468 (1949).
3. *2710 Eighth Ave. v. Frank Formam Pharmacy*, 180 Misc. 376, 42 N. Y. S. 2d 887 (1st Dep't 1943).
4. *Planetary Recreations v. Kerns*, 184 Misc. 340, 54 N. Y. S. 2d 418 (City Ct. 1945).
5. *Wash-O-Matic Laundry Co. v. 621 Lefferts Ave. Corp.*, 191 Misc. 884, 82 N. Y. S. 2d 572 (Sup. Ct. 1948).
6. *Muller v. Concourse Investors*, 201 Misc. 340, 111 N. Y. S. 2d 678 (Sup. Ct. 1952). Even a diagram of the space demised has been held insufficient, *Wash-O-Matic Laundry Co. v. 621 Lefferts Ave. Corp., supra*, note 5.

operates subject to the dominion of the owner,[7] possesses only a bare license. Thus in the instant case, where the concessionaire did not have exclusive possession of any defined areas of the defendant's theaters, where the contract did not specify where his stands and machines were to be located, and where he was allowed to hawk his wares anywhere in the theater, a bare license existed, and the defendant was not subject to prosecution for larceny for misappropriation of complainant's deposit.

Liability of Landlord Out of Possession

In *De Clara v. Barber Steamship Lines,*[8] the Court was faced with a difficult problem concerning the liability in tort of a landlord out of possession. The action was one for wrongful death brought by the administratrix of decedent's estate. By a lease agreement defendant landlord had covenanted to make repairs at tenant's request and in addition had reserved the right to enter and inspect the premises at any time. In pursuance of this agreement landlord maintained an elaborately equipped repair crew on the property at all times with the understanding that landlord should be solely responsible for all repairs. Landlord was aware of the faulty equipment, which caused decedent's death, for some time prior to the accident.

The Court held, reversing the Appellate Division,[9] that a landlord has reserved such privileges of ownership as to incur liability in tort where he may enter the premises at will to inspect for and correct any defects he may find.

The owner of a public building or one which abuts upon a public thoroughfare owes a duty of care toward the public even though he has leased the premises to another, if he has covenanted to repair the property[10] Aside from this exception, which does not apply in the instant case, it was held in *Cullings v. Goetz,*[11] that a mere covenant to repair will not create such possession and control of the premises in the landlord so that he may be held liable for injuries to persons resulting from failure to repair.

The *Cullings* case, the leading New York case on the question of landlond liability, sets forth a general review of the New York law. Both the majority and

7. *Halpern v. Silver,* 187 Misc. 1023, 65 N. Y. S. 2d 336 (City Ct. 1946); *Muller v. Concourse Investors, supra,* note 6.
8. 309 N. Y. 620, 132 N.E. 2d 871 (1956).
9. 285 App. Div. 1062, 139 N. Y. S. 2d 568 (2d Dep't 1955).
10. *Appel v. Muller,* 262 N. Y. 278, 186 N.E. 785 (1933).
11. 256 N. Y. 287, 176 N.E. 397 (1931); This is no more than "the assumption of a burden for the benefit of the occupant with the consequences the same as if there had been a promise to repair by a plumber or contractor."