

Leases With Active Military Personnel

Termination and Eviction Implications

WIGGIN AND DANA

Counsellors at Law

The current war against terrorism and post-war involvement with Iraq warrants a quick review of the recently enacted Service Members Civil Relief Act, 50 U.S.C. App. 501, Pub. L. No. 108-189, 117 Stat. 2835 (effective Dec. 19, 2003). This Act is a restatement, clarification and revision of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. Section 501 (collectively the "Act"). The general purpose of the Act is to temporarily suspend certain legal proceedings and transactions which might "...adversely affect the civil rights of servicemembers during their military service." (Section 2 of the Act). Among these transactions are commercial and residential leases which may be materially affected by the Act. This article will briefly address the implications of two sections of this Act with respect to termination and eviction rights under residential and commercial leases with an active military service person or his/her dependents.

I. TERMINATION

Section 305 of the Act provides substantial protection for military service personnel by enabling them to terminate their leases, both residential and commercial. Section 305, provides that "...a lease of premises occupied or intended to be occupied by a servicemember or a servicemember's dependents for a residential, professional, business, agricultural or similar purpose..." may be terminated by a person who after the execution of the lease entered military service or "the servicemember, while in military service, ex-

cludes the lease and thereafter receives military orders for a permanent change of station or to deploy with a military unit for a period of not less than 90 days."

Two servicemen in a three person general partnership successfully relied on the equivalent of this Section under the old Act to terminate their interests in a commercial lease in which the partnership was the tenant. The remaining partner, however, was held liable for the entire rental obligations under the lease for the remaining term. In holding the remaining partner liable, the court cited general partnership law which holds partners jointly and severally liable for the obligations of the partnership. The court rejected landlord's argument that landlord could seek reimbursement for unpaid rent from each partner's interest in partnership property. The court concluded that the partnership had dissolved by operation of law upon the termination of the lease as to the two partners. The court reasoned that although the lease was entered into prior to dissolution, the ongoing obligation to pay rent on the part of the remaining partner was considered a debt contracted after dissolution and therefore the landlord could not recover against the two partners nor their interests in partnership property. *J.C.H. Service Stations v. Patrikes*, 46 N.Y.S. 2d 228, (1944).

In *Omega Industries, Inc. v. Raffaele*, 894 F.Supp. 1425 (1995), an optometrist successfully terminated his commercial lease under the equivalent Section under the old Act. The optometrist voluntarily

Leases With Active Military Personnel

Termination and Eviction Implications

WIGGIN AND DANA

Counsellors at Law

applied to the United States Department of Health and Human Services for an appointment as a commissioned officer one year after he entered into a five year commercial lease. The court rejected the landlord's argument that the Act was intended to provide relief for military service personnel and their families during a war time crisis, by holding that, in order to encourage such volunteerism, the Act did cover a person who voluntarily applies for duty during peace time.

The Act provides specific requirements to provide effective notice of termination to a landlord. Further the effective date of the termination varies depending on whether the lease provides for monthly payment of rent or less frequent rent payments. The specific provisions of the Act should be reviewed as to these requirements.

The Act does, however, provide some protection to landlords. A landlord may seek equitable relief with respect to lease terminations. Section 305 provides in part: "Upon application by the lessor to a court before the termination date provided in the written notice, a relief granted to the servicemember may be modified as justice and equity require." In *Omega Industries, Inc. v. Raffaele*, although the court did not hold for the plaintiff landlord, the court reasoned that a court had "...broad latitude and discretion in granting equitable remedies to landlords...". The court stated that such remedies could include reimbursements to landlords in the amount of the cost of tenant improvements made to the premises by landlords plus the monthly rental obligations of the service personnel if a tenant had for example entered

into a lease knowing that he/she would soon be entering active military service and invoking the Act.

II. EVICTION

Pursuant to Section 301 of the Act: "...a servicemember, or the dependents of a servicemember..." may have an eviction proceeding stayed for 90 days unless "...justice and equity require a longer or shorter period of time," the rent does not exceed \$2,400/month (subject to a consumer price index adjustment) and the premises is occupied or "...intended to be occupied primarily as a residence."

The Act defines dependent as the servicemember's spouse, child or "...an individual for whom the servicemember provided more than one-half of the individual's support for 180 days immediately preceding an application for relief under the Act." (Section 101 of the Act.) Given the Act's recent passage, there is no case law to help define the meaning of "support" and whether it will be interpreted broadly by the courts as the courts have broadly interpreted "dependent" under the old Act. The concept of dependent had been construed to mean a person who depends on the military person for the ability to pay rent. In *Balconi v. Dvascas*, 507 N.Y.S. 2d 788 (1986), the court held that the Act applied to a divorced wife with a dependent child who relied on monthly military allotment payments from her ex-husband to pay her rent. The court reasoned that the "...dependent status turns, not on the parties legal relationship, but rather on whether some form of financial dependency in fact exists." In *Scanlan v. Garrick*, 61 N.E. 2d 773 (1945), the court awarded relief under the Act to the wife,

Leases With Active Military Personnel

Termination and Eviction Implications

WIGGIN AND DANA

Counsellors at Law

brother and father of a serviceman tenant. However, an aunt, a wife and children of a serviceman were not entitled to protection under the Act when they lived with the serviceman as "invitees" of his aunt, the tenant. *Pfeiffer v. McGarvey*, 61 F. Supp. 570 (1945). In this case the court denied a petition to stay an eviction brought by the serviceman's aunt. The court reasoned that since the serviceman and his wife had no obligation to pay rent, nor was the aunt dependent on the serviceman for any portion of the rent, the Act did not apply.

If a tenant does obtain relief under the Act, a tenant is relieved of its obligation to pay rent for the period of the stay and upon the lifting of the stay, it has been held that tenant's obligation to pay rent resumes including the unpaid rent which accrued during the stay. *JONDA Realty Corporation v. Marabotto*, 34 N.Y.S. 2d 301 (1942).

Just as in Section 305, there is some relief for landlords under this Section as well. Section 301(b) authorizes the courts to grant a stay only if the ability to pay rent by the servicemember is "...materially affected by military service". Further, the Act expressly permits the court to grant landlord equitable relief when justified. In *Ingram v. Reinhold*, 57 Pa. D. & C. 223 (1946), the court, in reliance on a similar

section under the old Act, did not stay an eviction on behalf of the serviceman where third party purchasers of the landlord's property were elderly and ill and had purchased the house for their residence.

Finally, landlords should be aware that under Section 301(c), there are criminal penalties for "...a person who knowingly takes part in an eviction...or attempts to do so..." in violation of Section 301(c). In *Clinton Cotton Mills v. United States*, 164 F.2d 173 (1947), the court upheld a conviction and fine against a landlord for threatening to evict the wife and children of a serviceman.

In conclusion, during this period in which servicemen and women have been called to military service, landlords, tenants and business partners should be aware that the recently enacted Servicemembers Civil Relief Act may have a substantial impact on their leases and the exercise of their rights therein'.

Endnote:

1. It is noteworthy that the Act also has a material impact on other real property interests, including mortgages, security interests and purchase and sale agreements.

One Century Tower
P.O. Box 1832
New Haven CT
06508-1832
Telephone 203.498.4400
Telefax 203.782.2889

400 Atlantic Street
Stamford CT
06911-0325
Telephone 203.363.7600
Telefax 203.363.7676

450 Lexington Avenue
Suite 3800
New York NY
10017-3913
Telephone 212.490.1700
Telefax 212.490.0536

One CityPlace
185 Asylum Street
Hartford CT
06103-3402
Telephone 860.297.3700
Telefax 860.525.9380

Quaker Park
1001 Hector Street, Ste. 240
Conshohocken PA
19428-2395
Telephone 610.834.2400
Telefax 610.834.3055