

Friday, October 28, 2022
9:00 AM – 10:15 AM

Workshop #20

SELF HELP: I GUESS I WILL DO IT MYSELF! NAVIGATING WHEN, AND WHEN NOT TO USE SELF-HELP

Presented to

2022 ICSC+U.S. LAW
JW Marriott Grande Lakes, Orlando, Florida
October 26-28, 2022

by:

Karim A. Ali
Partner
Porter Wright Marris & Arthur LLP
41 South High Street
Columbus, OH 43215
Kali@porterwright.com

Michael A. Kostiew
Partner
Reed Smith LLP
225 Fifth Ave.
Pittsburgh, PA 15218
Mkostiew@reedsmith.com

I. Summary of commercial landlord and tenant self-help rights

Commercial landlords are presented with two possible methods of self-help. Where permitted, they can either elect to use self-help to reenter the property to evict a tenant, or they can use self-help to reenter the property to conduct necessary repairs that the tenant was required to complete. Regarding self-help eviction, most states do not permit the practice. In states that recognize this common law right, the permissibility of self-help eviction typically turns on whether the lease is commercial or residential. In the residential context, the landlord's right to exercise self-help is wholly dependent on whether the state recognizes this common law right. In the commercial context, however, a bar against the use of self-help repossession of residential property does not necessarily eliminate a landlord's right to exercise self-help. *Craig Wrecking Co. v. S.G. Loewedick & Sons, Inc.*, 38 Ohio App. 3d 79, 83-84 (10th Dist. Franklin Cnty 1987).

Absent a breach of the peace and acting pursuant to a valid provision of the lease agreement, a landlord may exercise self-help against a commercial tenant. *Id.* Among the states which do not permit the use of self-help, there are two camps. There are states that have expressly abrogated the common law rule permitting the use of self-help by statute and there are states that have not expressly eliminated the common law right permitting the use of self-help but have held that, because a statutorily prescribed judicial remedy exists, the use of self-help is against public policy. Courts generally hostile towards a commercial landlord's use of self-help.

Landlords may also exercise self-help for the purposes of inspection, repair, or maintenance. Whether or not a landlord can permissibly enter a leased premise for the purposes of inspection, repair, or maintenance is governed by the lease or agreement or the landlord-tenant statute of the jurisdiction. In either case, the operative principle is "notice and consent." Notice of entry by the landlord and consent to entry by the tenant are typically required in some form. Landlord notice is usually required to be given within some reasonable timeframe prior to the entry. While the tenant's consent is typically required, the tenant may not unreasonably withhold consent. The courts of various jurisdictions have construed these notice and consent requirements differently whether prescribed by statute or defined in the lease agreement.

Commercial tenants have remedies available in the form of self-help depending on the state. A commercial tenant's form of self-help could include withholding of rent or by offsetting rent by the cost of completing maintenance and repairs that the landlord failed to complete as required by the lease. Unlike landlord forms of self-help, most jurisdictions permit the commercial tenant practice of withholding rent where the parties have expressly contracted for it in the lease. Moreover, if the parties have expressly contracted that the right to withhold rent on the part of the tenant is prohibited, the tenant may not withhold rent.

There are some instances where States have allowed for a commercial tenant to bypass the requirement of "expressly contracting for the right to withhold rent within the lease." One of these instances is where the landlord has breached his duty to make repairs. In these states, if a landlord breaches its duty to make repairs

after notice that such repairs are needed and subsequently fails to make those repairs after a reasonable time, then the tenant may make the repairs directly and then either demand reimbursement of the cost or offset the cost against rent owed to the landlord. Otherwise, these states hold that the tenant does not have an express right to withhold rent unless provided in the lease. Only Florida explicitly addresses what a tenant can do in the event the lease is silent on the procedure to be followed regarding the responsibility for repair and maintenance and the payment of rent relating to that responsibility.

Another instance is in cases where the landlord has breached a covenant critical to the lease agreement. In these states, if a landlord causes a materially and sufficiently serious breach of a covenant critical to the lease agreement then the tenant may be entitled to withhold rent to pay for its costs to remedy the landlord's breach. This includes covenants that played a significant part in inducing the tenant to enter into the lease as laid out in Restatement (Second) of Property § 7.1, cmt. c (1977).

The final instance is in the event the commercial tenant is being constructively or actively evicted. These states often require that the tenant show that the landlord's wrongful actions have materially deprived the tenant of its beneficial use and enjoyment of the leased premises. Some states go even further by requiring that the tenant vacate the premises without unreasonable delay in order to validly withhold rent.

II. Landlord Self-Help Evictions

A. Whether self-help eviction is permissible varies across jurisdictions

As common law self-help doctrine has developed, various jurisdictions have held that self-help evictions must be conducted in a "peaceable" manner. What constitutes "peaceable" entry onto the premises varies widely across jurisdictions. In Vermont courts have held that breaking down a door is peaceable entry. *Mussey v. Scott*, 32 Vt. 82 (1859). On the other hand, California courts have held that achieving entry by picking a lock violates the "peaceable" standard. *Karp v. Margolis*, 323 P.2d 557 (Cal. Ct. App. 1958). While New York courts have articulated the peaceable standard as: "[t]o determine whether the landlords entry was peaceable or not, it must be determine if it was made in a "forcible manner." *Fults v. Munro*, 202 N.Y. 34, 43-44, 95 N.E. 23, 26 (1911).

The concept of "peaceable" self-help is more broadly defined in the Restatement (Second). Where the controlling law of a jurisdiction permits the landlord to use self-help to recover possession of leased property, a landlord is not permitted to exercise this right unless recovery by self-help is accomplished:

- (1) within a reasonable time after the lease terminates;
- (2) without causing physical harm, or the reasonable expectation of physical harm, to the tenant or anyone else on the leased property with the permission of the tenant; and
- (3) by using reasonable care to avoid damage to the property of the tenant or of other property on the leased property with the tenants permission.

Restatement Second, Property: Landlord and Tenant § 14.3.

A survey of forty-two U.S. jurisdictions revealed that eleven states permit the use of self-help evictions under some circumstances involving commercial tenants. Among these jurisdiction, there are those that are the most permissive. The only limitation imposed on the commercial landlord in these jurisdictions is the relevant state's peaceable standard. Then, there are jurisdiction that only permit the use of self-help when the landlord is acting pursuant to a valid provision of the commercial lease. Still, there are some outliers;

- **Arizona, Maryland, Vermont, and Virginia** should be considered the most permissive jurisdictions in that the landlord's right to exercise self-help is subject only to the limitation of the "peaceable" standard discussed earlier. *MILLER v. CONDON*, 66 Ariz. 34, 182 P.2d 105 (1947); *K & K Mgmt., Inc. v. Lee*, 316 Md. 137, 557 A.2d 965 (1989); *Mercandante v. E. Indus., Inc.*, 2007 Vt. Super. LEXIS 49; Va. Code Ann. § 55.1-1400.
- **West Virginia**, in addition to the peaceable standard, raises the bar slightly for permissible self-help by adding "...the right of entry, without judicial proceedings, is a qualified and limited one, and should be exercised with much caution...." *Bachinsky v. General Coal & Coke Co.*, 78 W. Va. 721, 727 (1916).
- **Hawaii** does permit the use of self-help eviction but there are limits to its use. *Watson v. Brown*, 67 Haw. 252, 256-58 (1984). These limitations are contained within the case *Gomes v. Perry*. One of these limitations may be that if the commercial landlord commits an assault and battery upon the tenant in trying

to regain possession of their property, then they are punishable criminally under the laws of the jurisdiction concerning assault and battery. *Gomes v. Perry*, 26 Haw. 661, 665 (1922). Another limitation may be that if in the attempt to regain possession the landlord lays hands upon the tenant or otherwise assaults him or takes or injures his furniture or other property, the tenant will have a right of action against the landlord, upon suitable pleadings, to recover damages for such assault and for such losses or injuries. *Id.*

- **Mississippi, New York, Idaho, and Wisconsin** permit self-help evictions where the landlord is acting pursuant to a valid provision of the lease. *Clark v. Serv. Auto Co.*, 143 Miss. 602, 108 So. 704 (1926); *Bozewicz v. Nash Metalware Co.*, 284 A.D.2d 288, 725 N.Y.S.2d 671 (App. Div. 2001); *Simhiser v. Farber*, 270 Wis. 420, 71 N.W.2d 412 (1955); *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982).
- Per **Ohio** law, § 5321.15 of the Ohio Landlord and Tenant Act prohibits landlords from exercising self-help. Ohio courts have held that this restriction does not apply to commercial leases. Ohio Rev. Code Ann. § 5321.15; see *Craig Wrecking Co. v. S. G. Loewendick & Sons, Inc.*, 526 N.E.2d 321 (1987); *Quigg v. Mullins*, 1991 Ohio App. LEXIS 1756 (Ohio Ct. App. Apr. 19, 1991). Courts have nevertheless imposed the following limitations on the landlord's right to self-help.
 - There must be a provision in the lease allowing self-help repossession.
 - The tenant must unlawfully hold over or be in breach of the lease.
 - The landlord must give notice of termination, or notice of and an opportunity to cure the breach.
 - Repossession must be accomplished without a breach of the peace.

Id. at 1756 (Ohio Ct. App. Apr. 19, 1991).

- **Nevada** courts limit a commercial landlord's right to exercise self-help, as they only permit for a commercial landlord to change the locks to a commercial premises if the tenant is delinquent in paying rent. Nev. Rev. Stat. Ann. § 118C.200. If a landlord or a landlord's agent changes the door lock of commercial premises leased to a tenant who is delinquent in paying rent, the landlord or agent must place a written notice on the front door of the commercial premises stating the name and the address or telephone number of the person or company from which the new key may be obtained. The new key is required to be provided only during the regular business hours of the tenant and only if the tenant pays the delinquent rent. *Id.* Otherwise, Nevada courts will hold that the landlord's actions in self-help evicting the tenant were not permitted.

The above survey also revealed that thirty-eight states explicitly prohibit the use of self-help evictions as a remedy for commercial landlords. Among these states, there are two camps:

- There are those states, like **Arkansas**, which have expressly, statutorily abrogated the common law rule permitting the use of self-help evictions in any context. A.C.A. § 18-60-302. Similarly, **Illinois**, which is governed by the Illinois Eviction Act, states that "[n]o person shall make an entry into lands or tenements except in cases where entry is allowed by law, and in such cases he or she shall not enter with force, but in a peaceable manner." 735 Ill. Comp. Stat. Ann. 5/9-101. If a tenant does not surrender possession of the leased premises after receiving all required pre-suit notices, the landlord can bring an action to regain possession under this statute. Thus, the Illinois Eviction Act does not permit self-help evictions as the common law rule permitting the use of self-help evictions in any context has been clearly abrogated by the statute.
- Other states have not clearly abrogated the common law remedy by statute. However, their state courts have held that, in light of the existence of a statutorily prescribed judicial remedy, the use of self-help eviction is contrary to public policy. **Delaware** is one example. *Affordable Autos, Inc. v. Dietert*, 2016 Del. Super. LEXIS 134 at *13 (2016). Here, the court explicitly states that "under the Code, landlords, including commercial landlords, cannot use the remedy of self-help. Instead, a summary proceeding through the Justice of the Peace Court is the appropriate remedy for landlords in situations where a landlord is owed rent." *Id.* at *11. **Pennsylvania**, similarly, does not permit self-help evictions. As explicitly stated in *Lenair v. Campbell*, a landlord who desires to repossess the leased premises from a tenant may not undertake a self-help eviction or dispossession of its tenant because the tenant did not vacate the premises when the landlord desired or tenant failed to pay rent. Moreover, a landlord who

desires possession of the leased premises because of non-payment of rent or failure of the tenant to vacate can only evict the tenant by bringing an action under the Landlord and Tenant Act of 1951, 68 P.S. § 250.501, et seq., or by bringing an action in ejectment. Finally, the Landlord and Tenant Act of 1951 provides the sole remedies and procedures for a landlord seeking to evict a tenant. *Lenair v. Campbell*, no. 1137 March term, 1983, 1984 Pa. Dist. & Cnty. Dec. LEXIS 353, at *4-5 (C.P. Nov. 8, 1984). As a result, any form of a self-help eviction is improper under Pennsylvania law.

In these States, the disparate treatment between commercial and residential tenants is attributable to the perceived bargaining power and superior competence of commercial tenants. *Freeman v. Muia*, N.Y.S.2d 214 (3d Dept. 2005). As a result, attorneys rarely advise their clients to employ this remedy as the court is generally hostile towards a commercial landlord's use of self-help.

B. Jurisdictional anomalies

- **New Hampshire** law explicitly states that it prohibits the use of self-help evictions for *residential* leases. However, it does not address the use of self-help evictions with respect to *commercial* leases. There are no statutes or reported court decisions prohibiting the commercial use of self-help. As a result, this remedy may still be available to commercial landlords in the state.

C. In those jurisdictions which permit the use of self-help when acting pursuant to a valid lease, proper drafting is essential to either promote or limit the practice.

i. General principles

From the perspective of the commercial landlord, the ideal lease provision, which is meant to promote the use of self-help, should contain some key language. Language pertaining to self-help eviction will typically be located in the default clause of the commercial lease. Joshua Stein, *Commercial Leasing* 39-17 (3d ed. 2017). A well drafted default clause should expressly provide:

1. That if the tenant defaults in the payment of rent or commits any other violation of the lease constituting a default, the lease shall terminate automatically.
2. That the landlord may thereafter recover possession in accordance with his common law rights.
3. That the landlord may do so without any duty, requirement, or necessity to provide due process or to seek prior court approval, through summary dispossession proceedings or any other action or proceeding at law, before evicting the tenant and removing the tenant's property and/or person from the premise.

Id. at 39-21

In at least one jurisdiction where self-help evictions are permitted when the right is reserved in a commercial lease (New York), the term "reentry" has been interpreted by courts as alluding to merely the right to commence summary proceedings. *Id.* at 39-22 n. 71. The lease agreement, therefore, should make clear that "reentry" is not being used in a technical or narrow sense but in the sense that the landlord may affect physical entry onto the premises (i.e. changing the locks). *Id.* 39-22. See the example below:

1.05 If Tenant shall default in the payment of any Fixed Rent or Additional Charges, and such default shall continue for ten (10) days after written notice thereof has been given to Tenant, or if this lease shall terminate as provided in Article XXXX hereof, Landlord or Landlord's agents and employees may immediately or at any time thereafter reenter the Premises, or any part thereof, either by summary dispossession proceedings or by any suitable action or proceeding at law, or by force or otherwise, including self-help, without being liable to indictment, prosecution or damages therefor, and may repossess the same, and may remove any person therefrom, to the end that Landlord may have, hold and enjoy the Premises. The word "reenter," as used herein, is not restricted to the narrow sense of its technical or legal meaning, but instead in the sense that the Landlord may affect physical entry of the Premises in accordance with its common law rights.

Id. at appx. 39-48

ii. A lesson from case law

New York

"(1) If Tenant defaults in fulfilling any of the covenants of this lease other than the covenants for the payment of rent ... upon [Landlord] serving a written fifteen (15) days['] notice upon Tenant specifying the nature of said default, and upon the expiration of said fifteen (15) days, if Tenant shall have failed to comply with or remedy such [*74] default ... , then [Landlord] may serve a written five (5) days['] notice of cancellation of this lease upon Tenant

"(2) ... or if Tenant shall make default in the payment of the rent reserved herein ... , then, and in any of [the] events [specified in paragraph 17 (2)], [Landlord] may without notice, re-enter the demised premises either by force or otherwise, and dispossess Tenant by summary proceedings or otherwise, ... and Tenant hereby waives the service of notice of intention to re-enter or to institute legal proceedings to that end." *Sol De Ibiza, LLC v. Panjo Realty, Inc.*, 2010 NY Slip Op 20386, ¶¶ 1-2, 29 Misc. 3d 72, 73-74, 911 N.Y.S.2d 567, 568 (App. Term)

Here, the court held that other courts have concluded that commercial landlords have sufficiently reserved their rights of reentry through lease provisions containing language substantially similar to the language employed in the lease provision herein. *Id.* at 570 (App. Term)

With the above considerations in mind, commercial landlords should be aware that the exercise of self-help eviction does not necessarily mean that litigation will be totally avoided. Issues such as (1) whether the tenant was actually in default or (2) whether the landlord's entry was peaceable or otherwise lawful may need to be litigated. *Stein supra* at 39-19. Therefore, landlord's should ensure that the tenant's default is carefully documented and that entry is accomplished in a peaceable manner. *Id.* Where either issue is uncertain, summary judicial proceedings are the preferable course of action. *Id.*

In order to ensure that reentry is not deemed forcible, the landlord should arrange for the reentry to occur during late night/early morning hours when the tenant's business is closed. The landlord's agents should be certain that no one is present on the leased premises before entering. Bailey, Adam Leitman, and John M Desiderio, *Drafting an Effective Commercial Lease Default Lease: Two More Secrets*, Law Journal Newsletter (July 1, 2017), <https://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/07/01/drafting-an-effective-commercial-lease-default-lease-two-more-secrets/>. Upon reentry, when the peaceable self-help eviction is successful, the landlord may then change the locks or padlock the doors. To thwart any potential damage claims, the entire reentry operation should be videotaped, and all items of tenant property removed from the property should be photographed and inventoried. *Id.* The tenant's property should then be placed in storage, for a reasonable period of time in accordance with a lease provision that contemplates such action in the event of an eviction. *Id.*

III. Landlord Self-Help Repairs

As a general rule, the tenant's right to exclusive possession of the leased property suspends the landlord's right of entry during the lease term. 49 Am Jur 2d Landlord and Tenant §391. This meaning, **absent the express reservation of the right of entry in a lease or statute a landlord's unilateral entry onto the leased premise to conduct repairs constitutes a trespass**. Notice or Consent Required 49 A.L.R 7th 4; See Janet Portman & Fred S. Steingold, *Negotiate the Best Lease for Your Business*, 13/5 (2d ed. 2005) (differentiating between when a landlord can *always* enter the commercial property (during a gas leak, fire, etc.) and when a landlord can enter the property when expressed in the lease (repair and maintenance)).

When the lease is silent on the right to reenter the premise for inspection or repairs, the landlord may have an implied right of entry for such purposes. *Sachs v. Exxon Co. U.S.A.*, 9 Cal. App. 4th 1491, 1498-99 (1992). Cases which have recognized that implied covenants require that they are firmly rooted in the parties' express agreement and justified by legal necessity. *Id.* The operation of a certain type of business may create an implied covenant which permits a landlord with particular qualifications or expertise to enter the premise for inspection or repair. *Id.*

Example: A lessee who operates a gas station on the leased premise may be bound by an implied covenant which permits the landlord to enter the premise for inspection or to conduct repairs. Because of the particular business practice being conducted on the property – potential

contamination concerns, regulation by the state or federal government, and the need for expertise to find defects and cure them – an implied right of entry may exist. *Id.*

Most leases and landlord tenant statutes will provide that the landlord has the right to enter in certain situations, primarily to repair and inspect the property. *Id.* Importantly, nearly all landlord-tenant statutes in the United States refer to a landlord's right to reenter "a dwelling" for the purposes of repairs and, thus, these statutes are technically applicable to residential leases. See e.g. Ala Code §§35-9A-303. In the commercial context, a landlord's ability to enter the premise for the purpose of repairs will typically be governed by a provision in the lease agreement. Janet Portman & Fred S. Steingold *supra* 3/15.

Two main operative principles govern the landlord's right to reenter the premise to conduct repairs when reserved in the lease. Landlord must generally give notice of their reentry and the tenant must give the landlord consent to do so. Notice or Consent Required 49 A.L.R. 7th 4. As a rule of thumb, the landlord is required to give the tenant anywhere from 24-48 hours' notice of his planned entry. *Id.* While the tenant is required to give consent to the entry, lease provisions will typically provide that the tenant may not unreasonably withhold consent. *Id.*

Lease Provision Practice Points:

A lease provision, already having reserved the right of entry to conduct repairs, seeking to clearly define adequate notice should address the following:

- The sensitivity of the business will define how much notice of entry is adequate. For example, a retail business would not likely need significant notice. Repairmen would not particularly disrupt the business.
- Different repairs should require different notice periods. Tenants should be notified of entry for significant repairs earlier than minor repairs.
- Entry time and days should be specified. Ideally repairs could be completed during non-business hours.

IV. Tenant Right to Withhold Rent; Self-Help

A. Two states recognize that no common law or statutory right to withhold rent, regardless of whether it is expressly contracted into the lease.

Massachusetts, and **South Dakota** do not recognize a common law or statutory right for a commercial tenant to withhold rent. For Massachusetts and South Dakota, this is in sharp contrast with the law governing residential tendencies as both states recognize a right to withhold rent by a residential tenant. These states do not allow for commercial tenant to contract this right of self-help into their commercial lease. South Dakota law only allows a *residential* tenant to deduct the cost of repairs if, within a reasonable time after notice to the landlord of conditions requiring repair to make the premises fit for human habitation and in good and safe working order, the landlord neglects to do so. S.D. Codified Laws § 43-32-9.

B. For the majority of states, a tenant does not have any express common law or statutory right to withhold rent unless expressly contracted for in the lease.

In Twenty-three states, such as Alabama, California, Delaware, Hawaii, and Idaho, they recognize that a tenant does not have any right to withhold rent or offset rent unless provided in the lease. *Country Mile, LLC v. Cameron Props.*, No. M2017-01771-COA-R3-CV, 2019 Tenn. App. LEXIS 126 (Ct. App. Mar. 13, 2019); *First Interstate Bank v. Heritage Square, Ltd.*, 1992-NMSC-037, 113 N.M. 763, 833 P.2d 240; *Peroff v. United Rim Transp., Inc.*, 2009 Haw. App. LEXIS 104 (Haw. Ct. App. Mar. 13, 2009).

- **Idaho** case law goes into further detail by recognizing that "if the landlord and tenant negotiate default, termination, and notice provisions which exceed any statutory rights, that agreement will be binding. *Galindo v. Hibbard*, 678 P.2d 94 (Idaho Ct. App. 1984). A tenant may be entitled to lost profits damages if the damages are proved with reasonable certainty, and such damages were within the parties' contemplation. To be proven with reasonable certainty, the damages must not be within the realm of speculation. *Circle C Ranch Co. v. Jayo*, 659 P.2d 107 (Idaho 1983). Additionally, if the tenant has a remedy against the landlord for a breach by the landlord, the tenant has the same remedies against the landlord's assigns. Idaho Code § 55-303.

C. One state addresses what happens if a lease requires a landlord to complete repairs, but the Landlord fails to undertake those repairs and the lease is silent regarding the Landlord's responsibility to undertake such repairs.

Florida Commercial Landlord Tenant Law 83.201 states that when "[w]hen the lease is silent on the procedure to be followed to effect repair or maintenance and the payment of rent relating thereto, yet affirmatively and expressly places the obligation for same upon the landlord, and the landlord has failed or refused to do so, rendering the leased premises wholly untenable, the tenant may withhold rent after notice to the landlord. The tenant shall serve the landlord, in the manner prescribed by s. 83.20(3), with a written notice declaring the premises to be wholly untenable, giving the landlord at least 20 days to make the specifically described repair or maintenance, and stating that the tenant will withhold the rent for the next rental period and thereafter until the repair or maintenance has been performed. The lease may provide for a longer period of time for repair or maintenance. Once the landlord has completed the repair or maintenance, the tenant shall pay the landlord the amounts of rent withheld. If the landlord does not complete the repair or maintenance in the allotted time, the parties may extend the time by written agreement or the tenant may abandon the premises, retain the amounts of rent withheld, terminate the lease, and avoid any liability for future rent or charges under the lease. 1 Florida Commercial Landlord Tenant Law 83.201.

V. Tenant Self-Help Repairs

A. Some states allow for a commercial tenant to withhold rent by offsetting their rent by the cost of repairs needed to be done that the landlord failed to make after a reasonable time after demand.

In these states the general theme is that in order for the commercial tenant to be able to offset the cost of repairs against the rent owed to the landlord, the repairs must be necessary and the cost reasonable. Notice to the landlord may also be required.

- **Louisiana** permits tenants to make the repairs directly and either demand immediate reimbursement of the costs or offset the cost against rent owed to the landlord in the event a landlord breaches his duty to make repairs **BUT** only to the extent that the repair was necessary and the cost reasonable. La. Civ. Code Ann. art. 2694
- **Montana** adds an additional state specific requirement besides necessity and reasonableness. There, if within a reasonable time after notice to the landlord of repairs that the landlord ought to handle, the landlord neglects to do so, and if the cost of the repairs does not require an expenditure *greater than one month's rent of the premises*, the tenant may perform the repairs and deduct the expenses of the repairs from the rent or the tenant may vacate the premises, in which case the tenant is discharged from further payment of rent or performance of other conditions. Mont. Code Ann. § 70-26-203

VI. Certain States allow commercial tenants to withhold rent where the landlord has breached covenant critical to the lease agreement, following the guidelines laid out in Restatement (Second) of Property § 7.1 and its comments.

Pennsylvania and Utah allow for this exception to the general rule that commercial tenants may not exercise self-help in the form of withholding rent unless expressly contained within the lease.

- **Pennsylvania** case law holds that if a landlord breaches a covenant that was critical to the lease agreement, the tenant may be entitled to withhold rent to pay for its costs to remedy the landlord's breach. *Pawco, Inc. v. Bergman Knitting Mills, Inc.*, 424 A.2d 891, 896 (Pa. Super. Ct. 1980).
- **Utah** case law states, a "breach of a critical covenant" that justifies a lessee abating rent is one for which there is a significant breach of a covenant material to the purpose for which the lease was consummated. *Richard Barton Enters. v. Tsern*, 928 P.2d 368, 377 (Utah 1996). Temporary or minor breaches of routine covenants by a lessor do not. If a breach has little effect on the essential objectives of the lessee in entering into the lease, the lessee may not withhold rent. *Id.* Additionally, following Restatement (Second) of Property § 7.1, cmt. c (1977), a covenant is not a significant inducement if "the landlord's failure to perform his promise has only a peripheral effect on the use of the leased property by the tenant." A significant inducement means the "performance of [a] promise [that has] a significant impact on the benefits the tenant anticipated he would receive under the lease." Restatement (Second), § 7.1 cmt. c.

VII. Certain states allow for a tenant to withhold rent in response to the landlords alleged breach where there is an actual or constructive eviction.

Generally absent an agreement to the contrary the covenant to pay rent is wholly independent from other covenants contained in a lease, and a tenant may not withhold payment of rent in response to an alleged breach by the landlord. New York recognizes that an exception exists when there is an *actual* eviction, in whole or in part, and the tenant vacates the portion of the premises evicted from. In such event, the obligation to pay rent is suspended during the period the tenant is excluded from possession. However, this exception does not apply to a constructive eviction. N.Y. Real Prop. Law § 227; See also *Barash v. Pa. Terminal Real Estate Corp.*, 26 N.Y.2d 77 (1970). In the case of a partial actual eviction, a tenant's refusal to pay rent constitutes an election of remedies and the tenant may not then also sue for damages for the eviction. *Frame v. Horizons Wine & Cheese, Ltd.*, 467 N.Y.S.2d 630 (1983); *487 Elmwood, Inc. v. Hassett*, 486 N.Y.S.2d 113 (1985).

Similarly, a commercial tenant in Michigan may withhold rent if a landlord breaches the covenant of quiet enjoyment and deprives the tenant of the beneficial use of the premises to a substantial degree. *Saugatuck v. Palm Beach Polo Holdings*, No. 300283, 2011 Mich. App. LEXIS 2226 (Mich. Ct. App. 2011). Thus if a commercial tenant is constructively evicted, which in Michigan occurs when the act of landlord is of such a character as to deprive the tenant of the beneficial use and enjoyment of the premises, then they may withhold rent. *Belle Isle Grill Corp. v. City of Detroit*, 666 N.W.2d 271, 279 (Mich. Ct. App. 2003).

A. A tenant withholding rent as a result of the landlords breach may make the tenant subject to an eviction action or other judicial proceeding.

- **New Jersey**, holds that a tenant may withhold rent based on a landlord's breach; however, this may subject the tenant to an eviction action. At this action, "the tenant or person in possession of the demised premises shall at any time on or before entry of final judgment, pay to the clerk of the court the rent claimed to be in default." N.J. Stat. § 2A:18-55. The court will then consider the merits of who breached the lease first and whether withholding rent was justified, commonly called a "Marini defense" or "Marini hearing." *Marini v. Ireland*, 265 A.2d 526 (1970).
- **Kansas** does not recognize common law or statutory right of a commercial tenant to withhold rent. The commercial tenant should expressly contract for this right in the lease. However, the court hold that a tenant does have the right to make repairs if economically feasible and then bring a claim to recover repair costs. *Serv. Oil Co. v. White*, 542 P.2d 652 (Kan. 1975). Absent an explicit expression of giving the tenant the right to withhold rent, there is no other way for the tenant to get reimbursed for making the repairs other than by going to court. They must resort to the courts in order to reimbursed for their expenses.

Practical Tips for Drafting "Self-help" Rights in Leases

Key Terms in Drafting Self-help Clauses

Several categories of issues should be considered when drafting a self-help clause¹:

1. Notice periods;
2. Default conditions;
3. Whether self-help is based on representations at execution or later defect;
4. Limits on performance and costs incurred;
5. How repayment is made;
6. Preservation of remedies;
7. Enforceability protections; and

¹ See Current Leasing Law and Techniques, Forms § 3D.26 (2022).

8. Dispute resolution

The below sections examine each issue and outline how their construction can favor tenants and landlords respectively.

Tenant-friendly Terms

1. Notice periods;

(a) Notification of defect and opportunity to cure;

- (i) There must be some time period between when the tenant notifies the landlord of a defect and the landlord's obligation to cure arises. **Generally, if the landlord fails to act within this period, the tenant acquires self-help rights.**
- (ii) **A shorter period benefits the tenant.** Many leases proscribe 10-30 days for landlords to act after being put on notice of default. However, carve outs that extend the time are common for curing defaults that take longer to cure.
- (iii) **Seek a defined, rather than "reasonable" period.** Defining the period in days helps set clear expectations and avoid ambiguity that could benefit the landlord.
- (iv) **Avoid successive notice periods.** Some leases include second (and even third) notice and opportunity to cure periods. Usually, the periods accelerate and each iteration is shorter. If successive periods are necessary, tenants could negotiate more favorable reimbursement for self-help if the landlord fails to cure in an earlier period.
- (v) **Avoid exceptions for emergencies and force majeure events.** It is relatively common for leases to excuse non-performance by the landlord in instances of emergency or force majeure events.
- (vi) **If possible, require cure during the period rather than initiating performance.** Specify that the landlord must cure defect within the period, not merely prepare or begin to do so.

(b) Repayment after exercising self-help;

- (i) After a tenant exercises self-help, the landlord will need some amount of time to review claimed costs and repay the tenant. **Again, tenants will want this period to be as short as possible.**

(c) Method of notification;

- (i) **Specify the form and content of notice.** Many require that notice be in writing and requests for reimbursement include documentation of costs incurred. If maintenance risks are complex and could involve specialist contractors (e.g. hazardous waste disposal) more thorough documentation requirements should be pursued.

2. Default conditions;

- (a) **Broadly define default conditions.** Critically, tenants should insure self-help rights arise wherever a defect adversely affects business operations.

- (b) **Any situation that has a "material adverse effect on operations" should trigger self-help.** Enumerating specific default conditions necessarily narrows the set of circumstances where the tenant could be entitled to self-help. Making

“material adverse effect on operations” a catch-all default will provide broader protection.

- (c) **Avoid limiting self-help to defaults “caused” by the landlord.** Some leases even limit self-help to culpable or negligent failures of the landlord. Both formulations severely restrict the set of situations where the tenant obtains self-help rights.
 - (d) **Recognize that some defects are risky for tenants to repair and might be left out of default provisions.** Oftentimes, landlords and cotenants will be entitled to consequential damages caused by the tenant exercising self-help. Certain repairs (e.g. structural integrity) that inhere high risk of damage to the property and might be too risky for tenants to bear potential liability for.
- 3. Whether self-help is based on representations at execution or later defect;
 - (a) **When concerned about pre-conveyance representations, secure a self-help right to restore the property to the promised condition after taking possession.** Issues such as compliance with zoning laws, regulations, and habitability could frustrate the tenant’s ability to operate immediately upon taking possession, but could be curable through self-help.
 - (b) More commonly, default conditions are triggered by future conditions.
- 4. Limits on performance and costs incurred;
 - (a) Maintenance and repair.
 - (i) **Avoid standard of care requirements.** It is advantageous for landlords to require that any self-help be performed consistent with a standard of care, such as “best efforts,” “workmanlike,” or “reasonable,” and hold tenants liable for damages resulting from deviations from the standard. Also note that interpretations of these terms vary by jurisdiction.
 - (ii) **Reserve the right to repair or maintain any default condition contemplated in (2).** For self-help to be effective, tenants should have the right to cure any default that triggers the clause.
 - (iii) **Reserve the right to repair common areas or utilities.** To the extent that defects in common areas trigger default, it would be desirable for tenants to have an option to repair them.
 - (b) Costs.
 - (i) **Avoid cost limitation language to the extent possible.** Many leases insert language limiting costs to those that are “reasonable” under the circumstances.
- 5. How repayment is made;
 - (a) **Offset the cost of performance from rent.** This is a potent remedy for tenants because more protections apply to landlord recovery of rent than a claim for reimbursement.
 - (b) **Avoid provisions that include costs arising from self-help with maintenance the tenant is already liable for.** Some leases proscribe that tenants are liable, up to a set amount, for routine maintenance. Because self-help generally arises in extreme circumstances that could exceed that ceiling, tenants should ensure that their maintenance obligations will not be deducted from the amount recoverable from the landlord for performance.

6. Preservation of remedies;
 - (a) **State that all remedies are cumulative and nonexclusive.** Because self-help is most often triggered in situations of breach or default, there will likely be other remedies available to the tenant that could be preferable under some circumstances.
 - (b) **State that the exercise of self-help does not terminate the lease, including covenants and obligations of the landlord.** Tenants have an interest in the landlord maintaining beneficial covenants and obligations throughout the remaining term of the lease.
 - (c) **Waive counterparty damages to the extent possible.** Certain types of damages can be waived in commercial leases and, in many cases, such waivers are enforceable.².
7. Enforceability protections; and
 - (a) **Ensure the lease is purely commercial.** This is more likely an issue from the landlord's perspective, but some states have general prohibitions on self-help in residential leases. In such jurisdictions, parties should examine zoning rules and ensure the lease is commercial to preserve enforceability.
8. Dispute resolution
 - (a) **Offset attorneys' fees arising from self-help disputes from rent.** Self-help rights do not provide perfect protection from litigation. Parties may include an attorneys' fees cost shifting provision to allocate this risk. Some leases stipulate that only a party who initiates litigation and loses will be liable for the other's attorney fees.
 - (b) **Require arbitration to resolve self-help disputes.** Parties could also agree that all self-help disputes will be resolved via arbitration or an alternative dispute resolution procedure.

Landlord-friendly Terms

Provisions favorable to a landlord exercising self-help rights against a tenant will generally mirror those favorable to tenants, with several key distinctions flagged below.

1. Notice periods;
 - (a) **Minimize the period of time between notice of defect to tenant and the landlord's opportunity to cure.** Because the landlord necessarily exercises some discretion in the timing of entry and cure, a "reasonable" standard could be more advantageous than a strictly defined period.
 - (b) **Waive remedies that toll cure periods.** Some remedies, such as "Yellowstone" injunctions in New York, allow tenants to obtain a stay tolling cure periods until a judicial determination on their ability to cure is made. New York recently determined that this remedy can be waived by sophisticated parties in commercial leases³.
2. Default conditions;

²See *Long Liu v. WLW*, 2021 Cal. Super. LEXIS 92493 at *10 (Super. Ct. Los Angeles Cnty. 2021) (denying a motion to strike allegations of punitive damages in excess of rental offsets because the lease did not waive rights to recover all damages resulting from the landlord's failure to install a restroom on the premises).

³ *159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353, 366 (N.Y. 2019) (holding that a provision of a commercial lease waiving tenants' rights to seek a Yellowstone injunction was enforceable because it was clear and unambiguous, adopted by sophisticated parties negotiating at arm's length, and did not violate public policy).

- (a) **Define default conditions as violations of terms, covenants, or obligations of the tenant.** Rather than events that impede operations of the tenant's business, landlords want to preserve the conditions and obligations of the lease.
 - (b) **Specify duties to replace "substantial" repairs.** In some jurisdictions, duties to replace are insufficient to obligate tenants to perform extensive repairs or replacements⁴. To ensure a default provision triggers in this scenario, describe tenant obligations with specificity.
- 3. Whether self-help is based on representations at execution or later defect;
- 4. Limits on performance and costs incurred;
 - (a) **Avoid limitations on the manner and places in which default is cured.** For landlord self-help to be effective, a broader range of defects may need to be redressed than for tenants. Defects that require complex repair or are located in common areas should be included.
 - (b) **Minimize limitations on when self-help can be performed.** Many leases restrict landlord entry during hours of business operation and other times. Compromise terms such as "any reasonable time" or "outside of hours of operation" could be appropriate.
- 5. How repayment is made;
 - (a) **Seek reimbursement as a freestanding claim, stipulate penalties, or raise rent.** In many jurisdictions, the default rule is that damages are not recoverable as rent for violation of repair covenants⁵. However, damages can be recoverable as rent if self-help penalties provide so.
- 6. Preservation of remedies;
 - (a) **Reserve the right, but not the obligation, to cure tenant breach through self-help.** This avoids potential liability if the landlord chooses not to exercise self-help to the detriment of tenants.
 - (b) **Make termination a discretionary remedy after exercising self-help.** Termination of the lease and eviction of tenants could be desirable after curing their default.
 - (c) **Providing a tenant with the option to exercise self-help can, in some circumstances, shield from liability.** If a tenant fails to establish that they complied with self-help provisions, it can undermine breach of contract claims against the landlord⁶.
- 7. Enforceability protections; and
- 8. Dispute resolution

⁴ See e.g. *Busby Family, LLC v. Zervos*, 2022 Cal. App. Unpub. LEXIS 3205 at *74 (Cal. Ct. App. 2022) ("A lease requiring the tenant to 'repair and maintain' the premises does not include a duty to replace a dilapidation on the premises absent express provision in the lease to that effect or undisputed extrinsic evidence to the contrary").

⁵ See *Building Serv. Local 32B-J Pension Fund v. 101 L.P.*, 115 A.D.3d 469, 470 (N.Y. App. Div. 2014) (reciting that courts reject claims for lost rent arising from tenant breach of maintenance covenants and instead award damages limited to the reasonable costs of restoration); See also *Avalon Pacific—Santa Ana, L.P. v. HD Supply Repair & Remodel, LLC*, 192 Cal. App. 4th 1183, 1199 (Cal. Ct. App. 2011) ("Cost of repair damages . . . are not recoverable by a lessor during the lease term for breach of maintenance and repair covenants,").

⁶ See *Rivertown TCI, L.P. v. SPM Global Servs.*, 2020 Phila. Ct. Com. PI. LEXIS 36 at *25-6 (Philadelphia Ct. Com. PI 2020).