Warning
As of: Dec 05, 2012

PACIFIC COAST SILKS LLC v. 247 REALTY LLC

600505/07

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2008 N.Y. Misc. LEXIS 5925*; *240 N.Y.L.J. 37

July 21, 2008, Decided

SUBSEQUENT HISTORY: Reversed by, Remanded by *Pacific Coast Silks, LLC v. 247 Realty, LLC, 2010 N.Y. App. Div. LEXIS 5759 (N.Y. App. Div. 1st Dep't, July 1, 2010)*

CASE SUMMARY:

PROCEDURAL POSTURE: The court set forth its judgment after the dispute involving a commercial lease was tried before the court without a jury. Plaintiff tenant brought suit against defendant lessor/owner for constructive eviction and, as later asserted in a post-trial brief, for actual partial eviction. The dispute arose from the lack of a working elevator for the leased premises. Defendant filed various counterclaims.

OVERVIEW: The parties entered into a commercial lease whereby plaintiff was renting the seventh floor of a building. Plaintiff had paid rent security in the amount of $ 22,500, and the amount of $ 7,500 as rent in advance. Defendant sought recovery on its counterclaims in the sum of $ 144,155, plus attorney's fees. Shortly after execution of the lease, defendant gave plaintiff a key to the seventh floor. The building contained a single elevator, and the main access to the seventh floor premises was via the elevator, which opened directly into the premises. The only other means of access to the premises was a stairwell. The elevator did not work until almost six months into the lease term. The court held that the failure to provide elevator service constituted an actual partial eviction. As such, there was a failure of consideration. In turn, the court held that a waiver of rent abatement clause in the lease agreement did not apply since there was a failure of consideration. Since defendant terminated the lease by failing to provide elevator access, the court held that plaintiff was entitled to a refund of the prepaid rent and the security deposit it paid.

OUTCOME: Plaintiff was awarded the sum of $ 30,000, with prejudgment interest, and the court dismissed defendant's counterclaims. The court further held that defendant was not entitled to retain the security deposit and was not entitled to recover attorney's fees since there was no default by plaintiff.

CORE TERMS: tenant, lease, elevator, rent, landlord, notice, partial eviction, demised premises, floor, rider, commencement, appurtenance, eviction, default, delivery, actual eviction, constructive eviction, failure to provide,

deliver possession, installation, alterations, partial, leased, silk, lease term, freight elevator, occupancy, covenant, fabric, repairs

LexisNexis(R) Headnotes

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Constructive Eviction
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Partial Eviction
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Possession of Premises
[HN1] An actual eviction can result from interference with other appurtenant rights. Depriving the tenant of the use of a hallway lavatory or access to the use of a freight elevator, or merely changing or limiting the means of ingress and egress without denying access to the leased premises can amount to an actual eviction from a substantial portion of the premises.

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Possession of Premises
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Remedies > General Overview
[HN2] See *Real Property Law § 223-a*.

Real Property Law > Landlord & Tenant > Lease Agreements > Breach > Material Breach
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Possession of Premises
[HN3] Elevator access in a leased building is an appurtenance, and the failure to provide it constitutes a failure to deliver possession.

Real Property Law > Landlord & Tenant > Lease Agreements > Exculpatory Clauses
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Possession of Premises
[HN4] *Real Property Law § 223-a* implies a condition to deliver possession on the specified date, absent an express agreement entered into by the parties to the contrary. Implicit in a standard exculpation clause is a promise to deliver possession on the date fixed by the lease or within a reasonable time thereafter unless factors beyond the landlord's control make that event impossible. Such an interpretation creates no objectionable results and is consonant with the parties' freedom to contract as indicated by § 223(a).

Real Property Law > Landlord & Tenant > Lease Agreements > Damages > Liquidated Damages
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Possession of Premises
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Remedies > Rent Abatement
[HN5] A provision for the abatement of rent does not excuse the owner from its obligation to deliver possession. Rather, it operates as a liquidated damages clause.

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Possession of Premises
[HN6] A key is the symbol of possession. Furnishing a tenant with a key to leased premises is a customary incident to the giving of possession, just as the surrender of the key by the tenant is evidence of an intent on his part to surrender possession. While deprivation of a key may constitute an eviction, without physical access the key is merely symbolic. The mere giving of a symbol is not a substitute for the actual delivery of possession.

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Constructive Eviction
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Partial Eviction
[HN7] An actual partial eviction, or a constructive eviction, is a matter of common law, and may occur whether or not an owner is in default of an obligation imposed by the lease.

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Constructive Eviction
[HN8] Lack of elevator service can, depending on the facts, support a claim of constructive eviction.

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Constructive Eviction
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Partial Eviction
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Possession of Premises
[HN9] Where a tenant continues in possession until the conditions complained of are remedied or no longer exist,

the tenant has waived the right to claim a constructive abandonment. That principle looks not at when the tenant formally surrenders possession, but when the tenant leaves the premises. A tenant may invoke constructive partial eviction, where it continues to use and occupy the overall premises but ceases to use a portion of the premises.

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Constructive Eviction
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Remedies > Rent Withholding
[HN10] Constructive eviction does not relieve a tenant from payment of rent already accrued at the time of its abandonment of the premises.

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Partial Eviction
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Remedies > Rent Abatement
[HN11] Even where a tenant is ousted from only a portion of the demised premises, the eviction is actual, if only partial. Unless the actual partial eviction is de minimus, the tenant's obligation to pay rent is entirely suspended until the eviction stops and the tenant is restored.

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Possession of Premises
[HN12] The right to use an apparent, usual, and proper means of ingress and egress to a tenant's premises is an appurtenance included in a lease as a matter of right. When one leases rooms in a building, that carries with it not only the right of access, but the right to heat them, if necessary; and if the only means provided by which the rooms can be heated be a furnace in the cellar, then the right to use such furnace for that purpose. To hold otherwise would enable the lessor, at the expense of the lessee, to destroy, either in whole or in part, the subject-matter of the lease by depriving the lessee of the beneficial use and enjoyment of the thing leased.

Real Property Law > Landlord & Tenant > Lease Agreements > Breach > Material Breach
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Partial Eviction
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Possession of Premises
[HN13] Elevator access is an appurtenance even where the lease does not expressly give the tenant the right to elevator service. The mere fact that some means of physical access remains available, does not negate the actual partial eviction where access to an appurtenance is denied. Notwithstanding the availability of stairwell access, and even hoist access, the deprivation of elevator access constitutes an actual partial eviction, the elevator being an appurtenance and therefore part of the leased premises, even though the lease does not expressly give the tenant the right to use the elevator.

Real Property Law > Landlord & Tenant > Lease Agreements > Breach > Material Breach
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Partial Eviction
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Possession of Premises
[HN14] Appurtenances reasonably essential to the demised premises pass as an incident to them unless specifically reserved. Appurtenances are incorporeal easements or rights and privileges which may pass with a grant or demise. If the use of the elevator by the tenant is reasonably necessary and essential to the beneficial enjoyment of the demised premises, then the tenant is entitled to the continued use thereof in the manner in which it has heretofore used it, and any interference therewith or disturbance thereof constitutes an actual partial eviction.

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Partial Eviction
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Possession of Premises
[HN15] It makes no difference to a tenant that he was refused/possession of the room rather than removed from it. The effect, from his viewpoint, is the same. In either case, there results a partial failure of the consideration for-the rent he agreed to pay. The tenant is not bound to accept part of the premises and may terminate the relationship if not given possession of the whole demised premises on the date agreed upon.

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Constructive Eviction
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Possession of Premises

[HN16] When premises are in such a condition that they would constitute a constructive eviction if the tenant were in possession, the tenant is not required to take possession.

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Partial Eviction
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Remedies > General Overview
[HN17] Where there is a partial actual eviction, the tenant's obligation to pay rent is entirely suspended until the eviction stops, and the tenant is restored.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Waiver & Preservation
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Partial Eviction
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Remedies > General Overview
[HN18] Partial actual eviction is a defense to an action by the landlord for nonpayment of the rent; it is not an affirmative cause of action for the refund of rent already paid. In cases of partial eviction, the tenant's refusal to pay rent constitutes an election of remedies, and the tenant has no claim for damages. Conversely, where the tenant elects to assert a claim for damages he thereby waives the eviction as a defense in an action for the rent. By paying the rent as it becomes due, a tenant waives the right to claim that it was discharged from any rent or liability for its occupation of the residue of the premises and the waiver operated as an estoppel against it.

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Partial Eviction
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Remedies > General Overview
[HN19] Where a tenant elects to remain in possession and pay the rent after a partial actual eviction, he may claim as damages from his lessor: the proportionate part of the rent of that portion of the premises from which he is evicted; consequential damages, if any; the difference between the actual rental value of the portion from which he is evicted and the proportionate part of the rent of that portion; and loss of profits. His recovery for each of the items may be had, however, only for the remainder of the period for which that rent was due or until the eviction ends, if that occurs first. The preclusion applies where the tenant elects to remain in possession and pay the rent after a partial actual eviction and the basis for the principle on which owner relies is election of remedies.

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Possession of Premises
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Remedies > General Overview
[HN20] When a lessor has failed to give possession or wrongfully withholds possession, the tenant need not resort to ejectment but may sue for damages. The measure of damages then is the value of the lease above the rent received or the difference between the rent received and the value of the premises for the time. Of course there would be no damage if the value was less than the rent.

Contracts Law > Remedies > Election of Remedies
[HN21] It is a prerequisite to the doctrine of election of remedies that the plaintiff have knowledge of the facts material to the pursuit of inconsistent remedies, such knowledge being necessary to enable the plaintiff to make an intelligent and deliberate choice.

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Possession of Premises
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Remedies > General Overview
[HN22] See *Real Property Law § 223-a*.

Real Property Law > Landlord & Tenant > Lease Agreements > Lease Provisions
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Possession of Premises
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Remedies > General Overview
[HN23] *Real Property Law § 223-a* implies in all leases a condition of delivery of premises at the beginning of a term, provides only the remedies of rescission and repayment for failure to deliver, the plaintiff seeks only money damages thereunder, and the cause may not stand. Thus, a claim for repayment of money already paid as rent, where possession was not delivered, is not a claim for money damages. Indeed, even where the tenant has made the election by paying the rent after the partial eviction has occurred, it is not without recourse. The tenant may recover in damages the proportionate part of the rent of that portion of the premises from which he

was evicted.

JUDGES: [*1] Judicial Hearing Officer Ira Gammerman

OPINION BY: Ira Gammerman

OPINION

This action was tried without a jury on December 11, 2007.

The dispute relates to a commercial lease dated September 5, 2006 between plaintiff Pacific Coast Silks, LLC ("tenant") and defendant 247 Realty, LLC ("owner") for premises on the seventh floor of a building located at 247 West 36th Street in Manhattan. The key facts are largely undisputed. The focus of the dispute is the effect on the parties' respective rights and obligations of the lack of any working elevator until shortly before tenant returned the keys to owner.

At the time of trial, tenant withdrew all causes of action in the complaint other than the claim for the return of its rent security and the $ 7,500.00 that it paid as rent in advance. Owner seeks recovery on its counterclaims in the sum of $ 144,155, plus attorney's fees.

AMENDMENT OF PLEADINGS

The complaint asserts a claim based on constructive eviction. In its post-trial briefing, tenant alleges actual partial eviction. It also contends that owner never gave possession. Owner objects to the change of theory, but fails to demonstrate any prejudice. At the end of the trial, tenant moved to conform the pleadings to **[*2]** the proof. To the extent not already granted at trial, that motion is granted, see Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3025:15, C3025:16, C3025:17 and cases there cited.

FACTS

Upon execution of the lease, Tenant paid owner $ 7,500.00 representing the first month's rent and deposited $ 22,500.00 as security. The lease includes a Rider, which provides that "[i]n case of any contradiction or inconsistency between any of the following provisions and the foregoing provisions of this lease, the following provisions shall prevail." Shortly after execution of the lease, owner gave tenant a key to the seventh floor.

The building contains a single elevator. The main access to the seventh floor premises is via the elevator, which opens directly into the premises. The only other means of access to the premises is a stairwell.

Intended Use of Premises

In its post-trial brief, tenant states that the premises "were leased to Pacific to be used as a showroom for the sale of silk garment fabric." In response, in its post-trial brief, owner states:

> Contrary to that which was presented in Tenant's moving Brief, there was no testimony or evidence that the Tenant's Premises was **[*3]** intended to be used as a "show room for customers".

The lease states, in pertinent part:

> OCCUPANCY: 2. Tenant shall use and occupy the demised premises for Silk Garment Fabric Sales provided such use is in accordance with the certificate of occupancy for the building. If any, and for no other purpose.

Thus, while the term "show room" does not expressly appear in the lease, I find that it was understood and intended by the parties that tenant would use the premises as a business location for the sale of silk garment fabric to potential customers who would come to the premises and be shown merchandise that tenant desired to sell to such customers.

Without the elevator, the sole means of access to the premises, whether for tenant's own personnel or for potential customers, including access for disabled persons, would have been to climb up seven flights of stairs.

At the time the lease was executed, the elevator was in the midst of a major modernization and conversion. The work on the elevator began in July 2006. At the time the lease was signed, which, as noted above, was September 5, 2006, tenant was aware that there was presently no elevator service in the building. I credit the testimony **[*4]** of Shrage Rokosz, owner's Manager, who signed the lease, that at the time he signed the lease, he expected that the elevator would be completed by October 15, 2006. However, it was not completed and functioning until December 4, 2006.

Lease Provisions Regarding the Elevator

The lease includes a Work Letter, discussed more fully below. In addition to the Work Letter, the following lease provisions are relevant to elevator usage.

Paragraph 31

Paragraph 31 of the lease provides, in pertinent part:

> As long as Tenant is not in default under any of the covenants of this lease, beyond the applicable grace period provided in this lease for the curing of such defaults, *Owner shall: (a) provide necessary passenger elevator facilities on business days from 8 a.m. to 6 p.m. and on Saturdays from 8 a.m. to 1 p.m.*, (b) if freight elevator service is provided, the same shall be provided only on regular business days, Monday through Friday inclusive, and on those days only between the hours of 9 a.m. and 12 noon and between 1 p.m. and 5 p.m.... *Owner reserves the right to stop service of the* heating, *elevator*, plumbing and electric systems, when necessary, by reason of accident or emergency, or *for repairs, **[*5]** alterations, replacements or improvements, which in the judgment of Owner are desirable or necessary to be made, until said repairs, alterations, replacements or improvements, shall have been completed*. If the building of which the demised premises are a part supplies manually operated elevator service, Owner may proceed diligently with alterations necessary to substitute automatic control elevator service without in any way affecting the obligations of Tenant hereunder [emphasis added].

The clause "Owner reserves the right to stop service of the...elevator...when necessary, by reason of accident or emergency, or for repairs, alterations, replacements or improvements, which in the judgment of Owner are desirable or necessary to be made, until said repairs, alterations, replacements or improvements, shall have been completed" is not directly applicable to this dispute, since, in order for elevator service to be "stopped," it must first be ongoing. [1]

1 Even if the clause did apply, however, it would be subject to the requirement, implied by law, that the "stopping" be for a reasonable time, see *Hartwig v. 6465 Realty Co., 67 Misc 2d 450, 324 N.Y.S.2d 567 (App Term 1st Dept 1971)*; *Rein v. Robert Metrik Co., 200 Misc 231, 105 N.Y.S.2d 160 (Sup Ct, Nassau County 1951)*. **[*6]** This is underscored by the inclusion in that same clause of heating, plumbing, and electrical systems. If the clause were not subject to an implied requirement that the stoppage be for a "reasonable" time, it would mean that owner could stop all plumbing, heating and electricity for repairs in the building indefinitely. As discussed below, the delay herein was not "reasonable."

Moreover, as discussed below, the failure to provide elevator service constituted an actual partial eviction. In 132 Spring Street Associates v. Helversen Enterprises, Inc., NYLJ, March 1, 1989, at 22, col 4 (Civ Ct, NY County 1989) (Freedman, J.), cited with approval by the First Department in *Union City Union Suit Co., Ltd. v. Miller, 162 AD2d 101, 556 N.Y.S.2d 864 (1st Dept 1990)*, lv denied *77 NY2d 804, 571 N.E.2d 82, 568 N.Y.S.2d 912 (1991)*, the court held.

> The petitioner/landlord argues strenuously that [Articles] 4, 13, 26 and 67 of the lease provide that the tenant shall have no rent abatement for any failure of the landlord to make repairs. But the Court of Appeals in [*Fifth Ave. Bldg. Co. v. Kernochan, 221 NY 370, 117 N.E. 579 (1917)* [2]] stated that an actual partial eviction is in the matter of a failure of consideration. Therefore, this defense is not barred by the **[*7]** [above numbered] waiver clauses.

Similarly, since the failure to provide elevator service was an actual partial eviction, and thus a failure of consideration, this waiver clause does not apply.

2 In Kernochen the Court of Appeals held:

> Eviction as a defense to a claim for rent does not depend upon a

> covenant for quiet enjoyment, either express or implied. It suspends the obligation of payment either in whole or in part, because it involves a failure of the consideration for which rent is paid.

Paragraph 43.04--No Abatement

Owner relies on the following language in Rider paragraph 43.04 of the lease:

43.04 NO ABATEMENT:

> Tenant shall not be released or excused from the performance of any of its obligations under this lease for any failure of for interruption or curtailment of any electric energy, elevator service, heat, or for any reason whatsoever [3] and no such failure, interruption or curtailment shall constitute a constructive or partial eviction unless due to Landlard's willful misconduct or negligence.

3 If read literally, this clause ("or for any reason whatsoever") would mean that no breach by owner, unless willful or negligent, could relieve tenant of its obligations. Under the principles **[*8]** of ejusdem generis and noscitur a sociis, the phrase "any reason whatsoever" must be construed as limited to the types of reasons expressly listed, see e.g. *242-44 East 77th Street, LLC v. Greater New York Mut. Ins. Co., 31 AD3d 100, 815 N.Y.S.2d 507 (1st Dept 2006)*; *Popkin v. Security Mut. Ins. Co. of New York, 48 AD2d 46, 367 N.Y.S.2d 492 (1st Dept 1975)*.

Owner asserts that there was no evidence that owner's installation of new elevator was performed in a negligent manner or with wilful misconduct.

However, like paragraph 31, the clause is not applicable to the present issue. In order for there to be a "failure," "interruption," or "curtailment," there must first be elevator service in place that can "fail," be "interrupted" or be "curtailed." Once elevator service had commenced, this clause would apply if that service were thereafter subject to a failure, interruption or curtailment. Here, there was no such elevator service. In any event, as with paragraph 31, the law implies a reasonable time, and the time here involved was not reasonable.

Rider Paragraph 44.05

Rider Paragraph 44.05 provides:

> The Tenant shall not ship or receive goods, merchandise or Inventory or use the public corridors of the building to ship or receive **[*9]** same and Tenant shall not at any time use any hand trucks or other wheeled vehicles in the public or other corridors of the building. The aforesaid shall be restricted to the freight passageways and freight elevator of which there is no freight elevator in the building where the Demised Premises forms apart [sic].
>
> Notwithstanding the above, *Tenant may use the building elevator for deliveries* and Tenant shall be responsible for all damages from its use [emphasis added].

Rules

Annexed to and made a part of the lease are certain Rules and Regulations, including the following:

> 1. The sidewalks, entrances, driveways, passages, courts, elevators, vestibules, stairways, corridors or halls shall not be obstructed or encumbered by Tenant or *used for* any purpose other than for *ingress or egress from the demised premises and for delivery of merchandise and equipment* in a prompt and efficient manner, using elevators and passageways designated for such delivery by Owner.
>
> ***
>
> 8. *Freight, furniture, business equipment, merchandise and bulky matter of any description shall be delivered to*

> *and removed from the demised premises only on the freight elevators* [4] and through the service entrances and corridors, **[*10]** and only during hours, and in a manner approved by Owner. Owner reserves the right to inspect all freight to be brought into the building, and to exclude from the building all freight which violates any of these Rules and Regulations of the lease, of which these Rules and Regulations are a part [emphasis added].

4 As quoted above, however, Rider Paragraph 44.05 provides that "[t]enant may use the building elevator for deliveries."

Thus, the lease affirmatively prohibits the use of the stairwell to bring "freight" and "merchandise" to the premises--necessarily including the silk garment fabric whose sale is the stated sole permitted use of the premises.

Paragraph 25 of the lease, entitled "No Waiver," provides, in pertinent part, that "no provision of this lease shall be deemed to have been waived by Owner unless such waiver be in writing signed by owner." No such written waiver of the foregoing clause was introduced in evidence.

Rider Paragraph 48.21

In addition, Rider paragraph 48.21 provides:

48.21 NO WAIVER OF CONDITIONS

> One or more waivers of any covenant or condition by Landlord or Tenant shall not be construed as a waiver of a subsequent breach of the same or any other covenant or condition, **[*11]** and the consent or approval by Landlord or Tenant to or of any act by Tenant or Landlord requiring the other party's consent or approval shall not be construed to waive or render unnecessary such consent or approval to or of any subsequent similar act. The failure of either party to seek redress for violation of, or to insist upon the strict performance of, any term, covenant or condition in this Lease shall not prevent a similar subsequent act from constituting a default under this Lease.

Therefore, at all times, any delivery via the stairwell of "[f]reight, furniture, business equipment, merchandise and bulky matter of any description," including the silk garment fabric whose sale was the sole permitted use of the premises, would have been a breach of the lease.

In sum, the lease

a. permits no use of the premises other than for sale of silk garment fabric, and thus contemplates that customers would visit the seventh-floor premises to view such merchandise;

b. expressly requires owner to "provide necessary passenger elevator facilities on business days from 8 a.m. to 6 p.m. and on Saturdays from 8 a.m. to 1 p.m.";

c. expressly gives tenant the right to use the building elevator for deliveries; **[*12]** subject to the right of owner to "stop" the elevator for, e.g., repairs; and protects owner in the event of "failure," "interruption" or "curtailment" of elevator service (which, as discussed above, is not applicable here, and in any event would be limited to a reasonable time); and

d. prohibits tenant from using the stairwell for delivery of "[f]reight, furniture, business equipment, merchandise and bulky matter of any description, thus prohibiting the silk garment fabric from being brought to the premises except by elevator.

Additional relevant lease clauses are discussed below.

Lease Term

The lease contains the following provisions regarding the term of the lease:

a. At page 1, the lease states that the lease term runs from October 1, 2006 through September 30, 2007. These dates are handwritten.

b. Rider Paragraph 42.01 provides as follows:

> Tenant shall pay the Annual Rental Rate (the term "In order to protect Landlord

> from inflation and cost of living expense and in lieu of applying an index such as porter's wage or consumer price Index, Landlord and Tenant have agreed to implement the following payments as additional rent
>
> From September 1, 2006 to August 31, 2007 $ 90,000 per annum ($ **[*13]** 7,500.00 per month) [sic].

This is followed by an option to renew, with the new term to begin September 1, 2007.

These provisions, a and b, are mutually contradictory. Standing alone, ordinary rules of construction do not resolve them. On the one hand, the Rider states that in the event of inconsistency, the Rider prevails; however, the usual rule of construction is that handwritten provisions prevail, see e.g., *Feldman v. Fiat Estates, Inc., 25 AD2d 750, 268 N.Y.S.2d 949 (2d Dept 1966)*.

However, Rider Paragraph 41.02 provides:

> The term of this lease shall commence on October 1, 2006 the date (herein referred to as "Commencement Date"). However, in the event the elevator installation is not completed by October 15, 2006, the Commencement Date is [sic] the lease shall be adjusted to October 15, 2006.

The provision in Rider paragraph 41.02 that the term shall commence October 1, 2006 is inconsistent with Rider paragraph 41.01. However, since it is undisputed that the elevator was not completed October 15, 2006, October 15 is the earliest date that the term can be deemed to have commenced, if it ever commenced, an issue discussed more fully below.

The lease contains no express provision governing the situation **[*14]** that occurred herein, to wit, that, contrary to expectation, the elevator was not in service until well after October 15. I find that the absence of such a provision reflects that the parties did not contemplate that that situation would occur.

As noted above, I credit Rokosz's testimony that at the time he signed the lease on behalf of owner, he expected that the elevator would be completed by October 15, 2006. I credit the uncontradicted deposition testimony, put in evidence by owner, of Joseph Ricci, a member of tenant, who executed the lease on behalf of tenant, that when he visited the premises on November 10, 2006 there was no mention of rent whatsoever. If rent were due regardless of whether the elevator was operational by October 15, the November rent was already overdue on the date of that visit. While not dispositive, and while the failure to mention the rent cannot be deemed a waiver, the fact that no mention was made of rent at that time supports the inference, which I draw, that at the time, Rokosz's understanding was that since the elevator was not working by the expected date of October 15, 2006, tenant's obligation, to pay rent had not yet been triggered. [5]

> 5 Rokozc testified **[*15]** that under Rider Paragraph 41.02 ("in the event the elevator installation is not completed by October 15, 2006, the Commencement Date if [sic] the lease shall be adjusted to October 15, 2006"), tenant was obligated to pay rent for the entire year even if the elevator never became operational. However, owner elicited no testimony that this was Rokosz's intent and understanding at the time he signed the lease on September 5, 2006. The testimony was given as if it were a legal opinion. Even overlooking that Rokozc was not competent to give a legal opinion, his opinion was legally unsound.

I credit Rokosz's testimony that at the time the lease was signed, there were three vacant floors available in the building, to wit, the fifth, sixth and seventh floors; and that despite the availability of the fifth and sixth floors, tenant chose the seventh floor. This supports the inference, which I draw, that tenant understood that the elevator would be in service no later than October 15, 2006.

In view of the foregoing, I find that the parties executed the lease based on the expectation that the elevator would be in service no later than October 15, 2006, and that at the time that the lease was signed, **[*16]** neither party understood or intended that rent would be payable even if the elevator was not in service by that date.

Work Letter

This conclusion is further supported by the "Work Letter" that forms part of the lease. It provides as follows:

> In consideration of you entering into a lease for the above premises the Landlord will, at its own cost and expense, do the following work in the Demised Premises in accordance with Tenant's plans:
>
> 1. Remove the current top layer of Hardwood flooring
>
> 2. Install new Hardwood flooring which shall be provided by Tenant. (2 1/4 x 3/4 white oak select)
>
> 3. Sand and 2 coats Polyurithan such Hardwood flooring.
>
> 4. Install recessed lighting to be supplied by Tenant after approval by Landlord, In current electric box locations
>
> 5. Install Metal or Mesh Gate over both skylights.

This list Is followed by the the following clause (the "exoneration clause"):

> Notwithstanding anything to the contrary contained herein, any items in the Lease or in this work letter that require Landlord to do work, the incompletion of any item same shall not toll the Commencement Date and Tenant shall pay the Annual Rental Rate and additional rent without any offsets or abatement on the Commencement **[*17]** Date.

On the plain face of the exoneration clause, the exoneration applies only to "items in the Lease or in this work letter that require Landlord to do work."

Immediately following the exoneration clause is the following clause (the "elevator clause"):

> In addition, Tenant acknowledges that the elevator is out of service as it is currently being replaced and that the lobby of the building ("Building") where the Demised Premises forms a part and the Building are currently being completely rehabilitated.

The elevator clause cannot be read as somehow negating the express provisions in the lease entitling tenant to elevator service, especially since the lease was executed a month before the lease term was to begin. The lease expressly provided that if elevator service were not provided by October 15, 2006, the lease term would not commence until that day, which, as discussed above, is the day on which owner expected the elevator to be in service. In view of the express provisions of the lease requiring owner to supply elevator service, the mere absence in the lease of any provision governing the parties' rights and obligations if, contrary to owner's expectation, the elevator were not in **[*18]** service by October 15, 2006, cannot be construed as relieving owner of its obligation to supply, elevator service.

Far from supporting owner's contentions, the quoted provisions of the Work Letter support tenant's position. If the exoneration clause were intended to apply to the elevator, it would not have been phrased and placed as it was. As drafted, the exoneration clause applies to the specific "items" in the lease and Work Letter that owner is required to perform, i.e., itemized items. The elevator is not among those items and, instead, is addressed separately, in the elevator clause. Pursuant to the principle "expressio unius est exclusio alterius," the provision in the exoneration clause that the failure to complete "any items in the Lease or in this work letter that require Landlord to do work" will not toll the commencement date or affect tenant's rent obligations, coupled with the absence of any such provision in the elevator clause, supports the construction that the failure to supply elevator service affects both the commencement date and the tenant's rent obligations.

Paragraph 20

Owner relies further on Paragraph 20 of the lease, which provides:

> Owner shall have the right, **[*19]** at any time, without the same constituting an eviction and without incurring liability to Tenant therefor, *to change the arrangement and or location* of public entrances, passageways, doors, doorways, corridors, *elevators*, stairs, toilets, or other

> public parts of the building, and to change the name, number or designation by which the building may be known. *There shall be no allowance to Tenant for diminution of rental value and no liability on the part of Owner by reason of inconvenience, annoyance or injury to business arising from Owner* or other Tenant *making any repairs in the building or any such alterations, additions and improvements*. Furthermore, Tenant shall not have any claim against Owner by reason of Owner's imposition of any controls of the manner of access to the building by Tenant's social or business visitors, as Owner may deem necessary, for, the security if the building and its occupants [emphasis added].

Owner's reliance on this paragraph is misplaced.

First, the absence of elevator service is not within the scope of "change the arrangement and or location" of elevators.

Second, on its plain face, the clause applies to inconvenience, annoyance or injury to business **[*20]** arising from Owner or other Tenant "*making* any repairs in the building or any such alterations, additions and improvements [emphasis added]." Here, the lack of access to the premises was not due to owner *making* repairs, alterations, additions, or improvements. To the contrary, the lack of access was not due to anything that owner affirmatively did. Rather, it was due to owner's failure to provide elevator service.

Owner cites *Cut-outs, Inc. v. Man Yun Real Estate Corp., 286 AD2d 258, 729 N.Y.S.2d 107 (1st Dept 2001)*, lv denied *100 NY2d 507, 795 N.E.2d 1244, 764 N.Y.S.2d 235 (2003)*. According to owner, in that case,

> the Court upheld language in a lease barring a tenant's claims for actual partial eviction or constructive eviction. In that case, paragraph 20 of the standard portion of the lease, which is identical with paragraph 20 of the Lease in the case at bar quoted above, was held to have allowed the landlord to discontinue a manual passenger elevator. and a freight elevator for many months while those elevators were being converted to automatic elevators, without it constituting an eviction.

This assertion by owner mischaracterizes the holding in that case. Indeed, far from supporting owner's position, a careful reading of Cut-outs **[*21]** demonstrates not only that Cut-outs is readily distinguishable, but that the court's reasoning impliedly supports tenant's claim.

In Cut-outs, the tenant based its claims of partial eviction on several grounds. These included

a. the owner's taking of a 6 foot by 10 foot portion of the vestibule outside the passenger elevator on plaintiff's floor which was walled off pending the renovation of that elevator.

As to this ground, the court held:

> However, such temporary walling off of the elevator is precisely the sort of activity incident to renovation addressed by Article 20 ("Building Alterations and Management"), which was plainly intended to preclude technical eviction claims based on such renovation-related temporary encroachments on plaintiff's premises.

b. a 2.5-foot-wide vestibule space that defendant's construction manager testified would be permanently taken when the renovation was completed.

As to this issue, the court held:

> plaintiff failed to prove that this encroachment constituted anything more than a de minimis taking of inessential space. Any such taking was protected by the terms of Article 20, which permits defendant to "change the arrangement and/or location of public entrances, **[*22]** passageways, doors, doorways, corridors, elevators, stairs, toilets or other parts of the building.... There shall be no allowance to Tenant for diminution of rental value and no liability on the part of

> Owner by reason of inconvenience, annoyance or injury to business."

c. the owner's installation of a new electrical conduit in space within the premises that plaintiff used for storage of its dies.

As to this issue, the court held:

> Such installation was clearly protected under article 13, which specifically permits defendant "to use and maintain and replace pipes and conduits in and through the demised premises and to erect new pipes therein provided, wherever possible, they are within walls or otherwise concealed." Again, plaintiff failed to present any evidence indicating how much space was taken by this conduit, or whether the taking was of any practical significance.

d. In contrast to nos. a-c, item d relates to access. As described by the court:

> Specifically, due to the renovation work, from April 1996 until plaintiff vacated the premises: the front entrance to the building and the lobby were closed; the passenger elevator was taken out of service; one of the two freight elevators was **[*23]** reserved for construction use only; and *the other freight elevator was used for* both *plaintiff's use* and for construction, with priority given to the construction work; the front and back stairways were obstructed by construction materials; and access to the loading docks was impeded by trash, dumpsters and scaffolding [emphasis added].

Thus, while elevator access to the premises was available less freely, it was available.

As to these "access" issues, the court did not rely on Paragraph 20 of the lease. Instead, it rejected these claims solely on the ground that as a matter of common law, the circumstances did not rise to an actual partial eviction. The court held as follows:

> While defendant's renovations indisputably caused plaintiff substantial inconvenience, involved certain encroachments on the leased premises and caused delays in bringing shipments in and out of the premises, plaintiff does not contend that it was deprived of access to the premises, only that access was slower, less convenient, less pleasant, and more difficult. For example, plaintiff's president admitted that, although "it took a lot more time and effort" (in that trucks had to park about a block away from the **[*24]** loading dock), the obstruction of the loading dock did not prevent freight from coming in or going out.
>
> Such interference with ingress and egress does not amount to partial actual eviction (see, *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave, Assocs., 240 AD2d 161, 658 N.Y.S.2d 272,* citing *Barash v. Pennsylvania Term. Real Estate Corp., 26 NY2d 77, 82-84, 256 N.E.2d 707, 308 N.Y.S.2d 649)* [6] and the cases cited by the trial court, [7] dealing with interference with access to demised premises, are distinguishable.

6 In *Graubard, Mollen, Horowitz, Pomeranz & Shapiro v. 600 Third Ave. Associates, 240 AD2d 161, 658 N.Y.S.2d 272 (1st Dept 1997),* as described by the court, the tenant contended that "defendant's project to replace two elevators with three smaller elevators resulted In a reduction of elevator service that constituted an actual partial eviction." The court rejected that contention, holding that there was no partial eviction because "the alleged interference with plaintiff's ingress and egress never resulted in denial of access." Barash, upon which Graubard relied, did not involve physical access, but only ventilation on weekends. While holding that under the facts of that case, there was no actual partial eviction, the court observed **[*25]** that "[t]o be an eviction, constructive or actual, there must be a wrongful

act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises." As discussed more fully below, a complete lack of elevator access to a seventh-story premises constitutes denial of access.

7 The cases cited by the trial court in Cut-outs on this issue were *487 Elmwood, Inc. v. Hassett, 107 AD2d 285, 486 N.Y.S.2d 113 (4th Dept 1985)* and *Camatron Sewing Mach., Inc. v. F.M. Ring Associates, Inc., 179 AD2d 165, 582 N.Y.S.2d 396 (1st Dept 1992)*. In 487 Elmwood, the court stated:

> [HN1] an actual eviction can also result from interference with other appurtenant rights. Thus, depriving the tenant of the use of a hallway lavatory (*524 W. End Ave. v. Rawak, 125 Misc 862, 212 N.Y.S. 287*), *or access to the use of a freight elevator* (*Broadway-Spring St. Corp. v. Berens Export Corp., 12 Misc 2d 460, 171 N.Y.S.2d 342*), or merely changing or limiting the means of ingress and egress without denying access to the leased premises (*Seigel v. Neary, 38 Misc 297, 77 N.Y.S. 854*; *Hamilton v. Graybill, 19 Misc 521, 43 N.Y.S. 1079, 26 Civ. Proc. R. 184*) can amount to an actual eviction from a substantial portion of the premises [emphasis added].

The court held that the tenant's easement to use a parking lot **[*26]** was appurtenant to its lease of the store in owner's shopping plaza, and that deprivation of that easement was an actual partial eviction. There was no contention that use of the parking lot was required to enter the store.

In Camatron the tenant challenged the owner's proposed diminution by 46.5 square feet of the space used by tenant as a store. The First Department issued declaratory and injunctive relief, holding that the proposed modification would constitute an actual partial eviction.

Thus, in *Cut-outs*, the court did not base its holding as to elevator usage on Paragraph 20.

Owner also relies on *Two Rector St. Corp. v. Bein, 226 App Div 73, 234 N.Y.S. 409 (1st Dept 1929)*, in which the lease permitted the owner to make building alterations and improvements without any liability to the tenant. The tenant's claim of actual eviction was based on the following, as stated by the court:

> Thereafter the landlord commenced alterations and improvements to the building, and incidental thereto a double hoist was temporarily constructed outside of the windows of the private office of the tenant and about four and one-half feet distant therefrom, thus shutting out a large portion of the light, air, and view and, **[*27]** when the windows were opened, causing dust and some dirt and noise to enter. The amount of dust and dirt was trivial, the substantial damage claimed, consisting of the noise and diminution of light, air, and view.

The Court, stated:

> As was said by Mr. Justice MCLAUGHLIN, in *Ernst v. Strauss (114 App Div 19, 99 N.Y.S. 597, 18 N.Y. Ann. Cas. 477)*: '*** alterations and improvements to leased premises, made with the consent of the tenant, do not amount to an eviction, no matter how extensive they may be nor how much they may interfere with the occupancy of the tenant. (*Olson v. Schevlovitz, 91 App Div 405, 86 N.Y.S. 834*.)

Here, however, the elevator service was not supplied, and the resulting lack of elevator service does not go to mere "interference" in the nature of dust, etc., but to failure to provide access.

DELIVERY OF POSSESSION

Real Property Law §223-a provides:

§223-a. [HN2] Remedies of lessee when possession is not delivered

> In the absence of an express provision to

> the contrary, there shall be implied in every lease of real property a condition that the lessor will deliver possession at the beginning of the term. In the event of breach of such implied condition the lessee shall have the right to rescind the lease and to recover the consideration **[*28]** paid. Such right shall not be deemed inconsistent with any right of action he may have to recover damages.

As discussed more fully below, [HN3] elevator access is an appurtenance, and the failure to provide it constituted a failure to deliver possession.

Paragraph 24

Paragraph 24 provides as follows:

> Failure to Give Possession:
>
> If Owner is unable to give possession of the demised premises on the date of the commencement of the term hereof because of the holding-over or retention of possession of any tenant, undertenant or occupants, or if the demised premises are located in a building being constructed, because such building has not been sufficiently completed to make the premises ready for occupancy or because of the fact that a certificate of occupancy has not been procured, or if Owner has not completed any work required to be performed by Owner, or for any other reason, Owner shall not be subject to any liability for failure to give possession on said date and the validity of the lease shall not be impaired under such circumstances, nor shall the same be construed in any wise to extend the term of this lease, but the rent payable hereunder shall be abated (provided Tenant is not responsible **[*29]** for Owner's inability to obtain possession or complete any work required) until after Owner shall have given Tenant notice that Owner is able to deliver possession in the condition required by this lease. If permission is given to Tenant to enter into possession of the demised premises, or to occupy premises other than the demised premises, prior to the date specified as the commencement of the term of this lease, Tenant covenants and agrees that such possession and/or occupancy shall be deemed to be under all the terms, covenants, conditions and provisions of this lease, except the obligation to pay the fixed annual rent set forth in page one of this lease. The provisions of this article are intended to constitute "ah express provision to the contrary" within the meaning of *Section 223-a of the New York Real Property Law* [emphasis added].

In *Hartwig v. 6465 Realty Co., 67 Misc 2d 450, 324 N.Y.S.2d 567*, supra, construing a like clause, the court held:

> The litigation arises solely from the landlord's inability to deliver possession on the date specified in the lease. *Real Property Law §223-a* [HN4] implies a condition to deliver possession on the specified date, absent an express agreement entered into by the **[*30]** parties to the contrary. This lease contains such an agreement, standard in form. Paragraph 21 exculpates the defendant from liability where its failure to give possession is due to the incompletion of a building under construction. In addition, the lease was to remain effective postponing payment of rent until possession was actually delivered. Such a clause, if strictly enforced, would cause extreme hardship and the most undesirable results. The law, in such cases, properly engrafts a rule of reason upon such clauses in order that they do not, contrary to the intention of the parties, become arbitrary and unreasonable. Implicit in this standard exculpation clause, therefore, is a promise to deliver possession on the date fixed by the lease or within a reasonable time thereafter unless factors beyond the landlord's control make that event impossible. (See *Rein v. Robert Metrik Co., 200 Misc. 231, 105 N.Y.S.2d 160*

construing a similar provision.) Such an interpretation creates no objectionable results and is consonant with the parties' freedom to contract as indicated by *Real Property Law s 223(a)*.)

Unreasonable Delay

As noted above, the elevator was not fully and legally operational until December 4, **[*31]** 2006, at which time owner gave tenant keys to the elevator. This was some nine weeks after October 1, 2006, which was itself some four weeks after the lease was executed. The December 4 date was some seven weeks after October 15, 2006.

The lease was for a one-year term. The delay, if measured from October 1, was over two months, and thus one-sixth of the lease term. Owner provided no explanation for the delay or evidence of any diligence on its part. Even disregarding that the lease was entered into based on the expectation that the elevator would be operational no later than October 15, 2006, I find that under the circumstances, the delay until December 4, 2006 was an unreasonable length of time, see *Rein v. Robert Metrik Co., 200 Misc 231, 105 N.Y.S.2d 160*, supra (clause similar to the one at bar [8]; delay of one-sixth of lease term, with no explanation by owner of delay or evidence of diligence, was unreasonable).

8 The clause in Rein provided:

> 21. If landlord shall be unable to give possession of the demised premises on the date of the commencement of the term hereof by reason of the fact that the premises are located in a building being constructed and which has not been sufficiently completed to make **[*32]** the premises ready for occupancy or by reason of the fact that a certificate of occupancy has not been procured or for any other reason, Landlord shall not be subject to any liability for the failure to give possession on said date. Under such circumstances the rent reserved and covenanted to be paid herein shall not commence until the possession of demised premises is given or the premises are available for occupancy by Tenant, and no such failure to give possession on the date of commencement of the term shall in any wise affect the validity of this lease or the obligations of Tenant hereunder, nor shall same be construed in any wise to extend the term of this lease.

Assuming, arguendo, that paragraph 24 otherwise applies, [9] if these situations occur,

> Owner shall not be subject to any liability for failure to give possession on said date and the validity of the lease shall not be impaired under such circumstances, nor shall the same be construed in any wise to extend the term of this lease, but *the rent payable hereunder shall be abated* (provided Tenant is not responsible for Owner's inability to obtain possession or complete any work required) *until after Owner shall have given Tenant* **[*33]** *notice that Owner is able to deliver possession in the condition required by this lease* [emphasis added].

9 The clause applies to a "building being constructed," but the subject building was not being "constructed." If It applies at all, it is pursuant to the clause "if Owner has not completed any work required to be performed by Owner, or for any other reason." The phrase "if Owner has not completed any work required to be performed by Owner," must be read in connection with the very similar clause (the exoneration clause, quoted above) in the Work Letter that forms part of the lease, to wit, "[n]otwithstanding anything to the contrary contained herein, any items in the Lease or in this work letter that require Landlord to do work, the incompletion of any item shall not toll the Commencement Date and Tenant shall pay the Annual Rental Rate and additional rent without any offsets or abatement

> on the Commencement Date." As discussed above, that clause does not include the elevator. The clause "for any other reason" is limited by the principles of ejusdem generis and noscitur a sociis, to the types of reasons expressly listed, see e.g. *242-44 East 77th Street, LLC v. Greater New York Mut. Ins. Co., 31 AD3d 100, 815 N.Y.S.2d 507,* **[*34]** supra; *Popkin v. Security Mut. Ins. Co. of New York, 48 AD2d 46, 367 N.Y.S.2d 492,* supra.

I construe the first phrase ("Owner shall not be subject to any liability for failure to give possession on said date") as precluding tenant from recovery of any consequential damages, not from recovering prepaid rent. The clause expressly provides that if possession is not given, the rent "shall be abated." Therefore, if construed to preclude recovery of rent, it would permit owner to collect and retain rent that has been expressly "abated," and, thus, despite the failure of consideration--an unreasonable construction.

Such [HN5] a provision for the abatement of rent does not excuse the owner from its obligation to deliver possession. Rather, it operates as a liquidated damages clause, see *State Warehouse Co., Inc. v. Standard Brands Inc., 56 AD2d 829, 393 N.Y.S.2d 26 (1st Dept 1977)*; see also *Bates Advertising USA, Inc. v. 498 Seventh, LLC, 7 NY3d 115, 850 N.E.2d 1137, 818 N.Y.S.2d 161,* rearg denied *7 NY3d 784, 853 N.E.2d 1113, 820 N.Y.S.2d 545 (2006).*

The second phrase ("the validity of the lease shall not be impaired under such circumstances") merely provides that the lease is not invalid. It does not preclude a claim of actual partial eviction or constructive eviction. Nor is the clause inconsistent **[*35]** with the contention that tenant never moved into the premises. Where such contentions are asserted, the underlying premise is that the underlying lease is valid.

The third phrase ("nor shall the same be construed in any wise to extend the term of this lease") has no applicability here. Tenant is not claiming that the failure to provide elevator access extended the term of the lease.

As quoted above, the clause herein expressly states that in the circumstances described

> *the rent payable hereunder shall be abated* (provided Tenant is not responsible for Owner's inability to obtain possession or complete any work required) *until after Owner shall have given Tenant notice* [10] that Owner is able to deliver possession in the condition required by this lease [emphasis added].

10 Rider paragraph 48.23 provides:

> 48.23 NOTICE
>
> Any notice under this lease, (except a demand for the payment of rent or additional rent, for which no written notice is required), *must be in writing and shall be served personally or shall be sent by registered or certified mail, return receipt requested or by a nationally recognized overnight carrier* to the last address to the party to whom notice is to be given as designated **[*36]** by such party in writing [emphasis added].

There was no evidence that any such written notice was given as to the completion of the elevator. However, it is unnecessary to address the effect of this noncompliance.

Since, as discussed below, the failure to provide elevator access constituted a failure to give possession, under this clause tenant's rent obligation was abated until December 4, 2006. By that time, however, the actual partial eviction and tenant's non-entry into the premises (justified by the failure to provide elevator access) had already occurred, thereby permitting tenant to rescind under *Real Property Law §223-a*.

The phrase

> If permission is given to Tenant to enter into possession of the demised premises, or to occupy premises other than the demised premises, prior to the date specified as the commencement of the term of this lease, Tenant covenants and agrees that such possession and/or occupancy shall be deemed to be under all

> the terms, covenants, conditions and provisions of this lease, except the obligation to pay the fixed annual rent set forth in page one of this lease

has no applicability here, and even if it did, would negate tenant's rent obligation.

The mere fact **[*37]** that upon the signing of the lease owner provided tenant with a key to the premises, does not ipso facto mean that tenant had possession as of the outset of the stated lease term. "[HN6] A key is the symbol of possession. Furnishing a tenant with a key to leased premises is a customary incident to the giving of possession, just as the surrender of the key by the tenant is evidence of an intent on his part to surrender possession," *American Tract Society v. Jones, 76 Misc 236, 134 N.Y.S. 611 (App Term 1st Dept 1912)*. While deprivation of a key may constitute an eviction, id. without physical access the key is merely symbolic. The mere giving of a symbol is not a substitute for the actual delivery of possession.

Since the lease provides for only one situation where the lease term would commence on a date later than October 1, that being October 15 if the elevator were not yet completed, delivery of full possession--including elevator access--was required to be made ho later than October 15, compare *Fox Paper Ltd. v. Schwarzman, 168 AD2d 604, 563 N.Y.S.2d 439 (2d Dept 1990)*. [11] Here, Rider paragraph 41.02 expressly modifies the lease term in the event of a specified cause of delay. By implication, therefore, that was to be the **[*38]** only exception to owner's obligation to provide elevator service. This specific provision takes precedence over the general provisions of paragraph 24, see e.g. *Bank of Tokyo-Mitsubishi, Ltd., New York Branch v. Kvaerner a.s., 243 AD2d 1, 671 N.Y.S.2d 905 (1st Dept 1998)*.

11 In Fox Paper, the court held as follows:

> In this case, although the lease at the outset recites that the term is to commence on December 1, 1986, and although the exculpation clause set forth in paragraph 23 might contain an implied promise to in any event deliver possession within a reasonable time after commencement of the term (see, *Hartwig v. 6465 Realty Co., supra*), paragraph 53(a) which was specially drafted by the plaintiff's attorney, clearly sets forth that "[a]nything herein before contained to the contrary notwithstanding", the term was not to "commence until the work required under paragraph 50 of this rider is completed". The parties thus expressed their intent that delay in completion of the defendant's work would do more than simply abate the obligation to pay rent as set forth in paragraph 23. It would effectively extend the term of the lease to five years after completion of that particular work, thus also extending **[*39]** the time from which the defendant's obligation to deliver possession would be measured.

TERMINATION EVENTS

Paragraph 48.02 of the lease provides:

> 48.02 ADDITIONAL PROVISION
>
> This lease and the term and the estate hereby granted are subject to the limitation that (a) whenever Tenant shall default in the payment of any installment of Annual Rental Rate or in the payment of any additional rent, on any day upon which the same shall be due and payable, without notice or demand, or (b) whenever Tenant shall do or permit anything to be done, whether by action or inaction, contrary to any of Tenant's obligations hereunder, other than the payment of rent, and if such situation shall continue and shall not be remedied by Tenant within 10 days after Landlord shall have given to Tenant a notice specifying the same, or in the case of happening or default which cannot with due diligence be cured within a period of 10 days and the continuance for which the period required for cure will not subject

> Landlord to the risk of criminal liability or foreclosure of any superior mortgage, if Tenant shall not duly institute within such 10 day period and promptly and diligently prosecute to completion all steps **[*40]** necessary to remedy the same, or (c) whenever any event shall occur or any contingency shall arise whereby this lease or any interest therein, or the estate hereby granted or any portion thereof or the unexpired balance of the term hereof would, by operation of law, or otherwise, devolve upon or passed [sic] to any person, firm or corporation other than the Tenant or (d) whenever Tenant shall abandon the Demised Premises or a substantial portion of the Demised Premises which shall remain vacant for a period of thirty (30) consecutive days, unless such vacancy arises as a result of a casualty; then, in any such event covered by subsections a,b,c or d of this article at any time thereafter, Landlord may give to Tenant a notice of intention to end the term of this lease at the expiration of three days from the date of the service of such notice of intention, and upon the expiration of said 3 days, this lease and the term and the state hereby granted, whether or not the term shall theretofore have commenced, shall terminate with the same effect as if that date were the expiration date, but the Tenant shall remain liable for any damages sustained as a result thereof.

Owner sent a notice **[*41]** dated December 18, 2006 (the "notice"), signed by Rokosz as Managing Member. The notice stated, in pertinent part, as follows:

> PLEASE TAKE NOTICE that you have failed to pay t [sic] 247 Realty LLC, Inc., your Landlord, the rent and additional rent due under the Lease in the amount of $ 12,950.00 for the period of October 1, 2006 through December 31, 2006 as per Exhibit "A" annexed hereto.

The notice then quotes portions of Rider paragraph 48.02, and continues as follows:

> Please take notice that the Lease set forth above and the right to possession by Pacific Coast Silk LLC of the 7th floor at 247 West 36th Street, New York, New York 10018, is hereby terminated effective December 27, 2006.
>
> Be further advised that unless Pacific Coast Silk LLC vacates and surrenders to the undersigned, the 7th floor at 247 West 36th Street, New York, New York 10018, vacant and clean as required under the terms of the Lease, on or before December 27, 2006, the undersigned will commence appropriate legal proceedings to evict Pacific Coast Silk LLC and everyone and anyone occupying the Premises, and without waiving any rights of the undersigned, and without any intent to reinstate the Landlord Tenant relationship **[*42]** between the undersigned and 506 Broadway, Inc., the undersigned demands that all use and occupancy and arrears be paid to the undersigned. [12]

12 Owner states in its post-trial memo of law:

> That Notice provided that unless the outstanding rent and additional rent in the amount of $ 12,950.00 *would be paid* by the Tenant to the Landlord on or before December 27, 2006, the Lease *would be terminated* [emphasis added].

This is an inaccurate description of the notice. The notice as drafted does not provide for any opportunity to cure.

It would appear that the notice is defective, cf *542 Holding Corp. v. Prince Fashions, Inc., 46 AD3d 309, 848 N.Y.S.2d 37 (1st Dept 2006)*. The notice describes the rent as being owed "for the period of October 1, 2006 through December 31, 2006." However3, on the plain face of Rider Paragraph 41.02 ("In the event the elevator installation is not completed by October 15, 2006, the Commencement Date if [sic] the lease shall be

adjusted to October 15, 2006"), the lease term did not commence on October 1, 2006, it being undisputed that the elevator installation was not completed by October 15. Rokosz testified that "the lease gave [tenant] a discount for the first fifteen days," for the **[*43]** elevator, but that is an inaccurate description of the relevant provision, which speaks not of a "discount" but of a modification of the commencement of the lease term.

Moreover, owner failed to meet its burden to establish that the notice was served in the manner required by the lease. As quoted above, Rider paragraph 48.23 provides, in pertinent part:

> 48.23 NOTICE
>
> Any notice under this lease, (except a demand for the payment of rent or additional rent, for which no written notice is required), must be in writing and shall be served personally of shall be sent by registered or certified mall, return receipt requested or by a nationally recognized overnight carrier to the last address to the party to whom notice is to be given as designated by such party in writing.

Nothing in the notice itself demonstrates that it was sent in compliance with the above provision. Nor did owner supply any evidence as to how it was sent.

It is unnecessary to resolve the effect of these defects, and I accordingly do not reach these issues.

In response, by letter dated December 27, 2006, sent by Federal Express, enclosing the keys, Tenant stated as follows:

> After execution of the Lease Tenant had no access to **[*44]** the Premises due to Landlord's failure to provide elevator service. Landlord has also failed to install a floor despite its obligation to do so under the Lease. The condition of the premises is such as would constitute a constructive eviction if Tenant were in possession. Under such circumstances the Tenant is justified not to take possession and no rent is due. *Ianacci v. Pendis, 64 Misc.2d 178, 315 N.Y.S.2d 399 (Civ. Ct. Queens Co. 1970)*; *Mayers v. Kugelman, 81 Misc.2d 998, 367 N.Y.S.2d 144 (3d Dist. Suffolk Co. 1975)*.
>
> Since the rent claimed in the Notice is not due, there is no legitimate basis for the Landlord's purported termination of the Lease.
>
> Nevertheless Tenant is hereby complying with Landlord's demand for surrender of possession--even though possession was never delivered to Tenant in the first place. Tenant hereby surrenders to Landlord any and all right, title, interest and possession of, in and to the Premises which it may have, and hereby abandons any and all right, title, interest and possession of, in and to any personal property which may remain in the Premises. Enclosed herewith are the keys to the Premises.
>
> The Lease is now cancelled and demand is hereby made that **[*45]** Landlord return to Tenant its security deposit together with the pre-paid October, 2006 fixed rent installment...

Subsequently, owner re-let the premises to Marmellata Corp. Owner and Marmellata Corp. signed a lease for the premises on March 8, 2007. The term of that lease began on April 1, 2007 and expires on March 31, 2012.

Except for the flooring materials, which were abandoned, the premises were empty at the time of December 27, 2006 letter. [13]

> 13 While tenant withdrew its claims relating to the wood for the floor, the following is relevant to the issue of partial actual eviction.
>
> As quoted above, the Work Letter, which was

> part of the lease, required owner to install hardwood flooring In the premises, the hardwood flooring to be provided by tenant. Initially, Rokosz testified that the wood did not arrive until November 14, 2006, but on cross examination he corrected that testimony to November 2, 2006. He testified that he had the wood flooring brought by his own workers to the seventh floor, and that his workers brought tools up as well. Once the wood was delivered, owner removed the existing wooden floor and prepared the floor for installation. I credit Rokosz' uncontradicted testimony **[*46]** that he was ready to complete the floor installation, but that he, Rokosz, raised issues about the proposed installation, after which Ricci told him to hold off, and not to install the wooden floor. Rokosz testified that tenant's contractor delivered plywood on December 13, 2006, evidently to address the floor issues raised by Rokosz. There was no evidence as to when tenant purchased the plywood, but I infer that it was purchased in November, shortly after the discussion between Ricci and Rokosz. The December 13, 2006 delivery is therefore not inconsistent with tenant's contention that tenant never moved into the premises, especially since owner had already removed the existing flooring and the sole purpose of the plywood was to strengthen the subfloor to enable the new flooring to be used. As noted above, after the floor wood was delivered, tenant told owner not to proceed with the floor installation. Had tenant intended to move into the premises, it would have told owner to proceed with the floor installation. Tenant never did so.

NOTICE PROVISION

Citing paragraph 46.02 of the lease (the "notice clause"), owner contends that tenant cannot claim that owner was in default of the lease, **[*47]** as tenant did not serve any notice on owner claiming that owner was in default of its lease obligations. That paragraph contains the following:

> The Landlord shall hot be in default under this Lease in any respect unless the Tenant shall have given the Landlord written notice of the breach by certified or registered mail, return receipt requested or by an [sic] nationally recognized overnight carrier, and within thirty (30) days after notice, the Landlord has not cured the breach or if the breach is such that it cannot reasonably be cured under the circumstances within thirty (30) days, has not commenced diligently to prosecute the cure to completion. (Exhibit "B" and TR. At 24-5).

As noted above, an actual partial eviction (here based on the failure to provide elevator service) "is in the matter of a failure of consideration," not merely a default of a covenant in the lease, 132 Spring Street Associates v. Helversen Enterprises, Inc., NYLJ, March 1, 1989 at 22 col 4, supra, citing *Fifth Ave. Bldg. Co. v. Kernochan, 221 NY 370, 117 N.E. 579,* supra. That is, [HN7] an actual partial eviction, or a constructive eviction, is a matter of common law, and therefore may occur whether or not an owner is in "default" **[*48]** of an obligation imposed by the lease.

Therefore, while no such notice of default was served, it does not affect tenant's rights as to constructive eviction or actual partial eviction, or regarding owner's failure to give possession. [14]

> 14 As owner acknowledges, the purpose of the notice clause is to provide owner with an opportunity to cure. Implicit in owner's argument, therefore, is the premise that had owner been given formal written notice, either a) it would have been able to cure the condition within 30 days, or b) the lack of elevator service could not have been reasonably cured within 30 days, but Owner would have "commenced diligently to prosecute the cure to completion." Here, however, it is undisputed that owner was aware that the elevator was out of service. Owner offered no evidence as to why, contrary to its admitted expectation, the elevator was not in service by October 15, 2006. If the delay was beyond owner's control, any notice of default would have been futile, and accordingly excused, see *Irving Trust Co. v. Nationwide Leisure Corp., 95 FRD 51 (SD NY 1982)* ("to the extent that the notice provision is a condition precedent to some claims, compliance could be excused **[*49]** if, under the circumstances, compliance would be meaningless,

add nothing or be a gesture in futility").

CONSTRUCTIVE EVICTION

As noted above, while tenant's complaint asserts a claim based on constructive eviction, in its post-trial brief it argues actual partial eviction. Owner argues that constructive eviction is not applicable.

[HN8] Lack of elevator service can, depending on the facts, support a claim of constructive eviction, see e.g. see *Hayden Co. v. Kehoe, 177 App Div 734, 164 N.Y.S. 686 (2d Dept 1917)*.

[HN9] Where a tenant continues in possession until the conditions complained of are remedied or no longer exist, the tenant has waived the right to claim a constructive abandonment, see generally 74 NY Jur 2d, Landlord and Tenant, §288; 2 Dolan, Rasch's Landlord & Tenant including Summary Proceedings §28:30 (4th Ed.)

That principle is inapplicable here. That principle looks not at when the tenant formally surrenders possession, but when the tenant leaves the premises. *Indeed, in Minjak Co. v. Randolph, 140 AD2d 245, 528 N.Y.S.2d 554 (1st Dept 1988)*, the **[*50]** First Department held that a tenant may invoke constructive partial eviction, where it continues to use and occupy the overall premises but ceases to use a portion of the premises.

Here, tenant never moved into the premises. Not moving in is the functional equivalent, for purposes of constructive eviction, of moving out, see *Mayers v. Kugelman, 81 Misc 2d 998, 367 N.Y.S.2d 144 (Dist Ct, Suffolk County 1975)*; *Ianacci v. Pendis, 64 Misc 2d 178, 315 N.Y.S.2d 399 (Civ Ct, Queens County 1970)*. Tenant's not moving in occurred while there was no elevator service. Accordingly, constructive eviction is applicable.

[HN10] Constructive eviction does not relieve a tenant from payment of rent already accrued at the time of its abandonment of the premises, see *Hayden Co. v. Kehoe, 177 App Div 734, 164 N.Y.S. 686*, supra; *Bookman v. Polachek, 165 NYS 1023 (App Term 1st Dept 1917)*; *Perry-Freeman Co. v. Murphy, 164 NYS 74 (App Term 1st Dept 1917)*. Here, however, no rent ever became due, since, as discussed below, owner did not deliver possession within the required time period.

ACTUAL PARTIAL EVICTION

As owner acknowledges, [HN11] even where a tenant is ousted from only a portion of the demised premises, the eviction is actual, if only partial, *Scolamiero v. Cincotta, 128 AD2d 224, 516 N.Y.S.2d 334, (3d Dept 1987)*. **[*51]** Unless the actual partial eviction is de minimus, see *Eastside Exhibition Corp. v. 210 East 86th Street Corp., 23 AD3d 100, 801 N.Y.S.2d 568 (1st Dept 2005)*, a circumstance not here present, the tenant's obligation to pay rent is entirely suspended until the eviction stops and the tenant is restored; see e.g. *81 Franklin Co. v. Ginaccini, 160 AD2d 558, 554 N.Y.S.2d 207 (1st Dept 1990)*.

Elevator as Appurtenance

Owner contends that tenant always had full possession of the premises, and that there was no eviction of any kind. Citing *Barash v. Pennsylvania Term. Real Estate Corp., 26 NY2d 77, 256 N.E.2d 707, 308 N.Y.S.2d 649* supra, owner argues that in order for there to be an actual partial eviction, an owner must wrongfully oust a tenant from physical possession of the leased premises, and that there must be a physical expulsion or exclusion. This is a generally correct statement of the law, but it does not mean that the failure to provide elevator access to a seventh floor premises cannot constitute an actual partial eviction.

This is because the "premises" that are the subject of a lease are not limited to the office space itself, but include the appurtenances thereto, including, where appropriate, means of ingress and egress.

[HN12] The right to use an apparent, **[*52]** usual and proper means of ingress and egress to a tenant's premises is an appurtenance included in a lease as a matter of right, see e.g. *Presby v. Benjamin, 169 NY 377, 62 N.E. 430 (1902)*; *Lawrence v. Edwin A. Denham Co., 58 Misc 543, 109 N.Y.S. 752 (App Term 1908)*; *Seigel v. Neary, 38 Misc 297, 77 N.Y.S. 854 (App Term 1902)* (partial actual eviction resulted where the owner boarded up and closed off one of the entrances to the tenant's store); *Hamilton v. Graybill, 19 Misc 521, 43 N.Y.S. 1079, 26 Civ. Proc. R. 184 (App Term 1st Dept 1897)* (owner's cutting off access from the tenant's private office to a common hallway was a partial actual eviction, even though tenant still had access to the hallway from his general, outer office). [15]

15 Cf. *Stevens v. Taylor, 111 App Div 561, 97 N.Y.S. 925 (1st Dept 1906)*:

> *When one leases rooms in a building, this carries with it not only the right of access*, but the right to heat them, if necessary; and if the only means provided by which the rooms can be heated be a furnace in the cellar, then the right to use such furnace for that purpose. *To hold otherwise would enable the lessor, at the expense of the lessee, to destroy, either in whole or in part, the subject-matter of the lease by depriving the lessee of the beneficial use and enjoyment* **[*53]** *of the thing leased* [emphasis added].

In situations comparable to those herein, New York courts have held that [HN13] elevator access is an appurtenance--even where, unlike the present case, the lease did not expressly give the tenant the right to elevator service. The mere fact that some means of physical access remains available, does not negate the actual partial eviction where access to an appurtenance is denied. In *Broadway-Spring Street Corp. v. Jack Berens Export Corp., 12 Misc 2d 460, 171 N.Y.S.2d 342 (Mun Ct, NY County 1958)*, [16] the court held that, notwithstanding the availability of stairwell access, and even hoist access, the deprivation of elevator access constituted an actual partial eviction, the elevator being an appurtenance and therefore part of the leased premises, even though, unlike in the present case, the lease did not expressly give the tenant the right to use the elevator. The court held:

> Assuming arguendo that the language of the lease above quoted does not constitute a specific grant to the tenant of the right to use the freight elevator in the manner in which it has heretofore been used by it, that does not bar the tenant's right to the continued enjoyment thereof. In *Henry A. Fabrycky, Inc., v. Nad Realty Corporation, (261 App. Div. 268, 269, 25 N.Y.S.2d 347)*, **[*54]** the Court says: "Here the elevator appurtenance was not specially reserved by the landlord. The fact that elevator service was not mentioned in the lease under the circumstances herein does not bar plaintiff's right to the enjoyment thereof."
>
> The general rule is that [HN14] appurtenances reasonably essential to the demised premises pass as an incident to them unless specifically reserved. *Henry A. Fabrycky, Inc., v. Nad Realty Corporation, supra.* Appurtenances are incorporeal easements or rights and privileges which may pass with a grant or demise. Rasch, Landlord and Tenant and Summary Proceedings, Vol. 1, Section 834. It the use of the elevator by the tenant is reasonably necessary and essential to the beneficial enjoyment of the demised premises then the tenant is entitled to the continued use thereof in the manner in which it has heretofore used it, and any interference therewith or disturbance thereof constitutes an actual partial eviction [citations omitted].
>
> ***
>
> I find from the foregoing facts that the freight elevator and its openings into the lower store and mezzanine constitute appurtenances to the premises demised to the tenant and are reasonably necessary and essential to the tenant's **[*55]** beneficial enjoyment thereof and that the landlord's interference therewith and disturbance thereof constitute an actual partial eviction.

In 132 Spring Street Associates v. Helversen Enterprises, Inc., supra, NYLJ March 1, 1989, p 22. c 4 (Civ Ct, NY County) (Freedman, J.), the court held:

> the testimony indicated that this tenant in order to conduct her retail and wholesale textile business must move belts of fabric of weighing between 75 lbs. and 500 lbs. in [and] out of the premises. I find that under these circumstances the use of the freight elevator (the only elevator in the premises) was an appurtenance and was essential to the beneficial use and enjoyment of this tenancy, even though

there was other access by two staircases to the respondent's second floor premises.

16 Among the cases citing Broadway-Spring Street with approval are *Union City Union Suit Co., Ltd. v. Miller, 162 AD2d 101, 556 N.Y.S.2d 864*, supra and *487 Elmwood, Inc. v. Hassett, 107 AD2d 285, 486 N.Y.S.2d 113*, supra.

The court held that the owner's failure to provide reliable elevator access constituted a partial actual eviction.

See also *Union City Union Suit Co., Ltd. v. Miller, 162 AD2d 101, 556 N.Y.S.2d 864*, supra (citing Helversen with approval); *Hall v. Irwin, 78 App Div 107, 79 N.Y.S. 614 (1st Dept 1903)*; **[*56]** *Libby Properties v. Gross, 76 NYS2d 568 (App Term 1st Dept 1948)*.

I conclude that in the case at bar, the elevator was an appurtenance. Most notably, since under the lease the stairwell could not be used for delivery of "[f]reight, furniture, business equipment, merchandise and bulky matter of any description," the sole means of access to the premises for such delivery was the elevator.

Second, the premises were leased for the express purpose of "Silk Garment Fabric Sales," thus contemplating that customers would be visiting the premises, including disabled persons. Without a functioning elevator the premises were unfit for the purpose for which they were leased, cf. Helversen, NYLJ March 1, 1989 col 4, supra (elevator use an appurtenance where tenant's business required moving belts of fabric weighing between 75 pounds and 500 pounds in and out of the premises).

Moreover, the elevator is the main entrance to the premises. Thus, tenant was deprived not only of a necessary appurtenance, but also of access through the main entrance to the premises.

Possession

In *Fifth Ave. Estates. Inc. v. Scull, 42 Misc 2d 1052, 249 N.Y.S.2d 774 (App Term 1st Dept 1964)*, the court held "[I]t [HN15] makes no difference to tenant **[*57]** that he was refused/possession of the room rather than removed from it. The effect, from his viewpoint, is the same. In either case, there results a partial failure of the consideration for-the rent he agreed to pay."

Here, there was an actual physical exclusion from a material portion of the demised premises, to wit, the appurtenance of elevator access. Indeed, it would not have been possible for tenant to take possession of the entire premises until December 4, 2006, the date when the appurtenance was first made available.

As stated in PJI 6:18:

> The tenant is not bound to accept part of the premises and may terminate the relationship if not given possession of the whole demised premises on the date agreed upon, *Forshaw v. Hathaway, 112 Misc 112,182 NYS 646 (App T)*; *Goerl v. Damrauer, 27 Misc 555, 58 NYS 297 (App T)*.

Since elevator access was appurtenant to the premises, and since it was not timely provided, access was not given and tenant was not obligated to accept the premises without the appurtenant elevator access.

From another perspective, [HN16] when premises are in such a condition that they would constitute a constructive eviction if the tenant were in possession, the tenant is not required **[*58]** to take possession, see *Ianacci v. Pendis, 64 Misc 2d 178, 315 N.Y.S.2d 399*, supra (awarding return of security deposit; holding that "[a] requirement for a tenant to move in and then immediately remove would constitute an idle gesture and would only increase the plaintiff's damages. The court could not cause parties such hardships.")

Contrary to owner's contention, tenant's December 27, 2006 letter does not establish that tenant was in possession of the premises. As quoted above, tenant's letter (i) states that after execution of the lease, possession was not delivered to tenant, and (ii) surrendered to owner "any and all right, title, interest and possession of, in and to the Premises which it may have...."

EFFECT OF OWNER'S TERMINATION OF LEASE

Relying on Paragraph 48.02 of the lease, quoted above, owner contends that notwithstanding owner's

termination of the lease, tenant continued to remain liable to owner for damages sustained. As noted above, I do not reach the issue whether, due to various defects, owner's notice was ineffective. In any event, however, tenant was not in default. The first month's rent had been prepaid. Tenant was not provided with elevator service by October 15, 2006 as contemplated, **[*59]** and the delay was for an unreasonable period of time. Therefore no rent was due, and the failure to pay subsequent rent was not a default.

ELECTION OF REMEDIES

As owner acknowledges, [HN17] where there is a partial actual eviction, the tenant's obligation to pay rent is entirely suspended until the eviction stops, and the tenant is restored, see e.g. *City of New York v. Pike Realty Corporation, 247 NY 245, 160 N.E. 359 (1928)*; *81 Franklin Co. v. Ginaccini, 160 AD2d 558, 554 N.Y.S.2d 207*, supra.

Citing *487 Elmwood, Inc v. Hassett, 107 AD2d 285, 486 N.Y.S.2d 113*, supra, owner contends that partial actual eviction is a defense to a claim for nonpayment of rent, but that it is not an affirmative cause of action for a refund for rent already paid by tenant. Owner's reliance on *487 Elmwood* is misplaced.

In 487 Elmwood the actual partial eviction was not from the premises per se. Rather, plaintiff, a tenant in a shopping plaza, possessed the right under its lease to use the existing plaza parking area in common with the other plaza tenants. The owner leased two-thirds of the parking lot to a third party, which proceeded to demolish the parking lot and construct a McDonald's restaurant on the site. The court held that the right to use the parking lot **[*60]** was an easement appurtenant to the premises and that owner's interference with that easement constituted an actual partial eviction. The tenant had continued to pay rent.

As to the relief to which tenant was entitled against the owner, the court held:

> [HN18] partial actual eviction is a defense to an action by the landlord for nonpayment of the rent; it is not an affirmative cause of action for the refund of rent already paid. In cases of partial eviction "the tenant's refusal to pay rent constitutes an election of remedies, and the tenant has no claim for damages." **[*61]** Conversely, where the tenant elects to assert a claim for damages he thereby waives the eviction as a defense in an action for the rent. Here, plaintiff stipulated that it paid the rent as it became due under the lease. Plaintiff, therefore, is bound by its election to claim damages from the lessors and it is not entitled to a return of the rent already paid to them; it is not entitled to both rent and damages. By paying the rent as it became due, plaintiff waived the right to claim that it was discharged from any rent or liability for its occupation of the residue of the premises and the waiver operated as an estoppel against it.
>
> [HN19] Where a tenant elects to remain in possession and pay the rent after a partial actual eviction, he may claim as damages from his lessor "(a) (1) The proportionate part of the rent of that portion of the premises from which he is evicted. (a) (2) Consequential damages, if any. (b) The difference between the actual rental value of the portion from which he is evicted and the proportionate part of the rent of that portion. (c) Loss of profits. His recovery for each of the above items may be had, however, only for the remainder of the period for which that rent **[*62]** was due or until the eviction ends, if that occurs first." [17]

Thus

a. the preclusion applies where the tenant "elects to remain in possession and pay the rent after a partial actual eviction"; and

b. the basis for the principle on which owner relies is election of remedies.

17 Similarly, in *City of New York v. Pike Realty Corporation, 247 NY 245, 160 N.E. 359*, supra, the Court of Appeals held:

> [HN20] When a lessor has failed to give possession or wrongfully

> withholds possession, the tenant need not resort to ejectment but may sue for damages. The measure of damages then is the value of the lease above the rent received or the difference between the rent received and the value of the premises for the time. Of course there would be no damage if the value was less than the rent.

Here, tenant did not "elect[]" to "remain in possession." Owner never gave possession; and tenant never moved into the premises.

Further,

> "[i]t [HN21] is a prerequisite to the doctrine of election of remedies that the plaintiff have knowledge of the facts material to the pursuit of inconsistent remedies, such knowledge being necessary to enable the plaintiff to make an intelligent and deliberate choice," 1 NY Jur2d Actions §12 [footnote omitted].

Ipso **[*63]** facto, there can be no election of remedies where, as here, the occurrence for which the alternative remedies are potentially available (the failure of owner to timely provide elevator service) did not occur until after the activity supposedly constituting the "election" (the prepayment of rent) occurred.

Here, the claim for the refund of the prepaid rent is not "damages" as referred to in 487 Elmwood. "Damages" in that context is, as quoted above. ""(a)(1) The proportionate part of the rent of that portion of the premises from which he is evicted. (a)(2) Consequential damages, if any. (b) The difference between the actual rental value of the portion from which he is evicted and the proportionate part of the rent of that portion. (c) Loss of profits." Here, plaintiff seeks only the refund of the prepaid rent, not damages.

As quoted above, *Real Property Law §223-a* provides:

> *§223-a*. [HN22] Remedies of lessee when possession is not delivered
>
> In the absence of an express provision to the contrary there shall be implied in every lease of real property a condition that the lessor will deliver possession at the beginning of the term. In the event of breach of such implied condition the lessee shall **[*64]** have the right to rescind the *lease and to recover the consideration paid*. Such right shall not be deemed inconsistent with any right of action he may have to recover damages [emphasis added].

In *Atlantic Bank of New York v. Sutton Associates, Inc., 36 AD2d 943, 321 N.Y.S.2d 380 (1st Dept 1971)*, the First Department, construing *section 223-a*, explained:

> that section, which [HN23] implies in all leases a condition of delivery of premises at the beginning of a term, provides only the remedies of rescission and *repayment for failure to deliver*, plaintiff seeks only money damages thereunder, and the cause may not stand [emphasis added].

Thus, the court recognized that a claim for repayment of money already paid as rent, where possession was not delivered, is not a claim for "money damages." [18]

> 18 Indeed, even where the tenant has made the election by paying the rent after the partial eviction has occurred, it "is not without recourse. The tenant may recover in damages the proportionate part of the rent of that portion of the premises from which he was evicted," *81 Franklin Co. v. Ginaccini, 160 AD2d 558, 554 N.Y.S.2d 207*, supra (citing *487 Elmwood, 107 AD2d 285, 486 N.Y.S.2d 113, supra*.)

Accordingly, in this context, the "damages" that may not be awarded **[*65]** are damages resulting from the loss of the use of the leased premises. That is a wholly different issue than the right of plaintiff to be repaid the prepaid rent that was "abated." The consideration for the prepaid rent was the possession of the premises, and the failure to deliver same constitutes a failure of consideration. The rent that tenant paid is owed by owner to tenant as money had and received.

SECURITY

Since tenant did not breach the lease, owner has no right to retain the security. The security deposit is tenant's property pursuant to *GOL §7-103*.

COUNTERCLAIMS

Owner's counterclaims are dismissed.

ATTORNEY'S FEES

Paragraph 19 of the lease does not entitle owner to attorney's fees, as there was no default by tenant.

Accordingly, it is hereby

ORDERED that, after trial, plaintiff is awarded the sum of $ 30,000, with prejudgment interest at the rate of 9 percent from December 27, 2006; and it is further

ORDERED that defendant's counterclaims are dismissed; and it is further

ORDERED that upon presentation of the requisite papers, the Clerk is directed to enter judgment accordingly, with statutory costs and disbursements as taxed by the Clerk.