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Expert Analysis

When Is an Intangible Service Considered Real Property?

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Principally a lease of real property conveys the right to exclusive possession of land, a building or a portion thereof.[1] But a lease may also include significant incorporeal rights, which are more akin to a service than to occupancy of tangible real property. In some cases such a service may be deemed to be real property and the intentional physical deprivation of the service may be deemed to be an eviction, either actual or constructive.

An appurtenant easement is an incorporeal right to use or control property of the landlord beyond the tenant's premises which is reasonably necessary to the tenant's full beneficial use and enjoyment of its premises; and which is therefore included in the demise, either expressly or by implication. In New York practice an appurtenant easement is generally referred to as appurtenance.[2]

The most obvious example of an appurtenance is the right to ingress and egress, whether by crossing over the landlord's farm, or passing through the building lobby and hallway. Such right to use the landlord's property is indispensable to the tenant's beneficial use and enjoyment of its premises and is therefore included in the demise by implication.[3]

Other examples of customarily implied appurtenances are the right to light, air and ventilation through a window, the right to use a common bathroom, the right to use a parking lot essential to the tenant's business, and the right to connect equipment to common water pipes.[4]

On the other hand, services a landlord agrees to provide to a tenant under a lease, such as cleaning, are not appurtenances.[5] They are rights, but not rights in and to real property. This distinction significantly affects the parties' rights, duties and remedies.

A landlord's failure to provide a non-appurtenant service is a breach of lease, and the tenant's remedy is generally a plenary action for damages or specific performance. The obligation to pay rent is unaffected because rent is an independent covenant.[6] (In a residential situation there is a statutorily created warranty of habitability which, if breached, may entitle the tenant to a partial abatement of rent.[7])

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On the other hand, since an appurtenance is part of the real property demise, a landlord's intentional deprivation of a material appurtenance constitutes an actual partial eviction.[8] The rent is abated in full. It is as if the landlord had locked the tenant out of a portion of the real property. No rent is due until the appurtenance is restored.[9]

The question of what is and what is not an appurtenance depends on the parties' intent, which often must be inferred from the circumstances. Although certain items have commonly been held to be appurtenances, it appears from the case law that there is no particular limit on what now, or in the future, could be held to be an appurtenance, so long as it is reasonably necessary to beneficial use and enjoyment of the premises.

For more than 100 years, elevator service has been held to be an appurtenance.[10] The appurtenance is not the tangible elevator cab or the right to access the shaft. The appurtenance is not the right of access to the premises; elevator service has been held to be an appurtenance even where other methods of access are available. The appurtenance is the service, including the mechanical operation of the elevator responsive to calls from the floors.[11] In the past (and sometimes still today) that service was provided by a human being elevator operator. Today it is typically provided through the operation of an automated system. What is remarkable is that this service is not tangible, and yet it is considered real property.

Other Services

In *Barash v. Pennsylvania Terminal Real Estate Corp.*[12] the tenant entered into an office lease while the 29-story, glass-enclosed building was under construction. The windows were sealed and the supply and circulation of air was under the landlord's exclusive control. The lease required the landlord to furnish ventilation (and air conditioning during the summer) on business days until 6 p.m. The tenant alleged that by 7 p.m. the premises were hot, stuffy and unusable, and commenced a lawsuit alleging actual partial eviction and seeking reformation of the lease to conform to the landlord's pre-execution representation that the building would be "open" 24 hours per day, seven days per week.

The Court of Appeals reversed the denial below of the landlord's motion to dismiss. The allegation that the premises were "hot, stuffy, and unusable and uninhabitable" was insufficient to make out an actual partial eviction, which requires a physical exclusion from the premises. Nor was there

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a constructive eviction, as the tenant never abandoned the premises.

The Court noted the distinction between appurtenances and services. The right to air through a window is an appurtenance, but here the air came in by operation of a mechanical system. The operation of such a system is similar in some ways to the operation of an elevator. They are both mechanical. They are both services. An elevator provides access, this system provided air.

The Court also noted that the tenant had not pleaded or interposed the claim that he had been deprived of an appurtenance, even though the ventilation system provided his premises with outside air. This situation, where the windows did not open and the sole flow of outside air was by way of the ventilation system, would seem analogous to those situations where the tenant was deprived of the ability to access air through a window. But the tenant had not made any such claim in his pleadings, and on the motion to dismiss the Court could not make that claim for him. It stated "there is no claim to an appurtenant right to air external to the demised premises but rather the failure to provide an essential service within the demised premises, which failure traditionally constitutes a constructive eviction."

It seems that the Court was keeping open the possibility that if such a claim had been made, it could have found that the "service" of providing air from the outside by operation of a mechanical system might constitute an appurtenance.

In commercial offices today business is done through the Internet. Access is obtained through cables running through the landlord's building. This access is indispensable to many business operations. landlords often advertise Internet access as a feature of available space. Is the right to connect to the cables which run through the landlord's real property an appurtenance? Is the right to connect to telephone lines through the landlord's building, also indispensable to business, an appurtenance?[13] It would appear to be a matter of the parties' intent, as may be inferred from the circumstances.

In a number of New York State cases decided in 1949 and 1950, courts held that television antennas installed by the tenants on the roofs of residential buildings constituted a trespass on the landlord's property.[14] In 1982 the U.S. Supreme Court held that a cable box the tenant had placed on the roof was not an appurtenance.[15] In 2004 the Appellate Term, First Department, upheld a lease provision prohibiting the tenant's installation of a satellite dish on the roof.[16]

In each of those cases, however, there was no way the court could have inferred that the placement of the item on the landlord's property was volitional from the point of view of the landlord. None of the items were in place at the time of the demise. In the antenna and satellite dish cases, the installation was done after the lease was made, without the landlord's consent. In *Teleprompter* the cable was placed on the roof under a statute. In these cases the right to use the landlord's premises was not part of the demise and therefore could not have been an appurtenance. In another case however the tenant's claim that a rooftop antenna was an appurtenance survived a motion to dismiss, the court holding that it would depend upon the parties' intent.[17]

In a case where Internet or telephone cables are in place at the time of the demise, and are necessary to the tenant's beneficial use and enjoyment of the premises, it is possible that the right to access cyberspace through these cables could be held to be an appurtenance.

Clauses and Recovery

A lease clause which provides that the landlord "shall not be liable" in the event that a service is not provided will only preclude the tenant from maintaining a claim for damages, it will not overcome a claim of actual partial eviction if the service is held to be an appurtenance.[18] A landlord who agrees to provide a service would be better protected by a clause expressly stating that such service is not an appurtenance. Whether an item is an appurtenance depends on the parties' intent, and "appurtenances reasonably essential to the enjoyment of demised premises pass as an incident to them *unless specially reserved*."[19]

> The question of what is and what is not an appurtenance depends on the parties' intent, which often must be inferred from the circumstances.

If a service is not an appurtenance, upon the deprivation thereof a commercial tenant will be relegated to a claim for money damages rather than actual partial eviction.

1. *219 Broadway Corp. v. Alexander's, Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979).
2. *Woodhull v. Rosenthal,* 61 N.Y. 382 (1875).
3. *Anixter v. Bangor Realty Corp.*, 104 Misc. 613, 172 N.Y.S. 732 (N.Y. Co. 1918).
4. *O'Neill v. Breese*, 3 Misc. 219, 23 N.Y.S. 526 (Super. Ct. 1893), 487 *Elmwood, Inc. v. Hassett*, 107 A.D.2d 285, 486 N.Y.S.2d 113 (4th Dept. 1985).
5. *Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 N.Y.2d 77, 256 N.E.2d 707, 308 N.Y.S.2d 649 (1970).
6. *Ely v. Spiero*, 28 A.D. 485, 51 N.Y.S.124 (2d Dept. 1898), *Manhattan Mansions v. Moe's Pizza*, 149 Misc.2d 43, 561 N.Y.S.2d 331 (Civ. Ct. N.Y. Co. 1990).
7. RPL §235.
8. *Barash*, supra.
9. Where a tenant is evicted from all or part of its premises, the rent is abated in total. An actual total eviction occurs where by wrongful act of the landlord the tenant is excluded from physical possession of the entire premises. An actual partial eviction occurs where by wrongful act of the landlord the tenant is physically excluded from a material portion of the premises. A constructive eviction occurs where by wrongful act of the landlord the tenant is materially deprived of the beneficial use and enjoyment of the premises and abandons the premises within a reasonable time. A partial constructive eviction (which results in an abatement of a portion of the rent) occurs where the tenant is forced to abandon a portion of the premises. Barash, supra.
10. *Hall v. Irvin*, 78 A.D. 107, 79 N.Y.S. 614 (1st Dept. 1903).
11. *Henry A. Fabrycky, Inc. v. Nad Realty Corp.*, 261 A.D. 268, 25 N.Y.S.2d 347 (2d Dept. 1941).
12. 26 N.Y.2d 77, 256 N.E.2d 707, 308 N.Y.S.2d 649 (1970).
13. This question was considered in a few unreported decisions in the 1950s wherein landlords were directed to permit the installation of telephone lines. Milton R. Friedman, FRIEDMAN ON LEASES §3.2 (4th ed. 1997).
14. *Leona Building Corp. v. Rice*, 196 Misc. 514, 94 N.Y.S.2d 390 (App. Term 2d Dept. 1949), *Scroll Realty Corp. v. Mandell*, 195 Misc. 972, 92 N.Y.S.2d 813 (Kings Co. 1949), *Kaplan v. Sessler*, 197 Misc. 270, 97 N.Y.S.2d 642 (App. Term 2d Dept. 1950).
15. *Loretto v. Teleprompter Manhattan CATV Corp.*,, 458 U.S. 419, 102 S. Ct. 3164 (1982).
16. *2682 Kingsbridge Associates LLC v. Martinez*, 4 Misc.3d 111, 782 N.Y.S.2d 496 (App. Term 1st Dept. 2004).
17. *Perlov v. Loric Holding Corp.*, 191 Misc. 835, 82 N.Y.S.2d 531 (Kings Co. 1948).
18. *State Warehouse Co., Inc. v. Standard Brands, Inc.*, 56 A.D.2d 829, 393 N.Y.S.2d 26 (1st Dept. 1977).
19. *Henry Fabrycky, Inc*, supra. (emphasis added).