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The Eastside Exhibition Rule: The De Minimis Exception for Trifles and Trivialities in Partial Actual Eviction Cases in New York

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The Eastside Exhibition Rule: The De Minimis Exception for Trifles and Trivialities in Partial Actual Eviction Cases in New York

Cover Page Footnote

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**THE EASTSIDE EXHIBITION RULE: THE *DE MINIMIS*
EXCEPTION FOR TRIFLES AND TRIVIALITIES IN PARTIAL
ACTUAL EVICTION CASES IN NEW YORK**

*Hon. Stephen L. Ukeiley**

“While the dissent seems to view our holding as revolutionary and ‘schizophrenic’ . . . we regard it as nothing more than an application of the familiar *de minimis* principle which we have never held or suggested to be inapplicable to actual partial eviction cases.”

- Hon. Carmen Beauchamp Ciparick (Senior Associate Judge, New York Court of Appeals) (Retired)¹

I. INTRODUCTION

Since at least the early twentieth century, the law in New York has been that the landlord’s physical ouster of a tenant from all or a portion of the premises warranted full rent abatement.² This is the case regardless, whether the expulsion is from just one inch or the entire premises.³ The proverbial “one inch rule” puts the parties on notice that a landlord who unlawfully reclaimed a portion of the

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¹ Eastside Exhibition Corp. v. 210 E. 86th St. Corp., 965 N.E.2d 246, 250 (N.Y. 2012) (emphasis added) (citation omitted), *cert. denied*, 133 S. Ct. 654 (2012).

² See, e.g., Fifth Ave. Bldg. Co. v. Kernochan, 117 N.E. 579, 580 (N.Y. 1917) (holding that where the expulsion is performed by a non-party with a superior interest to the lessor, then the rent would only be apportioned).

³ *Id.*; Barash v. Pa. Terminal Real Estate Corp., 256 N.E.2d 707, 710 (N.Y. 1970).

leased premises did so at substantial risk.⁴

In 2012, New York's highest court was presented with a pragmatic question:⁵ Is a commercial tenant permitted to occupy the premises for the duration of the lease free of all rent obligations where the landlord reclaimed a minor portion of the premises and there was no detectable impact on the tenant's business?⁶ In what appears to be a case of first impression, the Court of Appeals answered in the negative.⁷

The impact of the court's decision will take years of litigation to sort through.⁸ Regardless of which side of the issue you may fall on, it is clear that commercial landlords in New York may unilaterally take a minute and trivial portion of leased premises without fear of forfeiting rent payments.

Prior to *Eastside Exhibition Corp. v. 210 East 86th Street Corp.*,⁹ practitioners could reasonably advise their clients that in partial actual eviction cases, the tenant could either withhold all rent payments, even where there were no damages,¹⁰ or elect to continue to pay the rent and sue for damages.¹¹ As discussed herein, although the law remains unchanged, determining the appropriate legal advice has become increasingly more complicated.

The *Eastside Exhibition Corp.* case involved a partial actual eviction from a commercial property.¹² Part II of this article details the distinction between actual and constructive evictions in New York. In Part III, the majority and dissenting opinions in *Eastside Exhibition Corp.* are analyzed with particular focus on the court's holding that a *de minimis* intrusion does *not* constitute an actual eviction, partial or otherwise. Finally, in Part IV, the impact of the court's decision and the challenges facing counsel and the parties going forward are addressed.

⁴ See *Barash*, 256 N.E.2d at 710 (describing the likelihood of the rent being suspended due to the landlord's actions).

⁵ *Eastside Exhibition Corp.*, 965 N.E.2d at 247.

⁶ *Id.*

⁷ *Id.* at 250.

⁸ The author expresses no opinion either in favor of, or against, the court's ruling.

⁹ 965 N.E.2d 246 (N.Y. 2012).

¹⁰ *Barash*, 256 N.E.2d at 710.

¹¹ 487 Elmwood, Inc. v. Hassett, 486 N.Y.S.2d 113, 117 (App. Div. 4th Dep't 1985).

¹² *Eastside Exhibition Corp.*, 965 N.E.2d at 247.

II. ACTUAL AND CONSTRUCTIVE EVICTIONS DEFINED

Actual and constructive evictions require a showing that the landlord's actions or failure to act, whether intentional or unintentional, resulted in the impermissible intrusion upon some or all of the leased premises.¹³ In other words, for there to be either type of eviction, there must be a wrongful act or omission by the landlord that denied the tenant of possession or the beneficial enjoyment of some or all of the premises.¹⁴

A. Actual Evictions

An actual eviction occurs where the landlord physically ousts the tenant from some or all of the leased premises.¹⁵ Common examples include the landlord's changing of the locks and physically denying access to one or more rooms or areas within the premises.¹⁶ Expert testimony, while not required to establish the defense, is necessary to prove damages whether asserted as a counterclaim in the landlord's summary proceeding or in a separate plenary action.¹⁷

Interference with the tenant's appurtenant rights that implicitly pass to the tenant, regardless of whether they are included within the lease, may further constitute a partial actual eviction.¹⁸ Typically, the tenant need not demonstrate a separate breach of the covenant of quiet use and enjoyment because an actual eviction, whether partial

¹³ *Barash*, 256 N.E.2d at 709-10.

¹⁴ *See id.* at 709-11 (stating that the tenant failed to establish either type of eviction).

¹⁵ *Id.* at 709.

¹⁶ *Id.* at 709-10.

¹⁷ *See, e.g., 487 Elmwood, Inc.*, 486 N.Y.S.2d at 117 (stating a lease provision prohibiting the tenant's assertion of counterclaims in a summary proceeding will generally be enforced unless the counterclaims are "inextricably intertwined" with the claim for unpaid rent); *Man Chit Cheng v. Chang*, No. 2008-477QC, 2008 WL 5146919, at *1 (App. Term 2d & 11th Jud. Dists. Dec. 3, 2008) (stating that a lease provision barring counterclaims in a summary proceeding is generally enforceable); *Bomze v. Jaybee Photo Suppliers, Inc.*, 460 N.Y.S.2d 862, 863 (App. Term 1st Dep't 1983). *But see All 4 Sports & Fitness, Inc. v. Hamilton, Kane, Martin Enter., Inc.*, 802 N.Y.S.2d 470, 471 (App. Div. 2d Dep't 2005) (permitting counterclaims for maintenance charges, notwithstanding a lease provision to the contrary, where the counterclaims were "inexplicably intertwined" with the landlord's underlying claim).

¹⁸ *See Second on Second Café, Inc. v. Hing Sing Trading, Inc.*, 884 N.Y.S.2d 353, 362-63 (App. Div. 1st Dep't 2009) (citing *487 Elmwood, Inc.*, 486 N.Y.S.2d at 115-16) (stating that denying use of parking area acquired appurtenant to the lease constituted a partial actual eviction).

or complete, constitutes a deprivation of such use and enjoyment.¹⁹

The defense of actual eviction is available in a non-payment proceeding but may not be utilized to garner a refund of rent previously paid.²⁰ Whether the landlord's intrusion constitutes a partial actual eviction is a factual issue.²¹ For example, the tenant's lost use of vault space in the basement,²² its ouster from negotiated parking areas,²³ and the inability to use a common hallway from the tenant's private office,²⁴ were all held to constitute partial actual evictions. More recently, the Appellate Division, First Department ruled that the landlord's failure to fully repair leaks in an employee bathroom could also result in a partial actual eviction.²⁵

However, the claim is unsustainable where the tenant fails to demonstrate that it was expelled or excluded from at least a portion of the premises. For example, building renovations that merely make ingress and egress "slower" and "less convenient" generally do not rise to a level of a partial actual eviction.²⁶ Similarly, partial actual eviction claims were denied where there was a reduction (not elimination) in elevator service,²⁷ denial of access to a particular sidewalk entrance,²⁸ and the landlord's refusal to cooperate with the installation of an illuminated exterior sign.²⁹

¹⁹ *Park Towers S. Co., LLC v. 57 W. Operating Co., Inc.*, 945 N.Y.S.2d 554, 554 (App. Div. 1st Dep't 2012) (holding that in a non-payment proceeding, the tenant may, but need not, demonstrate a breach of the covenant of quiet use and enjoyment to sustain the defense because the eviction "involves a failure of the consideration for which rent is paid") (quoting *Fifth Ave. Bldg. Co.*, 117 N.E. at 580).

²⁰ *487 Elmwood, Inc.*, 486 N.Y.S.2d at 117.

²¹ *Barash*, 256 N.E.2d at 710.

²² *Fifth Ave. Bldg. Co.*, 117 N.E. at 580.

²³ *Whaling Willie's Roadhouse Grill, Inc. v. Sea Gulls Partners, Inc.*, 793 N.Y.S.2d 124, 125 (App. Div. 2d Dep't 2005).

²⁴ *Hamilton v. Graybill*, 43 N.Y.S. 1079, 1080 (App. Term 1st Dep't 1897).

²⁵ *Mini Mint Inc. v. Citigroup, Inc.*, 922 N.Y.S.2d 313, 315 (App. Div. 1st Dep't 2011).

²⁶ *Cut-Outs, Inc. v. Man Yun Real Estate Corp.*, 729 N.Y.S.2d 107, 110 (App. Div. 1st Dep't 2001), *appeal denied*, 795 N.E.2d 1244 (N.Y. 2003).

²⁷ *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assoc.*, 658 N.Y.S.2d 272, 272 (App. Div. 1st Dep't 1997).

²⁸ *23 E. 10 L.L.C. v. Albert Apt. Corp.*, 937 N.Y.S.2d 217, 217-18 (App. Div. 1st Dep't 2012) (finding that the use of a sidewalk entrance was an appurtenant right).

²⁹ *Webb & Knapp, Inc. v. Churchill's Terminal Rest., Inc.*, 155 N.Y.S.2d 588, 589 (App. Div. 1st Dep't 1956).

B. Constructive Evictions

A constructive eviction, on the other hand, does not entail a physical exclusion or expulsion from the premises. Rather, the landlord's wrongful act or omission substantially deprived the tenant of the "beneficial use and enjoyment" of all or a portion of the premises.³⁰ For example, the landlord's failure to fix a leaking roof, or to make other necessary repairs that render a portion or all of the premises uninhabitable or unusable, are common examples of constructive evictions.³¹

In New York, the tenant must physically vacate only the unusable portions of the premises in a timely manner to sustain the claim.³² There is no prohibition against the tenant continuing to occupy the other portions of the premises following a partial constructive eviction.³³ However, if the tenant continues to use the unusable portions, even if the usage is greatly diminished, then a constructive eviction defense will fail.³⁴

C. Election of Remedies

It is well established that where there is an actual eviction, whether complete or partial, the tenant's responsibility to pay rent is suspended.³⁵ The complete suspension of rent similarly applies to the situation where the tenant remains in a portion of the leased premises following a partial expulsion.³⁶

³⁰ *Barash*, 256 N.E.2d at 710.

³¹ *S.E. Nichols, Inc. v. New Plan Realty Trust*, 553 N.Y.S.2d 359, 360 (App. Div. 1st Dep't 1990).

³² *See, e.g., Zurel U.S.A., Inc. v. Magnum Realty Corp.*, 719 N.Y.S.2d 276, 276 (App. Div. 2d Dep't 2001) (holding a four month delay in vacating commercial premises following constructive eviction was timely); *428 Camera Corp. v. Tandy Corp.*, 707 N.Y.S.2d 101, 102 (App. Div. 1st Dep't 2000).

³³ *See Bernard v. 345 E. 73rd Owners Corp.*, 581 N.Y.S.2d 46, 46 (App. Div. 1st Dep't 1992); *Minjak Co. v. Randolph*, 528 N.Y.S.2d 554, 557 (App. Div. 1st Dep't 1988).

³⁴ *Barash*, 256 N.E.2d at 712; *see Arpino v. Cicciaro*, No. 2011-2161SC., slip op. at 2 (App. Term 9th & 10th Jud. Dists. Dec. 20, 2012) (holding where tenants "proffered testimony that [the premises] has been used for its intended purposes, albeit for a drastically reduced amount of time . . . there has been no abandonment" and no partial constructive eviction).

³⁵ *Barash*, 256 N.E.2d at 710; *see Frame v. Horizons Wine & Cheese, Ltd.*, 467 N.Y.S.2d 630, 633 (App. Div. 2d Dep't 1983) (holding a landlord may not collect rent for the part of the premises in which the tenant remains following a partial actual eviction).

³⁶ *Barash*, 256 N.E.2d at 710.

The tenant may instead opt to pay the rent and assert a claim for damages against the landlord in a plenary action.³⁷ A benefit of this approach from the tenant's perspective is that it need not be concerned with an eviction proceeding in the Housing Part due to the non-payment of rent. However, the tenant must prove its damages to be compensated for the unlawful taking.³⁸

Although the decision rests with the tenant, it may *not* withhold the payment of rent and seek monetary damages.³⁹ In other words, the tenant must elect which path it chooses to take. Thus, the decision to withhold rent "constitutes an election of remedies" that prohibits the tenant from asserting a claim for damages.⁴⁰ On the other hand, if the tenant pays the rent and asserts a claim for damages, then it waives the right to assert that the obligation to pay rent for that portion, or any other portion, of the premises was forfeited.⁴¹

Damages that may be recovered for an unlawful eviction by the landlord include: (1) the proportionate share of the rent for the area of the premises from which the tenant was evicted; (2) consequential damages; (3) the variation between the rental value of the part of the premises the tenant was evicted from and the proportionate share of the rent for that portion for the remainder of the lease term; and (4) lost profits demonstrated with a reasonable certainty.⁴² Once again, expert testimony is required to establish monetary damages due to an unlawful eviction.⁴³

Since a claim for unlawful eviction typically arises from a breach of contract, the damages may "include general (or direct) damages, which compensate for the value of the promised performance, and consequential damages, which are indirect and compensate for additional losses incurred as a result of the breach, such as

³⁷ 487 *Elmwood, Inc.*, 486 N.Y.S.2d at 117.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Frame*, 467 N.Y.S.2d at 633.

⁴¹ 487 *Elmwood, Inc.*, 486 N.Y.S.2d at 117.

⁴² *Id.*; *Appliance Giant, Inc. v. Columbia 90 Assocs.*, 779 N.Y.S.2d 611, 612 (App. Div. 3d Dep't 2004). In *Appliance Giant, Inc.*, the court found that when the rent is paid following a partial actual eviction, the tenant may generally recoup in addition to consequential damages and lost profits, damages equal to (1) that portion of the rent "attributable to the portion of the premises" from which the tenant was evicted and (2) "the difference . . . between the rent attributable to the portion of the premises from which [the eviction occurred]" and the reasonable rental value of that portion. *Id.*

⁴³ 487 *Elmwood, Inc.*, 486 N.Y.S.2d at 117.

lost profits”⁴⁴ If the offending party is *not* the landlord, the tenant may recover compensatory damages for the diminution in the value of the premises for the remainder of the lease term.⁴⁵ Compensatory or direct damages are typically computed as the difference in the value of the leased premises prior to the actual eviction compared to its value following the eviction.⁴⁶

Damages are typically limited to whichever occurs first: the remainder of the lease term or until the eviction ends.⁴⁷ Although punitive damages are generally unavailable in contract claims absent a showing of utterly reprehensible conduct,⁴⁸ treble damages may be recovered by persons pursuant to New York Real Property Actions and Proceedings Law (“NY RPAPL”) section 853.⁴⁹ In addition, a tenant may be able to recoup damages for trespass.⁵⁰

The measure of damages in a constructive eviction case is contingent upon whether the eviction is complete or partial.⁵¹ If the constructive eviction materially deprives the tenant of the use and enjoyment of the entire premises, then the obligation to pay rent is suspended.⁵² However, where a partial constructive eviction occurs, the tenant is only entitled to a partial abatement of rent, as opposed to a complete suspension of the rent.⁵³ The amount of the abatement generally equates to the reasonable diminution of the rental value of the leased premises.⁵⁴ Expert testimony is required to establish damages in commercial partial constructive eviction cases, but the same is not

⁴⁴ *Appliance Giant, Inc.*, 779 N.Y.S.2d at 613.

⁴⁵ See N.Y. REAL PROP. ACTS. LAW § 853 (McKinney 2013).

⁴⁶ *487 Elmwood, Inc.*, 486 N.Y.S.2d at 117.

⁴⁷ See *id.*

⁴⁸ *Id.* See *Minjak Co. v. Randolph*, 528 N.Y.S.2d 554, 557-58 (App. Div. 1st Dep’t 1988) (awarding punitive damages due to “the dangerous and offensive manner in which the landlord permitted the construction work to be performed, the landlord’s indifference to the health and safety of others, and its disregard for the rights of others . . .”).

⁴⁹ The section provides, in pertinent part, where a person is “disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means,” treble damages may be recovered in a plenary action. See § 853.

⁵⁰ *Golonka v. Plaza at Latham LLC*, 704 N.Y.S.2d 703, 706-07 (App. Div. 3d Dep’t 2000).

⁵¹ *Minjak Co.*, 528 N.Y.S.2d at 557.

⁵² *Johnson v. Cabrera*, 668 N.Y.S.2d 45, 46 (App. Div. 2d Dep’t 1998).

⁵³ *Minjak Co.*, 528 N.Y.S.2d at 557.

⁵⁴ *Id.* at 556-57; see *Arbern Realty Co. v. Clay Craft Planters Co.*, 727 N.Y.S.2d 236, 237 (App. Term 2d Dep’t 2001).

true for residential cases.⁵⁵

III. *EASTSIDE EXHIBITION CORP.: THE LAW DOES NOT CONCERN ITSELF WITH TRIFLES*

Nearly a decade after the landlord intruded upon a relatively small portion of the commercial premises located in New York City, the Court of Appeals was asked to determine whether the longstanding rule in New York that a partial actual eviction results in a total abatement of rent was still the law.⁵⁶ Although the court answered that question in the affirmative, the critical portion of the decision, at least for the purposes of this article, was that the court cushioned the remedy, which, at times, had been described as draconian.⁵⁷

The court emphasized that the law in New York was, and remains, that a partial actual eviction warrants a complete abatement of rent.⁵⁸ However, as a result of *Eastside Exhibition Corp.*, the court acknowledged that not every intrusion by a landlord amounts to an actual eviction.⁵⁹

Balancing equity with modern day realities, the court considered certain intrusions to be *de minimis* in nature, or so trivial that they do not trigger the remedies available to a tenant following a partial actual eviction.⁶⁰ As a result of the ruling, it would appear that only those takings that have a “demonstrable effect on the tenant’s use and enjoyment of the space” constitute an eviction warranting an abatement of rent.⁶¹ In reaching this conclusion, the court relied upon “ ‘the familiar maxim, *de minimis non curat lex*’ (the law does not concern itself with trifles).”⁶²

Where such a *de minimis* expulsion occurs the tenant may still recoup damages, should they be proven.⁶³ However, a tenant so minimally displaced may no longer elect to withhold the payment of rent,

⁵⁵ *Arbern Realty Co.*, 727 N.Y.S.2d at 237.

⁵⁶ *Eastside Exhibition Corp.*, 965 N.E.2d at 249.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See *id.* (reasoning that the tenant’s “all or nothing [claim] . . . ‘has little but age and inertia to recommend it’ ”) (quoting MILTON R. FRIEDMAN, FRIEDMAN ON LEASES § 29:2.4, 29-16 (Patrick A. Randolph, Jr. ed., 5th ed. 2012)).

⁶⁰ *Id.* at 250.

⁶¹ *Eastside Exhibition Corp.*, 965 N.E.2d at 247.

⁶² *Id.* at 249 (quoting *Lounsbury v. Snyder*, 31 N.Y. 514, 516 (N.Y. 1865)) (internal quotation marks omitted).

⁶³ *Id.* (citing *Lounsbury*, 31 N.Y. at 516).

but instead its lone recourse is to commence a plenary action for damages.⁶⁴

A. The Facts: The Multiplex Movie Theater Leasehold

The facts of the case were relatively straightforward. In 1998, the landlord 210 East 86th Street Corp. (hereinafter, “86th Street Corp.” or “landlord”) and the tenant Eastside Exhibition Corp. (hereinafter, “Eastside” or “tenant”) entered into an eighteen-year, nine and one-half month (225½ total months) rental agreement (hereinafter, “the lease”) for two floors within the landlord’s “seven-story retail and office building.”⁶⁵ Eastside was to utilize the space to operate four theaters consisting of 1,150 seats.⁶⁶

Two lease provisions warranted significant attention.⁶⁷ Article 13 authorized “the landlord to enter the . . . premises [at reasonable hours for the purpose of making] repairs and improvements” and further specified that the tenant would not be entitled to an “abatement of rent during” those periods.⁶⁸ Article 4 stated the tenant was not entitled to recover “for the diminution of rental value” as a result of the construction.⁶⁹

In December 2002, without either the consent of Eastside or any advanced notice, 86th Street Corp. entered the leased premises and installed “unaesthetic cross-bracing” between the steel support columns in marginal sections on both of the leased floors.⁷⁰ The cross-bracing consumed approximately a mere twelve square feet of the leased premises which totaled between 15,000 and 19,000 square feet.⁷¹ The cross-bracing was installed for the purpose of adding

⁶⁴ See *id.* at 250 (concluding that the tenant was unable to demonstrate its entitlement to either injunctive relief or money damages).

⁶⁵ *Id.* at 247. Apparently, Eastside paid East 86th Street Corp. in excess of \$3 million to construct the movie theaters. See Brief for Plaintiff-Appellant at *8, *Eastside Exhibition Corp. v. 210 E. 86th St. Corp.*, 965 N.E.2d 246 (N.Y. 2012) (No. 2012-0021), 2011 WL 7561636, at *8.

⁶⁶ *Eastside Exhibition Corp.*, 965 N.E.2d at 247.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* According to the tenant, East 86th Street Corp. caused nearly 100 square feet of rough plywood enclosures to be installed on every floor, which blocked several stairs between the upper theaters and the lobby, and removed the ceiling above both lobbies. See Brief for Plaintiff-Appellant, *supra* note 65, at *9-*10.

⁷⁰ *Eastside Exhibition Corp.*, 965 N.E.2d at 247, 250.

⁷¹ *Id.* at 250.

“two additional [stories] to the building,”⁷² and it was estimated the additional flooring would result in excess of \$900,000 additional income per year, or approximately \$12.6 million over the remainder of the parties’ lease.⁷³

B. Procedural History: The Supreme Court and Appellate Division

As a result of the intrusion, Eastside withheld the payment of rent and commenced a declaratory judgment action seeking a permanent injunction enjoining additional renovations and for an “abatement of its rent obligation[s],” plus compensatory and punitive damages.⁷⁴ Notwithstanding the well-established rule that the withholding of rent following a partial actual eviction constitutes an election of remedies that bars a claim for damages,⁷⁵ the trial court initially “granted . . . a temporary restraining order” prohibiting additional renovations and directed the landlord “to expeditiously complete the current work.”⁷⁶

After trial, the lower court dismissed Eastside’s claims and awarded a judgment in favor of 86th Street Corp. for the unpaid rent.⁷⁷ The court reasoned that a full rent abatement was unjust because the taking was a *de minimis* intrusion.⁷⁸

On appeal, the Appellate Division, First Department, held that the trial court erred because there is no *de minimis* exception for actual evictions regardless of how minor the intrusion.⁷⁹ Although the

⁷² *Id.* at 247.

⁷³ Brief for Plaintiff-Appellant, *supra* note 65, at *12.

⁷⁴ *Eastside Exhibition Corp.*, 965 N.E.2d at 247-48, 248 n.1.

⁷⁵ *See, e.g., 487 Elmwood, Inc.*, 486 N.Y.S.2d at 117 (quoting *Frame*, 467 N.Y.S.2d at 633).

⁷⁶ *Eastside Exhibition Corp.*, 965 N.E.2d at 248.

⁷⁷ *Id.*

⁷⁸ *Id.* The trial court cited precedent from the Appellate Division, First Department in support of its ruling. *See, e.g., Cut-Outs, Inc.*, 729 N.Y.S.2d at 109-10 (determining that the intrusion was nothing “more than a *de minimis* taking of inessential space”); *Camatron Sewing Mach., Inc. v. F.M. Ring Assoc., Inc.*, 582 N.Y.S.2d 396, 398 (App. Div. 1st Dep’t 1992) (concluding that the taking of approximately 25% of the leased premises was not *de minimis*); *Paine & Chriscott v. Blair House Assoc.*, 417 N.Y.S.2d 68, 69 (App. Div. 1st Dep’t 1979) (determining that the .5% space at issue may constitute a partial actual eviction that is recoverable with money damages).

⁷⁹ *Eastside Exhibition Corp.*, 965 N.E.2d at 248; *see Eastside Exhibition Corp. v. 210 E. 86th St. Corp.*, 801 N.Y.S.2d 568 (App. Div. 1st Dep’t 2005).

minimal intrusion was considered a partial actual eviction, the Appellate Division reasoned that where the intrusion is so *de minimis* the tenant's exclusive remedy is to pursue money damages in a plenary action.⁸⁰

In addition, the court explained that a full rent abatement was unjustified given the circumstances and that to permit such would be suggestive of "harsh and oppressive strictures derived from feudal law[s] that mirror the policies and concerns of that earlier society."⁸¹ The case was then remanded to the trial court for a hearing on damages.⁸² At the hearing three years later, Eastside failed to prove it had been damaged, in part due to the testimony of its own witnesses that the computation of damages was nearly impossible to estimate.⁸³ On appeal, the Appellate Division, relying upon its rulings in the prior appeal, affirmed the trial court's findings.⁸⁴ The Court of Appeals granted leave for appeal.⁸⁵

C. The Court of Appeals: Not All Takings Constitute An Eviction

The Court of Appeals affirmed the Appellate Division's decision but on different grounds.⁸⁶ From the outset, the Court of Appeals disagreed with the Appellate Division's conclusion that a tenant was prohibited from *withholding* rent following a partial actual eviction of trivial proportions.⁸⁷ To the contrary, citing precedent dating back to 1826⁸⁸ and 1917,⁸⁹ New York's highest court unambiguously reaffirmed that where there is a partial actual eviction, the tenant may

⁸⁰ *Eastside Exhibition Corp.*, 801 N.Y.S.2d at 571-72. The Appellate Division's ruling would have effectively eliminated the tenant's election of available remedies by imposing a singular, exclusive remedy for trivial takings. Specifically, the tenant would remain liable for the payment of the rent and could seek monetary damages in a plenary action. *But see Barash*, 256 N.E.2d 707, 710 (1970) (holding that the obligation to pay rent is suspended following the unlawful intrusion where the tenant remains in another portion of the premises).

⁸¹ *Eastside Exhibition Corp.*, 801 N.Y.S.2d at 572.

⁸² *Id.*

⁸³ *Eastside Exhibition Corp.*, 965 N.E.2d at 248.

⁸⁴ *Eastside Exhibition Corp. v. 210 E. 86th St. Corp.*, 911 N.Y.S.2d 610, 611 (App. Div. 1st Dep't 2010).

⁸⁵ *Eastside Exhibition Corp. v. 210 E. 86th St. Corp.*, 946 N.E.2d 176 (N.Y. 2011).

⁸⁶ *Eastside Exhibition Corp.*, 965 N.E.2d at 249.

⁸⁷ *Id.*

⁸⁸ *Dyett v. Pendleton*, 8 Cow. 727, 731 (N.Y. 1826).

⁸⁹ *Fifth Ave. Bldg. Co.*, 117 N.E. at 580.

elect to withhold the full payment of rent, even when the tenant continues to occupy another portion of the premises, or it may pursue money damages.⁹⁰

In *Eastside Exhibition Corp.*, the Court of Appeals focused on the definition of a partial actual eviction and endeavored whether a minimal physical expulsion constituted such an eviction.⁹¹ The court concluded that a minimal physical expulsion was *not* a partial actual eviction and, in the process, permanently narrowed the definition of partial actual eviction.⁹² In this regard, the court held that “[f]or an intrusion to be considered an actual partial eviction it must interfere in some, more than trivial, manner with the tenant’s use and enjoyment of the premises.”⁹³

The court further explained that it was unaware of any case where a full rent abatement was permitted when “[the] so called ‘eviction’ [was] as trivial as this one,” which affected less than one-tenth of one percent of the leased premises.⁹⁴ It further emphasized that the tenant could pursue a claim for damages but, in this case, neither the aesthetics of the cross-bracing nor the minimal impediment to pedestrian traffic substantiated a denial of the use and enjoyment of the premises.⁹⁵

The court, in summarizing its rationale, noted that “there can be an intrusion so minimal that it does not prescribe [to] such a harsh remedy” of a complete rent abatement.⁹⁶ Moreover, the court noted the parties are free to negotiate different lease terms that could justify a different outcome, but, in this case, Articles 4 and 13 of the rental agreement suggested that East 86th Street Corp., may have had the right to enter the premises to perform construction.⁹⁷

D. The Dissent: “No Predictability of Outcome”

In her dissent, Judge Read highlighted several factors which she asserts evidence the court’s misapplication of the law and its de-

⁹⁰ *Eastside Exhibition Corp.*, 965 N.E.2d at 249 (noting the longstanding rule, the court stated that “we do not, herein, jettison or overrule it as stated by the dissent”).

⁹¹ *Id.* at 250.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Eastside Exhibition Corp.*, 965 N.E.2d at 250.

⁹⁶ *Id.*

⁹⁷ *Id.* at 247, 250.

violation from “the [strict] common law rule.”⁹⁸ In distancing herself from the majority, Judge Read opined that the law is clear that any physical expulsion from even a portion of the leased premises, no matter how trivial, warrants complete rent abatement.⁹⁹

1. The Landlord Cannot Apportion Its Wrong

Initially, the dissent asserted that the court mistakenly relied upon *Lounsbury v. Snyder*,¹⁰⁰ a case from the mid-nineteenth century, because that case did not involve either an actual or constructive eviction.¹⁰¹ In *Lounsbury*, the parties entered into an oral agreement permitting the landlord to store firewood on a portion of the premises in exchange for a reduction of rent.¹⁰² When one of the tenants decided that it no longer wished to continue with the arrangement it withheld rent after the landlord refused to remove the firewood.¹⁰³

The Court of Appeals reasoned that the storage of the firewood was a mere trespass, as opposed to an actual or constructive eviction.¹⁰⁴ Thus, the tenant improperly withheld rent because there had been neither a physical exclusion from the premises (actual eviction) nor a substantial deprivation of use and enjoyment of the property (constructive eviction).¹⁰⁵

Instead, the dissent relied on *Fifth Ave. Bldg. Co. v. Kernochan*¹⁰⁶ and its progeny.¹⁰⁷ In *Kernochan*, a full rent abatement was granted because the tenant had been denied access to a portion of a vault located in the basement after the City of New York revoked its license.¹⁰⁸ Judge Cardozo succinctly stated that where “an eviction, though partial only, is the act of the landlord, it suspends the entire rent because the landlord is not permitted to apportion his own wrong.”¹⁰⁹ This holding was reaffirmed by the Court of Appeals

⁹⁸ *Id.* at 252-56 (Read, J., dissenting).

⁹⁹ *Id.* at 251-53, 256.

¹⁰⁰ 31 N.Y. 514 (N.Y. 1865).

¹⁰¹ *Eastside Exhibition Corp.*, 965 N.E.2d at 252 (Read, J., dissenting); *Lounsbury*, 31 N.Y. at 515.

¹⁰² *Lounsbury*, 31 N.Y. at 514-15.

¹⁰³ *Id.* at 515.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 515-16.

¹⁰⁶ 117 N.E. 579 (N.Y. 1917).

¹⁰⁷ *Eastside Exhibition Corp.*, 965 N.E.2d at 246.

¹⁰⁸ *Fifth Ave. Bldg. Co.*, 117 N.E. at 580.

¹⁰⁹ *Id.*

more than fifty years later in *Barash v. Pennsylvania Term. Real Estate Corp.*¹¹⁰

Alternatively, the dissent asserted that even if the steel-bracing did not amount to a partial actual eviction, the court still should have addressed the landlord's trespass which, unlike the transitory intrusion in *Lounsbery*, was "permanent in nature."¹¹¹ In sum, Judge Read believed the result was inequitable and unjust because a commercial tenant, who previously could withhold rent no matter how trivial the unlawful taking, now may be left with no recourse where it continues to operate its business.¹¹²

2. *The Conflation of Actual and Constructive Evictions*

The dissent further contended that the majority "conflates actual and constructive eviction" because there was no requirement on the part of Eastside to demonstrate an infringement upon its use and enjoyment of the premises.¹¹³ This reasoning stems from longstanding precedent that a partial actual eviction, regardless of how trivial or seemingly insignificant, is deemed to be an infringement of such rights.¹¹⁴

The dissent cited *Dyett v. Pendleton*,¹¹⁵ another opinion from the early nineteenth century, which incidentally the majority also relied upon to substantiate this point.¹¹⁶ In *Dyett*, the court reasoned that a partial actual eviction is considered a violation of the tenant's beneficial enjoyment of the premises that warrants the withholding of rent.¹¹⁷ The court specifically held:

[A] tenant shall not be required to pay rent, even for the part of the premises which he retains, if he has been evicted from the other part by the landlord. As to the part retained, this [meaning the physical expulsion

¹¹⁰ 256 N.E.2d 707, 710 (N.Y. 1970) (holding that "[i]n the case of actual eviction, even where the tenant is only partially evicted, liability for all rent is suspended although the tenant remains in possession of the portion of the premises from which he was not evicted").

¹¹¹ *Eastside Exhibition Corp.*, 965 N.E.2d at 254 (Read, J., dissenting).

¹¹² *Id.* at 251.

¹¹³ *Id.* at 253.

¹¹⁴ *Id.* at 254.

¹¹⁵ 8 Cow. 727 (N.Y. 1826).

¹¹⁶ *Eastside Exhibition Corp.*, 965 N.E.2d at 253-54 (Read, J., dissenting).

¹¹⁷ *Dyett*, 8 Cow. at 731.

or exclusion] is *deemed* such a disturbance, such an injury to its beneficial enjoyment, such a diminution of the consideration upon which the contract is founded, that the law refuses its aid to coerce the payment of any rent.¹¹⁸

To sum up the dissent's perspective, "a physical expulsion or exclusion is, by definition, nontrivial."¹¹⁹

3. *The Decision Should Not Be Applied Retroactively*

The dissent further considered the *de minimis* exception to be such a dramatic deviation from established precedent that the court, at minimum, should have refrained from applying its ruling "to any litigation arising out of commercial leases entered into *before* [the court's] decision."¹²⁰ This, in the dissent's opinion, would be fair and just considering the number of existing commercial leases in which the parties negotiated their agreements with the understanding that any physical expulsion or exclusion would result in the suspension of the entire rent.¹²¹ As a consequence, the parties may have negotiated different terms had they known a *de minimis* taking by the landlord was permitted.¹²²

Furthermore, it is worth noting that Eastside may not only be obligated to pay the nine years of rent that it withheld, but it may further be liable for interest and perhaps attorney's fees, if the parties' agreement included such relief.¹²³ Although a tenant cannot reasonably expect to occupy another's property without paying rent, the dissent contended that the severe potential financial consequences for Eastside's withholding of rent warranted a delay in implementation.¹²⁴

¹¹⁸ *Eastside Exhibition Corp.*, 965 N.E.2d at 253-54 (Read, J., dissenting) (alteration in original) (quoting *Dyett*, 8 Cow. at 731).

¹¹⁹ *Id.* at 254.

¹²⁰ *Id.* at 256.

¹²¹ *Id.* at 256-57.

¹²² *Id.* at 255.

¹²³ *Eastside Exhibition Corp.*, 956 N.E.2d at 256 (Read, J., dissenting).

¹²⁴ *Id.* at 256-57. The dissent opined that the court's ruling was such a " 'sharp break in the continuity of the law' that [its] 'retroactive application should be eschewed.' " *Id.* at 257 (quoting *Gager v. White*, 425 N.E.2d 851, 854 (N.Y. 1981)).

IV. THE IMPACT ON OTHER CASES

The obvious question is: how will the decision impact landlords and tenants going forward? In addition, questions as to the scope and breadth of the court's ruling, and whether the *de minimis* exception applies to residential leaseholds are bound to arise. Although the answers will not be known until these issues work their way through the courts, there are some discernible trends and notable impacts.

A. Litigation Strategy

As a result of the decision, there are now severe potential consequences to the tenant's withholding of rent following a partial actual eviction. From a litigation strategy vantage point, the tenant will have to weigh the risks in the event a court finds the landlord's taking to be *de minimis*. As demonstrated in *Eastside Exhibition Corp.*, an improper withholding of rent for even a trivial taking may not only result in an award in favor of the landlord, but may further subject the tenant to additional costs and expenditures, including late fees, statutory interest and attorney's fees where included within the lease.¹²⁵

The difficulty for counsel and the parties is the uncertainty as to how much of the premises the landlord is permitted to take and still collect the rent. The court provided no guidelines or instructions, but instead found that these questions are to be decided on a case-by-case basis.¹²⁶ Until then, it is feasible that tenants may feel compelled to continue to pay rent notwithstanding the expulsion for fear of these additional costs.¹²⁷ Prior to *Eastside Exhibition Corp.*, the

¹²⁵ See *Henry v. Simon*, 890 N.Y.S.2d 369, 369 (App. Term 2d Dep't 2009) (concluding that attorney's fees are unrecoverable in a summary proceeding where they are not deemed "additional rent" in the lease).

¹²⁶ See *Eastside Exhibition Corp.*, 965 N.E.2d at 250 (listing the actions taken by the landlord that will likely result in a rent abatement).

¹²⁷ *Id.* at 255-56 (Read, J., dissenting). But see, e.g., *Burke v. Aspland*, 867 N.Y.S.2d 759, 761 (App. Div. 3d Dep't 2008) (noting that damages other than "rent due" are not recoverable in a summary proceeding); *Wilsdorf v. Fairfield Northport Harbor, LLC*, 950 N.Y.S.2d 494, 494 (App. Term 2d Dep't 2012) (finding that a lease provision charging "10% of the monthly rent" as late fee is an unenforceable penalty in a residential property); *Saunders St. Owners, Ltd. v. Broudo*, 936 N.Y.S.2d 61, 61 (App. Term 2d Dep't 2011) (stating that sublet fees are *not* recoverable in a summary proceeding where the fees were not listed as "additional rent" in the lease); *Walden Ctr. Assoc., L.P. v. Cardenas*, 930 N.Y.S.2d 177, 177 (App. Term 2d Dep't 2011) (holding that expenses identified within the lease as "additional rent" may *not* be recovered in a summary proceeding where they had not yet been incurred);

simplest route was to withhold the rent where the landlord unlawfully intruded upon even a minimal portion of the premises.¹²⁸ Today, this is no longer necessarily the case.¹²⁹ To the contrary, there are significant risks to withholding rent following a minimal exclusion.¹³⁰

B. Residential Properties

It remains to be determined whether the *de minimis* exception will be extended to residential leaseholds.¹³¹ The court expressly framed the issue as “whether a minimal and inconsequential retaking of space that has been leased to a *commercial* tenant constitutes an actual partial eviction relieving the tenant from all obligation to pay rent.”¹³²

At least one court, however, has since weighed in on the issue in a residential case. In *Paskov v. Kreshitichki*,¹³³ an Appellate Term within the Second Judicial Department reversed a trial court’s award of twenty-five percent rent abatement after the tenant was denied access to the backyard.¹³⁴ Citing *Eastside Exhibition Corp.*, the Appellate Term held that since “this deprivation was not *de minimis* . . . it constituted a partial actual eviction and discharged [tenants] from all liability for rent accruing after the eviction, for as long as the eviction

Henry, 890 N.Y.S.2d at 369 (noting that additional expenses will not be recoverable in a summary proceeding to the extent reasonable and where they have not been delineated within the rental agreement as “additional rent”).

¹²⁸ *Eastside Exhibition Corp.*, 965 N.E.2d at 249.

¹²⁹ See, e.g., *N.Y.C. Hous. Auth. v. Torres*, 403 N.Y.S.2d 527, 529 (App. Div. 1st Dep’t 1978) (recognizing that where the landlord prevails in a non-payment summary proceeding, the tenant may still stave off eviction should it tender payment of the full amount awarded prior to the issuance of the final judgment of possession and the warrant of eviction and provided the tenant offers to satisfy the award in this manner, the landlord must accept the monies and the tenancy continues); *Peekskill Hous. Auth. v. Quaintance*, 864 N.Y.S.2d 668, 669 (App. Term 2d Dep’t 2008) (holding that if tenant tenders the full amount of rent owed prior to the entry of judgment, eviction is stayed and tenancy continues); STEPHEN L. UKEILEY, *THE BENCH GUIDE TO LANDLORD & TENANT DISPUTES IN NEW YORK* 5-9, 13-16 (2011) (discussing the differences between the “award” and “entry” of judgment and the award of rent and “added rent” that may be recovered in a non-payment summary proceeding).

¹³⁰ *Eastside Exhibition Corp.*, 965 N.E.2d at 255-56 (Read, J., dissenting).

¹³¹ See *id.* at 250 (majority opinion) (“Given the inherent inequity of a full rent abatement under the circumstances presented here and modern realities that a *commercial lessee* is free to negotiate appropriate lease terms, we see no need to apply a rule, derived from feudal concepts, that any intrusion—no matter how small—on the demised premises must result in full rent abatement.”) (emphasis added).

¹³² *Id.* at 247 (emphasis added).

¹³³ 954 N.Y.S.2d 760 (App. Term 2d Dep’t 2012).

¹³⁴ *Id.*

continued.”¹³⁵ Since the trial court failed to make a finding as to the duration of the eviction, the matter was remitted to the lower court for a new trial.¹³⁶

V. CONCLUSION

While the full impact of *Eastside Exhibition Corp.* remains to be determined, the immediate effect is that the law in New York continues to permit the withholding of rent as a result of a partial actual eviction.¹³⁷ However, it is no longer the case that all physical expulsions or exclusions from a commercial property constitute a partial actual eviction.¹³⁸ Instead, the Court of Appeals has determined that a *de minimis* taking is *not* a partial actual eviction at all.¹³⁹

The Court of Appeals did not impose a bright line rule but rather held that each case would be decided on its own particular set of facts.¹⁴⁰ Accordingly, litigation is looming and the evolution of the case law should be telling.

In any event, practitioners representing both landlords and tenants will undoubtedly be challenged to advise their respective clients accordingly. From the landlord’s perspective, a physical expulsion is still unlawful.¹⁴¹ From the tenant’s perspective, if only a minimal expulsion occurs, the decision whether to withhold the rent or sue for damages has been made increasingly more difficult. Regardless, all involved should be keenly aware that in New York, a *de minimis* exception exists for trifles and trivialities.¹⁴²

¹³⁵ *Id.* (emphasis added).

¹³⁶ *Id.*

¹³⁷ *Eastside Exhibition Corp.*, 965 N.E.2d at 249.

¹³⁸ *Id.* at 247.

¹³⁹ *Id.* at 250.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 252.

¹⁴² *Eastside Exhibition Corp.*, 965 N.E.2d at 250.