

Question 1

Larry leased in writing to Tanya a four-room office suite at a rent of \$500 payable monthly in advance. The lease commenced on July 1, 2006. The lease required Larry to provide essential services to Tanya's suite. The suite was located on the 12th floor of a new 20-story office building.

In November Larry failed to provide essential services to Tanya's suite on several occasions. Elevator service and running water were interrupted once; heating was interrupted twice; and electrical service was interrupted on three occasions. These services were interrupted for periods of time lasting from one day to one week. On December 5, the heat, electrical and running water services were interrupted and not restored until December 12. In each instance Tanya immediately complained to Larry, who told Tanya that he was aware of the problems and was doing all he could to repair them.

On December 12, Tanya orally told Larry that she was terminating her lease on February 28, 2007 because the constant interruptions of services made it impossible for her to conduct her business. She picked the February 28 termination date to give herself ample opportunity to locate alternative office space.

Tanya vacated the suite on February 28 even though between December 12 and February 28 there were no longer any problems with the leased premises.

Larry did not attempt to relet Tanya's vacant suite until April 15. He found a tenant to lease the suite commencing on May 1 at a rent of \$500 payable monthly in advance. On May 1, Larry brought suit against Tanya to recover rent for the months of March and April.

On what theory could Larry reasonably assert a claim to recover rent from Tanya for March and April and what defenses could Tanya reasonably assert against Larry's claim for rent? Discuss

Answer A to Question 1

Larry v. Tanya

In the lawsuit between Larry and Tanya regarding their lease of the office building that commenced on July 1, 2006, the following are the salient points that Larry will assert and Tanya will defend.

First, the lease was a tenancy for years. Second, there were no Breach of Covenants to give rise to a right of termination. Third, the termination was ineffective because it was not in writing.

Each of these points and defenses are addressed in detail.

I. The Tenancy

The first issue is to determine the tenancy created.

Tenancy by Years

Under this type of tenancy there is a fixed date of termination with no notice required to end the arrangement. It expires at a specified time.

In this case, the lease between Larry and Tanya simply stated that a rent was to be paid monthly in advance. There is no mention of a fixed date of termination.

Therefore, a tenancy by years was not created.

Periodic Tenancy

A periodic tenancy is one that continues for a specific period – week/week; month/month – until it is effectively terminated.

Termination requires written notice of at least one month prior in case of a month-month lease and the lease must end at a natural lease period.

In this case, a periodic tenancy was created since the lease called for payment of a monthly rent of \$500 in advance and did not have a fixed termination date.

Therefore, the lease is a periodic tenancy.

II. Termination

The next issue is to determine whether the termination of the lease by Tanya was effective on February 28. If it was then she will not be liable for rent for March and April.

Tanya can assert termination based on 1.) Valid notice, 2.) Breach of Covenants, 3.) Constructive eviction.

Valid Notice

To terminate a month-month lease valid notice of at least one month is required in writing. The lease must also end at a natural lease period.

In this case, Tanya orally told Larry she was terminating her lease on February 28. She did this on December 12. While the length of the notice was sufficient because it was given at least a month prior to the termination, Larry will argue that it was effective since it was not given in writing.

As such, Larry will argue that since the notice was ineffective to terminate the lease Tanya could not have moved out on February 28 and remains liable for the rent of March and April.

In conclusion, there was no valid notice.

Surrender

Surrender occurs when a tenant abandons the tenancy and the landlord takes possession and control of the premises.

However, a landlord may move in and attempt to relet the premises on behalf of the tenant, which will not result in a surrender.

In this case, Tanya will argue that Larry accepted surrender due to his delayed attempt in finding a substitute tenant. Larry did not move in and try to relet the premises immediately, but let six weeks elapse, after which he decided to relet.

However, Larry will argue that he did nothing to accept surrender since he did not exercise control enough and was simply reletting on Tanya's behalf.

In conclusion, surrender will not likely work.

Constructive Eviction

Constructive eviction occurs when:

1. there is a condition on the premise that makes it uninhabitable.
2. the landlord knows or should have known about the condition.
3. the landlord fails to remedy the condition.
4. the tenant moves out within a reasonable time.

Conditions

In this case, Tanya will point out to the following conditions that made habiting the premises unreasonable.

First, interruption of water. This is an essential service that Larry agreed to provide that was interrupted frequently. This happened once in November and during the week between December 5 and December 12 the interruption lasted for one entire week.

Second, interruption of elevator service. Tanya is on the 12th floor of a 20 story office building which makes the elevator service essential to the lease since trekking twelve floors is an unreasonable condition in a commercial building.

Third, interruption of heat and electricity. These services were interrupted frequently and once for as long as one whole week.

These constant interruptions of services made it impossible for Tanya to conduct her business.

Larry's Knowledge

Additionally, Tanya informed Larry immediately about the conditions and he admitted he was aware about them and doing everything he could to repair.

Larry Remedied the Situation?

However, Larry will argue that he fixed the problems and therefore Tanya no longer had a claim to constructive eviction. Ever since December 12 up to February 28, for an entire six weeks there were no longer any problems in the leased premises.

Did Tanya move out in a reasonable amount of time?

Furthermore, Larry will point out that Tanya did not move out within a reasonable time since she waited six weeks.

She gave herself this amount of time to give herself ample opportunity to locate alternative office space.

This behavior is contrary to the contention that the premises were in such bad condition and that Tanya moved out within a reasonable time.

Implied Warranty of Habitability

This doctrine only applies to residential leases. Under this doctrine a landlord warrants that the premises are suitable for human habitation.

However, the lease between Tanya and Larry is for an office suite, which is commercial in nature, and as such this doctrine is inapplicable.

Breach of Covenants – Right to Termination of Lease

Tanya could also possibly terminate the lease if the breach of any covenants gives her the right to do so under the terms of the lease.

Usually, the covenants between the landlord and tenant are independent, making the breach by one giving rise simply to damages, and not a right to terminate.

However, in this case, Larry breached his covenant to provide essential services, by failing to supply running water, heat, electricity for a period as long as one week. Therefore, under the terms of the lease Tanya may have a right to terminate.

III. Damages

Finally, if Tanya is unsuccessful in arguing that she had a right to terminate the lease she will try and lessen her damages by pointing that Larry did not mitigate his damages.

A landlord has a duty to mitigate damages by promptly reletting the premises.

In this case, Larry knew that Tanya was going to be gone by February 28. However, he did nothing to relet the premises until April 15, which is a duration of six weeks.

It only took Larry two weeks to find a new tenant when he decided to relet.

If he had done so earlier he could have relet the premises for April.

Therefore, Tanya should not be liable for rent for April.

Answer B to Question 1

1. Larry's claim against Tanya for March and April rent

Rental Agreement

Larry and Tanya entered into a written lease agreement. A periodic tenancy is a lease agreement in which the tenancy is for periods of time as determined by the cycle of payments. A periodic tenancy can be created expressly, by written agreement, or by implication. Moreover, a periodic tenancy can be terminated by providing the landlord with notice of intent to terminate the lease, in which the notice is given to the landlord at least one period in advance.

Here, Larry and Tanya entered into a lease agreement for a month-to-month lease, with rent payable at \$500 monthly. Moreover, although the landlord need not assume general repairs for the tenancy space, here Larry agreed to provide essential services to Tanya's suite. This lease agreement is valid.

Tanya's proper termination?

To terminate a periodic tenancy, the tenant must provide a reasonable period of notice, at least one period in advance. The termination notice must be in writing. Larry argues that Tanya's attempt to terminate the lease was improper because she orally terminated the lease, rather than provided written notice of her intent to terminate the lease. As a result, if the termination notice should have been in writing, Tanya's termination was improper.

Failure to pay rent – Abandonment

Larry will argue that he is entitled to the rent. A tenant has a duty to pay rent. Where a tenant fails to pay rent and abandons the premises, a landlord may treat the abandonment as a subrent, relet and sue the tenant for damages, and in some minority jurisdictions can ignore the abandonment and sue for damages without attempting to relet the apartment. Here, Tanya failed to pay the rent for the months of March and April. Therefore, Larry will claim that Tanya breached the lease agreement.

2. Tanya's Defenses

Implied warranty of habitability

Tanya may first attempt to argue that the landlord has breached the implied warranty of habitability. The implied warranty of habitability warrants that the premises are suitable for human habitation and basic needs. Where this warranty has been breached, the tenant can choose to move out, repair and deduct the rent from future payments, remain on the premises and sue for damages, or reduce the rent payments. However, the implied warranty of habitability has been held to apply only to residential leaseholds. Here, Tanya is renting a four-room office suite on a 20-story office building. As a result,

because this is clearly not a residential lease but instead a commercial lease, this defense will not resonate with the courts.

Implied warranty of quiet enjoyment

Constructive Eviction

Tanya will argue that Larry breached the implied warranty of quiet enjoyment. The implied warranty of quiet enjoyment is an implied warranty that the landlord will not interfere unreasonably with the tenant's use and possession of the premises. This warranty can be breached by both an actual and a constructive eviction. To make a claim for a constructive eviction, and for this warranty to be breached, there must be substantial interference caused by the landlord (or of which the landlord had noticed but failed to act), the tenant must provide notice of the interference and problems, and then the tenant must move out immediately. Where this warranty is breached and a constructive eviction has occurred, the tenant may leave immediately and terminate all future payments of rent.

Here, Larry's failure likely reached the level of substantial interference with Tanya's use. Tanya for many days did not have running water, clearly an essential service. In fact, this occurred at least more than once and occurred for periods of up to one week. Moreover, Tanya was deprived of heat during the winter months of November and December, making it difficult to use the premises without Tanya making substantial sacrifices for warmth. The electrical services were interrupted on three occasions, sometimes lasting for a week: in a commercial office building, failure to have electrical services clearly makes running an office or other commercial space difficult. She would likely have been unable to run the computers, printers, and other important office equipment necessary for the functioning of a viable office environment. As a result, it is likely that there was substantial interference with Tanya's use and possession. Larry may attempt to point out that Tanya did not leave the apartment until months after these problems, suggesting that Tanya was okay with the interference and that it did not disrupt her business substantially. Nevertheless, on this prong, it is clear that weeks without heat and services are clearly substantial interference.

Here also Tanya made complaints to Larry. They were timely: she made them immediately. And she made them in each instance after each particular problem. Larry was clearly on notice. Although Larry will attempt to claim that he "was doing all he could to repair them," and that he was therefore not responsible for the failures, the facts nevertheless suggest (as in the paragraph before) that Larry's failure to take action or improve the situation resulted in a substantial interference.

As mentioned above, the tenant must move out immediately. Here, Larry may attempt to claim that Tanya did not move out within a fast enough period of time. Tanya was apparently fed up with the failures to provide essential services on December 12, yet she failed to leave her office suite until February 28, 2007. This suggests that perhaps the interference was not that substantial. Moreover, it also suggests that there was not indeed a constructive eviction. However, Tanya will point to the need to find alternative office

space. She will argue that, although there was substantial interference with her ability to use her commercial space, still having some space was better than not having any at all. Nevertheless, Larry may have a good claim that this was not indeed a constructive eviction because this element was not met. Tanya did not leave her apartment immediately, and therefore cannot claim a constructive eviction.

As a result, given Tanya's failure to move out immediately, a court may find that Tanya cannot defend that she was constructively evicted.

Breach of Contract

Tanya will claim that by failing to provide essential services, Larry breached his lease agreement, which is a breach of contract. A landlord and his tenant are in contractual privity. Although a landlord at common law did not have duty to repair the leased office space, a landlord can specifically contract to provide such repairs. Where the landlord provides such repairs, he will be liable for any unreasonable failures to do so. Where the express promise to repair does not occur, the failure will be deemed a breach, especially where the tenant to receive her benefit of the bargain.

Here, Larry contractually agreed in the lease agreement to provide essential services to Tanya's suite. Larry failed to provide essential services as required. Given that Tanya was on the 12th floor of the office building, clearly elevator service would be essential to running an office in a commercial space. Moreover, heat (especially in the winter months of December and November) and running water are essential services, as they are necessary for mere basic human habitation. These failures occurred regularly and for extensive periods of time. As a result, Tanya will be able to claim a breach of the contract.

Independent Conditions?

However, promises in the lease agreement are deemed to be independent. As a result, a breach of one condition generally does not relieve the tenant or landlord of the other obligations in the rental agreement. Here, Larry will argue that although he may have failed to provide some of the essential services, this does not in and of itself relieve Tanya of her obligation to pay rent. Instead, Larry will argue, Tanya had a responsibility to continue to pay rent and sue for any damages she may have suffered.

If Larry is successful on this argument, and indeed Tanya should have continued to pay rent, then Tanya will claim that Larry failed to mitigate his damages.

Failure to Mitigate

Tanya will claim that, even if she had a duty to continue to pay rent, Larry failed to mitigate his damages. Damages for failure to pay rent will be awarded where the damages are foreseeable, causal, unavoidable, and certain. Unavoidable requires that the non-breaching party take reasonable steps to mitigate any losses he may have suffered. Where a person has abandoned the premises and fails to pay rent, the landlord must

attempt to relet the apartment. Then, it will be appropriate for the landlord to sue for the difference between the initial lease payments and the payments made by the reletter, as well as any incidental damages.

Here, Tanya will claim that Larry failed to take reasonable steps to mitigate. Although Larry was aware on December 12 that he would need to find a new tenant on February 28 – more than a month and a half away – Larry still failed to attempt to relet Tanya's vacant suite until mid-April. Therefore, although Larry had substantial lead-time, he waited more than a month after Tanya vacated to even attempt to find someone else. Moreover, the second he attempted to find someone else, he was able to, as evidenced by the fact that between April 15 and May 1, he had already found a new occupant. Given the immediacy with which he was able to find a new tenant, and given the fact that he also had a month and a half of lead time before Tanya moved out, Tanya will win on her claim that Larry failed to mitigate his damages.

As a result, even if Tanya is liable for some of the rent on the arguments above, Tanya will not be required to pay the full rental price.