

SQUARE FEET

When the Welcome Mat Wears Out

By ALISON GREGOR

Because of a recent state court ruling, the man who came to dinner — or his equivalent among office tenants in New York City — may be presented with a rather hefty bill for damages.

On Dec. 28, the Appellate Division, First Department, of the New York State Supreme Court upheld a lower court's decision involving an office tenant, Tahari Ltd., a fashion company. Tahari had overstayed its lease for 18 months on the coveted top floor of the 48-story Grace Building at Avenue of the Americas and 42nd Street, and the court ruled that it was liable for damages to the incoming tenant, Kronish Lieb Weiner & Hellman, a law firm.

The next phase of the case — which was the first in New York to find an outgoing office tenant liable to an incoming one for trespass — will include a trial to determine damages owed to the law firm, now called Cooley Godward Kronish. The firm is asking for about \$1 million plus interest.

More important, the ruling may cause office tenants to think twice about overstaying their welcomes, or "holding over" in their spaces, said Todd E. Soloway, a partner at Pryor Cashman Sherman & Flynn, which represented Kronish Lieb Weiner & Hellman.

"The court has determined that outgoing tenants, in addition to being liable to the landlord for the fair market rental value of the space, also face the potentiality of liability to the incoming tenant," Mr. Soloway said. "That makes it much more risky for tenants to stay beyond the expiration of their term."

The current tenant-friendly legal system in New York makes it easy for office tenants to hold over, lawyers said. Frequently, tenants, particularly smaller ones, have good reason to do so. They might delay a move when renovations of their new space have not been completed or if negotiations for a new space fall apart at the last minute, said Stuart Lilien, an executive vice president of the Lansco Corporation, a brokerage firm that specializes in representing tenants.

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"There are thousands of leases done every year in New York City, so holdovers are not infrequent," Mr. Lilien said.

Yet the case of Tahari was unusual, even in New York City, because the company lingered long after the expiration of its lease. Tenants that hold over typically do so for weeks or, at most, a couple of months, not 18 months, brokers said.

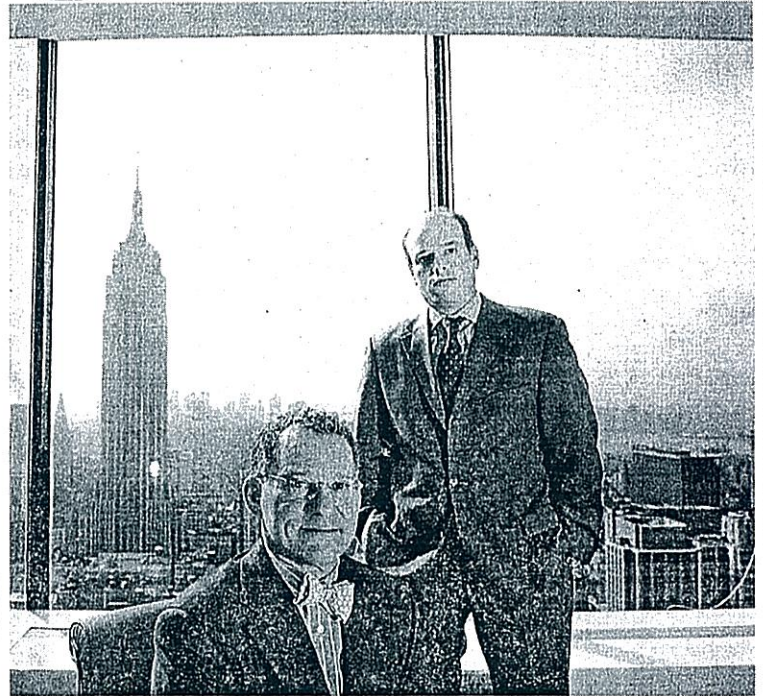
According to court documents, Tahari grew attached to its 48th floor space, which overlooks Bryant Park and has views of both the East and Hudson Rivers. But Kronish Lieb, which was on the 46th and 47th floors, had exercised an option in 2001 to expand to the top floor when it was scheduled to become available on June 1, 2003.

Notwithstanding that arrangement, Tahari did not move out when its lease expired. The landlord, Trizec Properties Inc. of Chicago, sued in June 2003 to evict Tahari, but the fashion company fought back, and was not expelled from the space until December 2004, when an appellate court denied Tahari's appeal of an eviction order.

That same month, in an unusual move, Kronish Lieb sued Tahari, not for violation of contract as would typically be the case between a tenant and landlord, where a contract exists, but for the damages caused by trespass.

This approach was novel, Mr. Soloway said, although it had been used in a couple of cases, one involving commercial real estate in 1948. "In those cases, the court talked about the fact that people need commercial certainty," Mr. Soloway said. "They need to know they can move into the space, because if not, it can create a whole ripple effect of people not being able to move in. In a place like New York City, where it's a busy real estate market, there's a risk of that happening."

Kronish Lieb said that it suffered monetary damages, including having to lease temporary space and operate out of two sites and having to pay inflated construction costs to



Jennifer S. Altman for The New York Times

Alan Levine, left, of Cooley Godward Kronish, with the lawyer Todd Soloway. Mr. Levine's firm sued the ex-tenant of its top-floor space.

build out the 48th floor space almost two years after its scheduled occupancy.

Tahari's lawyer, David Rozenholz, said he hoped to appeal the decision to the New York State Court of Appeals.

Mr. Rozenholz said he believed the ruling's effect on the New York City office market would be minimal. "Even if the decision stands, it's a rather unusual set of circumstances that led to this cause of action, which would have very little effect on most landlord-tenant relationships," he said.

Others in the industry disagreed. Ted R. Jadwin, the general counsel for Trizec Properties, said the decision would compel tenants to contemplate being sued if they do not vacate on time.

"The good news is tenants can't game the system and just stay there and try to negotiate a better deal, because they know they've got the landlord over a barrel," he said.

Douglas Durst, a co-president of the Durst Organization, said last month that his company had signed a 15-year lease with Tahari to occupy 29,674 square feet of space on the

50th floor of the Bank of America Tower at One Bryant Park, which Durst is currently developing.

Mr. Durst said he wasn't worried about leasing to Tahari. "We've given ourselves protection in case he does decide to hold over," he said, though he would not disclose the terms of the lease.

Still, Mr. Durst said the ruling would give landlords more leverage in negotiating with tenants.

Mr. Jadwin said negotiations between landlords and tenants could be affected in many ways. "If you're the person moving somewhere else, you have to push harder for your new landlord to commit to the new space being ready, so you don't get caught at the other end of a trespass suit," he said.

Mr. Lilien of Lansco speculated that the decision might induce insurance companies to offer a new product. "The insurance companies will come along and structure some type of an insurance policy for tenants who have to overstay due to unforeseen events," he said, "so they won't be liable to the incoming tenant and all the other tenants lined up behind him that can't move."