

# LAW TODAY

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## LANDLORD'S LIENS FOR UNPAID RENT VS. TENANT'S CREDITORS: WHO HAS PRIORITY?

By Glenn R. Reiser, Esq.  
February, 2005

New Jersey statutory law grants commercial landlords limited lien rights against a tenant's goods and chattels located upon the demised premises to satisfy certain rental arrearages. Such liens do not exist at the inception of the lease agreement, but rather come into existence only when the tenant defaults in its rent obligation under the lease.

There are several scenarios where a landlord's statutory lien claims may conflict with the lien claims of the tenant's other creditors, including secured creditors, particularly in situations where the tenant is insolvent. Therefore, parties negotiating commercial lease agreements, as well as vendors leasing and/or financing equipment and machinery to commercial tenants, must be cognizant of the landlord's statutory lien remedies.

This article examines pertinent New Jersey laws that address landlord's liens vis-à-vis the claims of other creditors and interested parties of the tenant. The use of contractual provisions to establish a landlord's lien and an enforceable security interest is briefly discussed in the context of guarding against a tenant's future bankruptcy filing.

### I. LANDLORD'S LIENS IN GENERAL

Two New Jersey statutes expressly give a commercial landlord a lien over its tenant's goods and chattels to the extent of unpaid rent: N.J.S.A. 2A:42-1 et seq., and N.J.S.A. 2A:44-



166. Whereas the latter statute is generally confined to landlord/tenant relationships where the tenant uses the premises for manufacturing purposes, the former statute generally applies to the standard commercial tenancy. In addition, landlord's lien rights may arise by contract in the lease itself.

#### A. N.J.S.A. 2A:42-1

A landlord's lien arising under N.J.S.A. 2A:42-1 provides the landlord with a lien against the tenant's goods and chattels located upon the leased premises to the extent of 1 year's rental arrearages. By the statute's express terms, if a tenant is in default of its rent obligations to its landlord then any execution or judgment creditor of the tenant is prohibited from removing any of the tenant's goods or chattels from the premises unless the creditor pays the landlord for rental arrears

not to exceed 1- year's rent. "The landlord's lien arising under N.J.S.A. 2A:42-1 is not a lien that arises at the inception of the lease," and indeed "is not a lien at all but rather a statutory right to preference in payment over other creditors." *Hartwell v. Hartwell Co., Inc.*, 167 N.J. Super. 91, 97 (Ch. Div. 1979).

In *Farmers & Merchants Nat'l Bank v.*

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(continued from cover)

Boyman, 155 N.J. Super. 120, 124 -125 (Law Div. 1977), the court emphasized that the statute does not prohibit a tenant from disposing of its goods and chattels, but rather preserves the landlord's right to recoup a year's worth of unpaid rent from the tenant's goods and chattels over the competing claims of the tenant's execution creditors.

## **B. N.J.S.A. 2A:44-166**

The Loft Act, N.J.S.A. 2A:44-165, et seq., also provides for a landlord's lien. See N.J.S.A. 2A:44-166. Specifically, landlord's liens arising under the Loft Act are limited to tenants operating commercial premises for manufacturing purposes. Hartwell, 167 N.J. Super. at 99, n.1. Whereas N.J.S.A. 2A:42-1 provides for a landlord's lien to the extent of 1-year's unpaid rental arrears, N.J.S.A. 2A:44-166 limits a landlord's lien for rental arrears to 6-months.

Landlords and their attorneys should be mindful of the Loft Act because a landlord's lien arising under N.J.S.A. 2A:44-166 has priority over any lien or mortgage created after the machinery or chattels are placed in the leased premises, including priority over the lien of secured creditors whose liens were created or acquired after their machinery or chattels are placed in the premises. Hartwell, 167 N.J. Super. at 99, n. 1, citing *In re Holly Knitwear, Inc.* 140 N.J. Super. 375, 383 (App. Div. 1976). However, the same priority rule does not apply to a landlord's liens arising under N.J.S.A. 2A:42-1. Hartwell, 167 N.J. Super. at 99 at n. 1.

## **C. Contractual Landlord's Lien**

A landlord's lien can also exist by contract. In fact, real estate leases can include express provisions granting the landlord a security interest in a tenant's personal property, even to after acquired property. Such a lease, in effect, serves as a security agreement for the tenant's lease obligations and can be perfected by following the rules of Article 9 of the New Jersey Uniform Commercial Code ("UCC"), including the filing of financing statements.

One requirement under the UCC is that the collateral must be reasonably described. A second requirement is that the lien be perfected. Under the revised UCC, a landlord may file an unsigned financing statement if the tenant authorizes the filing in the lease or has otherwise granted its landlord a security interest. This allows landlords to correct prior missteps without requesting the tenant's signature.

## II. PRIORITY OF LANDLORD'S LIENS

### **A. Statutory Landlord's Liens vs. Secured Creditors**

Whereas contractual landlord's liens can be perfected under UCC Article 9, statutory landlord's liens established pursuant to either N.J.S.A. 2A:42-1 or N.J.S.A. 2A:44-166 are considered to be outside the scope of Article 9 by its express terms (Reference Rev. Article 9-109(d)(1) and Former Article 9-104(b)).

A landlord's lien established under N.J.S.A. 2A:42-1 is subordinate to a security interest perfected in accordance with the Uniform Commercial Code. Hartwell, 167 N.J. Super. at 100-101. This principle is derived from New Jersey cases decided before enactment of the Uniform Commercial Code (or pre-Code law). *Id.* (internal citations omitted).

However, as previously mentioned, a landlord's lien arising under the Loft Act (N.J.S.A. 2A:44-166) has priority over secured creditors whose security interest was "created or acquired after machinery or other chattels are placed in the premises." *Id.* The Appellate Division affirmed this principle in *Holly Knitwear*, 140 N.J. Super. at 387

A landlord's lien rights under the Loft Act will inevitably impede a tenant's ability to obtain outside funding to run its business and/or lease/finance expensive equipment. For this reason, it is common practice for vendors and equipment lessors to demand that the landlord execute a written agreement either waiving or subordinating the landlord's lien claims to the lien rights of the creditor with respect to the equipment to be placed upon or within the premises. Where a good relationship exists between a tenant and its landlord, and for practical business reasons, the landlord will often execute a landlord's lien waiver thus enabling the lender or equipment lessor to obtain first priority lien position in the specified collateral.

### **B. Priority of Statutory Landlord's Lien vs. Asset Purchasers**

In *Schlüssel v. Emmanuel Roth Co.*, 270 N.J. Super. 628 (App. Div. 1994), the court held that a purchaser of business assets acquired the assets subject to the landlord's statutory lien for unpaid rent pursuant to N.J.S.A. 2A:44-165 to 2A:44-167. In *Schlüssel*, where it was undisputed that at the time of the asset purchase closing the tenant owed the landlord back rent totaling \$10,622.00, the court held

that as of the date the assets were transferred the tenant's assets were impressed with a Loft Act lien equal to the unpaid rent and the purchaser "took those assets subject to that lien." 270 N.J. Super. at 649 (internal citation omitted).

### **C. Priority of Statutory Landlord's Lien in Tenant's Bankruptcy Proceedings**

In the context of federal bankruptcy proceedings, a landlord's statutory lien rights under New Jersey statutory law is trumped by the trustee's or debtor-in-possession's lien avoidance rights pursuant to 11 U.S.C. § 545(3). This Bankruptcy Code section allows the trustee or debtor in possession to avoid a statutory lien on property of the debtor to the extent that such lien is for rent.

Bankruptcy Code Section 545(3), however, does not void a trustee's or debtor-in-possession's obligation to pay the landlord post-petition use and occupancy rent, which is treated as an administrative priority expense under 11 U.S.C. § 503(b)(1)(A). See e.g., *Zagata Fabricators v. Superior Air Prod.*, 893 F.2d 624, 627 (3d Cir.1990); *In re Cornwall Paper Mills*, 169 B.R. 844, 851 (Bankr. D.N.J. 1994).

### **D. Priority of Contractual Landlord's Liens in Tenant's Bankruptcy Case**

A prudent attorney representing a commercial landlord, and anticipating the tenant's future bankruptcy filing, should consider including a contractual rent lien provision in the lease agreement in favor of the landlord, since the express language of 11 U.S.C. § 545(3) provides the trustee or debtor-in-possession with the absolute right to avoid only statutory liens for rent. The statute makes no reference to avoiding contractual liens for rent.

Logically, however, since a contractual landlord's lien is not a creature of statute and is capable of being perfected under UCC Article 9, there is no reason why such a lien should not survive the bankruptcy lien avoidance statute. Especially considering that state law determines lien priorities in bankruptcy. In fact, in *Cohen v. Korol*, 9 N.J. Super. 183, 187 (App. Div. 1950), which involved the competing lien claims of a landlord and an assignee for the benefit of creditors, the Appellate Division recognized that a landlord could exercise contractual lien rights for unpaid rent against the tenant's personal property upon default of the tenant's rent obligations. ■

# EXPUNGEMENT OF YOUR CRIMINAL RECORD IN NEW JERSEY

By Carmine LoFaro Esq.  
February, 2005

Expungement is defined by N.J.S.A. 2C:52-1(a) as the “extraction and isolation of all records on file within any court, detention or correctional facility, law enforcement or criminal justice agency concerning a person's detection, apprehension, arrest, detention, trial or disposition of an offense within the criminal justice system.” The expungement of records includes “complaints, warrants, arrests, commitments, processing records, fingerprints, photographs, index cards, “rap sheets” and judicial docket records.” N.J.S.A. 2C:52-1(b). The purpose of expungement is to provide relief to the one-time offender, but does not allow a periodic violator of the law a regular means of expunging police and criminal records. N.J.S.A. 2C:52-32. However, *State v. A.N.J.*, 192 N.J. Super. 350 (App. Div. 1983), *aff'd* 98 N.J. 421 (1985), provides that N.J.S.A. 2C:52-1 to 2C:52-32 permits the expungement of more than one disorderly persons offense.

“The purpose of expungement is to provide relief to the one-time offender, but does not allow a periodic violator of the law a regular means of expunging police and criminal records.”

## Indictable Offenses

N.J.S.A. 2C:52-2(a) covers indictable offenses. It provides that in all cases where an individual is convicted of a crime, and has no prior or subsequent convictions and has not been adjudged a disorderly or petty disorderly person on more than two occasions, he or she may petition the Superior Court of the county in which the conviction was entered to expunge his or her record after ten years pass from the date of conviction, payment of fine, completion of probation or parole, or release from incarceration, whichever is later.

Pursuant to N.J.S.A. 2C:52-2(b), records of conviction of the crimes of murder, manslaughter, treason, anarchy, kidnapping, rape, forcible sodomy, arson, perjury, false swearing, robbery, embracery, or a conspiracy or attempt to commit any of the said offenses, or aiding, assisting or concealing any person accused of the foregoing, are not subject to



expungement. Expungement shall also be denied in the case of a conviction for the sale or distribution of a controlled dangerous substance (“CDS”) or possession thereof with the intent to sell, except when the CDS was 25 grams or less of marijuana or 5 grams or less of hashish. N.J.S.A. 2C:52-2(c).

## Disorderly & Petty Offenses

N.J.S.A. 2C:52-3 covers disorderly and petty disorderly offenses. The statute provides that “[a]ny person convicted of a disorderly...or petty disorderly persons offense [who has no previous or subsequent conviction of a crime] or of another three disorderly...or petty disorderly persons offenses may” petition for expungement after five (5) years from the date of conviction, payment of fine, completion of probation or release from incarceration, whichever is later. The petition is filed in the Superior Court of the county in which the conviction was entered. See also, *State v. A.N.J.*, 98 N.J. 421 (1985).

## Ordinance Violations

Regarding ordinance violations, N.J.S.A. 2C:52-4 provides that “a person found guilty of violation of a municipal ordinance [who has no prior or subsequent conviction of a crime] and who has not been adjudged a disorderly...or petty disorderly person on two or more occasions, may” file a petition with the Superior Court after two (2) years from the date of conviction, payment of fine, completion of probation or release from incarceration, whichever is later.

## Juvenile Delinquents

N.J.S.A. 2C:52-4.1(a) covers juvenile delinquents and provides that for the purposes of expungement, any act which resulted in adjudication as a delinquent shall be classified as if that act was committed by an adult. Such adjudications may be expunged pursuant to N.J.S.A. 2C:52-2, 3 or 4.

Pursuant to N.J.S.A. 2C:4.1(b), any juvenile delinquent may have his record expunged if:

**1** Five years has elapsed since the final discharge of that person from legal custody or supervision, or five years has elapsed after the entry of any other court order not involving custody or supervision;

**2** He/she has not been convicted of a crime, or disorderly or petty disorderly offense, or adjudged a delinquent...during the five years prior to the filing of a petition [for expungement], and no proceeding or complaint is pending seeking such a conviction or adjudication;

**3** He/she was never adjudged a juvenile delinquent on the basis of an act which if committed by an adult would constitute a crime not subject to expungement;

**4** He/she has never had an adult conviction expunged;

**5** He/she has never had adult criminal charges dismissed following completion of supervisory treatment program or other diversionary program.

N.J.S.A. 2C:52-5 provides that any person convicted of an offense under Chapters 35 or 36 of Title 2C of the New Jersey Statutes where the CDS was 25 grams or less of marijuana or 5 grams or less of hashish and was 21 years of age or younger at the time of the offense may file a petition for expungement

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## FIRM NEWS

We are pleased to announce that Stacy Modlin-Neglio, formerly of Mongelli & Neglio L.L.C., has joined the firm as an associate. Ms. Neglio's practice focuses on bankruptcy & creditors' rights, and commercial litigation.

# EXPUNGEMENT OF YOUR CRIMINAL RECORD IN NEW JERSEY

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of such conviction and all records pertaining thereto after one (1) year has elapsed from the date of the conviction, termination of parole or probation, or discharge from custody, whichever is later, provided that such person has not violated the conditions of his probation or parole and has no prior or subsequent violations of Chapters 35 or 36 of Title 2C, or has not had any prior or subsequent criminal matters dismissed because of acceptance in a supervisory treatment program.

N.J.S.A. 2C:52-6 provides that pursuant to N.J.S.A. 2C:52-6(a), in all cases wherein a person was arrested for a crime, disorderly or petty disorderly offense or violation of a municipal ordinance and against whom the proceedings were dismissed, who was acquitted or who was discharged without a conviction or finding of guilt, that person may at any time after the disposition of the proceedings, present a petition for expungement of such records. In such cases, there is no waiting period. Where the charges were dismissed following completion of a supervisory treatment program, such person shall be barred from relief until six (6) months after the

entry of the Order of Dismissal. N.J.S.A. 2C:52-6(b). Where the discharge, dismissal or acquittal resulted from a determination that the person was insane or lacked the mental capacity to commit the crime charged, he/she is barred from expunging his/her records. N.J.S.A. 2C:52-6(c).

Once your petition is filed, the court will enter an order setting a time not less than 35 nor more than 60 days thereafter for a hearing on your expungement. N.J.S.A. 2C:52-9. Often, the court will order the expungement without conducting a hearing if there are no objections from the persons or agencies notified and if there are no reasons as provided by N.J.S.A. 2C:52-14 for denial of relief.

Pursuant to N.J.S.A. 2C:52-15, once your expungement is granted by the court, all records specified in the court's order shall be removed from the files of the persons and agencies which have been notified and shall be placed in the control of the person designated by each agency. This person ensures that the records are not released for any reason or utilized or referred to for any purpose, the very reason why, if you are eligible, we strongly recommend expunging your record. ■

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