

When Is a Repair Structural or Nonstructural Under a Commercial Lease?

By Jack Malley

A common question that commercial landlords and tenants face is which of them is responsible for a repair to the subject premises. These disputes often center on whether the repair is “structural” or “nonstructural.” In this article, we provide a framework for the practitioner to analyze whether a repair is structural or nonstructural by providing the general test to be applied and a review of representative decisions, focusing on recent ones where possible.

BACKGROUND

Under standard office and store leases, landlords are typically responsible for structural repairs, and tenants are typically responsible for nonstructural repairs. See Standard Form of Office Lease, REBNY, 7/04 ¶ 4; Standard Form Of Store Lease, REBNY, 7/04 ¶ 4. The classic net-lease provides

Jack Malley is a Partner at Smith, Buss & Jacobs LLP, in the firm’s commercial litigation and real estate departments.

that the tenant is responsible for both structural and nonstructural repairs. See, e.g., *Mennis v. Comet 380, Inc.*, 54 A.D.2d 641, 642, 864 N.Y.S.2d 414, 416 (1st Dep’t 2008).

In the best scenario, the lease itself will define what repairs are considered structural. For example, in *Bubeck v. Farmers’ Loan & Trust Co.*, 180 A.D.2d 542, 167 N.Y.S. 1049 (1st Dep’t 1917), at issue was whether the landlord or tenant was responsible for a directive from the Department of Labor (DOL) to enclose an inner stairway with fire-resistant material. Under the lease, the tenant was responsible for all repairs “with the exception of repairs necessary to remedy structural defects, such as the replacing of main walls or main supports of foundations or the main structure of the roof.” The First Department interpreted the words “such as the replacing of main walls or main supports of foundations or the main structure of the roof” as defining the only structural repairs that the landlord was responsible for. Since the en-

closure of an inner stairway with fire-resistant material was not among the specified structural repairs, the First Department held that the tenant was liable for the repair. Accord, *Blackwell v. Jamal Holdings Corp.*, 240 A.D.2d 527, 528, 658 N.Y.S.2d 684, 685 (2d Dep’t 1997) (where the landlord was only responsible for exterior structural repairs).

THE PROSS TEST

Absent such specific lease provisions defining what repairs are structural, an analysis of whether a repair is structural or nonstructural should start with the test set forth 92 years ago in *Pross v. Excelsior Cleaning & Dyeing, Co., Inc.*, 110 Misc. 195, 179 N.Y.S. 176 (Mun. Ct. of the City of New York, Borough of Manhattan, Eighth District 1919). The lease in *Pross* required tenant to make repairs, and to comply with all laws and ordinances. When landlord received an order from the fire department requiring compliance with a state statute requiring a fire escape attached to the front of the building, landlord contended that, under

the terms of the lease, tenant was responsible for complying with the statute. The court held that the tenant would be on the hook unless the addition of the fire escape was a “structural change,” which the court defined as “such a change as to effect a vital and substantial portion of the premises, as would change its characteristic appearance, the fundamental purpose of its erection, or the uses contemplated, or a change of such a nature as would affect the very realty itself — extraordinary in scope and effect, or unusual in expenditure.” Applying this test, the court found for the landlord holding that “the erection of a fire escape does not amount to a structural or extraordinary change.”

The *Pross* test has been applied repeatedly by New York courts over the last 92 years. *See, e.g., Garrow v. Smith* 198 A.D.2d 622, 623, 603 N.Y.S.2d 635, 636 (3d Dep’t 1993), quoting 1 Rasch, New York Landlord and Tenant, § 15:7, at 677 [3d ed]. Of course, a lawyer’s familiarity with *Pross* alone will not provide the ultimate answer in any dispute because “what will constitute a structural alteration [or repair] necessarily depends upon the facts of each case and requires that the nature and extent of the proposed repair or alteration be examined in the context of and in relationship to the structure itself.” *Garrow*, 198 A.D.2d at 624, 603 N.Y.S.2d at 637.

EXCEL ASSOCIATES

Whatever facts a lawyer may face on a given repair issue, the Aug.

3, 2011, decision by Justice Judith J. Gische in *Excel Associates v. Excelsior 57th Corp.* demonstrates that the *Pross* test is alive and well. *Id.*, Index No. 108755/09, 2011 WL 3471228 (Supreme Court, New York County Aug. 3, 2011). In that case, the lease provided that the landlord was obligated to make structural repairs in the leased space. The tenant sought a declaratory judgment that the landlord was obligated to reimburse the tenant for repairs it made to a pool gutter and filtration system on the ground that they were structural. Citing *Pross* at length, Justice Gische denied the application holding that “there is nothing extraordinary about replacing a corroded gutter or a filtration system in a pool: such repairs are patently nonstructural.”

OTHER NOTABLE DECISIONS

With this framework in mind, notable decisions finding a repair nonstructural include: *Salaices v. Gar-Ben Associates*, 82 A.D.2d 740, 741, 918 N.Y.S.2d 510, 511 (2nd Dep’t 2011) (“[T]he placement of a proper cover on [an] outlet box did not constitute a structural repair within the meaning of the relevant lease provision.”); *Hunting Ridge Motor Sports v. County of Westchester*, 80 A.D.3d 567, 568, 914 N.Y.S.2d 274, 275-76 (2d Dep’t 2011) (where the Second Department held that a six inch hole in the wall through which water allegedly entered the premises was not a structural defect that the landlord was obligated to repair under the lease); accord, *National Bank of North America v. Brook*

Shopping Centers, Inc., 113 A.D.2d 461, 495 N.Y.S.2d 696, 697 (2d Dep’t 1985) (modifications necessary for installation of an ATM were not structural in nature).

Notable decisions finding a repair structural include: *Malik v. Toss 29, Inc.*, 15 Misc.3d 1112 (A), 839 N.Y.S.2d 434, 2007 WL 926297, at * 3, 7 (District Court, Nassau County, Mar. 29 2007) (where the replacement of a main sewer line was a structural repair that the landlord was responsible for under the lease); *Refrigeration For Science, Inc. v. Deacon Realty Corp.*, 70 Misc.2d 500, 506, 334 N.Y.S.2d 418, 425 (Supreme Court, Nassau County 1972) (where the repair of a separation of the wall from the slab was a structural repair that the landlord was obligated to perform); accord, *The New School For Social Research v. Sutton Space, Inc.*, 188 A.D.2d 341, 342, 591 N.Y.S.2d 22, 23 (2d Dep’t 1992) (where the installation of double-width entrance doors was a structural alteration that required the landlord’s consent).