RIGHTS TO TENANT PROPERTY UPON TERMINATION OF A COMMERCIAL LEASE

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What follows is a discussion of landlord and tenant rights under Delaware law regarding improvements, trade fixtures, equipment, and other personal property at leased premises upon termination of a commercial lease. In particular, this article addresses how the law deals differently with property in the leased premises that is defined as improvements or fixtures, in contrast to that defined as trade fixtures or the tenant's other personal property (sometimes referred to as chattels). Of course, this article also assumes that the lease is silent on the issue, as the language of the lease could ultimately control the outcome.

I. TENANT'S RIGHT OF REMOVAL

The threshold issue to address in determining the tenant's right to remove property is whether the property constitutes fixtures or non-fixture personal property. The law concerning fixtures (sometimes identified as improvements, which are usually, though not always, fixtures) is a wonderfully complicated topic that returns us to the earliest days of Anglo-America common law. Ultimately, the law turns on the legal definition of fixtures, as that will largely determine whether the property belongs to and can be removed by the tenant or belongs to and must stay with the leased premises as the landlord's property. We start with the rule that *quicquid plantatur*, *solo*, *solo cedit*, or all things next to realty become part of it. But were it that simple.

Under the common law, a "fixture" is an article that, though originally a chattel, is by reason of annexation to land regarded as part of the land itself, having the character of realty and, ordinarily, belonging to the owner of the land.[1] Whether an item of personal property becomes a fixture is dependent on several elements.[2] The leading Delaware case in this regard is *Warrington v. Hignutt*,[3] which identifies the following factors for determining whether a chattel installed on the real estate becomes a fixture or remains a chattel with the right of subsequent removal: (1) the intention of the party making the annexation (which is stated to be the paramount consideration); (2) whether the item can be removed without substantial damage to the realty; and (3) whether the item can be removed without substantial damage to the item itself. The second and third factors are, in essence, also factors that bear on the intention of the installing party. Note, too, that

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1. 2 Tiffany Law of Real Property § 606 (3d ed. 1939).

2. Annot. *What constitutes improvements, alterations, or additions within provisions of lease permitting or prohibiting tenant's removal thereof at termination of lease*, 30 A.L.R.3d 998; A. M. Squillante, *The Law of Fixtures: Common Law and the Uniform Commercial Code*, 15 Hofstra L. Rev. 191 (Winter 1987). An early leading case on the law of fixtures in the United States is Teaff v. Hewitt, 1 Ohio St. 511 (Oh. 1853).

3. 31 A.2d 480 (Del. 1943). *See also* Martindale v. Bowers Beach Corp., 117 A. 299 (Del. Ch. 1922).

the analysis may differ based on the context—whether landlord and tenant, life estate and remainderman, mortgagor and mortgagee, and the like. The court wrote in *Warrington v. Hignutt*:

> The great weight of authority today regards the intention of the party making the annexation, as disclosed by the surrounding circumstances, the controlling test. It requires some positive act on the part of the annexor to change the nature and legal qualities of a chattel into those of a fixture, and it is reasonable to hold that the intention to make the article a permanent accession to the realty must plainly appear. The test of intention as discoverable in the facts and circumstances of the particular case is one of general and uniform application by which, in most instances, the essential qualities of a fixture can be determined, and by which the apparent conflict in the authorities may be reconciled. Under this doctrine, the nature of the chattel, the mode of its annexation, the purpose or use for which the annexation has been made, and the relationship of the annexor to the property are considered and weighed in determining the question of intention. The mode of annexation may have little or no significance; but where the chattel has been so affixed that it cannot be removed without serious damage to the realty or to the chattel itself, the mode of annexation alone may, as a matter of law, be conclusive of the annexor's intention. The character of the article as adapted to the use of the realty and the appropriation of the article to that use may be considerations of weight in disclosing the annexor's intention; but it may well be that the article itself may be removed and as well utilized elsewhere, and, in such case, the intention is but dimly revealed. [4]

As an example of personal property that may or may not be a fixture, overhead lights installed by the tenant might be stock lights that were not specifically designed for the leased premises and could be removed with minimal injury to the realty and in a manner that permits the lights to be used elsewhere. Installation of these lights with brackets, rather than mounting them into the ceiling or by some other more permanent method, might support an intent that the lights are easily removable and thus intended to remain tenant's personal property. However, carpeting and paneling cut to the irregular shape of the demised premises or fence posts installed using concrete can be indicative of the intent to install permanent fixtures.[5] In *Warrington v. Hignutt*, for example, the fact that oil pipes ran from an outside source, through a building, and to a stove was insufficient to find that the stove was intended to be a permanent fixture where the stove was fastened to the building using small clamps and was easily removed.

Further complicating this law is an early and long-standing exception to the rule of fixtures—that is, the tenant has the right to remove trade fixtures.[6] Trade fixtures are generally recognized as property used by a tenant in the conduct of its business that, although having the characteristics of fixtures under the common law, retain the definition of personal property.[7] Thus, fixtures generally cannot be removed by the tenant because, once determined to be fixtures, by definition they were intended to become part of the realty; but trade fixtures, although fixtures, can be removed by the tenant. On the other hand, removability is not an essential element in determining whether certain property is a trade fixture rather than a fixture or personal property.[8]

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4. *Warrington v. Hignutt,* 31 A.2d at 482.

5. *See* Squillante, *supra* n. 3, at 226.

6. A. R. Berman, ed., 2 Friedman on Leases § 25:3 at 25-16 (6th ed. 2017).

7. Squillante, *supra* n.3, at 239.

8. M. Rikon, *Condemnation of Machinery and Equipment: A Case Study*, The Practical Real Estate Lawyer, Sept. 2011, at 46. Note that in the context of eminent domain, trade fixtures may be viewed differently. *Id*.

Because the law of fixtures and trade fixtures is one of intention, what is important is the expressed intention of the parties, usually determined by interpreting the words of the lease. Thus, even the tenant's right to remove trade fixtures can be waived by the tenant. In other words, in what can seem to be a circular analysis, a tenant may remove fixtures that the tenant has installed if they are trade fixtures or if the removal can be accomplished without substantial injury to the landlord's property because, in the latter case, the fact that the removal can be accomplished without substantial injury to the landlord's property goes to the determination of the party's original intention that the improvement was not a fixture because it can be removed without substantial injury to the landlord's property, and so on and so forth. The issue is further complicated in that there are certain situations in which the improvement, although removable under ordinary circumstances, cannot be removed, such as where the tenant's installation is in substitution of property already in place and owned by the landlord (that is, the tenant cannot leave the leased premises in worse condition than when the tenant took possession of the leased premises), or where the lease requires the tenant to make certain improvements (that is, the tenant's obligation to make improvements is consideration).[9]

Of course, once the lease expires, the tenant no longer has a right to remove the fixtures. If the tenant wishes to retain the right to remove trade fixtures after the lease expires, that right must be included in the lease. For example:

> It is specifically agreed that any and all fixtures, buildings, machinery, and improvements of every description erected or installed on the leased premises by lessee during the term of this lease shall be removed by lessee within [*number of days*] days after the termination of this lease.[10]

Following from this analysis of the tenant's right to remove certain property, a tenant has no affirmative duty to remove improvements (provided that the improvements were made in a manner permitted by the lease). However, the tenant appears to have the duty to remove tenant's personal property based on the implied covenant to return the leased premises in the same condition as received.[11] Accordingly, if the landlord wishes the tenant to remove improvements prior to the expiration of the lease, the lease must contain this affirmative duty by express language. For example:

> On the expiration of the term of this lease agreement, or earlier termination of this lease agreement, lessee shall, at lessee's own expense, remove all property belonging to lessee and all additions, alterations, or other improvements that, by the terms of this lease agreement, lessee is permitted to remove, repair all damage to the demised premises caused by such removal, and restore the demised premises to the condition they were in prior to the making or installation of the improvements and other property so removed.[12]

The following is an example of a provision in a commercial lease form in use in Delaware:

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9. 2 Tiffany Law of Real Property § 621 (3d ed. 1939).

10. 8A Am. Jur. *Legal Forms* § 119:12.

11. 2 Friedman on Leases § 18:1 at 18-3 (6th ed. 2017); *but see* 49 Am. Jur. 2 d *Landlord & Tenant* § 696.

12. 11A Am. Jur. *Legal Forms* § 161:546.

> All alterations, improvements, additions or fixtures, whether installed before or after the execution of this Lease, shall, immediately upon completion, become the property of Landlord and shall remain upon the Premises at the expiration or sooner termination of this Lease unless Landlord shall, prior to the expiration or termination of this Lease, have given written notice to Tenant to remove any of the same which were installed by or for Tenant, in which event Tenant will remove such alterations, improvements and additions and restore the Premises to the same good order and condition in which they existed prior to the installation of such alterations, improvements, additions or fixtures.[13]

Note that all of the improvements will remain, which may not be in the best interests of the landlord who may need to demolish and remove improvements made by the tenant in order to relet the space to a replacement tenant. From the landlord's standpoint, a better approach may be to reserve to the landlord the flexibility of requiring the tenant to remove improvements at the end of the lease term unless the landlord allows the improvements to remain.

II. TENANT'S ABANDONMENT OF PROPERTY.

The characterization of the property will also determine what happens to the property upon the termination of the lease and surrender of the leased premises. The landlord should keep in mind that, absent express language in the lease, personal property remaining in the leased premises after the expiration of the lease remains the property of the tenant, whereas fixtures (and, in most jurisdictions, trade fixtures) are deemed to have been abandoned by the tenant.[14] A few jurisdictions allow the tenant a reasonable time after the termination of the lease to remove fixtures, although the tenant will be liable for damages in trespass arising from the removal.[15] At some point, the tenant will be considered to have abandoned the personal property; however, there is no bright-line test for when that occurs. Moreover, the landlord could be held liable to the tenant for wrongfully disposing of the tenant's personal property.[16]

As a general rule, a tenant does not forfeit or lose title to its personal property by failing to remove it from the leased premises after termination of the lease, even if that failure continues for a reasonable time after the lease termination.[17] Abandonment at common law requires the intent to relinquish a known right or interest.[18] It is therefore important for the landlord to investigate the ownership and lien status of the tenant's personal property and trade fixtures before asserting claims against them and certainly before claiming abandonment by the tenant. This investigation should include at a minimum a search of the applicable financing statement records of the jurisdiction. Treating a tenant's personal property as abandoned without affording the tenant its legal rights over that property can constitute a conversion by the landlord and expose the landlord to various damages, including, in some instances, punitive damages.[19]

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13. Commercial-Industrial Realty Council of New Castle County, Delaware Retail Lease Form.

14. 51C C.J.S. *Landlord & Tenant* § 397; 49 Am. Jur. 2 d *Landlord & Tenant* § 205.

15. *E.g.*, *see* Adams Outdoor Advertising L.P. v. Long, 483 S.E.2d 224 (Va. 1997); Towne v. Sautter, 326 N.W.2d 694 (N.D. 1982); Ilderton Oil Co. v. Riggs, 186 S.E.2d 691 (N.C. Ct. App. 1972).

16. *See* Mombro v. Louis Capano & Sons, 526 F. Supp. 1237 (D. Del. 1981).

17. *Id*. at 1240. *See also* 51C C.J.S. *Landlord & Tenant* § 790.

18. *Mombro*, 526 F. Supp. at 1239. *See also* 1 C.J.S. *Abandonment* § 4.

19. Affordable Autos, Inc. v. Dietert, 2016 WL 1169244 (Del. Super. March 24, 2016).

A Pennsylvania case provides a useful analysis of these issues, particularly as they involve issues arising under Articles 2 and 9 of the Uniform Commercial Code (the "UCC"). In *Hoyt v. Christoforou*,[20] the landlord of a shopping center restaurant recovered possession of the restaurant space from the defaulting assignee of the original tenant. The original tenant had sold the restaurant equipment to the assignee on an installment basis, retaining a security interest in the equipment. After terminating the lease, the landlord refused to allow the original tenant entry onto the premises to recover her claimed equipment and re-rented the premises to a new restaurant operator. The landlord also purported to sell the equipment to this new tenant by bill of sale, retaining a security interest and filing a financing statement.

When the original tenant pursued her debt claim against her assignee, the landlord and the new tenant intervened. The sheriff determined, without a hearing, that the equipment belonged to the landlord and new tenant. The original tenant objected, and, at a hearing on the objection, the trial judge sustained the objection and set aside the sheriff's decision, allowing the original tenant execution of her judgment. The landlord and new tenant appealed. The landlord's claim to the equipment was based first on the alleged terms of the lease with the original tenant's assignee that, the landlord argued, allowed the landlord to retain property of the tenant not removed from the premises by tenant upon termination and, second, on the alleged abandonment of the equipment by the original tenant's assignee, upon which event title vested in the landlord. The new tenant's claim to the property was based on the argument that it was a good faith purchaser for value whose interest was superior to that of the holder of an unperfected security interest (*i.e.*, the original tenant).

On appeal, the court found, first, that the lease provision identified by the landlord only governed the removal of trade fixtures and deemed as abandoned to the landlord only those fixtures remaining in the premises upon termination of the lease, which did not apply to the restaurant equipment. The court viewed this as a UCC issue and found that high chairs, cash registers, ice chests, fax machines, broilers, step ladders, and the like were not fixtures as that term was defined in the Pennsylvania UCC. Second, the court dismissed the abandonment argument, holding that a landlord cannot infer abandonment of the equipment by the cessation of business and failure to pay rent or by the subsequent failure to remove the equipment once the lease was terminated by the landlord. The court noted that the landlord made little effort to ascertain the status of the equipment and simply padlocked the premises, which constituted an unlawful conversion of the tenant's property. The court observed that the landlord had lawful remedies available to it and could have obtained a landlord's lien or executed a distraint remedy under applicable Pennsylvania law. Either remedy would have allowed an exercise of jurisdiction over the equipment. The landlord compounded its error by proceeding to sell the equipment to the new tenant even though the landlord had actual notice of the original tenant's ownership claims. Finally, the court held that the new tenant could not have the status of a good faith purchaser for value, as the seller did not have title to the goods. As provided in Article 2-403 of the UCC, a purchaser of goods can only acquire the title held by the transferor.[21] A good faith purchaser from a converter acquires no interest in the goods bought.[22] Consequently, the original tenant, as the holder of an unperfected security interest, had a superior interest to a converter and the third-party purchaser of converted goods.[23]

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20. 692 A.2d 217 (Pa. Super. 1997).

21. U.C.C. § 2-403.

22. *Id.*

23. *Hoyt*, 692 A.2d 217. Note, too, that generally, a creditor or other person whose claims to the property arise from the tenant will have the same rights of removal as the tenant and must exercise those rights within the same period. 35 Am. Jur. 2 d *Fixtures* § 96; *but see* Gibson v. Exchange Nat. Bank, 42 P.2d 511 (Okla. 1935) (mortgagee retains reasonable removal rights even though tenant's removal right extinguished).

A lesson for landlords that can be drawn from *Hoyt v. Christoforou* is a warning against self-help remedies. The landlord could have utilized lawful remedies (*e.g.*, pursuing an action for distraint) to obtain control over the disposition of the equipment, and thus obtain priority over the original tenant's unperfected security interest. Instead, the landlord chose to assert self-help remedies that proved to be unlawful.

The common law provided a corollary to the general concept that failure to remove does not constitute abandonment by giving rights to the landlord to deal with personal property remaining in the premises. Because property left behind by the tenant may interfere with the landlord's use of the leased premises, the landlord has the right under the common law to recover from the tenant the cost of removing and storing such property.[24] The question then arises of how long the landlord must store the personal property before it can claim that the tenant has abandoned the property, allowing the landlord to dispose of it once and for all. The general statement of the courts has been that abandonment will have occurred if the personal property has not been removed within a reasonable time after the lease termination.[25] Again, it is important to keep in mind that trade fixtures not removed once the lease term ends and the tenant has surrendered the leased premises are deemed abandoned and become the property of the landlord.[26] That is, trade fixtures become treated like fixtures and are abandoned, absent contractual provisions to the contrary.

Some states have adopted statutory limitations whereby after a certain number of days, the tenant is deemed to have abandoned its personal property. For example, the Delaware Code provides:

> If, at the time of the execution of the writ of possession, the tenant fails to remove tenant's property, the landlord shall have the right to and may immediately remove and store such property for a period of 7 days, at tenant's expense …. If, at the end of such period, the tenant has failed to claim said property and to reimburse the landlord for the expense of removal and storage in a reasonable amount, such property and possessions shall be deemed abandoned and may be disposed of by the landlord without further notice or obligation to the tenant.[27]

These statutes often have limitations. As in Delaware, the statutory provision may relate only to property remaining after the tenant's dispossession under a possessory proceeding and might not apply if the tenant simply disappears and

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24. *Mombro* 526 F. Supp. at 1239. *See also* Restatement (Second) of Property, Landlord and Tenant § 12.3 (Am. Law Inst. Year); 49 Am. Jur. 2 d *Landlord & Tenant* § 696.

25. 49 Am. Jur. 2d *Landlord & Tenant* § 205.

26. Annot. *Time Within Which Tenant's Right to Remove Trade Fixtures Must Be Exercised*, 109 A.L.R. 5th 421 (2003).

27. 25 Del. C. § 5715(e). A Delaware court has held that this statutory remedy is the only means by which the landlord may remove and dispose of the tenant's property. Although the case involved a residential lease, the court did not distinguish what might be the result under a commercial lease. Drylie v. Woods, 1991 WL 53434, at *3 (Del. Super. March 18, 1991). *See also* 25 Del. C. § 4001(a) (personal property deemed abandoned after one year). Delaware courts do not seem to have addressed the possible inconsistency between abandonment under 25 Del. C. §5715(e) and under 25 Del. C. § 4001(a). One possible reconciliation is that 25 Del. C. § 5715(e) applies to dealing with the tenant's personal property after the landlord has lawfully evicted the tenant and received a writ of possession, and 25 Del. C. § 4001(a) applies to dealing with that property in any other situation (e.g., tenant's abandonment of the leased property). Such an approach, however, would seem to place a significant burden on the landlord in the latter situation for safekeeping the tenant's property.

fails to pay rent.[28] The statutory remedies may also have constitutional defects. In *Mombro v. Louis Capano & Sons*,[29] the District Court for the District of Delaware pursued a lengthy analysis of the statutory predecessor to the above-referenced abandonment statute and found that it was likely to be deficient on due process grounds as a pre-hearing deprivation. However, the court found that it could resolve the dispute without reaching the constitutionality of the statute, leaving the constitutionality question open.

For these reasons, careful landlords should draft clear and complete leases relating to the disposition of the tenant's property upon the termination of the lease. As seen in the decision in *Holt v. Christoforou*, it is important to provide for disposition of all types of tenant property and not simply improvements or even trade fixtures. The following is an example of a provision in a commercial lease form in use in Delaware:

> Any personal property which shall remain on the Premises for more than five (5) days after the expiration or earlier termination of this Lease or Tenant's right to possess the Premises may, at the option of Landlord, be deemed to have been abandoned by Tenant and may be retained by Landlord as Landlord's property or be disposed of, without liability of Landlord, in such manner as Landlord may see fit or Landlord, at its option, may require Tenant to remove the same at Tenant's expense. In case of such removal, all costs of removal and of repairing any damage to the Premises arising from such removal shall be paid by Tenant within ten (10) days after Landlord's demand. Tenant shall pay to Landlord within ten (10) days after Landlord's demand (i) a reasonable fee for storing and disposing of any such personal property, and (ii) all costs and expenses incurred by Landlord in storing and disposing of any such personal property (including, without limitation, reasonable attorney's fees relating to claims against Landlord by any and all parties claiming interests in such personal property).[30]

Such contractual dispositions of property are generally enforceable.[31]

III. VISUAL ARTISTS RIGHTS ACT OF 1990

Finally, landlords should be aware of the Visual Artists Rights Act of 1990 (VARA) granting rights to artists to prevent the removal or destruction of certain works of art incorporated into buildings.[32] Even though the art installed by the tenant may be a fixture and therefore the landlord's property upon the termination of the lease, the landlord's right to

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28. This leads to a different discussion, beyond the scope of this article, of how best to perfect the landlord's repossession of the leased premises in light of an apparent abandonment of the leased premises by the tenant. *See* Lempke v. Hospitality Inv. of Rehoboth, Inc., 1994 WL 89359 (Del. Super. Feb. 24, 1994).

29. 526 F. Supp. 1237 (D. Del. 1981).

30. *See* n. 12 *supra*. It is not clear whether the seven-day period for holding the tenant's payments under 25 DEL. C. § 5715(e) can be shortened by agreement. Certainly, if the tenant appeals the possession judgment, the property is to be held pending that appeal and until seven days after the resolution of the appeal. 25 DEL. C. § 5715(f)(1).

31. 51C C.J.S. *Landlord & Tenant* § 317(a). Of course, abandonment can cut both ways. For example, in *Kulkowitz v. 122 124 Duane Realty Corp*., , a landlord was held liable for injuries caused by a fallen sign that had been left on the premises by the former tenant. 583 N.Y.S. 2.d 388 (N.Y. App. Div. 1992).

32. 17 U.S.C. § 106A.

dispose of that property may be qualified in certain circumstances where the removal of the work will cause the destruction or mutilation of the work.[33]

VARA applies to a "work of visual art," which is defined as:

> (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
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> (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.[34]

Certain pictorial materials are not included in this definition of a "work of visual art," such as posters, motion pictures, technical drawings, databases, merchandising or advertising items, or, importantly, any "work made for hire."[35]

The statute provides that the author of a work of visual art has certain rights. These include the right:

> (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and
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> (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.[36]

There have been a number of cases dealing with substantive claims under VARA for alleged damage to works of visual art. In *Martin v. City of Indianapolis*,[37] the artist who had created an outdoor sculpture for the City of Indianapolis was entitled to damages for the complete destruction of that work when the sculpture was demolished by the city. On the other hand, a New York court has held that an artist is not entitled to relief under VARA where the work of art has been illegally placed on property.[38]

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33. *See* Carter v. Helmsley-Spear, Inc., 852 F. Supp. 228 (S.D.N.Y. 1994), Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303 (S.D.N.Y. 1994), rev'd on other grounds, 71 F.3d 77 (2d Cir. 1995), cert. denied, 517 U.S. 1208 (1996); Boorstyn on Copyrights § 5.07[3][b]; Nimmer on Copyrights § 8D.06[C][3]. Interestingly, most of the decisions under VARA have gone against the artists, whether on procedural grounds or for substantive reasons, often because the work in question was found not to be protected by VARA..

34. 17 U.S.C. § 101 (Definitions).

35. *Id*.

36. 17 U.S.C. § 106A(a)(3).

37. 982 F. Supp. 625 (S.D. Ind. 1997).

38. English v. BFC&R East 11th Street, LLC, 1997 WL 746444 (S.D.N.Y Dec. 3, 1997). *See also* Cheffins v. Stewart, 825 F. 3d 588 (9th Cir. 2016) (the work in question was found to be a work of applied art and not protected by VARA). On the other hand, the New York District Court has ordered a landlord to pay $6.75 million in damages for his willful demolition of a so-called "graffiti mecca" in order to build condominiums. Cohen v. G & M Realty, L.P., 320 F. Supp. 3d 421 (E.D.N.Y. 2018).

Perhaps one of the most significant cases has been *Carter v. Helmsley-Spear, Inc.*[39] As part of the renovations of an office building, the landlord had removed certain lobby sculptures that the landlord felt were out of keeping with the desired look of the renovated office building. The artists brought an action under VARA to enjoin the landlord from removing the sculptures. The trial court held that the sculptures were a work of visual art protected by VARA and the artists were entitled to an injunction for their lifetime. The Second Circuit, however, reversed the lower court and held that sculptures were a "work for hire" and exempt from VARA.

Finally, it is worth noting that the author of a work of visual art can waive its rights under VARA, allowing a landlord who secures a work of visual art for a lobby space, for example, to obtain a waiver. A waiver for this purpose must be express, in writing, specifically identifying the work, and specifically identifying the uses to which the waiver applies.[40]

IV. CONCLUSION

The fate of equipment, improvements, and other property upon lease termination will depend on the character of that property under the law. Although fixtures are only removable to the extent permitted by the lease and will automatically vest in the landlord upon the lease termination, trade fixtures remain removable by the tenant, except to the extent otherwise provided under the terms of the lease, but are deemed to have been surrendered to the landlord if not removed by the tenant before the termination of the lease. On the other hand, personal property always remains removable by the tenant—except if the tenant has agreed to limit its rights under the lease and except to the extent of any statutory limitations—and as it remains the tenant's property, it remains recoverable by the tenant from the leased premises even after the lease has terminated. Finally, a work of visual art may be statutorily protected from the landlord's desire to remove it from the premises.

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39. *See* n. 30 *supra*.

40. 17 U.S.C. § 106A(e)(1).