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REAL PROPERTY UPDATE

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NOVEMBER 18, 2014
SCBA Center - Hauppauge, NY

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SUFFOLK COUNTY BAR ASSOCIATION
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SUFFOLK COUNTY REAL ESTATE LITIGATION

UPDATE SEMINAR

INTRODUCTION

Real estate market conditions materially impact the types of cases that we see in the courts. This is especially true with respect to commercial landlord-tenant cases and real estate breach of contract cases. Office and retail tenants do not have the protection afforded by residential rent stabilization and rent control laws and regulations. In a strong market, some owners will look for excuses to terminate or renegotiate leases or sale contracts so that they may either lease or sell their property at a higher price. In a weak market, some tenants or purchasers may look for excuses to terminate or negotiate leases or purchase contracts.

For example, during the real estate recession of 2008-2011, condo purchasers tried to cancel contracts, claiming, *e.g.*, a) violation of the Interstate Land Sales Full Disclosure Act (ILSA), b) construction was proceeding too slowly and promised delivery dates could not be met, c) the finished construction deviated from the plans in the offering plans, sales brochures, oral promises, and d) the sponsor's financial condition was deteriorating and therefore, offering plans were misleading. Additionally, purchasers found that appraisals were coming in materially lower than anticipated and they could not complete their purchases. These issues led to significant litigation between purchasers, sellers, developers, lenders, contractors and brokers.

In a rising market, landlords could rent their office or retail space for numbers materially higher than their lease rents. In such context, some landlords have attempted to terminate leases because a retailer's signage may violate local land use regulations, or its

insurance failed to comply with a lease's insurance requirement or a use is beyond that permitted by a lease's use clause.

Real estate values on Long Island are often impacted by the real estate market in New York City. When the New York City job market is strong, there is greater market for second homes in areas like the Hamptons, the North Fork, Long Beach, Atlantic beach, etc. When New York City office rents, taxes and other costs increase, companies consider relocating to locations outside of the City. Given advances in communication technology, many companies believe that they do not necessarily have to be located in major gateway cities. Interestingly, however, tech companies have been expanding in New York City. They believe that the New York City location is attractive to many young employees.

Current Real Estate Market -

Factors:

Historically low interest rates continue, although rates are starting to slowly increase. Generally, there is a substantial inventory of apartments, condos, co-ops and private homes. For Long Island overall, the office vacancy rate has been approximately 17%. In Manhattan, foreigners have capitalized on a relatively "weak" dollar and now are seeking a relatively safe haven from economic and political instability in Europe, South America, Asia and the Middle East. (Forest City/Nets). Recently, a Spanish group bought 901 Broadway for $24.6 million all cash. Israeli group bought 452 Fifth Ave. for $325 million and 318 East 48th St. was bought by the Republic of Singapore for $30 million. The government of Turkey is redeveloping its embassy at 1st Avenue and East 47th Street. Chinese lending and investment has increased

significantly. Recently, Chinese companies invested in One Chase Manhattan Plaza, the General Motors building, Park Avenue Plaza (office building), 1180 Sixth Avenue, Cassa Hotel in Times Square and a 216 unit residential development projection in Williamsburg, Brooklyn. Foreign buyers are buying high end homes, condos and co-ops in Manhattan and homes in the Hamptons. However, they are also purchasing in Great Neck, Roslyn and Old Westbury and high end Suffolk County towns. Long Island real estate brokerage firms are hiring more brokers who speak foreign languages.

We still have a weakened local economy, high unemployment, uncertainty over the general economy, Congressional deadlock, the impact of Iraq and Afghanistan wars on the U.S. economy, as well as new threats from ISIL in Syria and Iraq, problems in the Ukraine and difficulties in obtaining mortgages because of more stringent requirements (no more "no doc", "no asset check" loans, FHA loan maximums and down payment requirements are tougher. Credit scores must be higher, need higher reserves available after closing, only count 70% of stocks held as reserves, not 100% as before.)

Refinancing is difficult today because equity has often been wiped out and homes do not appraise for a number that is high enough to refinance the existing loans. The problem is compounded by fewer sales/comparables (prices in contracts that haven't closed are not used) and less experienced appraisers as many experienced appraisers have left the field. Moreover, credit underwriting standards have become far more stringent. Has income gone down? Was the borrower laid off? Does the condo development have less than 20% or 50% units sold? Are the condo finances strong enough? High enough reserve fund? Is the building approved by Fanny and Freddie Mac?

After employment nationally and in New York had substantially declined, it has been stabilizing and slowly recovering. In 2007, the unemployment rate was about 4.5%, it is now about 5.1% on Long Island. (A statewide high of 10.1% was hit in 2009). The financial industry and related fields such as law, accounting, public relations and advertising have suffered major declines. Dewey LeBoeuf, Heller Ehrman, Lehman Brothers, Bear Stearns gone. Numerous banks merged and jobs trimmed as positions were consolidated. Other firms like Merrill Lynch were forced into sales or mergers. Recently, the law firm of Weil Gotshal & Manges laid off 10% of its workforce.

This is especially important since approximately 20% of NYC personal income is related to the financial industry. That is one reason why, in 2009, the New York metropolitan area was projected to lose more jobs than any other metropolitan area in the country (181,000 jobs). Job layoffs have not ceased. Besides Weil Gotshall, a week ago, Lockheed announced layoffs of another 4,000 employees.

Cresa Long Island, an international real estate advisory firm, recently reported that:

> *The Long Island Commercial Real Estate market, one of the largest and most important in the country is comprised of 65 Million Square feet of office space and almost 163 million square feet of industrial and flex space. Including some significant positive gains, Long Island's economy has begun to decrease its unemployment rate alongside the big picture of the Nation's. The biggest news of the quarter was that 2 large companies decided to relocate all of their jobs from Long Island. The new owner of drug maker Forest Laboratories plans to move most of its Long Island operations to New Jersey, leading to the loss of hundreds of jobs, and the sale of several of their buildings. Also, the new owner of Medical Action Industries decided to relocate its 51 employees to their North Carolina Headquarters.*

The industrial real estate market is still the most active area of the Long Island real estate market with significant sales and leasing activity causing availability rates to continue below 10%. Many of the larger industrial spaces are now rented, and since few new industrial construction projects are planned, inventory should remain low through the next several years.

In August, the number of private sector jobs on Long Island increased to 1,120,800 in. This spring's gains extend across the job sectors of: transportation, education and health services, professional and business services, natural resources, mining and construction, and other service sectors. Many more people are employed by these new service jobs, however their incomes are not substantial enough to bolster the economy.

High living expenses, taxes, and the absence of new substantial jobs on Long island are causing the exodus of young adults from long Island. A survey of Long Island residents aged 18 to 36 shows 30 percent of them plan to leave Long Island. Young adults, no longer planning to start families or companies in Long Island, may have devastating effects on the future of Long Island's economy. Along with the exodus of young adults, companies are also leaving Long Island due to the strict regulations placed on companies as well as the high costs of staying on Long Island.

Of the roughly 65 million square feet of office space comprised of 905 office buildings, approximately 14.51% is available which is a slight decrease from the previous quarter. Asking rental rates have deceased slightly as well to $24.81 average over all office classes in the last quarter. The vacancy rate for the 163 million square feet of industrial space has decreased to 9.4%. Rental rates currently average approximately $9.14/per square foot net which was $.20 higher than the previous quarter.

Current Residential Market - New York City

Residential leasing and sale prices which had declined substantially, are now stabilizing in certain areas. However, prices remain below the highs of 2007, except for extremely high end, well located condos in Manhattan. Developments in the Bronx, Queens (Astoria and Long Island City) and Brooklyn (Williamsburg, Greenpoint) were in trouble, but are now selling again. Some, but not many new projects are now moving forward. However, in

many cases, the prices have "reset" at a lower number. In Queens and Brooklyn, newly constructed condos which sold for $800 - $900 per sq. ft. in 2007, were selling for $575 - $675 per sq. ft. However, they are now once again approaching the $800 - $1,200 per sq. ft. range for the new luxury buildings with extensive amenities. The hot new "redevelopment" areas in Manhattan including Meat Packing District, Tribeca, Lower East Side, Financial District, Harlem, and Chelsea are very expensive. There is still a "disconnect" between buyers and sellers. Sellers who can hold on, have been waiting for prices to recover. There was a burst of activity in the last quarter of 2012 as many sought to lock in last year's capital gains tax rate. Prices also increased because of a race to complete transactions before the capital gains rate increased.

Developers now say if there is a good location - at a realistic price - units are selling because interest rates remain low and people need homes.

We are again starting to see multiple buyers showing up at open houses in NYC and competing at auctions, in certain markets, when the properties are priced well.

The key factors for construction loans had been location, economic analysis and track record of the developer. Today, there is great emphasis on the track record of developer. The lenders are now once again considering lending money to developers for new construction residential deals, provided that unless a deal involves government subsidies or tax benefits or it will be a well priced rental, with substantial equity (40-50%) and strong guarantees on the construction loan. Even then, it is extremely difficult to finance. Lenders have been reminded that condo markets can "evaporate" overnight. Florida, Las Vegas, Arizona, California, etc. A few bad news reports could materially impact the housing market.

Prices are also impacted by psychological factors. When people see extremely low returns on their bonds and other fixed income investments, people who still have a lot of money still feel "psychologically poor."

Although New York has suffered with high unemployment, the census indicates that approximately 1,000,000 people will be moving to New York City within the next eight years.

The New York metropolitan area is different than South Florida, Las Vegas, etc. where a large portion of sales have been made to "speculative investors." New York City and Suffolk County buyers are generally not "flippers." Moreover, in New York City, co-ops help stabilize the market since purchasers are screened for financial strength and they usually do not permit assignments, subletting or flipping.

Current Residential Market

In Suffolk and Nassau Counties:

Brokers in suburbia say there is substantial residential product available in Suffolk County. There are very different markets within Suffolk County. Homes under $1 million are selling far faster than homes in the $2 - $5 million range. Expensive homes continue to linger on the market. Many older people prefer condominium living. Sales activity is up, but prices have been slow to rise.

Generally, NYC, Nassau, Suffolk and Westchester markets remain relatively weak. Douglas Elliman reports that Long Island residential inventory increased 5.6%, prices have stabilized and days on the market have decreased by 7 days. The Hamptons area is still

down from highs, but Hampton's prices have increased about 18.95%. However, 5 out of 12 Hampton's local markets doubled in number of sales.

For Suffolk County, in general, median sales prices increased to highest level since 2008, but it really depends on the location. The number of condo sales increased, but prices declined from prior year.

However, Real Trac recently reported that residential foreclosures have almost doubled in New York from the prior year. Why? New York Chief Judge Lippman had issued rules which required that lawyers verify the accuracy of the documents upon which their foreclosure actions were based. This, coupled with the requirement that lenders attend good faith settlement conferences, have delayed foreclosures.

Current New York City Office Market

With respect to commercial space, New York City lost approximately 13,000,000 sq. ft of space in lower Manhattan because of 9/11. Another 12,000,000 sq. ft. of space was damaged. All seven World Trade Center buildings were destroyed. As a result, many companies were forced to consider space in other parts of the City, the outer-boroughs, Westchester, Nassau and Suffolk, as well as New Jersey. Some companies have looked to disperse back office and "back up" facilities.

The City has tried to attract new development in lower Manhattan through the use of government incentives, including Liberty Bonds. Now, ground zero development is rising and Larry Silverstein has signed major leases for his new buildings near ground zero. This will take time, especially because of the need to address transportation issues. The PATH station was

destroyed, but is now reopening. Rents are now firming up. Some office projects that were stalled have resumed (Boston Properties), but only if pre-leased. Manhattan vacancy rate up from 4.4% in 2007 to current 9.5%. However, average asking prices for Class "A" office space is up from $69.97 to $75.66, up 8.2%. Class "B" office space asking rents are averaging $54.96.

Development sites are now being sold or leased to hotel developers and new condo and mixed use projects (retail, office, residential and/or hotel).

Some developers believe that with basically so few new buildings going forward and a two year lead time for new buildings, it may make sense to build now. The problem is that lenders remain cautious.

An exception is the hotel sector and retail.

Retail Market

Retail - because of lower prices, more national retailers are moving into N.Y. area (Lowe's, Walmart, TJ Max, Cosco, Target, Whole Foods).

Suffolk County Office Market

Vacancy rate remained at approximately 10.10%. Vacancy rate slightly higher and asking rents slightly lower. Average asking rent for space is $28.55 per sq. ft. up for class "A" space. Last quarter 2012 it was $28.49. "B" office space asking price is about $21.00. Last quarter 2012 it was $21.78.

Employment is slightly up. Unemployment for Nassau and Suffolk 7.8% vs. national unemployment rate of 8.12%.

Suffolk industrial market vacancy rate slightly down and asking rent slightly up ($8.80 to $8.97).

Redevelopment of older office buildings, modern office space, residential, assisted living or hotel use and shopping centers - Faster and less expensive than new construction. Most commercial activity involves alteration and upgrading of existing properties. This means more litigation relating to the impact of alterations (egress/ingress problems, noise, loss of space, etc.). 67 Wall Street (Hawkins Delafield & Wood)

Some Distinctions Between Residential

and Commercial Landlord-Tenant

Judges have more discretion in commercial context than in residential context because of less regulation.

Approaches which permit judges to achieve "justice":

waiver

estoppel

ratification

materiality

rules of contract interpretation - See Justice Billings outline

rules of equity - *e.g.*, equity abhors forfeitures of valuable leasehold interests, and implied covenant of good faith and fair dealing.

COMMERCIAL LANDLORD-TENANT

Tenant's Right of First Refusal to Purchase Property Was Not Triggered When An Alleged Third Party Acting As a "Straw" Purchaser, Submitted An Offer to Purchase - Definition of "Affiliate" - Tenant's Position Would Permit It to "Employ Trickery and Deceit to Obtain A Result For Which It Did Not Bargain In the First Instance" - Complex Commercial Transactions May Not Be "Beanbag," But "Neither Is It A Three-Card Monte" - Tenant Engaged In "Gamesmanship"

A commercial tenant sued its landlord to enforce the terms of a lease which provided the tenant with a right of first refusal (ROFR) to purchase the subject property (property). The court found that the ROFR had not been triggered and the court dismissed the complaint.

The lease provided that if certain conditions were met, the tenant had a ROFR. The ROFR was to be triggered "if [landlord] receives an offer to sell the Premises to a Person that is *not a Landlord Affiliate or an Affiliate of Tenant or Guarantor* which Landlord desires to accept. . . ." The ROFR further specified that, if a landlord receives an offer to sell the premises for a purchase price of $16,280,000.00 or greater on an all-cash basis, the landlord shall agree to such offer solely for purposes of complying with the ROFR. Additionally, the lease provided, "'[a]ffiliates' means Persons (other than individuals), controlled by, controlling, or under common control with the tenant. . . . 'Control,' in turn, is defined as 'the possession directly or indirectly of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, *by contracts or otherwise*'. . . ."

The tenant had entered into an agreement with a real estate and financial services firm ("A"), pursuant to which "A" agreed "to provide advisory services" related to the tenant's real estate holdings. Thereafter, the tenant asked "A" to assist the tenant in acquiring the property and "A" agreed to do so.

"In order to ensure that [tenant] paid the lowest possible price, [tenant] and ['A'] agreed to have . . . ['A'] offer to purchase the [property] for exactly $16,280,000, the amount specified in" the ROFR lease provision. The tenant agreed to pay a $365,000 advisory fee upon the closing, if the tenant successfully purchased the property. "A" thereafter submitted a letter to the landlord which "purported to be a 'Purchase Offer' setting out the 'basic terms and conditions'" pursuant to which "A" or its assignees would agree to purchase the property. The tenant thereafter purported to exercise its ROFR. The landlord thereafter rejected the tenant's purchase offer.

"A" thereafter created a "script" for a tenant executive "to follow when speaking with representatives of [the landlord]." The script provided that the tenant had "learned of the purchase offer only because ['A'] had contacted [tenant] about ['A'] 'surrendering its leasehold.'" The script suggested that the tenant "'steer clear of' mentioning '[t]he meaning of control in the document' or '[t]he meaning of affiliate in the document.'" Although the tenant did not dispute that "A" had sent the script or had received the script, the tenant asserted that it had not discussed or relied upon the script.

The dispute turned "on whether ['A'] qualifies as an 'affiliate' of [tenant] for purposes of the ROFR. If "A" is an affiliate of the tenant, then the ROFR was not triggered. If "A" is not an affiliate of the tenant, then the ROFR was triggered and the landlord was required to sell the property to the tenant for the offered price. The landlord argued that "A" was an "affiliate" of the tenant because "A" was either an agent of the tenant or controlled by the tenant pursuant to "A"'s contract with the tenant. The tenant asserted that it neither controlled "A", nor was "A" an agent of the tenant.

The court found that "A" was an "affiliate" of the tenant. The court explained that the ROFR and its related definitions were "plainly drafted to prevent just the sort of gamesmanship [tenant] attempted in this case." The court stated that the "obvious reason to include such a clause in [the lease] is to prevent one counterparty from making a straw-man offer and effectively holding a call option on the property at a below-market price." The court found that "A" is an affiliate of the tenant since the tenant had "the power to direct or cause the direction of the management and policies of ['A'], whether through . . . *contracts or otherwise.*"

The contract between the tenant and "A" gave the tenant a "measure of control because it effectively required ['A'] to do exactly what [tenant] wanted it to do: namely, make a purchase offer for the . . . Property. That this measure of control came through positive rather than negative reinforcement - i.e., a benefit for complying rather than a punishment for breach - is irrelevant for purposes of the lease agreement, which also includes as 'affiliates' entities 'control[led] . . . otherwise." The court noted that "A" "only had to submit a purchase offer for the . . . Property in order to collect $360,000" and "A" "effectively bore no risk in the transaction whatsoever." Thus, the court held that under the language of the lease, "A" was "[the tenant's] affiliate - either by contract or, in the alternative, 'otherwise.'" Accordingly, the court dismissed the complaint.

The court further stated that even if the lease language was "initially ambiguous," the result would be the same. The court explained that the tenant's "preferred reading would . . . give it an unfair advantage, as it would effectively allow Plaintiff to employ trickery and deceit to obtain a result for which it did not bargain in the first instance." The court stated that the "world of complex commercial transactions, like politics, may not be 'beanbag,' . . . - but neither is it Three-Card Monte."

AAR Allen Services Inc. v. Feil 747 Zeckendorf Blvd LLC, 13 Civ. 3241, NYLJ 1202654899215, at *1 (SDNY, Decided May 6, 2014), Furman, J.

Commercial Landlord-Tenant - Tenant Entitled to 50% Rent Abatement Because "Opening Conditions" Had Not Occurred - Although Landlord May View Court's Decision As "Harsh," Courts Will Not Rewrite Clear Unambiguous Terms That Are Negotiated by Sophisticated Commercial Parties

A landlord commenced a summary non-payment proceeding against a shoe store (Tenant). The issue involved a lease clause which granted the Tenant "a 50 percent rent abatement until two other commercial spaces in the building become occupied by DSW and Walgreens, or the expiration of one year, whichever occurs first." The landlord asserted that the condition which triggered the full rent obligation had occurred once DSW and Party City, as a sublessee of Walgreens, opened in the two subject spaces. The Tenant countered that it was not obligated to pay full rent since Walgreens had never opened the store, as required by the lease. Each party sought summary judgment.

> The lease contained an "Opening Conditions" (OC) provision which stated:
> Notwithstanding anything to the contrary contained in the [l]ease, if the Commencement Date occurs prior to both DSW and Walgreens being open and operating in the Building [OC], [the respondent's] Minimum Rent shall be reduced by 50 percent until the earlier of (i) the date the [OC] are fully satisfied, or (ii) the passage of one year from the Commencement Date.

The lease also contained a merger integration provision.

In Apr. 2010, Duane Reade leased a store in the building. Duane Reade had become a subsidiary of Walgreens. On Feb. 23, 2012, Duane Reade sublet its space to Party City. The landlord had consented to the sublease. Party City thereafter opened on May 12, 2012. DSW had opened on Mar. 1, 2012. The Tenant had continued to pay only 50 percent of the rent pursuant to its lease which had commenced on Feb. 1, 2012.

On July 23, 2012, the landlord served the Tenant with a ten-day rent demand which included the unpaid 50 percent of the rent for the period following Party City's opening on May 12, 2012. The Tenant argued that pursuant to "the clear and unequivocal terms of the lease," full rent was not due until DSW and Walgreens were "open and operating in the Building" and that had not occurred. The landlord argued that "since 'Duane Reade/Walgreens' had the right to sublease to Party City, the provision in the . . . lease that 'DSW and Walgreens be open and operating in the Building' may be interpreted as 'DSW and Walgreens, assigns, successors, etc.'"

The landlord alleged that the Tenant had drafted the lease and "had expressed concerns during negotiations about the building being 'dark', i.e., without other open stores." The landlord claimed that he therefore agreed "to add the ['OC'] clause." The landlord asserted that the Tenant was not concerned about who the other tenants were, but that the spaces be occupied. The landlord alleged that it had advised the Tenant that the landlord had already executed leases with DSW and Duane Reade/Walgreens. The landlord conceded that "as of the lease commencement date, neither DSW nor Walgreens was 'open and operating' . . ., so that the [Tenant] was required to pay only 50 percent of the monthly rental. . . ." However, the landlord

argued that "once Party City opened in the Walgreens space, that space was no longer 'dark', and the [OC] had been met, thereby triggering the [Tenant's] obligation to pay full rent."

A broker witness asserted that the Tenant had not been concerned about the type of store that opened in the adjacent spaces, but rather that the building not be left "dark." The broker cited her "transaction trail," which was "a self-created document containing what she purport[ed] [were] all of the terms of the parties' final agreement." The broker stated that such document contained no reference to the OC, but only "a covenant by the [landlord] not to lease any adjacent space to an amusement arcade, adult bookstore or movie theater."

The court granted the Tenant's motion for summary judgment and denied the landlord's cross-motion. The court cited the following rules of contract construction:

> a written lease "agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms". . . . "Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide". . . . "[I]f the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity". . ., even if this results in an economically harsh result to one of the parties. . . .
>
> A contract is unambiguous if the language it uses has a "definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion". . . . Ambiguity is determined by looking within the four corners of the document and not to outside sources. . . . Thus, the "[m]ere assertion by one that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact". . . .

The court found that the lease language and particularly, the OC, "is clear and unambiguous in providing that the [Tenant] need only pay 50 percent of the rent until both DSW and Walgreens opened up." There was "no need to resort to the parol or extrinsic evidence proffered by the parties. . . ." The court reasoned that the parties were "sophisticated business people" and therefore, if "they intended for the [Tenant] to pay its full monthly rent if a tenant other than Walgreens occupied the building, they could easily have included such a provision in the lease." The court further noted that the rule that a contract should be construed strictly against the drafter, is "a rule of construction that should be employed only as a last resort" and the parties had provided that the lease constituted their "entire agreement." The court declined to "rewrite the plain language of the lease that was negotiated between sophisticated business entities."

The court acknowledged that the landlord may view the court's decision as "economically harsh," but explained that "parties are free to make their own contracts, and courts do not serve as business arbiters between parties in approximately equal stances." Thus, the court held that "the [Tenant] was obligated to pay only 50 percent of the rent at least through the date of the petition since a Walgreen's did not open."

34th Street Penn Asso., LLC, v. Payless Shoesource, Inc., 12N075998, NYLJ 1202645802507, at *1 (Civ., NY, Decided February 25, 2014), Bannon, J.

Commercial Landlord-Tenant - Tenant Failed to Timely Exercise Option to Renew - Improvements Were Not Based On Exercise of the Option - No Substantial Loss of Good Will

The petitioner had commenced a holdover proceeding to terminate the alleged month-to-month tenancy of the prime commercial tenant (tenant) and the undertenant. The premises were used as a dental office. The tenant asserted as affirmative defenses, *inter alia*, improper service of process, that an option to renew (option) had been properly exercised without objection by the petitioner, the petitioner waived any defects in the exercise of the option by accepting rent prior to and subsequent to the termination notice and equitable estoppel. The respondents defended the summary proceeding instead of commencing an action in the Supreme Court for declaratory and injunctive relief. The Civil Court and the Housing Part of the Civil Court "may entertain equitable defenses in a summary proceeding."

The subtenant argued, *inter alia*, partial constructive eviction. It counterclaimed for negligent operation of a boiler, asserted a waiver defense based on acceptance of rent, claimed that there was "no prejudice to the landlord," and asserted a third party beneficiary claim based on the wrongful rejection of the option by the petitioner. The subtenant also cross claimed against the prime tenant for breach of contract and "for the failure to properly exercise the option to renew."

The primary lease contained a renewal option for an additional 25-year period that was to be exercised "no later than sixty (60) days prior to the expiration date." The sublease provided for five successive five year renewals that had to be exercised in writing by the subtenant "no later than ninety (90) days prior to the expiration of the term of the sublease currently in effect."

The tenant had moved to dismiss on the grounds that the option had been properly exercised, "albeit, untimely." The tenant testified, *inter alia*, that a new building boiler had created "excessive heat in the subject unit" and that the excessive heat "caused irreparable harm to the subtenant and his dental equipment." The tenant alleged that she had to spend $20,000 to repair such condition and that "this proceeding is retaliatory" because of the boiler incident.

The tenant had testified that the option paragraph had been excluded from the copy of the lease which had been given to her by her husband's attorney. She claimed that she did not see any reference to the option. The option paragraph was a footnote in the lease. The tenant testified that once she was advised that she had not timely exercised the option, she promptly exercised the option. The tenant also testified that although the petitioner had returned her rent checks, she had returned all of the checks to the petitioner and all of those checks had been cashed.

The tenant had exercised the option on May 17, 2010. The petitioner asserted that the option had to be exercised on or before Jun. 30, 2009. The tenant had acknowledged that her husband had told her about the option, but she claimed that "she did not know how to exercise the option." Additionally, the tenant had sent the notice purporting to exercise the option to law firm "A". The tenant had never paid rent to "A" and knew that "A" was "not the law firm retained by the [petitioner] for business purposes." Rather, "A" was "the eviction" law firm.

The tenant stated that she thought she had the right to rent the space to the subtenant and that her husband had spent over $160,000.00 in the premises over the first five

years of the lease. However, "no documentary evidence was presented to substantiate this claim." The tenant asserted that she had paid rent from 2009 to 2012 and the petitioner had "waived any rights to evict her by the acceptance of her rent."

The subtenant testified that he was not aware of any issues as to the tenant's option and he had timely exercised his five year options. The subtenant acknowledged that although he did not see the option provision in the master lease, "he did notice . . . an asterisk on the document," but had "ignored it."

Appellate authority holds that "the task for determining whether a tenant shall be relieved of a default in exercising an option is threefold. The tenant must show (1) that the default was excusable; (2) that the default will result in a substantial forfeiture by the tenant; and (3) that the landlord would not be prejudiced. . . ." Additionally, when a contract requires written notice "to be given within a specified time period, the notice is ineffective unless it is received within that time. . . ."

However, equity will relieve a forfeiture "where a forfeiture would result from the tenant's neglect or inadvertent" and the landlord would not suffer prejudice. Equity will not intervene, however, "when a party fails to timely exercise a contractual option because 'the loss of the option does not ordinarily result in the forfeiture of any vested right'. . . ." This is because "the option itself does not create an interest in the property, and no rights accrued until the condition precedent has been met by giving notice within the time period specified."

Courts have held that tenants would not suffer a forfeiture where their investment had "already been amortized and depreciated by the time of the attempted renewal." In such case, the tenant had already "reaped the benefit of all initial expenditures," and therefore, would not suffer a forfeiture.

The court explained that the salient issues were "whether the default is excusable, whether the failure to renew the lease would result in a forfeiture of a substantial loss, whether the 'improvements' at the subject premises were made with intent to renew the lease, whether the subject premises should be recognized as an equitable interest that should be protected as a 'longstanding location' for the dental office or is an important part of the goodwill of that office to warrant protection against forfeiture. . . ."

The evidence did not indicate that "the Petitioner knowingly and intentionally waived the rights to object to the alleged lease extension," by accepting rent. The landlord's intention was evidenced by the commencement of a holdover proceeding, "the rejection of the rent after notice of the expiration of the lease" and the notice of the expiration of the lease. "[T]he tendered rent had not been the increased rent amount due under the lease extension" and had only been accepted in court after the court ordered the payment of use and occupancy.

Moreover, the omission of the option in the copy provided to the tenant was based on an error "presumably made by a member of the staff" of her husband's attorney's office. The court found that the lease option provisions were "complete, clear and unambiguous on their face" and would be "enforced according to the plain meaning of their terms," with an exception. Here, the option exercise was approximately 16 months late. The court emphasized "an option to renew must be timely, definite, unequivocable and strictly in compliance with the terms of the lease. . . ." Here, the exercise of the option was "ineffective" since it was untimely.

Additionally, exercise of the option was sent to the landlord's eviction attorney, rather than the landlord and/or the agent. "All rent payments were made to the Petitioner, all of her legal inquiries were made to the Petitioner's office, all notices were from the Petitioner except the holdover notice of petition and petition, and the rejection of her rent were all made by

the Petitioner and/or the Petitioner's . . . agent." Moreover, there was no evidence that "a limited power of attorney or other notice from the Petitioner was provided to her that granted either of their attorneys authorization to accept service of the option to renew."

The court opined that "it would be a hard stretch . . . to find that this default was excusable." Here, the failure to timely exercise the option could not be deemed attributable to "mere inadvertence or 'venial inattention.'" The court held that the failure to exercise the option to the proper party was "fatal and inexcusable."

Even if the default was "excusable," the "non-renewal of the lease" did not create "a substantial loss to the tenant." Assuming that the alleged investment was made "at the inception of the tenancy in 1984," the improvements were made approximately 30 years ago and the tenant had "recouped her and her husband's investment capital during the term of the lease and the value of the investment capital has depreciated over the course of the lease." The $20,000 to repair the boiler was expended by the tenant for "protecting her source of income" and "not for the purposes of renewing the lease" and such expenditure was "a 'repair' and not an 'improvement.'" Moreover, those expenditures had been made before the lease expired, not after the lease had expired.

The subtenant had made no improvements and had only cited the tenant's improvements, as well as the excessive heat problem. Thus, neither respondent "could claim any improvements in anticipation of the lease renewal." Absent evidence that either respondent had made substantial leasehold improvements, the tenant had "not shown an 'equitable interest' that would warrant the invocation of any 'equitable remedies' to protect against forfeiture."

Late option exercise cases that recognized the loss of good will involved retail businesses. The court did not believe that the dental office was the equivalent of a retail business that relied on its location and its "customers in the community." The subtenant had two other dental offices. The subject office could "not be characterized as a 'unique commercial commodity'" and was located in a building that contained over 122 residential apartments. There was no evidence that the residents used the particular "dental office as opposed to another dental office or that there would be any substantial loss in goodwill" if the dentist had to change locations. There was no evidence that this particular dental office had "any widespread name recognition at this particular location." There was no evidence that employees would lose their jobs if this location were closed or that there was no other alternate location available.

The court then noted that "[t]he landlord's inability to consummate another lease is prejudicial in and of itself." The petitioner could increase the rental and was a co-op that had "limited resources and would not be considered 'high end.'" The subtenant had not exercised the option to renew under the master lease agreement. Thus, the court held that the tenant was "not relieved of consequences of the untimely renewal notice." Accordingly, the court held that the petitioner was entitled to a final judgment of possession.

Comment: This decision incorporates a substantial review of case law relating to the late exercise of options.

149-05 Owners Corp. v. IRA Phillips, 51616/11, NYLJ 1202629494966, at *1 (Civ. QU, Decided October 31, 2013), Thompson, J.

Commercial Landlord-Tenant - Landlord Not Permitted to Engage in Self-Help Eviction If Not Authorized By Lease - Lease Permitted Owner to Change Arrangement of Elevators - "De Minimis" Encroachment of the Tenant's Space

A trial court denied a landlord's motion for a preliminary injunction (injunction) and granted the tenant's motion for a preliminary injunction enjoining the landlord from "closing access to its building and withholding utility services from [tenant's] leased premises. . . ." On appeal, the Appellate Division (Court) agreed that the injunction was properly granted, but modified the injunction "so as to allow [landlord] to enter [tenant's] premises to perform work on one of the building's elevator shafts to accommodate an elevator cab compliant with the Americans with Disabilities Act (ADA), and otherwise affirmed, without costs." The trial court had set the amount of the undertaking for the tenant's injunction in the amount of $162,208.84, plus monthly use and occupancy of $16,320.84. The Court reversed the "undertaking" order and remanded the matter for proceedings consistent with the subject decision. The Court also, *inter alia*, affirmed the trial court's determination that the landlord was "not entitled to engage in a self-help eviction of [tenant] absent court order. . . ."

The tenant held a long term lease for commercial space on the 19th floor of an office building. The tenant operates an "endodontic practice" at the premises. The owner wanted to convert the building into a hotel. The owner provided the tenant with a notice of cancellation pursuant to a lease provision which provided that, if the owner intends to apply to the New York City Dep't of Buildings (DOB) for "a permit to demolish 'all or substantially all' of the building, and provides that if the owner cancels the lease and thereafter fails to obtain such DOB permit before the effective date of the cancellation, then the cancellation is void."

Approximately a month before the notice's cancellation date, the owner commenced the subject action, seeking an injunction compelling the tenant to remove patient records from its premises. The complaint stated that following the cancellation date, the owner "intended to cut off public access to the building and withhold utilities from the tenant's premises in order to perform the conversion work." The tenant had moved for an injunction to stop the owner from pursuing a self-help eviction. The trial court had granted a temporary restraining order, pending an evidentiary hearing. Following the hearing, the trial court denied the owner's motion and granted the tenant's motion.

The Court found that the trial court had not "improvidently exercise[d] its discretion in granting the tenant's motion for . . . [an] injunction." The Court opined that the trial court had "correctly concluded, at this early stage of the litigation, that the tenant would likely succeed in establishing that the owner did not obtain a DOB permit to demolish 'all or substantially all' of the building before the effective date of the cancellation, which would render the cancellation notice void." Moreover, the Court found that the trial court had "properly found that the remaining criteria for injunctive relief were satisfied. . . ."

The Court stated, however, that the trial court "should have modified the injunction" to permit the owner to enter the premises "to perform work on one of the building's elevator shafts to accommodate an elevator cab compliant with the ADA." The lease permitted the owner to "change the arrangement of the elevators in the building, and the . . . plans call[ed] for a de minimis encroachment 2 feet 4 inches wide by 7 feet 2 inches long, which constitutes

only .44 percent of the tenant's leased space. . . ." The Court further found that the "balance of the equities on this issue lies with the owner."

Additionally, the Court found that the trial court had "properly granted the tenant's motion for summary judgment seeking a declaration that the owner is not entitled to evict the tenant by self-help. A landlord may, under certain circumstances, use self-help to peaceably re-enter commercial premises and regain possession. . . . This common-law right to re-enter, however, can only be exercised if the lease expressly reserves that right. . . ." Here, the lease lacked any "specific provision allowing the owner to use self-help to evict the tenant." The Court rejected the owner's argument that certain language constituted "an express reservation of the right to re-enter."

The Court then explained that the amount of the bond set by the trial court was inappropriate since "[t]he tenant would be required to pay these amounts independent of any . . . injunction." Although the trial court had "also provided that the tenant would be responsible for 'all damages and costs which may be sustained by reason of [the] injunction'. . . .," the trial court had not set an undertaking to cover those potential damages.

The "posture litigation" had changed since the trial court had initially set the undertaking. The Court has now modified the injunction to permit the owner to enter the tenant's space to work on the elevator and has now affirmed the trial court's declaration that the owner may not engage in a self-help eviction. Therefore, the Court remanded the matter to the trial court for a determination as to what undertaking, if any, should be set on the tenant's injunction. The Court explained that the trial court should determine whether, "pursuant to CPLR 6314, the owner should be required to post an undertaking as a result of our modification of the injunction." Finally, the Court held that "the owner's acceptance of a single rent check does not establish that the owner intended to relinquish its right to cancel the lease. . . ."

Comment: The trial court had found that the plaintiff's evidence failed to demonstrate that it intended "to demolish 'all or substantially all' of the Building." Although the owner planned to "remove 3 to 5 structural beams from each floor of the Building, over 100 beams on each floor will remain in tact. . . ." Although the plans require substantial work, "most of the structural elements of the building are to remain in tact. . . ." The "existing elevators are to remain, one is to be added and a staircase is to be relocated." The trial court found that the owner's building permits did not provide for demolition of "all or substantially all" of the building. Rather, the permits showed that the "vast majority of the essential Building structural elements are to remain in tact."

The owner had argued that "the test is whether, on a qualitative basis - considering, altogether, both the interior total gut-demolition work, and also the significant and substantial structural demolition work . . ., all in the context of the fundamental change of use here - the commercial office building that existed when the lease was made, is now being destroyed. . . ." However, the lease did not provide for cancellation in the event of an "alteration or 'change of use.'" The trial court reasoned that "more than the mere skeleton of the Building is to be preserved under [owner's] own conversion plans; the interior stairs, elevators, floors, ceilings and roof are also to remain." Thus, the trial court found that the notice of cancellation failed "to conform" to the cancellation provision of the lease.

The trial court had also opined that the landlord had failed to demonstrate irreparable injury absent the granting of injunctive relief. If the landlord's request for an injunction was not granted, it was "prepared to provide a protected space on the 19th floor for storage of [tenant's] medical records. . . ." In contrast, the tenant had alleged that after

exercising its option to renew its lease, it had invested between $175,000 and $200,000 in its space in the building. The space involved a "penthouse suite with terraces and views of Central Park where its members had practiced dentistry for over [15] years." The trial court found that the tenant would be "unable to practice dentistry absent the electrical service, plumbing service and Building access it seeks to retain in its application for a preliminary injunction."

With respect to balancing of the equities, the trial court found that conversion of the premises to a hotel "will be feasible even if it cannot immediately include the 19th floor as part of the hotel. . . ." The tenant's land use counsel had contended "that under existing law, [tenant's] use of the premises for the practice of endodontics would remain legal after the conversion of the balance of the Building to a hotel. . . ." There was no allegation that the tenant had not been paying its rent. Accordingly, the trial court found that the landlord would not be prejudiced by an injunction pending determination of the underlying action.

The trial court had also held that the landlord should not be required to commence an action for eviction in the Civil Court, rather than supplement its complaint with a proposed cause of action for eviction. The trial court is a court of "general jurisdiction, and in the circumstances of this action, hotly litigated in this Court for more than a year, there would be no good reason to have multiple actions proceed simultaneously in separate courts." Moreover, notice of cancellation was not "stale." The tenant's authorities in support of such argument "all involved new proceedings brought on termination notices used as the predicate for prior, dismissed proceedings." Here, the landlord's action was "brought timely and is still pending." Thus, the trial court permitted the landlord to supplement its complaint to assert a claim for eviction.

1414 Holdings, LLC v. BMS-PSO, LLC, App. Div., 1st Dep't, Index Nos. 11863-11867, decided May 2, 2014, Tom, J.P., Friedman, Acosta, Andrias, Richter, JJ.

Commercial Landlord-Tenant - Car Wash Tenant Sued Landlord - Tortious Interference with Business Relations - Breach of the Implied Covenant of Good Faith and Fair Dealing - Intentional and Negligent Property Damage - Landlord Allegedly Hired Counsel and Experts Who Fraudulently Misrepresented to Town Officials That They Had Been Hired and Retained By Neighbors to Oppose Approvals for Tenant's New Location - Landlord Sought to Open Its Own Car Wash and Appropriate Tenant's Customers - Landlords May Fill Future Vacancies, But May Not Destroy Or Injure Tenants' Rights Under Existing Leases

A tenant car wash operator (tenant) commenced an action, alleging causes of action for tortious interference with business relations (tortious interference), breach of the implied covenant of good faith and fair dealing (implied covenant), and intentional and negligent property damage (property damage). The tenant had moved to stay a summary proceeding to recover possession of the premises, restrain and enjoin the defendant landlords (landlord) from evicting the tenant during the pendency of the subject action, and to remove the summary proceeding to the Supreme Court and consolidate it with the subject action. The landlord, *inter alia*, cross-moved to dismiss for failure to state a cause of action. The court denied both motions.

The tenant "held over" after the expiration of its lease on Apr. 30, 2013 (lease expiration date). Approximately three years prior to the lease expiration date, the tenant had signed a new lease (new lease) for premises located nearby (new location), with the intention of relocating its car wash. The new lease was contingent upon the tenant obtaining "required variances, permits, and approvals" (approvals). The tenant eventually obtained the approvals.

The tenant asserted that the approval process had been delayed as a result of its landlord's "actions in secretly soliciting neighbors at the new location to oppose the [tenant's] applications" as part of an "attempt to cause the [tenant] economic harm by preventing [it] from relocating [its] car wash business." The tenant alleged that the landlord had "acted in bad faith and with actual malice by secretly retaining a land use attorney and various experts, including traffic and noise experts, to oppose the [tenant's] applications and file legal proceedings to stop or delay the [tenant] from establishing [its] car wash at the new location."

The tenant further alleged that the landlord had "instructed the land use attorney and the experts to fraudulently misrepresent" to Town officials "that they had been hired and retained by the neighbors, when they were, in fact selected, hired, retained, and paid by the [landlord]." As the result of the landlord's alleged bad faith actions "in opposing, obstructing, and delaying the approval process, the [tenant] failed to receive the necessary [approvals] with sufficient time to build [its] car wash at the new location" before the lease expiration date. The tenant also alleged that the landlord had "acted with actual malice and with the intent to cause the [tenant] economic harm in that the [landlord] planned to open [its] own car wash business at the existing location and misappropriate the [tenant's] customers and business to themselves." Additionally, the tenant claimed that it had suffered property damage when the landlord's agents or employees had "intentionally, . . ., or negligently punctured the waterproof materials on the

roof of the premises while performing a site inspection . . ., which caused extensive quantities of water to leak into the premises."

The landlord had allegedly "put up . . . signs announcing the opening of their business as of May 1, 2013, they parked a truck across the street from the [tenant's] existing business indicating that [it] would be opening and were now hiring, and handed out coupons to the [tenant's] customers knowing that the coupons would cause the [tenant's] customers confusion." The landlord had also allegedly "attempted to hire away the [tenant's] employees," and told "the . . . employees that they were putting the [tenant] out of business. . . ." Further, the landlord had allegedly "solicited business from . . . the [tenant's] car dealership clients by telling them that the [tenant] would soon be out of business." The landlord had also "attempted to cancel the . . . electric service, conducted lengthy inspections on the [tenant's] premises, made deliveries of new equipment to the [tenant's] business, and spread rumors that they would have the police standing by to re-take possession of the premises."

The tenant's land use attorney asserted that it had "taken twice as long as it should have for the [tenant] to obtain a building permit" and "based upon circumstantial proof," the landlord had "secretly funded and directed the opposition to [the tenant's] applications for [approvals] . . . at the new location." He further alleged that after the approvals were obtained, the attorney purporting to represent the neighbors commenced an Art. 78 proceeding that was "primarily designed to delay the approvals process."

The landlord argued that the tenant could not "demonstrate a likelihood of success on the merits," had "an adequate remedy at law in that [its] damages [were] compensable by a money judgment," the tenant failed to establish irreparable harm, the injunctive relief sought would give the tenant "a permanent tenancy for an indeterminate term" and would prevent the landlord from "regaining access to its premises after the lease expired" and the issues raised "are defenses to the summary proceeding."

The landlord further asserted that opposition to the new location was based on concerns as to a proposed "oil change facility" that would be "partially located in a residential zone" and concerns as to "pollution, noise, and traffic." The landlord argued that if the tenant had "only sought approval for a car wash," there would not have been delays. The landlord denied that it funded the opposition, but argued that even if it were true, "they have the legal right to do so, whether openly or not." The landlord also argued that it would not be a true competitor, since the tenant would be offering services beyond what the landlord would be offering, *e.g.*, oil changes. It also asserted that the car wash business was "not unique" and that it did nothing "to steal the [tenant's] customers or good will."

The tenant had clarified that it sought to stay the summary proceeding for six months to allow it to build a new facility. The tenant further argued that if the landlord had openly voiced objections to the new location under its own name, the municipal officials "would have paid them little to no attention because they are not affected by the project." The tenant asserted that since the landlord's property was located 900 feet away, the landlord would have lacked standing to pursue an Art. 78 proceeding. Additionally, the tenant had agreed to make "use and occupancy" payments during the holdover period.

The court denied the tenant's request for a preliminary injunction on the grounds that the facts "were in 'sharp dispute'" and the tenant had failed to establish irreparable harm or that it had "a 'clear right' to remain on the premises" after the lease expiration date. If the tenant prevails, it will recover damages. The court also declined to remove the landlord-tenant action to

the Supreme Court, since the local court was "the preferred forum for the resolution of landlord-tenant disputes."

However, the court denied the motion to dismiss the tortious interference claim. Although "circulating coupons to potential customers, . . . is not wrongful," the landlord had also allegedly "funded frivolous opposition to the [tenant's] land use approvals, told the [tenant's] customers and employees that the [tenant] would soon be out of business, and abused their status as the [tenant's] landlord to confuse the [tenant's] customers and employees and conduct burdensome inspections of the premises." The court viewed such alleged conduct as going "far beyond mere persuasion or legitimate economic pressure. . . ." The court stated that it was too early to determine whether the landlord's alleged involvement in the tenant's permitting process was "frivolous." Thus, the court found that the tenant's tortious interference claim was sufficiently pled.

The court also denied the motion to dismiss the breach of implied covenant of good faith and fair dealing claim. The tenant was entitled to receive benefits "during the entire term of the lease, up to and including the final days of the lease term." Here, the landlord was alleged to have "deliberately destroyed and interfered with the [tenant's] right to receive fruits of the lease by attempting to hire away the [tenant's] employees, spreading disinformation regarding the [tenant's] business, conducting unreasonable inspections, and having equipment delivered to the premises." If such allegations are true, they could support a finding that the tenant had been deprived of its rights under the lease. The court explained that although a landlord is entitled to make plans to fill a vacancy when the current vacancy is set to expire, the implied covenant of good faith and fair dealing requires that the landlord does so in a manner that does "not destroy or injure the right of the present tenant to receive the fruits of its lease. . . ." The court also held that the property damage claims had been sufficiently stated.

Comment: Some competitors will attempt to obstruct a business's effort to open at a new location. (They may even attempt to obstruct a business's effort to operate at an existing location.) For instance, some shopping center owners, supermarket companies and movie theatre chains have complained to public officials that a new proposed development will violate environmental or other land use laws and/or regulations. They have argued that the new development will create, *inter alia*, traffic and noise problems. "Competitor opponents" have not always acted openly or alone and they have funded and otherwise supported community opposition groups.

These efforts to derail competition are generally exempt under anti-trust laws, pursuant to the "Noerr-Pennington" line of cases. The "Noerr-Pennington" doctrine has an exception for objections that are a "pure sham." The reason that such anti-competitive conduct is legally permitted is because of, *inter alia*, First Amendment considerations and other important public policy considerations. It is often a competitor that has the resources to investigate possible violations of law or other bona fide development issues. When a competitor "blows the whistle" on possible violations of statutes or public regulations or illuminates other development problems, the public benefits through the airing and thoughtful consideration of such issues.

The difference here is that the landlord was not a mere competitor. Rather the landlord was a party to a lease contract and had a legal obligation to not undermine the tenant's ability to realize the benefits of such lease. The subject decision recognized that discovery may ultimately demonstrate that the landlord had acted within its legal rights. However, the court believed that the subject complaint should not be dismissed at the pleading stage.

Splash v. Shullman Family, 109193/2010, NYLJ 1202627012638, at *1 (Sup., Westchester Co., Decided October 9, 2013), Connolly, J.

Yellowstone Injunction Continued to Permit Plaintiff Opportunity to Cure Failure to Register With the State of New York - Foreign Corporation is "Doing Business" in New York by "Acting Continuously As the Sub-Landlord for Commercial Property" - BCL §1312(a)

A plaintiff commercial tenant had moved for a Yellowstone injunction prohibiting its landlord from terminating its lease while an action was pending, and tolling the plaintiff's time to cure any defaults under its lease. The defendant asserted, *inter alia*, that the motion should be denied because the plaintiff lacked standing to bring the action "pursuant to BCL §1312(a) as a foreign corporation not registered to do business in New York."

The plaintiff, a Delaware corporation, was not registered to do business in New York State. The defendant, as the ground lessee of the property, had a landlord/tenant relationship with the plaintiff pursuant to a long-term commercial lease. The plaintiff had taken several steps to remediate and control certain ground contamination. However, the defendant, concerned about the "slow speed of the cleanup" and "other required repairs," sent a 30-Day Notice to Cure (Notice). After the defendant had granted two extensions to the Notice, the defendant refused to grant any further extensions. The plaintiff then filed the subject motion.

The plaintiff argued that "it is not 'doing business' in New York within the meaning of" BCL §1312(a). The court explained that "[t]o come within BCL §1312(a), 'a corporation must do more than make a single contact, engage in an isolated piece of business, or an occasional undertaking; it must maintain and carry on business with some continuity of act and purpose'. . . ."

The plaintiff emphasized that "it has no place of business in New York; owns no property in New York; has no employees, officers or directors residing or working in New York; has no bank accounts, telephone numbers, or mailboxes in New York; does not solicit any business in New York, and does not physically occupy any portion of the Property." The defendant countered that the plaintiff acted as a "sub-landlord" for the property for several years and had subleased the property to several commercial tenants.

The court held that by "acting continuously as the sub-landlord for commercial property," the plaintiff was "doing business" within the purview of BCL §1312(a). The court found that the plaintiff's "subleasing activity was wholly intrastate, systematic, and regular." Therefore, until the plaintiff registered with the State of New York and paid all applicable fees, taxes, and penalties, the plaintiff was "precluded from maintaining this action in New York." The court extended the Yellowstone injunction which it had previously granted, in order to "afford the plaintiff an opportunity to cure by obtaining authority to do business in New York."

MKC-S, Inc. v. Laura Realty Co., 507918/2013, NYLJ 1202653274369, at *1 (Sup., KI, Decided April 21, 2014), Demarest, J.

RESIDENTIAL LANDLORD-TENANT

Landlord - Tenant - A Notice of Claim Is Not A Prerequisite For Moving to Hold NYC Housing Authority (NYCHA) In Civil Contempt - Claim For Actual Damages Denied - Lack of Proof - NYCHA Guilty of Civil and Criminal Contempt - NYCHA Knew When It Signed Several Stipulations Agreeing to Quickly Restore Hot Water, That It Would Not Comply

The underlying HP proceeding was commenced by the tenant against the New York City Housing Authority (NYCHA), to compel correction of building violations. "It was consolidated with a nonpayment proceeding between the same parties." The nonpayment proceeding had been settled pursuant to a stipulation wherein the tenant agreed to pay certain arrears and NYCHA agreed to do certain repairs within certain specified time periods.

The tenant moved to restore the proceeding, alleging that she paid the arrears, but was entitled to an abatement because of NYCHA's failure to make required repairs. The court ordered NYCHA to restore hot water and fix a leak under a sink and was adjourned for the "abatement issue." The motion was thereafter "denied" because of "no appearance" by the movant. The tenant then moved again, citing NYCHA's failure to make repairs and requesting an abatement. Pursuant to a subsequent stipulation, the tenant agreed to pay certain arrears and NYCHA again agreed to make repairs within specified dates. Approximately two years later, the tenant moved for "an order of civil and criminal contempt," consolidation with the HP proceeding, limited discovery and related relief. The parties stipulated to consolidation and discovery.

An inspector had found that the apartment lacked hot water, the water temperature was 87 degrees, an oven door needed repair, a faucet was defective, a bedroom wall needed repair, there was a broken glass window in the bedroom, walls needed to be repaired in another bedroom and hallway, there was black mold in the bathroom and that the "entire apartment needed to be painted."

The parties stipulated to settle the proceeding, pursuant to which NYCHA agreed to "restore hot water within two weeks" and other repairs were to be made within 30-60 days of initial access.

NYCHA allegedly had failed to comply with the so ordered stipulation, including the obligation to restore hot water. A prior court order had directed NYCHA to provide "heat and hot water, . . . fix the stove, kitchen faucet, and complete plastering and painting" by a certain date. The prior order provided that if NYCHA defaulted, the tenant could move for contempt.

Another stipulation provided that the necessary work would be done by certain agreed upon dates. The tenant again moved to hold NYCHA in contempt for failing to make repairs. The tenant asserted that hot water had yet to be provided, there were holes in her room and painting and plastering had not been done. NYCHA stipulated to provide the tenant with a one month abatement, to complete plastering by a date certain and to repair the broken glass window in the tenant's bedroom. Although NYCHA believed that "the hot water issue [had] already been addressed," NYCHA would re-inspect the hot water situation. That stipulation was not so ordered by the court.

Other litigation involving the subject housing project, but different plaintiffs, indicated that NYCHA knew at the time it entered into stipulations with the tenant, that there were building wide problems which were attributable to "faulty shower bodies which needed to be replaced in each unit." Additionally, testimony indicated that the tenant and his son had both suffered from asthma before they moved into the apartment.

The court found that the tenant was a credible witness and that although NYCHA did some repairs, it had not restored the hot water. The court further found that NYCHA breached several so-ordered stipulations, by failing to restore hot water, paint and plaster and abate the mold condition. The tenant's credible testimony was bolstered by inspection reports. Eventually, "NYCHA changed the shower body, and did other repairs."

The tenant had testified that she has since had "intermittent hot water in the shower and the bathroom." She acknowledged that she now had "consistent hot water in the kitchen, but testified that the hot water in the bathroom still remained intermittent," *i.e.*, there is a hot water problem in the bathroom in the mornings, but there is generally hot water in the evenings.

Emails demonstrated that NYCHA knew of "a pervasive lack of hot water" as early as Dec. 2008 and "had determined within one month of that date to make addressing the lack of hot water a priority." NYCHA was "overwhelmed with the number of court cases where lack of hot water had become an issue in the complex." Eventually, "a work request for the replacement of shower bodies in the development was submitted as an emergency request."

The court explained that

> A party that disobeys a court's lawful mandate may be held in Civil Contempt [Judiciary Law §753(a)(3)]. For Tenant to prevail on this claim, Tenant must establish that a lawful order was in effect with an unequivocal mandate, that the order was disobeyed, that NYCHA knew about the order, and that Tenant was prejudiced as a result of NYCHA's failure to comply with the order. . . . The undisputed failure by NYCHA to comply with four so-ordered stipulations and one court order by failing to provide an adequate supply of hot water, prejudice's the Tenant's rights in the proceeding and is sufficient to hold NYCHA in Civil Contempt. . . . Tenant did establish at the hearing that the so-ordered stipulations and order were lawfully in effect, unequivocally required NYCHA to make repairs including to restore hot water, and that NYCHA failed to comply repeatedly and over a long term. Tenant was clearly prejudiced as a result of NYCHA's noncompliance and all elements necessary for a finding of civil contempt were established by Tenant at the hearing. . . .

Accordingly, the court found the tenant is entitled to actual damages. The court rejected "NYCHA's argument that it is not subject to civil contempt because Tenant [had] not filed a notice of claim. . . ." NYCHA had not provided any legal authority showing that "a claim of civil contempt must be predicated on a notice of claim."

A party seeking actual damages for civil contempt "must prove actual loss, failing which the court is limited to the imposition of a fine of $250.00." The tenant had sought "$30 per day for each day without hot water, $20 per day for painting and plastering and similar per diem penalties for the mold condition and the window repair." Such amounts bore "no relation

to the reduced rental value" of the apartment. The court rejected the tenant's request for actual damages and noted that "[a] flat per diem fine as a penalty is inappropriate for damages on civil contempt."

The tenant also sought damages for "property loss, out of pocket expenses and loss of time from work." However, the tenant presented "no evidence of monetary damages on any of these categories." Additionally, the tenant sought damages for non-pecuniary loss items such as "pain and suffering and diminution of quality of life." Although a claim for non-pecuniary loss in determining actual damages arising from the civil contempt is permissible, the court found that the tenant failed to provide evidence supporting its claim for such damages. Although the tenant testified as to disruptions of a daily life, such testimony was "insufficient to establish damages for 'pain and suffering' or reduced 'quality of life' beyond the reduced value of the Subject Premises." The court found that the tenant's claim that she worried that the lack of hot water would cause her to lose custody of her son was not credible. The court believed that the tenant's claim for such damages was intended to punish NYCHA rather than to compensate the tenant for the actual losses.

The court found NYCHA had failed to restore hot water and had breached stipulations by failing to paint, plaster and abate the mold's condition. A fine for civil contempt is intended to compensate the tenant for actual damages and not intended to punish NYCHA. Although the tenant did not prove out of pocket expenses, the tenant gave credible testimony about the conditions in the apartment and their impact on her and her son. The court explained that "one form of actual damages established by Tenant at the hearing pertains to the decreased value of the Subject Premises as plagued by the conditions for the relevant periods. The calculation of these type of damages is similar to the calculation for a rent abatement. . . ." The court held that NYCHA's failure to address the combined conditions "effectively reduced the value of the Subject Premises by 80 percent" during the subject time period. The court declined to award damages for the period when there was "an intermitted lack of hot water. . . ." The record established that the tenant had "refused access to NYCHA on several dates" and NYCHA had eventually "substantially compiled with the prior order and stipulations."

Although the tenant also claimed that she incurred more costs for food by eating out, the tenant failed to support such claim by showing actual damages incurred or dollars spent. The tenant presented "no evidence of any pecuniary loss for property damage." Accordingly, the court awarded the tenant actual damages based on NYCHA's civil contempt in the amount of $10,194.00, *i.e.*, an 80 percent rent abatement.

> a party may be held in criminal contempt for wilful [sic] disobedience to the lawful mandate of the court. Authority for this court to punish for contempt is also found in §27-2124 of the Housing Maintenance Code and §110(e) of the Civil Court Act. In order to establish that NYCHA should be held in criminal contempt, Tenant must establish beyond a reasonable doubt that NYCHA willfully disobeyed the court's order. . . .

Evidence established that "NYCHA knew when it signed each one of the stipulations agreeing to quickly restore hot water to the Subject Premises that it would not be complying with this aspect of the stipulations." NYCHA knew that such problem could not be resolved until all shower bodies had been replaced and that would take a significant amount of time to accomplish. NYCHA was also aware that there was "a pervasive problem and had no intention of restoring hot water . . . within any of the time frames provided in the orders issued in

these proceedings." The court explained that "[c]riminal contempt is appropriately found here because NYCHA's execution of stipulations which it knew it could not comply with is an offense against judicial authority. The penalty is intended to compel NYCHA's respect for the court ordered stipulations, the penalty is punitive rather than coercive. . . ." Accordingly, the court found that NYCHA was "in criminal contempt by agreeing to stipulations which its agents were fully aware would not be complied with at the time they were entered." The court further noted that fines payable for criminal contempt are payable to the NYC Commissioner of Finance and that "[h]aving one city agency pay another city agency seems ineffective."

The court imposed a penalty of $100 per each criminal contempt for NYCHA's intentional breach of three stipulations for a total of $300.00 and awarded the tenant civil contempt damages of $10,194.00.

Randolph v. New York City Housing Authority East River Houses, L&T 15490/2010, NYLJ 1202663259322, at *1 (Civ., NY, Decided July 8, 2014), Kraus, J.

Landlord-Tenant - Nonpayment Proceeding - Landlord Failed to Timely Make Repairs, Even In Response to HPD Violations - Court Awarded 20% Rent Abatement - Tenant Had Rejected Landlord's Offer to Replace Entire Kitchen Floor and to Buy A New Stove - Tenant Wanted Wood Floors and Special Stove - Tenant Failed to Provide Unimpeded Access for Repairs - Complaints About Floor and Stove Did Not Warrant A Rent Abatement

This nonpayment proceeding involved a rent stabilized tenant in her 90's, had lived in the subject apartment for more than 40 years. The tenant had alleged several violations for warranty of habitability (WOH). Her complaints included "a malfunctioning and misaligned front entrance door; obsolete 'fifty year-old' air conditioning units; an inoperative smoke and fire alarm; stuck window sashes . . .; and several issues in the kitchen, such as a worn-out kitchen floor, a wall damaged by an old water leak and resulting 'mold' on the wall and countertop." The tenant had brought these problems to the attention of her landlord.

The landlord responded that the building superintendent (super) had been directed to make repairs, but the landlord would "not replace old but working items." During a hearing, the tenant repeatedly testified that the landlord "failed to make any repairs." Although the landlord claimed that the tenant had failed to provide "unimpeded access to make the repairs, [the landlord] acknowledged that he made no follow up efforts in response to Tenant's correspondence and that, . . . was his usual procedure. No written record of repairs or any other records, except for the Rent Ledger, were apparently kept, or submitted into evidence, by Landlord or [landlord's agent]."

The tenant had also complained to the NYC Dep't of Housing Preservation and Development (HPD). Following an inspection, HPD issued a Violation Notice that stated that:

> the bathroom's "plumbing basin sink porcelain is chipping or metal eroding," had a "spider crack" and . . . there was a "water leak from the ceiling" causing the walls to be "damp and wet;" . . . the "windows are stuck" and have "loose, broken frames in the entire apartment;" . . . the kitchen had mold on the walls and countertop from a "leak from the wall" and . . . its "floor covering [was] broken or defective;" and . . . the front door was "broken, defective missing entrance."

Ten days after the initial inspection, HPD found that "no repairs had been made." The most serious Class C violation found, was that "the 'electric/gas range pilot light [was] inoperative.'" The court found that "12 inspections by HPD and subsequent Violation Notices were allegedly entirely ignored by Landlord." HPD found that the landlord had "'refuse[d] to comply with HPD regulations' and make the required repairs. . . ."

After the tenant began withholding her rent, the landlord commenced the subject nonpayment proceeding. The tenant asserted that the landlord violated the WOH and had commenced this proceeding "in retaliation for her good faith complaints to HPD and other governmental agencies. . . ." The tenant counterclaimed to recover monies she had spent for repairs.

The landlord asserted that its employees visited the apartment on several occasions to make repairs and the "Tenant was 'hostile, hard to deal with' and sometimes failed to provide access . . . to complete the repairs." The landlord further claimed that several repairs had been made, "including the replacement of the bathroom sink, the repair and painting of the kitchen and bathroom walls, and the installation of a new smoke/carbon monoxide alarm." The landlord also testified that the kitchen floor "was in working order and only needed some replacement linoleum tiles."

The tenant's "own contractor verified that Tenants just wanted to replace the entire kitchen floor, even though only some tiles needed repair." The landlord had offered to install new linoleum floors, but the tenant "refused to approve floor samples to be used," describing them "as looking 'awful' and cheap." The landlord had also offered the tenant a new stove and a $400-$500 certificate to buy one, but the tenant rejected such offer, "wanting to refurbish or purchase the same kind of 'antique model' stove."

A court ordered inspection revealed:

> (1) "electric/gas range pilot light inoperative" in the kitchen; (2) "windows loose/broken frame or entire apartment;" and (3) "door broken, defective, missing entrance." These remaining repairs were certified as completed by Landlord in August 2013, and Landlord again offered a stove to Tenant during the pendency of the trial.

The court explained, *inter alia*, that "[u]nder this [WOH], the 'landlord is not required to ensure that the premises are in perfect or even aesthetically pleasing condition; he[/she] does warrant, however, that there are no conditions that materially affect the health and safety of tenants'. . . . In ascertaining damages for a violation of the warranty, 'the finder of fact must weigh the severity of the violation and duration of the conditions giving rise to the breach as well as the effectiveness of steps taken by the landlord to abate those conditions'. . . ."

The court further stated that "'the proper measure of damages for breach of the warranty is the difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach,' which calculation may take the form of a rent abatement or 'percentage reduction of the contracted-for rent as a setoff in summary nonpayment proceeding in which the tenant counterclaims or pleads as a defense breach by the landlord of his duty to maintain the premises in habitable condition'. . . . A tenant may also make needed repairs and then deduct their reasonable cost from the monthly rent, if after notice to the landlord, it 'willfully refused' to complete the repairs. . . ."

The court found that the tenant had established its entitlement to a rent abatement, but not for all of the complained of conditions. The "walls, floor and countertop look[ed] old, dingy and show some mildew around the corner of the kitchen sink, but they also appear to be fully functional and perhaps in need of cleaning. There was no testimony as to Tenant's housecleaning habits, general cleanliness, or how often she used the kitchen stove to cook her meals or otherwise, given her advanced age." There was evidence that the tenant had "ordered the stove permanently disconnected after the kitchen floor installation in 2013." There was also no proof of "actual mold." The court opined that those "violations may not be of such a magnitude, individually or collectively, as to constitute a danger to the life, health, or safety of Tenant . . . albeit a failure to provide a working stove constitutes a breach of the [WOH]. . . ."

The court further found that there were inoperable windows and newspaper-covered windows and the bathroom ceiling showed water damage, mildew and what appeared to

be mold. Moreover, the landlord had delayed making certain repairs. Although the landlord had repaired some conditions, others were "left unaddressed for over one year, whether due to Tenant's lack of access or their own neglect." Additionally, the court found that the "Landlord's failure to repair was not completely its fault." Apparently, "HPD had to conduct negotiating sessions between the parties at the Premises to get Tenant to provide unimpeded access."

The court held that the tenant was entitled to a rent abatement of 20% based on conditions of the "front door, bathroom, kitchen and windows" and the tenant "should be reimbursed for her expenditures in repairing the kitchen wall and countertop."

The court observed that the tenant was "loud, disrespectful and borderline abusive towards her counsel, her home-care aide ? who diligently attended to her needs ? and even to court personnel! She belittled and openly argued with her very competent counsel, who in response always behaved professionally towards her. With those displays of obstreperousness before a court of law, this Court can only imagine her behavior at the Premises towards Landlord's personnel. . . ."

The court believed the landlord's agent when he testified that the tenant "'unreasonably' refused to grant access to conduct the repairs and, . . ., permission to repair her kitchen floor and replace her stove." "There was no actual leak of gas" and the pilot light was defective, but could be lit with a match or a starter. The tenant eventually got on her own, hardwood floors. The court concluded "that Tenant just wanted a nicer and different floor and stove than the ones offered by Landlord, and that is not the standard for a rent abatement for such conditions." Thus, the court awarded no abatement or reimbursement for those items.

3660 Oxford Avenue Asso., LLC v. Ambrosini, L&T 011635/2013, NYLJ 1202662050134, at *1 (Civ., BX, Decided June 17, 2014), Vargas, J.

Landlord-Tenant - NYS Div. of Housing and Community Renewal Decision Reduced the Rents of 47 Tenants Because Certain Services Were Not Maintained - Claims Involved Condition of Hallway Carpeting, Overflowing Trash and Rubbish in a Compacter Room, Uneven and Bulging Areas and Water Accumulation On the Roof - DHCR's Fact Sheet #37 List of Conditions That Are De Minimus and Not Worthy of A Rent Reduction Is Neither All Inclusive Nor Dispositive And Is A Guideline

DHCR opposed the landlord's Art. 78 petition, arguing that the decision was "rationally based on the administrative record." The tenants did not submit papers in the proceeding, but had "actively participated in the proceedings before DHCR and some representatives appeared before this Court for oral argument, urging that DHCR's decision be upheld."

Several tenants had requested an order reducing their rent stabilized rents, alleging that "the [landlord] had failed to maintain all services required by the rent laws." After the landlord had an opportunity to be heard and after DHCR conducted three inspections and took photographs, DHCR issued an order reducing the rents (order). The order found that the following three services were not maintained:

> 1) Janitorial services are not being maintained in the Building's Hallways. The Hallway carpeting is dirty, stained and has some rubbed/worn areas.
>
> 2) Janitorial services are not being maintained in the compactor room. The trash barrel is overflowing with garbage and there is assorted rubbish on the floor.
>
> 3) The building's roof has areas of tar paper which are uneven and bulging. The roof also has water accumulation in various areas.

DHCR had rejected certain tenant complaints and had found that "services were being maintained in connection with the Main Entry door, the elevators, the laundry room, and security." The Order reduced "the legal regulated rents of the complaining tenants to the level in effect prior to the most recent guidelines increases" for the tenants' leases "which commenced before the effective date of the Order." The Order also barred the landlord "from collecting any future rent increases until it applied for, and DHCR issued, an order restoring rents based on a finding that the services at issue had been fully restored." Additionally, the Order directed the landlord to refund monies as a result of the retroactive rent reduction within 30 days of the Order, "failing which the tenants were authorized to deduct the amount from future rents until the total amount was refunded."

The landlord had filed a Petition for Administrative Review (PAR) and argued that two of the findings were factually incorrect, that "any issues were attributable to misuse of the areas by the tenants, and that, in any event, any failure to maintain services was de minimus and insufficient to warrant a rent reduction."

The landlord further argued that, "absent proof of leaks and water damage" relating to the roof, "no rent reduction was warranted." In granting the PAR, in part, DHCR concluded that the factual findings were supported by the inspections and "the conditions were not de minimus and warranted a rent reduction." However, DHCR agreed that "no rent reduction was warranted based on the pooling of water" on the roof, since the inspector had "not found any leaks nor any dangerous or hazardous conditions." The landlord then commenced the subject Art. 78 proceeding.

The court explained that the Appellate Division, First Dep't "has upheld a tenants' building-wide rent reduction for compacter rooms that, like the rooms here, were dirty with garbage overflowing, deferring to the agency's broad discretion and expertise in determining what constitutes a 'required service' that the [landlord] must maintain to receive a rent increase."

Since the tenants had "asserted in detail that the conditions found by the inspector" that had "impacted them," the court stated that it could not "say that it was arbitrary and capricious for the agency to find that the conditions were not de minimus." Moreover, the court found that the agency's findings with respect to "each of the particular conditions found in this case, . . . were amply supported by the three inspections conducted by DHCR's inspectors." The court noted that the inspector's findings "were documented in reports and photographs." Additionally, the landlord had "failed to submit persuasive evidence to the agency to somehow show that the inspector's findings and photographs were inaccurate." Thus, the court found that the factual findings had "a rational basis in the record and are entitled to judicial affirmance here." The court further noted that "courts typically give great weight to the findings made during on-site physical inspections."

The court further explained that DHCR was "not prohibited by [its] Fact Sheet #37 from issuing a rent reduction in this case." Although the Fact Sheet listed "some conditions that oftentimes are de minimus and not worthy of a rent reduction, the Fact Sheet specifically states that it is neither all inclusive nor dispositive but rather is intended as a guideline for the agency to consider." The Fact Sheet provided that "there may be circumstances where a condition although included on the schedule, will nevertheless be found to constitute a decrease in a required service."

Additionally, the court stated that the landlord's reliance on Rent Stabilization Code (RSC) §2523.4(e) to establish that the subject conditions are "de minimus and not worthy of a rent reduction," was rejected. "[T]hat section defines de minimus conditions as 'those that have only a minimal impact on tenants [and] do not affect the use and enjoyment of the premises. . . .'" The tenants had disputed the landlord's claim of "regular maintenance and provided detailed statements of the impact of the conditions on their use and enjoyment of the premises."

Moreover, that Code provision stated that "there may be circumstances where a condition, although included on the schedule, will nevertheless be found to constitute a decrease in a required service." Given the detailed tenant complaints and the verification by DHCR based on three inspections, the court held that DHCR's "finding of a decrease in services was wholly consistent with the terms of the [RSC] and Law and not arbitrary or capricious in any way."

The court urged the landlord "to promptly comply with the terms of the DRA Order directing a refund of rents. Should the [landlord] fail to do so, the tenants are authorized to utilize the remedy explained by the DRA" Order. Thus, the rent reduction will remain in effect until the landlord "restores all services and applies for and is granted by DHCR an order

restoring the rents." The court further noted that since "such an order may well be retroactive, the tenants are encouraged to appropriately budget their rent monies." Thus, the court dismissed the Art. 78 proceeding.

Matter of PWV Acquisition, LLC v. Towns, 101344/13, NYLJ 1202661508419, at *1 (Sup., NY, Decided June 17, 2014), Schlesinger, J.

Landlord-Tenant - So Ordered Stipulation of Settlement Vacated - Stipulation Took the Case Out of Its Due and Ordinary Course - Tenant Promptly Moved Before She Received Significant Part of the Benefit of the Stipulation - Changed Circumstances - Warranty of Habitability

A tenant, represented now, for the first time by counsel, moved for leave to renew a motion that had previously been denied and to vacate a stipulation of settlement that was "so ordered" (stipulation). The motion was "addressed to the court's discretion." The court granted "leave to renew, and upon . . . a rent deposit of $9,407.80" by a specified date, vacated "the stipulation and the judgment entered pursuant thereto," and restored the proceeding to its calendar for trial. The court provided that "[i]f the deposit is not made, the warrant may be executed upon the service, or re-service by mail, of a marshal's notice."

The landlord had commenced a nonpayment proceeding relating to a rent stabilized apartment for which the rent was $672.70 per month. The landlord claimed that the arrears amounted to $2,882.39. The tenant interposed a pro se answer in which she asserted that the landlord had not made necessary repairs. A NYC Dep't of Housing, Preservation and Development inspection report "showed 4 'B' violations at the premises."

The stipulation "converted the proceeding to a holdover, waived all rent through June 10, 2014, and provided that a judgment of possession would be entered and that a warrant might issue, but that execution would be stayed through June 10, 2014 for [the tenant] to vacate the premises and surrender possession." The stipulation had been entered into on Aug. 27, 2013.

The tenant previously moved to vacate the stipulation "on the ground that she had entered into the stipulation improvidently, i.e., out of a sense of despair that the repairs would ever be made. However, at argument [the tenant] represented that she could not pay anything toward the accrued rent arrears which then totaled about $6,700.00." The court had previously "reasoned that converting the proceeding back to a nonpayment would serve no purpose" and the court denied the motion.

The tenant thereafter asserted that she had "finally been able to secure legal representation" and that "she is now able to pay . . . not simply the $6,700.00 . . . but the rent arrears accrued through at least January 31, 2014." The tenant explained that she was now receiving certain payments from the NYC Human Resources Administration and other sources and could now pay $9,362.99. The court found that such new information "suffices as a basis for granting leave to renew" and the court granted such motion.

The court then explained that "[o]rdinarily courts uphold stipulations of settlement because doing so promotes justice and the administration of justice. . . . However, where there is cause sufficient to invalidate a contract, . . ., or where the stipulation takes the case out of the due and ordinary course of the proceeding, a court may vacate a stipulation and restore the pre-stipulation status quo. . . ."

The court noted that the stipulation "took the case out of its due and ordinary course. It is neither a commonplace nor a rarity in the Housing Part of the Civil Court for parties to convert nonpayment proceedings into holdovers by having the landlord waive rent due in exchange for the tenant's quick surrender of possession. What is so highly unusual here is that the landlord agreed to stay execution of the warrant for a very long period of time - nearly ten

months - and to waive all of the rent that would accrue during that time. Also remarkable here is that [tenant] moved promptly, albeit unsuccessfully, for relief from that agreement to vacate her home of the past 19 years, i.e., she sought relief well before she had received any significant part of the benefit of the stipulation."

The court further stated that "[i]t was natural to expect, i.e., within the contemplation of a reasonable observer, that [tenant], were she able to secure the requisite funds during this ten month period, would move again to retain her low-cost rental apartment." The court also cited the "mission" of the Housing Court "to improve the housing stock" and reasoned that it would serve such purpose if it provided the tenant "with an opportunity at trial to establish her affirmative defense of breach of the warranty of habitability."

Although the subject proceeding did not "fit squarely" within RPAPL §745(2), the tenant's motion was "addressed to the court's discretion" and the court found that such "statutory provision serves as a useful guide for protecting [landlord] against the possibility that [tenant] might fail to establish her affirmative defense and then abandon the apartment without paying anything." Accordingly, the court conditioned relief upon a rent deposit of $9,407.80.

275-277 Realty LLC v. Lawrence-Harris, 60007/13, NYLJ 1202656685859, at *1 (Civ., KI, Decided May 14, 2014), Marton, J.

Landlord-Tenant - NYC Housing Authority (NYCHA) Ordered to Pay More Than $19,000 In Civil Contempt Penalties - NYCHA Failed to Restore Hot Water to Apartment for More Than Two Years and Had Acted "Contumaciously" and Without Regard for the Tenant's Health - NYCHA Ignored Repeated Court Orders - Prior Settlement Stipulation Was Unenforceable Since It Was Indefinite, Illusory and Precatory - Court Infuriated That Building Manager Gave "Flippant and Disingenuous Testimony"

The petitioner, a tenant in a building owned and operated by the New York City Housing Authority (NYCHA), had commenced a Housing Part (HP) proceeding in Dec. 2010, requesting that NYCHA restore hot water to her apartment. In Jan. 2012, the tenant commenced another HP action, again claiming that she did not have hot water. The petitioner had submitted two motions for civil and criminal contempt against NYCHA, claiming that NYCHA had "acted in defiance of multiple court orders and so-ordered stipulations by not restoring hot water."

The tenant had appeared in court more than 24 times in an effort to get NYCHA to restore hot water over a period of two years and on the date when she filed the two motions for contempt, she still lacked hot water. The tenant asked that the respondents, NYCHA and its chair and the housing manager for the building (NYCHA), "be held in contempt and that fines be assessed and imprisonment be imposed until such time as the hot water is restored and until [tenant] is transferred to another NYCHA apartment which is both larger than her existing apartment and meets housing maintenance standards including providing hot water."

NYCHA had previously agreed to relocate the tenant to a larger apartment in a July 2011 stipulation in exchange for the tenant withdrawing with prejudice, her then pending motion for contempt. The tenant asserted that such transfer never occurred and that NYCHA agreed to transfer the tenant "only to 'get out from under' the then pending contempt motion and to avoid being punished for contempt." The tenant argued that the respondent "should be held in contempt for failing to relocate her" after they had agreed to such relocation before a judge (stipulation). The subject court noted that the "lack of hot water existed even as the court conducted the contempt hearings." The court dismissed the motion for criminal contempt on the grounds that service had not been made by "personal delivery pursuant to CPLR §308."

NYCHA claimed that the tenant had settled the case and had withdrawn a then pending motion for contempt. The court found that the stipulation was "indefinite, illusory and basically precatory" and that the NYCHA representatives who appeared on the date of the alleged settlement did "not even have the authority or discretion to effect the relocation of the tenant." Thus, the court found that the stipulation was unenforceable. The tenant had been unrepresented at the time of the stipulation.

Following a hearing, the court found "that NYCHA repeatedly disobeyed and disregarded clear and unequivocal court orders to fix or restore the hot water in [the tenant's] apartment." The court found credible testimony which established that "NYCHA personnel were aware of the hot water problem since 2011. They offered little or no legally acceptable explanation as to why the hot water problem was not dealt with and resolved in 2011 or at the latest in early 2012, when the hot water in only one . . . building was restored." The court found

that in Jan. 2012, when NYCHA executives had "refused to allocate funds to repair the hot water problem in [the tenant's] apartment, they acted contumaciously and with clear disregard for the court orders issued here but even more importantly they ignored the health and safety of their tenant . . ., and severely diminished her quality of life."

The court noted that "the Housing Maintenance Code, classifies the lack of hot water as a 'C' violation with civil penalties of $250 a day and up to $1,000 a day." The court stated that the "urgency and seriousness of these needed repairs were manifested by court order that required NYCHA to fix the problem within 24 hours, 48 hours and forthwith! Although NYCHA is not subject to the New York City Administrative Code and Housing Maintenance Code, it is bound to adhere to court orders." If NYCHA is found to be in contempt of such orders, the court could "impose fines for out of pocket expenses and non-pecuniary injury (i.e. pain and suffering for diminution of quality of life within the context of a contempt proceeding)." The court found it "infuriating" that NYCHA's building manager's testimony was "flippant and disingenuous" when "she unilaterally decided that the hot water had been fixed in 2011 because she ran her hand under the water for a few minutes and did not receive any more complaints from [the tenant]." The court opined that her testimony was "disturbing and designed to obfuscate truth." The court contrasted her testimony with "the intelligent and informative testimony" of two other NYCHA witnesses. The court concluded that NYCHA's building manager "was not interested in advocating and facilitating the repair of the hot water system."

Accordingly, the court found that NYCHA and the building manager were "in civil contempt" and awarded the tenant "a judgment in the amount of $19,205.00 in fines/damages for which they should be held jointly and severally liable." The court dismissed the motion to punish NYCHA's chairperson since no reference was made to him during the hearing.

Brown v. NYCHA, HP 1885/10 & 116/12, NYLJ 1202625719927, at *1 (Civ., NY, Decided October 17, 2013), Saxe, J.

Residential Landlord-Tenant - Summary Proceeding Based on Nuisance Relating to Bed Bug Infestation Dismissed - Landlord Cashed Check For Entire Month and "Nullified the Effect" of the Termination Notice - Landlord Failed to Serve Notice to Cure - Bed Bug Infestation Is Capable of Cure

A landlord had commenced a summary holdover proceeding on or about Jan. 16, 2014. The landlord had served the tenant with a notice to terminate (Notice) on the grounds that the tenant was "committing or permitting a nuisance in the . . . apartment by maintaining the apartment in unsanitary conditions." The landlord alleged that the tenant had "caused the apartment to be infested by bedbugs." The tenant had moved to dismiss, arguing that the landlord had "vitiated" the proceeding "by accepting and cashing a rent check after the Notice was served and before the petition was filed;" "the [Notice] [was] ambiguous, vague, conclusory and lack[ed] specificity" and the landlord had "failed to serve a notice to cure; and the condition complained about" did not "rise to the level" of a nuisance. In the alternative, the tenant sought "leave to interpose an answer and to conduct discovery."

The landlord acknowledged that it had cashed the tenant's rent check on Jan. 9, 2014. However, it asserted that it cashed the check five days before the tenancy had been terminated, since the tenancy had been effective Jan. 14, 2014. Thus, the landlord argued that the cashing of the check did not vitiate the termination notice. The landlord also asserted that "the [Notice] [was] sufficiently specific" because it referred to a specific ground under the Rent Stabilization Code and stated that it was "based on the unsanitary conditions" that resulted from "repeated bedbug infestations." The landlord asserted that was not required to serve a notice to cure since the improper conduct was "incapable of any meaningful cure as there was treatment of the apartment and a reoccurrence of the infestation less than six months later."

The landlord alleged that even if the tenant permitted access to eradicate the current infestation, the tenant would permit the infestation to recur. Additionally, the landlord argued that the tenant had did not shown ample need for discovery since it was the tenant who knew the facts surrounding the infestation, the tenant had failed to provide a reasonable excuse for the delay in answering the petition and had not demonstrated a meritorious defense.

The court found that the landlord had cashed the tenant's check prior to the termination date and the payment was for the entire month of Jan. 2014. The court held that by accepting the rent for the period "between the expiration of the notice and commencement of the proceeding, [landlord] 'nullified the effect of the notice'. . . ." The court additionally held that a notice to cure was required since bedbug infestation was capable of cure. The court noted that "treatment of a bedbug infestation generally requires more than one treatment to be effective." There had been no allegations that the tenant had denied access for treatment of the bedbug infestation. Thus, the court granted the tenant's motion to dismiss the proceeding.

Supreme Co. I, LLC v. Moylan, L&T 51648/14, NYLJ 1202655814887, at *1 (Civ., NY, Decided April 24, 2014), Gonzales, J.

Landlord - Tenant - Rent Stabilization - Non-Renewal Based On Tenant's Alleged Failure to Maintain Apartment As His Primary Residence - Tenant Alleged That Absence Was Because of Medical Reasons - Court Ordered Tenant to Submit to Independent Medical Examination - Discovery Permitted In Non-Primary Residence Proceeding

A landlord commenced a summary holdover proceeding, seeking possession of a rent stabilized apartment. The landlord had served the tenant with a notice of intention of non-renewal of the subject lease. The landlord alleged that the tenant had not occupied the apartment as his primary residence and had sublet the apartment without the landlord's approval. The landlord further alleged that for at least two years, the tenant had maintained his primary residence in New Jersey. The tenant countered that his absence from the apartment, "if any, was temporary and for medical reasons" and the subject proceeding was "retaliation stemming from an overcharge award he received against [landlord]." The landlord had moved for "an order granting leave to conduct discovery, and [tenant] cross-moved for the same relief."

The landlord sought "a deposition of [tenant], document production, and an independent medical examination ('IME' . . .) of [tenant]." The tenant sought production of the landlord's "surveillance tapes and concierge records."

The tenant argued that the landlord's request for document discovery was "overbroad, and is an invasion of privacy" and the request for an IME was "premature" and had not been "properly made as the statute governing IMEs requires that a notice be provided specifying the time and the conditions and scope of the examination." The tenant emphasized that "ample need must be shown in order to obtain discovery" in a summary proceeding.

The tenant sought "an order permitting him to redact financial information contained in tax returns, bank and credit card statements, and any other financial records," "to redact all but the last four digits of his social security number from the documents produced," and "to limit the production of medical records to the conditions he will rely on to support his affirmative defense." The tenant also sought production of surveillance tapes, which he was informed were in the landlord's possession. The tenant wanted "to view footage from any surveillance cameras installed in the lobby of the . . . building, his hallway or outside his apartment door" and an "opportunity to inspect the devices producing the footage." He also requested "production of concierge records during the relevant period."

Although discovery in a summary proceeding is not granted as of right, "it may be obtained with leave of court." Courts will consider:

> 1) whether a cause of action exists; 2) whether the information sought is directly related to the cause of action; 3) whether the disclosure is carefully tailored and likely to clarify disputed facts; 4) whether prejudice will result from granting disclosure; 5) whether such prejudice can be alleviated or diminished by a court order; and 6) whether disclosure can be structured to protect the parties.

The court found that the landlord had demonstrated "ample need for discovery" and the "information sought [was] proper, carefully tailored, and directly related to the central issue . . ., namely whether [tenant] occupied the subject apartment as his primary residence." Thus, the court granted the landlord's motion to compel production of documentary evidence, but permitted the tenant "to redact financial information," including his social security number, except for the last four digits.

Since the tenant had "put his medical condition at issue," the court granted the landlord's request to conduct an IME. Since the tenant did not provide details with respect to such medical reasons, the court found that the landlord could not comply with CPLR §3121, by specifying the conditions and scope of the examination. Therefore, the court directed the tenant to provide the landlord with a detailed affidavit executed by the tenant or his treating physician, "outlining the medical conditions that have prevented him from occupying the subject apartment as his primary residence." Thereafter, the landlord will serve a notice that complies with CPLR §3121(a). The court also directed that the tenant be deposed within 20 days after the IME.

Additionally, the court denied the tenant's request for discovery without prejudice. If the tenant had been absent from the apartment pursuant to a potentially meritorious reason, it was "unclear what the discovery sought would reveal." However, the court held that, should the landlord utilize "any surveillance or concierge logs at trial," the landlord must afford the tenant an "opportunity to review the foregoing at a reasonable time prior to its introduction at trial."

Windsor Plaza, LLC v. Pinies, L&T 84063/13, NYLJ 1202659641023, at *1 (Civ., NY, Decided May 29, 2014), Gonzales, J.

Landlord-Tenant - Rent Stabilization - Jury Found Tenant Was Non-Primary Resident and Landlord Was Awarded Judgment of Possession - Tenant Claimed That He Traveled for Business and Analogized to Touring Entertainers

A jury had rendered a verdict in favor of the landlord in a non-primary residence proceeding. The tenant thereafter moved, *inter alia*, for a judgment notwithstanding the verdict. The court denied the motion and awarded the landlord a final judgment of possession.

The landlord contended that the tenant had spent 80% of his time in Argentina, living at a "2400 square foot house that he was redecorating for the better part of two years." The tenant argued, *inter alia*, that the eviction case was brought "in part in retaliation" for the tenant "making demands about repairs and services." The tenant claimed that his absence was related to "business/work reasons" and taking care of an injured friend elsewhere in the United States.

The tenant also asserted that mail and bills continued to come to the subject rent stabilized apartment (apartment), his furniture and personal possessions remained in the apartment, the landlord had failed to properly make repairs, the apartment had heating and hot water problems and the tenant had placed "leaflets under doors" and had tried to form a "tenants' association." The tenant testified, *inter alia*, that he had taken two trips to South America and had been delayed in South America because of a "music project" and a volcano in Chili.

The tenant also alleged that although guests had stayed at the apartment, he had never charged them any money, *i.e.*, he did not sublease the apartment. Rather, he made "his home available to friends and business associates." The tenant further claimed that he was only "crashing out" in Argentina, he did not have his own room or his own furniture and he was living out of suitcases. The tenant analogized his situation to that of an entertainer who is "touring around the country and in Europe." He argued that there is nothing in the law that says if you have a rent-stabilized apartment in New York, you lose it because "you travel for business or to pursue business ventures or try to get investors to come and invest with you in Argentina."

There is no one-single factor that determines whether a residence is being used as a primary residence.

The landlord had cited the tenant's bank records and noted that the tenant was not in New York for nine months in 2009, eight months in 2010 and the first six months of 2011. The landlord acknowledged that people can have multiple homes, but argued that if the tenant spent most of his time at the other homes, he could not say that New York is his primary residence. The landlord further noted that the tenant had bought a home in Buenos Aires.

The landlord asserted that he would like to get the apartment back and rent it to people who need it. The landlord contended that the tenant used the apartment for a "crash pad for his friends who travel around the world," the tenant "didn't work in Argentina," "didn't sell anything down there," "had no business being down there" and he was "fixing up his mansion down there." The landlord also argued that there was a paucity of proof with respect to building problems.

The landlord emphasized that he did not need to prove why the tenant was gone from the apartment or where the tenant lived. Rather, he only had to prove that the tenant

"wasn't using" the apartment as his primary residence. The court held that the landlord had met its burden.

The court found that the landlord had established that the tenant "did not have an ongoing substantive physical nexus with the premises for actual living purposes. . . ." Since the jury's findings of fact were not "irrational," the court upheld the jury's verdict.

The court also rejected the tenant's argument that the landlord had failed to prove that it had served a *Golub* notice. The landlord's "*prima facie* case was merely to prove respondent's non-primary residence." The petitioner did not have to prove, at trial, that "the Court had jurisdiction over the respondent." The court explained that although "service of the *Golub* notice is a prerequisite to commencing this holdover proceeding . . .; respondent's mere denial of receipt is insufficient to warrant a traverse hearing, let alone raise a triable issue of fact." The tenant had failed to raise this argument in its motion to dismiss and therefore had "waived this defense by failing to raise it prior to trial." Moreover, such defense may have been irrelevant to the issues before the jury, since the tenant had not presented any facts or testimony on that point. Accordingly, the court awarded the landlord judgment of possession.

Comment: Adam Leitman Bailey, Esq., attorney for the landlord noted that the jury had considered "credit card statements, travel logs and passport stamps demonstrating the extended period of time the tenant spent out of the country." Mr. Bailey asserted that "[t]enants can no longer bank on winning a landlord-tenant case because of the opportunity to receive a jury trial. New York juries are smarter and more thoughtful and less pro-rent regulated tenant than when I first started doing jury trials."

Robert Grimble, Esq., of Grimble & LoGuidice, LLC, counsel for the tenant, stated that this decision is being appealed.

184-188 Claremont Investors, LLC. v. Nelson, Civ. Ct., N.Y. Co., Index No. 78034/11, decided 5/12/14, Kotler, J.

Landlord - Tenant - Holdover Proceeding - Tenants Do Not Forfeit Their Primary Residence Status Due to A Temporary Absence - Even Where Temporary Absence Is Attributable to A Definite Term of Incarceration In Prison

A landlord commenced a holdover proceeding against respondent ("A"), John Doe and Jane Doe, on the grounds that "A"'s license to occupy the subject apartment (apartment) had expired upon the death of the tenant of record ("B"), on or about May 15, 2012. After the landlord moved to conduct discovery of "A", the parties entered into a stipulation pursuant to which "C" appeared and was substituted as "John Doe." The proceeding was marked off the calendar pending their completion of discovery.

Thereafter, "D", allegedly "B"'s daughter, brought an order to show cause asserting that when "B" died, "B" had "a two (2) year lease that did not expire until February 28, 2014." "D" asserted that the lease was part of "B"'s estate and as such, she and "C" had the right to occupy the premises until Feb. 28, 2014. The court permitted the respondents to amend "the Answer to assert Respondents' right to occupy the Premises pursuant to ['B''s] unexpired lease." "D" and "E" further alleged that "C" had vacated the apartment.

The parties thereafter entered into a stipulation settling the proceeding (Stipulation). The Stipulation provided that the caption would be amended to reflect "D" and "E", as respondents; a final judgment would be entered in favor of the landlord and issuance of the warrant of eviction forthwith, with execution stayed until Feb. 28, 2014, on the condition that the respondents pay use and occupancy. The respondents had warranted that "they and their two (2) children [were] the only occupants of the Premises and they had not and would not sublet, assign or otherwise encumber the Premises through the date of vacatur."

On Mar. 4, 2014, "F", a son of "B", brought an Order to Show Cause seeking to stay execution of the warrant of eviction against him. "F" claimed that he is entitled to succeed to "B"'s tenancy. He asserted that the apartment had been "his . . . only primary residence since 1977, and that the only time period he did not reside in the Premises on a day to day basis was from October 2006 until May 2013, when he was in prison." "F" alleged that he was incarcerated from Oct. 2006 to May 2013 and had moved back into the apartment since his release from jail. "F" produced a letter from his Parole Officer dated Oct. 18, 2005, copies of DMV records dated Aug. 9, 2005, a copy of a summary report of "F"'s child support obligations dated Jan. 27, 2006, and a copy of an IRS Notice dated Nov. 7, 2005, all listing the apartment as his address. "F" also argued that he had not been named as a party, had not been served with any process, and had not been informed of the Stipulation. "F" asserted that he was denied due process, that "his time in jail cannot impede upon his succession rights" and "D" lacked authority to bind him to the Stipulation.

The landlord argued that since "F" had been named as "John Doe" in this proceeding, "F" failed to properly move to vacate his default and since "F" was "not named as a co-occupant on his mother's Section §8 HAP Contract, he is barred from claiming succession." The landlord also argued that "D"'s representations in the Stipulation bars "F"'s succession claim, the landlord cannot be prejudiced by "F"'s "delay in asserting a claim for succession as it was not made aware of ['F''s] claim for succession or his whereabouts" and "F" "concedes he

was not contemporaneously occupying the Premises two years immediately prior to his mother's death, and he fails to offer a valid exception to such requirement."

The court explained that "[d]ue process requires only that, for a warrant to be effective against a subtenant, licensee or occupancy, he be made a party to the proceeding, either by naming him in and serving him with the petition and notice of petition or by joining him as a party during the pendency of the proceeding." Here, "F" had neither been named nor served in the proceeding "and would be deprived of due process since he will not have the opportunity to assert his claim of succession. . . ." Since "C" had been substituted as "John Doe," the landlord could not utilize the already amended "John Doe" for "F". The court further explained that:

> "a tenant does not forfeit his primary residence status with respect to a rent-regulated premises due to a temporary absence therefrom. This is true where the tenant's temporary absence is attributable to a definite term of incarceration in prison".... "A patient or inmate of an institution does not gain or lose a residence or domicile, but retains the domicile he had when he entered the institution" Matter of Corr. v. Westchester County Dept. of Social Servs., . . ; see also. NY Const., art II, §4 ("No person shall be deemed to have gained or lost a residence, by reason of his presence or absence . . . while confined to any public prison.")

The court further stated that, "[i]n New York, at least for apartments which are subject to rent control and rent stabilization, the prevailing law holds that imprisonment does not break the nexus an individual has with the subject premise as it relates to succession rights." The court distinguished cases where tenants had still been "incarcerated at the commencement of the proceedings and serving a lengthy indeterminate sentence with no foreseeable release from jail" and where a tenant had not resided in an apartment for several years and had failed to show that he would "resume occupancy . . . in the foreseeable future."

Here, "F" had been incarcerated for six and a half years and had been "conditionally released on May 31, 2013, and resumed occupancy of the [apartment] subsequent to his release." "F" had provided documentation indicating that he resided at the apartment. The landlord, in rebuttal, had only submitted an affidavit asserting that the affiant "was unaware that ['F'] was in prison or claimed possession to the Premises, and a copy of ['B''s] . . . HAP contract failing to list ['F'] as an occupant of the Premises in 2001."

The court found that "F" "was not bound by his mother's failure to list him on the . . . HAP contract as an occupant," that "F" had stated "a colorable claim of succession" and "should be provided an opportunity to be heard on said claim." The court opined that "the prejudice allegedly suffered by [the landlord] due to ['F''s] delay in interposing his claim of succession [was] not enough to waive his due process right to assert this substantial defense to a licensee holdover proceeding." Moreover, "D" and "E"'s representations in the Stipulation were not binding on "F" since they lacked authority to enter into the agreement on his behalf, and "B"'s omission of "F"'s occupancy on the HAP contract "did not prohibit his right to assert his . . . defense of succession to a licensee holdover proceeding."

The court held that "['F'], under the Fifth and Fourteenth Amendments to the United States Constitution, has a fundamental right to be afforded due process of law, *i.e.*, the right to notice and opportunity to be heard before being deprived of the legal right to assert a substantial claim." Here, "F" was never served with a Notice of Petition and Petition, given no notice, was not named as a party to the litigation and had been given no opportunity to be heard.

The court stated that "[t]hese . . . substantial rights . . . cannot be lightly dispensed with." Accordingly, the court granted "F"'s motion and stayed the landlord from executing the warrant of eviction against "F". This was "without prejudice to [the landlord's] right to commence a licensee holdover proceeding or any other appropriate legal action against ['F']."

G&L Holding Corp. v. JR Gonzalez, 71920/2012, NYLJ 1202649981202, at *1 (Civ., NY, Decided April 1, 2014), Wendt, J.

Landlord-Tenant - Rent Stabilization - Non-Primary Residence - Appellate Division Affirmed Trial Court's Finding That Tenant Actually Resided In Vermont From 2004-2006 And Had Not Used Her New York Apartment As Her Primary Residence During That Time - Standard For Appellate Review Of Non-Primary Residence Cases

A trial court had awarded possession of a rent-stabilized apartment to the landlord in a summary holdover proceeding. The landlord had alleged that the tenant had not been using her apartment as her primary residence as required by Rent Stabilization Code 2524.4(c). Following a nonjury trial, the trial court determined that the tenant had not used her apartment as her primary residence. The Appellate Term had affirmed the judgment. The Appellate Division (court), in a 3-2 decision, had reversed the Appellate Term, denied the holdover petition and dismissed the proceeding. The Court of Appeals thereafter reversed, finding that "in primary residence cases, where the Appellate Division acts as the second appellate court, 'the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses'. . . ."

Applying such standard, the court found that "competent evidence in the record supports the trial court's conclusion that the tenant actually resided in a house in Vermont from 2004 to 2006, and that she had not used her New York apartment as her primary residence during that same time." Although the tenant attempted to explain away such fact, the tenant's assertions merely "raise[d] questions of fact and credibility for the trial court. . . ."

Comment: Joseph Burden and Magda Cruz, partners at Belkin Burden Wenig & Goldman, LLP, attorneys for the landlord, stated "[a]fter seven years of litigation, the Owner finally recovered possession of this rent stabilized apartment." They explained that "this case was important because the Court of Appeals enunciated the standard that the Appellate Division is to follow in reviewing a trial court's ruling in a non-primary residence proceeding."

409-411 Sixth Street LLC v. Mogi, 570068/09, NYLJ 1202636871437, at *1 (App. Div., 1st, Decided December 31, 2013). Before: Mazzarelli, J.P., Friedman, Renwick, Freedman, JJ.

Landlord-Tenant - Termination
Notice Lacked Sufficient Facts to Support
Claim of Illegal Activity At Apartment - Landlord
Argued That It Could Obtain the Required
Information By Asking Court to Grant Leave for
Discovery - Landlords May Not Commence Summary
Proceedings Hoping That They Will Discover
Necessary Predicate Facts Through Discovery -
NYC Police Dep't Arrest Records Regarding
Adults Are Not Confidential and Landlord Could
Have Spoken With Local Precinct

A landlord had commenced a holdover proceeding based on the tenant's alleged use of an apartment for "illegal and/or immoral purposes pursuant to Real Property Actions and Proceedings Law ('RPAPL') §711(5), and Rent Stabilization Code ('RSC') §2524.2(b) and §2524.3(d)." The Ten (10) Day Notice of Termination (Termination Notice) provided:

> 1) Upon information and belief, on or about, October 22, 2012 the New York City Police Department arrested one or more individuals at the subject premises.
>
> 2) Upon information and belief, the arrests were the result of illegal activity occurring in the subject premises
>
> 3) On or about, November 20, 2012 Landlord's attorney wrote a letter to tenants asking for a written explanation of the above described incident of October 22, 2012.
>
> 4) Your response to the letter, and a prior notice served upon you, denying any wrongdoing is insufficient to cure the aforementioned allegations.

The tenant had moved to dismiss on the grounds that the Termination Notice and petition failed "to state sufficient facts to support a claim of illegal activity in the subject premises" and that the Termination Notice allegations were "conclusory and vague."

The tenant emphasized that the landlord had not attached "any documentation regarding any arrest, prosecution or alleged illegal activity at the subject apartment" and the Termination Notice failed to specifically state "what kind of illegal use or activity allegedly transpired at the subject apartment, identify who was arrested at the subject apartment . . ., or that the arrest was the result of anything related to illegal use or activity in the subject premises." The tenant reasoned that the landlord's "bare and conclusory allegations" could not "trigger Real Property Law ('RPL') §231(a) nor does it satisfy [RSC] §2524.2(b) or RPAPL §741(4)."

The landlord countered that the Termination Notice was sufficient to place the tenant on notice of the claim and the petition stated a cause of action since it specified "the date that the arrest occurred, that the arrest was the result of 'illegal activity' occurring within the subject apartment, and prior attempts to resolve the matter with [the tenant] in good faith were

unsuccessful." The landlord argued that "it is unable to plead specific facts to describe the incident which led to the arrest as those facts are entirely in the possession of [the tenant]." Thus, the landlord contended that the Termination Notice and the petition were valid and it should be permitted to obtain leave from the court to obtain discovery.

The court reasoned that the landlord or its counsel "could easily have ascertained sufficient relevant facts with a simple visit to the police precinct. The arrest records of the New York City Police Department regarding adults are certainly not confidential." The court stated that a landlord cannot "commence a summary eviction proceeding in hopes that it will discover if it even has a cause of action by seeking leave of the Court to obtain discovery, after commencement of the holdover proceeding." The court further explained:

> A holdover proceeding brought pursuant to RPAPL §711(5) must state that the premises, or any part thereof, are used or occupied as a bawdy house, or place of assignation for lewd persons, or for purposes of prostitution, or for any illegal trade or manufacture, or other illegal business. See RPAPL §711(5). Furthermore, the illegal activity cannot be an isolated incident. The term "use" of premises for illegal purposes implies doing something customarily or habitually upon the premises. . . .
>
> RSC §2524.2(b) provides that "every notice to a tenant to vacate or surrender possession of a housing accommodation shall state the ground under section 2524.3 or 2524.4 of this Part, upon which the owner relies for removal or eviction of the tenant, the *facts* necessary to establish the existence of such ground, and the date when the tenant is required to surrender possession [emphasis added]". . . . "In the absence of any factual recitation of the reasons the landlord seeks to recover possession, the notice is insufficient to serve as a predicate for eviction proceedings". . . .

Accordingly, the court held that the Termination Notice allegations were "conclusory, and insufficient to put [tenant] on notice of [landlord's] claim." Additionally, the court noted that "[t]he mere fact that an arrest occurred at the . . . apartment does not establish any guilt or that the . . . apartment was used for illegal trade, manufacture, or other illegal business." For example, the tenant, "an occupant or a guest could have been arrested on a bench warrant" relating to activity completely unrelated to the apartment and "[s]uch arrest could not form the basis of commencing a proceeding" pursuant to RPAPL 711(5). Finally, the court explained that landlords may not commence summary proceedings as a "fishing expeditions" to learn if they have a cause of action to evict a rent stabilized tenant, "by seeking leave of the court to conduct discovery after commencement of the action." Accordingly, the court granted the tenant's motion to dismiss.

436-438 Assoc v. Alvardo, L&T 70350/2013, NYLJ 1202627012800, at *1 (Civ., NY, Decided October 31, 2013), Wendt, J.

Landlord-Tenant - Court Dismisses Holdover Proceeding Based On Illegal Business or Trade Being Conducted Out of Apartment - Landlord Failed to Demonstrate There Was Ongoing Business of Manufacturing Or Selling Drugs At Premises - Failed to Show Tenant's Knowledge or Acquiescence In Illegal Use of Apartment

A landlord commenced a holdover proceeding, seeking to terminate the tenancy of a tenant "based upon an illegal business or trade being conducted out of her apartment (apartment) pursuant to RPAPL 711(5), RPL 231(1) and Rent Stabilization Code [RSC] Sections 2524.2(b) and (c) and 2524.3(d)." The landlord alleged that a subtenant, in the vicinity of the apartment, "was in possession of a controlled substance, oxycodone, and sold two of the pills to an undercover detective." The landlord further alleged that the subtenant and the tenant's daughter had acted in concert to sell one pill and that another subtenant "possessed and sold marijuana to an undercover officer inside the building." The foregoing incidents occurred on Oct. 18, 2012. The landlord also alleged that it had received numerous complaints from tenants in the building regarding drug related activities from the apartment.

The tenant moved to dismiss, arguing that there was "no allegation that the apartment itself was used for illegal purposes." The tenant asserted that "even if an illegal purpose can be inferred from the pleadings the one incident that occurred on October 18, 2012 [was] insufficient to state a cause of action pursuant to RPAPL 711(5)." The tenant argued that "[o]ne arrest, on one day, without more, fails to state a claim establishing that the apartment is habitually being used for an illegal purpose."

The landlord was required to allege that the apartment had been "used for an illegal business or trade, and that the tenant knew or acquiesced in the illegal use of the apartment." There was no statement in the notice of termination (Notice), or the supporting documents regarding the tenant's "knowledge or acquiescence of the illegal use of her apartment." A criminal complaint attached to the Notice stated that "nine pills were found in plain view on top of a dresser." The court found that, "[w]ithout more, this can not rise to the level of acquiescence to an illegal business." A police officer stated that he had "found crack-cocaine in a dresser drawer in a large sandwich bag, as well as underneath a candle." The court noted that "the illegal drugs found in the apartment" had not been "in plain view," had not been found pursuant to a search warrant and had not been offered for sale by the subtenants to the police informant.

The court observed that "[a]ll the usual indicia of an illegal business or trade are absent in this petition." The "recovery of an extraordinary quantity of drugs may result in the inference that the premises are used for an illegal trade, and that the tenant knew of the use." Here, "[w]ithout any additional indicia of an illegal business, the total amount of drugs recovered does not rise to the level of an illegal business or trade." Moreover, there was an absence of "associated drug related paraphernalia" such as "scales, safes, large quantities of cash or records," guns, ammunition, or packaging material.

Thus, the court found that the "[i]ndicia of a drug business, with the apartment as the focal point is entirely missing from these pleadings." Even "[a]ffording the [landlord] every favorable inference," the landlord had not shown that there is an "ongoing business of manufacturing or selling drugs at the premises." Additionally, there was no specific allegation as

to the tenant's knowledge or acquiescence in the illegal use of the apartment. The only statement about the tenant was "speculative." The criminal complaint had stated that the tenant's daughter and two subtenants had been acting in concert to sell drugs. The tenant was not alleged to be part of that activity or to have acquiesced in any way. Thus, the court dismissed the proceeding.

Creston 2075 v. Diaz, L&T 19707/13, NYLJ 1202628473583, at *1 (Civ. BX, Decided November 4, 2013), Stanley, J.

Residential Landlord - Tenant - NYC Housing Authority's Termination of Tenancy Upheld - Penalty Did Not "Shock the Conscience" - Uncontrollable Children Had Brought Narcotics and Gun Into the Apartment

A trial court had vacated a determination by the NYC Housing Authority (NYCHA), terminating the subject tenancy and had remanded the matter to NYCHA for imposition of a lesser penalty. The Appellate Division reversed and dismissed the subject Art. 78 petition.

The petitioner tenant lives in a NYCHA apartment with five children, two of whom are minors. NYCHA commenced termination proceedings "after police recovered from the apartment a significant amount of marijuana, a bottle of oxycodone pills and a loaded and operable firearm." The tenant was not present at the time of the search and there was "no evidence that she had specific knowledge of the presence of the weapon or the drugs, which apparently were brought into the apartment by her older children and their friends."

However, the tenant acknowledged that "one of her older sons is a habitual marijuana user," that "she had encouraged him to seek treatment" and that "she could only control activities in the apartment when she was physically there."

Since the tenant had "dominion and control over her apartment and was responsible for the activities therein whether she was present or not," a NYCHA hearing officer (HO) "sustained the charges of nondesirability and breach of rules." The HO noted that the tenant had not offered "any assurance that narcotics and guns would never again be found in the apartment, and concluded that NYCHA 'has an obligation to its residents to terminate tenancies which permit such possession.'" NYCHA approved the HO's finding and determination and terminated the tenant's lease as the sanction.

The tenant thereafter commenced an Art. 78 proceeding, arguing, *inter alia*, that "the penalty of termination shocks the conscience because she had lived in the apartment for 23 years and served on the Tenants' Association Board for the past 5 years; she is a single mother and it would be unfair for her younger children to be evicted based on their older siblings' conduct; she was not home at the time of the search; and she was trying to encourage her older children to move out at the time of the incident." The trial court had granted the petition, based on the tenant's "unblemished record, long-time residency" and "her minor children," and opined that NYCHA's decision "shocks the conscience and must be vacated."

The Appellate Division (Court) essentially acknowledged that the loss of public housing accommodations is a "drastic penalty." In a prior unrelated decision, it had stated that the loss of public housing is particularly drastic because "for many of its residents, it constitutes a tenancy of last resort." However, that Court of Appeals had subsequently taken exception with the Court's statement that "public housing" is "a tenancy of last resort," for fear that such statement would create "a presumption that public housing tenants could never be evicted. . . ." The Court of Appeals emphasized that "reviewing courts must consider each petition on its own merit. . . ."

The Court then explained that a penalty is "unsustainable as 'shocking to one's sense of fairness' as one which 'is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened

by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly [situated]'. . . ."

Applying such standard, the Court found that the facts supported the tenant's eviction. The court reasoned that although "[e]viction is undoubtedly a 'grave' sanction," by "permitting drugs and a lethal weapon to be present in her apartment, [tenant] committed a serious breach of the code of conduct that is critical to any multiple dwelling community, and which warrants the ultimate penalty. . . ." The Court emphasized that the tenant's "neighbors have a right to live in a safe and drug-free environment, and [tenant] significantly compromised their ability to do so, her alleged ignorance of the activities in her apartment notwithstanding. . . ." Moreover, the tenant had provided no evidence that she and her younger children lacked the means to find other housing. Thus, the Court lacked the "factual basis to conclude that eviction will actually lead to" homelessness. Accordingly, the Court held that NYCHA had "acted within the bounds of its discretion in terminating [the tenancy]" and the Art. 78 court had "improperly substituted its judgment for that of NYCHA."

Comment: These kinds of cases, where there is no direct participation by the tenant-of-record and eviction would impact innocent children, are often "difficult." As the Court explained, NYCHA has a responsibility to protect the neighbors' "right to live in a safe and drug free environment." In most of these cases, the evidence includes such a large amount of drug related paraphernalia that the tenant-of-record cannot credibly argue that he or she did not know that the apartment was being used for an illegal activity. Here, NYCHA believed that since the tenant acknowledged that the apartment was being used for illegal activities, she knew there were problems with her older children's behavior and she was incapable of controlling such behavior, termination of the lease was necessary in order to protect the well-being of the neighbors. Under these circumstances, the Court did not believe that the penalty "shocked the conscience" and NYCHA had abused its discretion.

In re Mary Encarnacion Grant v. The New York City Housing Authority, 106199/11, NYLJ 1202651313180, at *1 (App. Div., 1st, Decided April 15, 2014) Before: Mazzarelli, J.P., Friedman, Renwick, DeGrasse, Gische, JJ.

Landlord-Tenant - Attorneys' Fees - Real Property Law §223-b - Retaliatory Proceeding - Reciprocal Mandate of Real Property Law (RPL) §234 - Appellate Division Reconciled Apparent Conflict As To Whether A Provision Which Permits A Landlord To Recover Attorneys' Fees For Re-renting an Apartment After Prevailing In A Holdover Proceeding Is Adequate To Invoke the Reciprocal Mandate of RPL §234

This appeal involved a tenant who had successfully defended a holdover proceeding. The landlord sought to recover the apartment, asserting that the tenant breached the lease "by making unauthorized alterations to the premises." Following a trial, the trial court had dismissed the holdover proceeding and "awarded the tenant attorneys' fees pursuant to [RPL] §223-b ['§223-b'], based upon [a court's] finding that [the] proceeding was retaliatory in nature." The Appellate Term reversed the award of attorneys' fees, but otherwise affirmed. The Appellate Term also rejected the tenant's alternative claim for attorneys' fees pursuant to RPL §234 (§234]. The Appellate Division, First Dep't (Court) modified the order of the Appellate Term and examined and reconciled "an apparent conflict within this Department with respect to whether a similarly worded lease provision, which permits a landlord to recover attorneys' fees for re-renting an apartment after prevailing in a holdover proceeding, is adequate to invoke the reciprocal mandate of . . . §234."

In 2004, the parties entered into a lease that provided for a rent of $2,200.00 per month for an "unregulated apartment." In 2005, the tenant filed a rent overcharge complaint with the NYS Div. of Housing and Community Renewal (DHCR), claiming that the apartment was, in fact, subject to rent stabilization. The landlord claimed that "the apartment had become deregulated because $60,000 in renovations were performed to the apartment before the tenant took occupancy." The tenant countered with proof that he, not the landlord, had performed such renovation work. DHCR found that there had been an overcharge and the apartment remained rent-regulated. The NYS Supreme Court had dismissed the landlord's Art. 78 petition challenging DHCR's determination and the Appellate Division had affirmed.

Thereafter, the landlord accused the tenant of "making unauthorized alterations to the apartment." The lease permitted the tenant to make alterations only with the "landlord's 'prior written consent.'" The lease provided that if the tenant defaulted, the landlord could re-let the apartment and recover the expenses of such re-renting, including the costs of getting possession and re-renting the apartment, "including, . . . reasonable legal fees. . . ."

After serving a notice to cure and a notice of termination, the landlord commenced a summary holdover proceeding. The landlord sought, *inter alia*, an award of possession and "legal fees in the amount of $3,000." The tenant asserted a defense of retaliatory eviction under §223-b and counterclaims for attorneys' fees and damages. The tenant asserted that the work did not violate the lease and had been "performed to remedy hazardous conditions."

The tenant testified that he discussed the work with the landlord before it was done and the landlord consented to the work. The building superintendent had given the tenant

access to the apartment before the lease commencement date. The tenant had also written to the landlord, advising that the work was completed and had enclosed bill invoices and requested reimbursements and a five year lease extension. A landlord representative had come to the apartment and verified that the work had been done and advised the tenant that he would not be reimbursed, but the landlord "would agree to extend the lease to a three-year term."

The trial court thereafter dismissed the holdover proceeding, finding that since the landlord's agents had authorized the alterations, the tenant had not breached the lease. The trial court found that the landlord's witness's testimony was "entirely incredible," the witness had "lied repeatedly and obviously" and the landlord had commenced the holdover proceeding "in retaliation for the tenant's successful rent overcharge claim." The trial court also stated that "[a]lthough . . . the attorneys' fee clause in the lease . . . is not enforceable under current case law, [the tenant] is entitled to collect his attorneys' fees as part of his damages for retaliatory eviction."

The Appellate Term modified the trial court award by denying the tenant attorneys' fees under §223-b, but otherwise affirmed. The Appellate Term found that "the landlord was estopped from enforcing the 'no alterations provision.'" Since the landlord's agents expressly consented to the work and the landlord, in connection with prior proceedings before DHCR, had falsely asserted that "its own contractors had effectuated the electrical work." The Appellate Term opined that the subject attorneys' fees provision did "not meet the requirement that a statute expressly authorize an award of attorneys' fees."

The tenant appealed to the Appellate Division solely from the denial of attorneys' fees. The Court found that since the tenant prevailed in the holdover proceeding, the tenant may recover attorneys' fees pursuant to §234. That section provides that "when a lease provides for a landlord's recovery of attorneys' fees resulting from a tenant's failure to perform any covenant under a lease, a reciprocal covenant 'shall be implied' for the landlord to pay attorneys' fees incurred as a result of either its failure to perform a covenant under the lease or a tenant's successful defense'. . . ."

The Court explained that §234 was intended "to provide a level playing field between landlords and tenants, by creating a mutual obligation that is an incentive to resolve disputes quickly and without undue expense. . . . As a remedial statute, . . . §234 should be accorded its broadest protective meaning consistent with legislative intent. . . . The outcome of any claim pursuant to . . . §234 depends upon an analysis of the . . . language of the lease provision at issue in each case to discern its meaning and import. . . ."

Here, the lease provided that, if it was cancelled, the landlord was entitled, *inter alia*, to use an eviction or other lawsuit to take back the apartment and if the landlord took back the apartment, "[r]ent and added rent for the unexpired Term is due and payable." The term "added rent" was defined to include "'other charges to Landlord under the terms of this Lease' which the tenant 'may be required to pay.'" The lease permitted the landlord to relet the apartment and the tenant would remain liable and not be released, except as provided by law. "Any rent received by Landlord for the re-renting shall be used first to pay Landlord's expenses and second to pay any amounts Tenant owes. . . . The landlord's expenses include the costs of getting possession and re-renting the Apartment, including, . . . reasonable legal fees."

The Court opined that such language came "within the language of . . . §234, since it does 'provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease. . . .'" The Court noted that the dissent argued

that §234 is inapplicable since the "language [,] attorneys' fees . . . merely provides for the offset of rents collected in the event of a reletting." The Court found that "such limitations of the award of attorneys' fees [is] of no moment as to whether the clause triggers the reciprocal mandate of . . . §234."

The Court explained that "an attorneys' fees clause in a lease may be narrowly tailored to permit fees only under certain circumstances, or for particular types of proceedings" and "what is significant for purposes of . . . §234 is whether the landlord's right to attorneys' fees is triggered by the tenant's failure to perform a covenant in the lease. . . ."

The Court emphasized that the attorneys' fees provision would be triggered by a breach of lease covenants and had the landlord prevailed in the holdover proceeding, it would have been entitled to acquire possession and re-rent the apartment and collect reasonable attorneys' fees relating thereto. The Court relied on Bunny Realty v. Miller, (180 AD2d 460 [1st Dept 1992]) and Matter of Casamento v. Juaregui, (88 AD3d 345 [2011]). Casamento stated that "[t]o deny the tenant's motion pursuant to . . . 234 simply because [the lease] does not include a more direct method for the landlord's recovery of his attorneys' fees would be only to reward 'artful draftsmanship' and undermine the salutary purpose of section 234. . . ."

The Court opined that "where the landlord . . . engaged in improper retaliation, a contrary conclusion based on the dissent's narrow construction of . . . §234 would undermine one of the key purposes of . . . §234." The Court noted that §234 was intended "to discourage landlords from engaging in frivolous litigation . . . to harass tenants, particularly tenants without the resources to resist legal action, into terminating legal occupancy." The landlord argued that two Appellate Division, First Dep't cases had overruled Bunny Realty. The Court stated that those cases did not cite Bunny Realty. Moreover, one case arose out of an agreement that was not the lease and "the tenants had incurred attorney's fee in their successful defense of the landlord's cause of action to rescind [such] agreement. . . ." Thus, the "attorneys' fees provision was not triggered by a breach of the lease." Moreover, the other appellate case did not expressly overrule Bunny Realty, did not "even cite it" and to the extent that such case relied upon dicta, it had "limited precedential value." Thus, the Court concluded that "the type of lease clause at issue here is sufficient 'to trigger the implied covenant in the tenant's favor pursuant to . . . §234'" and there was "no need to address the tenant's alternative contention that he is entitled to . . . attorneys' fees pursuant to . . . §223-b." Accordingly, the Court granted the tenant's claim for attorneys' fees pursuant to §234.

A dissenting opinion argued, *inter alia*, that "[l]egislative enactments in derogation of common law, and especially those creating liability where none previously existed, must be strictly construed. . . ." The dissent reasoned that "under the reciprocal provisions of . . . §234, a tenant may recover attorneys' fees only where the lease provides for the landlord's recovery of such fees (a) in an action or special proceeding or (b) as additional rent. Neither situation is present here." The dissent explained that "[n]othing in the . . . lease provision provides for tenant's payment of attorneys' fees. The language merely provides for an offset of rents collected in the event of a reletting. Therefore, . . . §234 is inapplicable."

The dissent cited a Court of Appeals decision which had been decided subsequent to Bunny Realty, which explained that "a statute providing for an award of attorneys' fees should be narrowly construed in light of New York's adherence to the common-law rule disfavoring any award of attorneys' fees to a prevailing party in litigation. . . ." The Court of Appeals had further stated that "'[t]he common law is never abrogated by implication, but on the contrary it must be held no further changed than the clear import of the language used in a statute absolutely

requires. . . .'" Additionally, the dissent asserted that where "[r]emedial statutes create liability not otherwise existing, or increase common law liability, the rule of liberal construction does not apply, but on the contrary the statute must be followed with strictness," citing McKinney's Cons Laws of NY, Book 1, Statutes §321.

The dissent further argued that the language of the lease did not provide "for a similar recovery by landlord if it had prevailed. Within the meaning of [Duell v. Condon, 84 NY2d 773 (1995)], the mere possibility of landlord's offset of reletting expenses can hardly be considered the 'same benefit' as today's outright award of attorneys' fees to tenant. Today's ruling makes for the mutuality of a 'heads, I win; tails, you still don't win' coin toss." Finally, the dissent agreed with the Appellate Term that was "no basis for an award of attorneys' fees under . . . §223-b inasmuch as the statute does not explicitly provide for such relief. . . ."

Comment: I was advised that this decision is being appealed.

Graham Court Owner's Corp. v. Taylor, 70520/10, NYLJ 1202639616295, at *1 (App. Div., 1st, Decided January 21, 2014), Before: Sweeny, Jr., J.P., Renwick, Moskowitz, DeGrasse, Gische, JJ. Opinion by Renwick, J. All concur except Sweeny J.P., and DeGrasse, J., who dissents in an Opinion.

Landlord-Tenant - Court Denies Tenant's Attorney's Application For Legal Fees - Court Found "Gross Overreaching" In Case Where Client Was "Not Even Being Billed For Legal Services" And Law Firm Had Used the Case to "Garner Good Will" - Court Found That Items Billed For and Number of Hours Spent Were "Incredible" and There Was No Basis to Award Any Legal Fees

A tenant had moved for attorney fees pursuant to the terms of a residential lease. The tenant "succeeded by default on a claim for return of a security deposit of $6,400 and treble damages." The tenant's counsel, a prominent international law firm that had described itself as a "global law firm with a large litigation practice . . . routinely represent[ing] clients in connection with disputes arising from . . . landlord/tenant [matters]," sought an award of "$126,026.88, after waiving certain costs, such as research fees from vendors, and its usual fees for services of administrative personnel and docket clerks. . . ." The court found that "the items billed for, and the number of hours allegedly spent on them, is incredible" and concluded that there was "no basis to award any fee." This was "particularly true" since "counsel is not even billing its client for legal services and by its own admission used the case to garner good will."

The court found that the application for counsel services "demonstrates much duplicated effort, research on the most basic and banal legal principles that a client could reasonably expect counsel charging minimally $405 per hour would have prior knowledge of, not requiring review or oversight by a more senior associate, . . ., at $615 per hour and a partner, . . ., at $895 per hour, all as unabashedly invoiced here."

The court cited "examples of the duplicative and unnecessary fees charged" and characterized the necessary work as "simple" and "uncomplicated." The court found that it was "unbelievable" that "the better part of two hours" was spent "researching, drafting, reviewing, conversing, conferring, and discussing with others, then revising and serving the Notice of Inquest." The court observed that such notice is "a one-sided Blumberg form requiring the preparer to add the caption of the matter, check off two boxes, and answering a series of eight rather basic questions to assure compliance with pretrial procedures, all of which were correctly noted as 'Not Applicable' in this case." The court also criticized the amount of time spent "preparing a simple opposition to an order to show cause seeking vacatur of a default judgment."

Additionally, the court noted that the tenant's counsel had made it clear that its representation in this matter was "really, '. . . done as a favor' and 'not looking to recover' anything from their clients, but rather as an accommodation for these clients." The court opined that it was apparent that the law firm's anticipated compensation "was that of good will which is, on many occasions, inestimable."

The court concluded that, although the subject fee statute provides for "reasonable compensation of tenant's counsel in matters of this nature," it would "not countenance the gross overreaching evidenced under the facts and circumstances of this case in which the client is not even being billed for legal services. To move any court to put its imprimatur of approval on such practices is simply intolerable." Accordingly, the court held it would not award any fees.

Clozel v. Jalisi, 11227/12, NYLJ 1202638719266, at *1 (Civ., NY, Decided January 14, 2014), Nervo, J.

Landlord-Tenant - Wrongful Eviction - Damage Claim Dismissed Without Prejudice Because District Court Lacked Authority To Award Legal Fees In RPAPL §713(10) Proceeding - Legal Fees Must Be Sued For Separately

The petitioner had been evicted from his cooperative apartment. He thereafter commenced "an unlawful entry and detainer proceeding pursuant to RPAPL §713(10) (§713[10]) against the cooperative corporation (co-op), seeking to be restored to possession and to recover compensatory and treble damages."

The co-op answered and moved for summary judgment dismissing the petition. The District Court had granted the co-op's motion, holding that, the petitioner lacked "standing to commence . . . §713 (10) proceeding." The Appellate Term had reversed, holding that the petitioner had standing to maintain the proceeding since he had been in "constructive possession . . ., through the possession of his subtenant, at the time of the alleged unlawful entry and detainer."

Following a trial, the District Court found that "the default and termination notices that had been served were ineffective to terminate the petitioner's tenancy and that petitioner had been wrongfully evicted by [the co-op's] then managing agent, the principal of which was ['A']. The District Court awarded petitioner damages against [the co-op], but did not award him possession because [the co-op] was not the 'titled owner.'" The apartment shares had been sold at auction to "B", the Sponsor, an entity that was also controlled by "A". "A" was the co-op's Vice President and he also controlled an entity that was the Sponsor.

On a prior appeal, the Appellate Term had directed that a final judgment of possession be awarded to the petitioner and dismissed, without prejudice, the petitioner's claim for damages. The Appellate Term found that the eviction was "wrongful" and "because ['A'], the principal of ['B'], was also the president of the company that had managed the property, the vice president of [the Sponsor], the person who had issued the defective predicate notices, and the person who had been in control of [the co-op's] defense of this litigation, ['B'] was bound by all the findings previously made in this proceeding." The Appellate Term dismissed the damages claim without prejudice, since "damages are not recoverable in a RPAPL 713(10) proceeding and must be sued . . . separately."

The petitioner thereafter commenced a Supreme Court action seeking, *inter alia*, damages. Thereafter, "B" moved to modify the Appellate Term's prior decision, arguing that the Appellate Term lacked "subject matter jurisdiction" because an undisclosed prior intervening sale of the subject co-op apartment, at arms' length had taken place. "B" claimed that it had "purchased the apartment at auction for $4,500 following the eviction, had renovated the apartment and had sold it" thereafter to "C" for $73,000. "B" argued that the Appellate Term "had been ousted of jurisdiction because ['B']" was not "in possession when this court's decision and order had been made." The Appellate Term denied "B"'s motion, "noting that the sale of the shares to a third party did not divest the court of jurisdiction."

In the interim, "B" moved in the District Court to vacate all prior proceedings and decisions and for a new trial based on a claimed lack of subject matter jurisdiction. "B" also moved to dismiss the petition on the ground that "the same relief had now been requested in the pending Supreme Court action and on the ground that ['B'] had no claim to possession of the premises." "B" admitted that "at ['A''s] instructions, [the co-op's] managing agent had changed

the apartment door locks following the auction sale to ['B'] and had given possession to ['B']. . . ." "B" nevertheless argued, *inter alia*, that "the District Court, and [the Appellate Term], lacked subject matter jurisdiction because no party originally named as a respondent in this proceeding had been in possession at the time the proceeding had been commenced."

The petitioner opposed the motion and moved for attorney's fees for approximately $90,000, as against "B" and the co-op. The District Court had denied "B" and the co-op's motions and granted the petitioner's motion to the extent of finding that since the petitioner had prevailed in the proceeding, the petitioner was entitled to recover attorney's fees, as against the co-op and "B" and set the matter down for a hearing to determine reasonable fees owed.

Although the Appellate Term held that the District Court had properly denied "B"s motion to vacate all the prior proceedings, it held that the petitioner's motion for attorney's fees against "B" should have been denied without prejudice. The court explained:

> The District Court's jurisdiction in all RPAPL article 7 summary proceedings, with respect to the relief that may be granted to a petitioner, is limited to an award of possession, rent, and use and occupancy. . . . Contrary to petitioner's contention, nothing in [RPL] §234 enlarges the court's jurisdiction so as to allow an award of attorney's fees to a petitioner in an RPAPL 713 (10) proceeding. We note, in any event, that petitioner's claim for more than $89,000 in attorney's fees far exceeds the $15,000 jurisdictional limit of the District Court (UDCA 202), and that, while the UDCA expands the District Court's jurisdiction to allow the recovery, in a summary proceeding, of "rent due without regard to amount" . . ., the fees sought herein are not "rent due." In view of the foregoing, [the co-op's] motion for, among other things, leave to amend its answer to seek indemnification for any attorney's fees awarded against it was also properly denied.

Saccheri v. Cathedral Properties Corp., 2012-333 N C, NYLJ 1202646432875, at *1 (App. Tm., 2nd, Decided January 27, 2014). Before: Nicolai, P.J., Lasalle and Marano, JJ. All concur.

Landlord-Tenant - Rent Stabilization - Abandonment - Surrender - Illegal Eviction - Tenant Neither Abandoned Nor Surrendered His Apartment - Court Ordered Restoration and Eviction of New Tenant

A petitioner rent stabilized tenant commenced a proceeding seeking to be restored to possession of his apartment. The landlord argued that the petitioner had "abandoned and/or surrendered the apartment." The court found that the petitioner had been "improperly locked out of the . . . apartment and is entitled to be restored to possession."

The petitioner had lived in the apartment since Aug. 2010 pursuant to a written lease agreement and was the recipient of a NYC Housing Authority (NYCHA) Section 8 rent subsidy. NYCHA made payments on the petitioner's behalf until May 2014. The petitioner testified that he neither abandoned nor surrendered possession and had never spoken to the respondent landlord's agent about vacating the apartment. He acknowledged that "electrical utility service for the apartment was suspended for non-payment and . . . that he was seeking financial assistance from the Veterans Administration (VA) to pay the utility bill." The petitioner used candles to light the apartment and frequently stayed with friends at other locations.

In May 2014, he traveled to Virginia to stay with family due to the poor health of his grandmother. The grandmother died on Jun. 1, 2014. The petitioner returned to his apartment on Jun. 6, 2014 and learned that a third party ("A"), was occupying his apartment. The petitioner's "furniture and furnishings were still in the apartment." He was advised by "A" that the apartment was leased by the agent as a furnished apartment. Although the petitioner was told by the agent that his clothing was stored in the building's basement, the petitioner asserted that he could not locate his clothing and other personal items.

The agent testified that he had "not seen the petitioner and believed" that he had vacated the apartment. The agent testified that the Section 8 rent payments stopped in Apr. 2014 and he had received a telephone call from a VA representative indicating that the petitioner would not be returning to the apartment. The agent admitted that the petitioner never surrendered his apartment keys and had not advised the agent that he was vacating the apartment. The agent's belief that the petitioner had vacated the apartment was predicated upon information from the VA representative and the suspension of the Section 8 payments. The agent testified that he had found the apartment door unlocked and the apartment was without electricity.

On Jun. 2, 2014, the agent entered into a one year lease for the apartment with "A".

The court explained that:

> Abandonment of an apartment has been defined as the "intent to abandon and engaging in some act or failure to act that indicates that the tenant no longer has an interest in the premises". . . . Surrender is defined as "a tenant's relinquishment of possession before the lease has expired, allowing the landlord to take possession and treat the lease as terminated". . . . It must be established that two facts concurrently exist: (1) Intention to abandon or relinquish, and (2) some overt act or some failure to act which carries the implication that the owner neither claims nor

> retains any interest in the subject matter of the abandonment. The burden of proving an abandonment or surrender is on the party seeking to establish it or relying upon such abandonment or surrender. . . . Failure to pay the utility bill was not an indication of abandonment but a financial crisis that petitioner alleges he was attempting to resolve with assistance from the V.A.

The court found that the landlord had failed to establish that the petitioner had abandoned or surrendered the apartment. There was no evidence that the petitioner had "expressed an intent to abandon the apartment, relinquished possession or treated the lease as terminated. Nor was any evidence provided that establish[ed] that "petitioner authorized anyone to surrender possession of the apartment." Rather, the landlord relied on "unverified statements allegedly made by third parties" and that was insufficient to establish the alleged abandonment or surrender.

The court then explained that "[w]here an eviction is held to be illegal but a new tenant is already in place, the court must balance the equities between the evicted tenant and the new tenant in order to determine whether reinstatement is warranted or whether the evicted tenant is relegated to a damage action only." The court noted that the "[t]imeliness of the evicted tenant's motion seeking reinstatement is among the factors to be considered in balancing the equities."

The petitioner had resided in the apartment for three years. His possessions remained in the apartment and were being used by "A". The petitioner had commenced the subject proceeding six days after he returned to the apartment following his grandmother's funeral in Virginia. Under these circumstances, the court held "the equities balance in favor of the petitioner." The court ordered that the petitioner be restored to possession of the apartment and that a judgment of possession be entered in favor of the petitioner and against the landlord and "A". Damages were reserved for a plenary action.

Colemen v. Onsite Property Management, Inc., 805127/14, NYLJ 1202664230667, at *1 (Civ., BX, Decided July 11, 2014), Rodriguez, J.

Landlord-Tenant - Chronic Non-payment Holdover Proceeding Dismissed - Four Non-payment Proceedings Were Insufficient to Sustain A Chronic Delinquent Holdover Proceeding Where Only Two Resulted In Judgments Against the Tenant and the Tenant Had Asserted Warranty of Habitability Defenses

A landlord commenced a chronic non-payment holdover proceeding against a rent stabilized tenant. The tenant moved to dismiss "on the grounds that the four non-payment proceedings upon which this proceeding" was predicated upon are "insufficient to support the commencement of a chronic non-payment proceeding."

The court explained that:

> [in a chronic non-payment holdover proceeding] there is no "magic number" of prior proceedings required, as each case is sui generis" . . . . While there is no "magic number," courts have found that the commencement of frequent non-payment proceedings in a short amount of time, due to a tenant's "'long term, unjustified and persistent failure' to pay rent as it became due" meets the requirements in a chronic non-payment petition. . . .

The landlord had commenced "four non-payment proceedings against the [tenant] - two in 2010, which resulted in judgments, one in 2012 and one in 2013, for a total of four proceedings in four years." The tenant had asserted "a warranty of habitability defense in the 2012 and 2013 proceeding[s], and the DHCR issued a Rent Reduction Order due to violations at the Premises" in 2013.

The Court held that in view of the tenant's "warranty of habitability defenses asserted . . ., the issuance of Rent Reduction order . . . for violations at the Premises, and the lack of frequency of cases in the past four years," the proceeding should be dismissed. The court emphasized that only two non-payment proceedings resulted in judgments against the tenant, warranty of habitability defenses had been asserted, and the tenant had resided in the apartment for 20 years. Additionally, "in the two most recent proceedings, the [tenant] satisfied the petitions in court. . . ." The court concluded that the alleged predicate proceedings did "not demonstrate that the tenant has breached a substantial obligation of his tenancy" and the court dismissed the proceedings with prejudice.

Kerem Realty LLC v. Hussein, 91560/13, NYLJ 1202655815017, at *1 (Civ., KI, Decided May 7, 2014), Scheckowitz, J.

Landlord-Tenant - Chronic Rent Delinquency Holdover Proceeding Dismissed - At Least Twelve Non-Payment Proceedings Had Been

Commenced - Most Had Been Commenced Beyond the Six Term Statute of Limitations and Others Resulted In Agreements With Required Repairs

A 73-year old tenant had resided, with three grandchildren, in a federally subsidized Housing and Urban Development (HUD) building for approximately 31 years. Issues had arisen with respect to the tenant's qualifications for her subsidy, prompting her to fall in arrears. She had commenced a CPLR Art. 78 proceeding against the NYC Dep't of Housing, Preservation and Development and the landlord.

The landlord had previously served the tenant with a ten-day Notice to Terminate (Termination Notice), alleging that the tenant had violated a substantial obligation of her lease "by 'exhibit[ing] a chronic . . . propensity for paying [her] rent late each month, allow[ing] arrears to accumulate over periods of months, and hav[ing] compelled the Landlord to commence numerous non-payment proceedings . . .' during the past 22 years of her tenancy." The landlord alleged that, since 1991, at least 12 non-payment proceedings had been commenced. The landlord thereafter commenced the subject chronic rent delinquency holdover proceeding, alleging chronic failure "to timely pay the rent," the tenant's lease had expired and the tenant owes more than $15,090 in rent arrears.

The tenant had moved to dismiss and for summary judgment, arguing that the Termination Notice failed to state a claim for breach of a substantial obligation of the tenancy based on chronic nonpayment of rent. In the alternative, she sought summary judgment dismissing that part of the petition which asserted "untimely predicate claims barred by the Statute of Limitations [SOF] of CPLR 213(2), or for permission to file an Answer pursuant to CPLR 3025(b)." The tenant contended that the landlord may not rely on nonpayment proceedings commenced more than six years prior to the subject proceeding, and that the three timely predicate legal proceedings cited by the landlord "were either settled by stipulations containing repair and habitability issues or concluded after only one appearance."

The subject proceeding had not been commenced "upon the ground of 'nuisance,' which requires a showing of 'aggravating circumstances.'" With respect to allegations of "chronic and systematic" failure to pay rent, "[t]he number and frequency of nonpayment proceedings are not the only criteria judicially considered when determining whether a substantial obligation has been violated since 'the number of nonpayment actions commenced is relevant only in the context of the entire circumstances surrounding the alleged withholding of rent.'" Additionally, "[a] temporary financial embarrassment may excuse isolated instances of late payment, but inability to pay cannot excuse chronic and continuing delinquency."

The court found that nine of the twelve legal proceedings relied upon by the landlord should have been "barred from consideration under the [SOL] . . ., as having been commenced more than six years prior to this contractual proceeding. . . ." Thus, the court granted the tenant's motion to dismiss "any consideration of those time-barred proceedings prior to 2007."

A 2007 nonpayment proceeding had been settled pursuant to an agreement that provided for payment and a repair schedule relating to "radiators, leaks and electrical problems." A 2011 proceeding had been settled pursuant to an agreement which obligated the landlord to make certain repairs and the tenant to provide payments. The third nonpayment proceeding resulted in a default judgment against the tenant for her failure to answer.

Accordingly, the court found that two of the nonpayment proceedings were "not so unjustified as to warrant a lease violation finding. . . ." Even if the court deemed the two 2011 proceedings as proper predicate proceedings, the tenant had established that the landlord had "failed to allege enough frequency and number of prior proceedings" to demonstrate a substantial violation of a material obligation of the tenant's 15-year tenancy. Thus, the court dismissed the proceeding.

Mins Court Housing Co., Inc. v. Wright, L&T 013224/2013, NYLJ 1202639434876, at *1 (Civ., BX, Decided January 10, 2014), Vargas, J.

Landlord - Tenant - Although Co-Op Proprietary Lease Specifies Residential Use, Tenant May Operate Licensed Day Care Center - Case of First Impression In First Dep't - Court Followed Reasoning of Appellate Division, 2nd Dep't in *Quinones v. Board of Managers of Regalwalk Condo.I* - Doctrine of *Stare Decisis* - Residential Use Limitation Is Unenforceable As Against Strong Public Policy - Social Services Law §390

A Mitchell-Lama housing company commenced a holdover proceeding against a tenant and her family members. The tenant has been a co-op shareholder and occupant of the subject apartment since 2004. Since Dec. 2009, the tenant had been a "group family day care provider licensed by the New York State Office of Children and Family Services ('OCFS') to provide care for children in the premises."

The landlord asserted that the tenant had used the premises "as a 'daycare business' in violation of the Proprietary Lease" (Lease). The landlord further alleged that the tenant "failed to amend her annual family income affidavit to reflect her 'actual income and the actual members of her household.'" The landlord had served a notice to cure and a notice of termination. The landlord thereafter served the tenants with a notice of petition and petition. The tenants served a pre-answer motion to dismiss the landlord's claim relating to the use of the premises as a childcare business.

The trial court had denied the tenant's motion to dismiss the petition "without prejudice to renew at trial." The tenants thereafter filed a notice of appeal. There was nothing in the record before the subject court as to the status of such appeal nor was there a stay of the proceeding from an appellate court. Each party moved for summary judgment with respect to the issue of the use of the apartment as a group family day care.

The court explained:

> Pursuant to Social Services Law Section 390(1)(d), a "group family day care home" shall "mean a program caring for children for more than three hours per day per child in which childcare is provided in a family home for seven to twelve children of all ages." Courts have generally enforced restrictions on the use of residential premises for residential use only. . . . However, as it relates to Social Services Law Section 390(l)(d), courts have carved an exception to such restrictions based upon public policy considerations and held that the use of a licensed group family day care in residential premises does not violate a substantial obligation of the tenancy.

The court explained that although courts had applied Social Services Law (SSL) §390(d) to "various private relationships," there were "no reported cases applying same to cooperatives." The court noted that "[a] cooperative is different than a condominium." The court explained that, "[i]n a cooperative, a 'person having a cooperative interest in real estate

typically owns stock in a cooperative corporation and has a proprietary leasehold granted by the corporation which is the sole owner of the land, structures and facilities.'" The court further stated that "[d]espite the difference in the structure of the ownership between a condominium and a cooperative, both are similar in that they have boards comprised of owners and shareholders, respectively, that govern the administration and regulation of the property. Both condominium owners and cooperators relinquish a degree of freedom and rights for the greater good of the building."

The court explained that since this was "a case of first impression in the First Department," the court would follow reasoning of *Quinones v. Bd. of Managers of Regalwalk Condo.I*, 242 AD2d 52 (2d Dept 1998), wherein the Appellate Division, Second Dep't held that "contract provisions barring group family day care in residential condominiums are unenforceable because of strong public policy that encourages childcare in residential apartments)." Thus, "public policy considerations preempt restrictive covenants in condominiums. Courts have applied public policy considerations to preempt restrictive covenants in cooperatives."

The court then held that the "rationale used in *Quinones* should also be applied to cooperatives." The prior court's decision was "without prejudice to renew at trial" and there were no issues of fact, as evidenced by the parties' mutual submission of motions for summary judgment. The prior trial court, by denying the motion to dismiss without prejudice, recognized that the use of the apartment as a daycare center may violate the proprietary lease. For example, if the respondents had "operated a day care business without the required license issued by OCFS," it would be an illegal use. Since the record became more developed and it was not disputed that the tenant is properly licensed by OCFS, the court found that "the proprietary lease . . ., which requires the premises to be used solely for residential use, is unenforceable and is void as against the strong public policy of this state as it relates to [SSL] Section 390." Thus, the court granted the tenants' "motion for summary judgment relating to the use of the premises as a family day care business."

Walden Gardens, Inc. v. Burns, 71274/11, NYLJ 1202661511876, at *1 (Civ. BX, Decided June 5, 2014), Elsner, J.

Landlord-Tenant - Tenant Sublet Unregulated Apartment Multiple Times On Short Term Basis, Without Landlord's Permission - Tenant Advertised the Apartment on Airbnb - Tenant Permitted to Cure Illegal Subletting

A landlord commenced a holdover proceeding against a tenant on the ground that the tenant "breached a substantial obligation of her tenancy insofar as she subleased the subject premises multiple times on a short-term basis" without Petitioner's (landlord) permission.

The apartment was not subject to rent regulation. The lease prohibited sublets without the landlord's consent and required that the tenant use the apartment solely for residential purposes. It was uncontested that the tenant had advertised the apartment on Airbnb. "Airbnb is a company that provides an internet platform connecting individuals who offer accommodations to individuals who wish to book accommodations and, if the parties agree on the price and terms, they can complete the transaction, including payment, via such platform."

The tenant had "collected money from a series of travelers . . . to sleep at the subject premises on a short-term basis, ranging from $129.00 per night to $200.00 per night." The tenant charged a monthly sublet rent of $2,350.00, which amounts to a daily rate of $77.26.

The landlord's property manager (manager) called the tenant on Oct. 15, 2013 and verbally told her to stop that activity. The landlord also served a notice to cure (Notice) on Oct. 28, 2013. The Notice stated that in order to cure the default, the tenant must "[i]mmediately and permanently remove all illegal occupants from the subject [premises]; and . . . [c]ease and desist from advertising the subject [premises] for short-term rentals; and . . . [c]ease and desist from illegally subletting [the subject premises] without the prior written consent of [landlord], and that [landlord] would terminate her tenancy if Respondent failed to cure the default on or before November 15, 2013."

At trial, the parties disputed whether the tenant had timely cured. The tenant claimed that "upon her conversation with [the manager] on October 15, 2013, she removed her advertisement from Airbnb, canceled plans with all of her guests that she had previously arranged with to stay at the . . . premises, and refrained from any further such conduct."

The landlord's super testified that the illegal conduct continued through Nov. 15, 2013, but had also testified that he regarded Nov. 15, 2013 "as early November." The court noted that the super was not a disinterested witness and his testimony that Nov. 15, 2013 is "'early November' defies common sense." However, even if the court credited the super's testimony, the landlord had failed to introduce evidence that the tenant had continued to engage in objectionable conduct after Nov. 15, 2013. There were no Airbnb advertisements in evidence that post-dated Nov. 15, 2013, and the super did not testify as to observing guests after Nov. 15, 2013. The court found that the preponderance of evidence demonstrated that the tenant had not engaged in the proscribed activity after Nov. 15, 2013.

The court noted that the tenant's guests were not roommates, but were subtenants and that "[e]ven in an unregulated context, an allegation of illegal subletting is normally curable." The landlord argued that the tenant could not cure since she had "profiteered and . . . has been operating the . . . premises essentially for commercial purposes."

The court explained that "'[p]rofiteering' does not necessarily preclude a cure, although there is authority that cure of a subtenancy where there has been profiteering requires a

refund to the subtenants of overcharged amounts." However, the court stated that "for these purposes, limitations on a tenant's ability to cure a sublease only apply to the extent that such a sublease undermines various rent regulatory schemes." The court further stated that landlords do not have claims against rent stabilized tenants who profiteer at the expense of a roommate. The court then explained that:

> The subject premises is not subject to regulation. Without a rationale such as the integrity of the Rent Stabilization Law and Code at stake, there is no discernible obstacle to a cure by ceasing the conduct objected to. . . . the predicate notice in this matter was highly specific about the meaning of a cure, to wit, ceasing advertisements, removal of illegal occupants, and ceasing subletting, and the evidence shows that this was all effectuated by the deadline in the notice itself, November 15, 2013.

The landlord had also contended that the tenant's conduct "violated public policy, as [evidenced] MDL §4(8)(a) and N.Y.C. Admin. Code §27-2004(a)(8)(a), which were amended by Laws 2010, Chapter 225 on July 16, 2010 to proscribe the kind of conduct [tenant] had engaged in." However, the court explained that "the Legislature is presumed to know what statutes are in effect when enacting new laws." "RPAPL §753(4), . . . presumes the opportunity to cure breaches of leases," and existed as of 2010. "Yet, the Legislature did not amend RPAPL §753(4) to carve out an exception for the kind of conduct [tenant] engaged in." Additionally, "the Multiple Dwelling Law and the New York City Housing Maintenance Code are generally aimed at the conduct of owners of property, not tenants." Thus, the court did not find that "the enactment of statutes designed to prevent rental property from being used for hotel purposes prevents [tenant] from being able to cure such activity."

Since the tenant had stopped engaging in the conduct objected to by the landlord which was outlined in the notice to cure within the time frame provided by the Notice and prior to the commencement of the subject proceeding, the court dismissed the proceeding.

Gold Street Properties, L.P. v. Freeman, 90185/2013, NYLJ 1202661511936, at *1 (Civ., NY, Decided June 16, 2014), Stoller, J.

Landlord-Tenant - Licensee Holdover Proceeding Dismissed - Based On Indicia of True Family, Court Found That Respondent, A Former Wife, Is A "Family Member" And Not A "Mere Licensee"

The petitioner commenced a licensee holdover proceeding against his former wife, the respondent, seeking to recover possession of the subject premises. The petition alleged that the respondent's license to occupy the premises had been terminated pursuant to a 10 Day Notice to Quit to Licensee (Notice). The respondent occupies a first floor apartment and the petitioner rents out the second floor apartment to a third party. The petitioner and the respondent had been married in 1995, but divorced 16 years later in 2011. They lived together in their marital home for many of those 16 years. Although the respondent did not pay rent or use and occupancy, she alleged that "she made payments towards utilities and maintenance of the residence." The deed and mortgage were in the petitioner's name.

The petitioner attempted to eject the respondent in the Supreme Court, but had failed because the divorce proceeding had granted him "neither ownership nor sole and exclusive occupancy of the marital residence." The petitioner then commenced a licensee holdover proceeding, which had been dismissed because of a defective predicate notice. The petitioner thereafter commenced the instant licensee holdover proceeding.

The petition described the premises "as 'all rooms of [the premises].'" The petition did not specify which apartment the petitioner sought possession of. RPAPL §741 requires that "the petition describe the premises from which removal is sought. . . . The description must be accurate enough to allow a marshal to locate the premises without additional information."

> The court found that,
> based on indicia of true family, . . . the respondent is a family member, not a mere licensee. RPAPL §713 (7) provides, in part, that after the service of a ten day notice to quit, a special proceeding may be brought against a licensee when his/her license has expired or has been revoked. While no explicit definition of "licensee" is provided in RPAPL §713 (7), a licensee in a landlord/tenant context is generally defined as someone who is granted permission, express or implied, by the owner to use and/or occupy the subject premises. . . . Licenses are revocable and not assignable. Frequently licensee holdover proceedings are brought against family member (erroneously or otherwise) to evict.

A prior Appellate Division case held that "absent any legal modification to the marital relationship, a spouse may not be evicted in a summary licensee holdover proceeding. Citing the pertinent Law Revision Commission report, the court observed that RPAPL §713 (7) was not intended to shield a divorced or separated spouse." However, the subject court observed that "case law over the past 50 years has shifted away from the exclusionary legislative intent espoused above."

The court cited decisions which held that "a de facto spouse/paramour/partner" was not a mere licensee and cases that reach similar results with respect to "stepchildren," "adult

lifetime partners," "adult children," "an ex-girlfriend and minor children of the relationship," "adult grandchildren" and "a sister-in-law." The court further explained that "[i]n determining whether a family member is [a] licensee," courts will employ "a case-by-case analysis."

The court noted that the respondent had been married to the petitioner for approximately 16 years, they have shared a home and the respondent had contributed monetarily to the household. The court acknowledged that "facts on emotional support are sparse," but stated that "the very nature of a husband and wife relationship implies a degree of emotional support and interdependence." Thus, the court emphasized the length of respondent's marriage to the petitioner, sharing of the home with petitioner, financial contributions to the household, and the "interdependent relationship."

The court further opined that "despite the divorce, a family relationship still exists." Decisional precedent found that "an ex-girlfriend met the requirements of a family member." The subject court reasoned that "[i]f an ex-girlfriend is afforded such rights, then it logically follows that an ex-wife from a 16 year marriage should too enjoy rights beyond that of a mere licensee. Divorce does not erase 16 years of interdependence and support." Thus, based on the indicia of "true family," the court held that the respondent is a family member and not a mere licensee and a license holdover proceeding was "inappropriate in the instant case." The court also found that the petition was defective in that it failed to adequately describe the premises sought to be recovered. Thus, the petition was dismissed.

Nauth v. Nauth, 041795/13, NYLJ 1202633189536, at *1 (Civ. BX, Decided November 12, 2013), Rodriguez, J.

Landlord-Tenant - Tenant Argued That She Either Did Not Sign the Lease Or Alternatively, She Was A Minor At the Time the Lease Was Signed and Was Thereby Relieved of Any Responsibility

A landlord had moved for summary judgment, alleging that the defendant had breached a two-year lease which was to commence on Aug. 1, 2008. Defendant "A" did not appear and defaulted. Defendant "B" ("B") opposed the motion, contending that she did not sign the lease and alternatively, "she was a minor at the time that it was signed, and is thereby relieved of any responsibility."

The court explained:

> An infant is defined by statute in New York as a person under the age of 18 years. . . . Infancy, . . ., is a legal disability and an infant, in the absence of evidence to the contrary, is universally considered to be lacking in judgment, since his or her normal condition is that of incompetency. In addition, an infant is deemed to lack the adult's knowledge of the probable consequences of his or her acts or omissions and the capacity to make effective use of such knowledge as he or she has. It is the policy of the law to look after the interests of infants, who are considered incapable of looking after their own affairs, to protect them from their own folly and improvidence, and to prevent adults from taking advantage of them citing. . . .

The lease contained what appeared be "B"'s signature. "B"'s passport indicated that she was seventeen years old when the lease was executed, approximately three months shy of her eighteenth birthday. The landlord countered that "['B'] did not disaffirm the lease, but instead, ratified it upon reaching the age of majority."

The landlord had the burden of proving that the infant had ratified the agreement. "Ratification looks to one's intent to affirm; an intent inferring knowledge of one's rights to affirm or disaffirm. . . ." The court stated that the landlord had presented no evidence demonstrating that "B" had "intentionally ratified the lease after attaining the age of majority." The court explained:

> contracts executed by an infant are voidable at the infant's election . . ., but the infant must disaffirm within a reasonable time after becoming of age. . . . What constitutes a reasonable time depends upon the circumstances of each particular case. . . . Furthermore, there is no required form of disaffirmance, only that "an intention to repudiate the contract must be made manifest, and whatever the act of disaffirmance be, it must be an unequivocal stand" . . ., and "That which indicates renunciation of the bargain or a disposition not to abide by the contract is sufficient to disaffirm it"

The court noted that "vacating the apartment, would constitute an unmistakable act of a disaffirmance." However, it was unclear when "B" had vacated the premises. The

landlord had not stated when "B" vacated, although the rent was sought through July, 2009. "B" asserted that "she only lived in the premises for one month." "A" had signed an affidavit which stated that "B" had "only lived there for a short period."

The court opined that if "B"'s position was accepted, then "she may have vacated the premises and possibly disaffirmed the lease, while she was still a minor." Moreover, "[p]leading the defense of infancy in the Answer, as ['B'] did here, also constitutes a disaffirmance of the lease. . . ." However, the answer was filed on Sept. 27, 2012, and the landlord sought rent through July, 2009.

When "an infant disaffirms a lease," the lessor may "recover the fair and reasonable value of the use and occupancy of the premises, not the rent contained in the lease, which is what the [landlord] seeks here. . . ." The court found that "B" had signed the lease. However, the landlord was not entitled to a judgment as a matter of law, since there were material issues of fact as to whether "B" had disaffirmed the contract and if so, when the disaffirmance occurred and whether it was within a reasonable time. Additionally, the fair and reasonable value of the use and occupancy had to be determined. Accordingly, the court denied the landlord's motion for summary judgment.

Parkash 242 LLC v. Gyan, 132363/09, NYLJ 1202659640827, at *1 (Civ., BX, Decided May 15, 2014), Franco, J.

Landlord-Tenant - Bankruptcy - Debtor Claimed That Value of Her Rent-Stabilized Lease Was Exempt From Her Bankruptcy Estate As A "Local Public Assistance Benefit" Within the Meaning of NY Debtor and Creditor Law (DCL) §282(2) - 2nd Circuit Court of Appeals Certified the Question to the NY Court of Appeals - No NY Court Has Interpreted the Phrase "Local Public Assistance Benefit" In the Context of DCL §282(2)

This decision involved an appeal from a District Court affirmance "of a bankruptcy court's order striking a debtor's claim of entitlement to an exemption of property from her estate." The debtor asserted that "the value of her rent-stabilized lease [lease] was exempt from her bankruptcy estate as a 'local public assistance benefit' within the meaning of [DCL] §282(2)." The Bankruptcy and District courts determined that the value of the lease did not "fall within the exemption." The Second Circuit Court of Appeals (Court) found that "application of §282(2) to New York's rent stabilization laws" (RSL) raises a "question of New York State law that is appropriately certified to the New York Court of Appeals." Therefore, the Court certified the question and stayed resolution of the appeal.

The salient issue was "whether the value inherent in a New York City tenant's rent-stabilized lease as a consequence of the protections afforded by New York's Rent Stabilization Code ('RSC'), . . ., make the lease, or some portion of its value, exempt from the tenant's bankruptcy estate as a 'local public assistance benefit' within the meaning of New York Debtor and Creditor Law ('DCL') §282(2)." The Court concluded that the New York Court of Appeals was "better positioned to resolve this unsettled issue of New York law."

The debtor, who had occupied her rent-stabilized apartment since the mid-1970's, had sought relief under Chapter 7 of the Bankruptcy Code. During the bankruptcy proceedings, she "continued to pay her rent and has remained current on her lease obligations." In her bankruptcy filing, "she listed her . . . lease on Schedule G as a standard unexpired lease." Thereafter, the landlord approached the Trustee and offered to buy the tenant's interest in the lease. When the Trustee advised the tenant that he planned to accept the offer, the tenant "amended her filing to list the value of her lease on Schedule B as personal property exempt from the bankruptcy estate under DCL §282(2) as a 'local public assistance benefit.'"

The Trustee moved to strike the tenant's claim of exemption. The Bankruptcy Court granted the motion on the grounds that RSL protections "did not qualify as a 'local public assistance benefit.'" The Bankruptcy Court noted that "'all of the items listed in section 282(2),' such as social security, disability, and unemployment benefits, 'are payments of one sort or another that a debtor has the right to receive or in which the debtor has an interest.'" The Bankruptcy Court held that "the 'benefit of paying below market rent . . . is a quirk of the regulatory scheme in the New York housing market, not an individual entitlement' comparable to the other items in §282(2)." The District Court affirmed the Bankruptcy Court, finding that it was unnecessary to determine "whether the exempt benefits were limited only to payments to a debtor, because 'the value in securing a lawful termination of the rent-stabilized lease' . . . is a collateral consequence of the regulatory scheme and not a 'local public assistance benefit.'" The

District Court also cited the absence of evidence that "the legislature had 'intended to confer upon the tenant a public assistance benefit consisting of the value of terminating the rent-stabilization regime.'"

> Section 522(b) of the Bankruptcy Code permits the debtor to exempt certain specified property from the bankruptcy estate. . . . Section 522(d) of the Code provides a list of categories of property that a debtor may exempt. However, the Code also permits states, . . ., to create their own lists of exemptions as an alternative to the exemptions found in Section 522(d). "New York has 'opted out' of the federal exemption scheme, . . . choosing instead to provide its own exclusive set of permissible exemptions for debtors domiciled in the state". . . . Under New York law, a debtor may exempt, among other things, her "right to receive or . . . interest in . . . a social security benefit, unemployment compensation or *a local public assistance benefit.*"

The issue before the Court was "whether the [RSL] regime provides such a benefit." The New York Court of Appeals had previously explained that "the [RSL] was created 'to ameliorate, . . ., the . . . housing emergency in the City of New York' by 'protect[ing] dwellers who could not compete in an overheated rental market, through no fault of their own.'" The RSL governs "'the initial rent, restrict rent increases, mandate lease renewal, and, upon the tenant's vacating of the premises, allow the tenancy to pass statutorily to certain members of the tenant's household,' if certain conditions are met." The Court noted that, "[u]nder the RSC, these terms substantially favor tenants, requiring lease renewal in almost all circumstances, and affording strong anti-eviction protections." The grounds for eviction under the RSC "are limited, and do not mention a debtor's bankruptcy."

The tenant contended "that this constellation of protections adds 'value' to a rent stabilized lease above the value of a market rate lease, and . . . the . . . value of these protections amounts to an exempt 'local public assistance benefit'" under DCL §282(2)."

Bankruptcy trustees may "'assume or reject any . . . unexpired lease of the debtor'" and "a rent-stabilized tenancy is the product of a 'lease' under federal law." Thus, the rent-stabilized lease "would appear to be covered by §365, but see B.N. Realty Assocs. v. Lichtenstein, 238 B.R. 249, . . . (S.D.N.Y. 1999)," which quoted a "Bankruptcy Court's conclusion that rent-stabilized leases fell within an exception to §365. . . ." However, that case was resolved on other grounds. An amicus brief in that case argued that "the inability of a creditor to reach the value of the debtor's rent stabilized apartment outside of bankruptcy bars the trustee from assuming the lease. . . ."

The Court further noted that "New York cases have assumed that a trustee possesses the authority under . . . §365 to assume or reject a rent-stabilized debtor's lease and have discussed the effect of a rejection." Moreover, "several bankruptcy courts have held that a trustee's authority under §365 extends to rent-stabilized leases." The Court therefore stated that there is authority "(albeit limited)" "for the proposition that a rent-stabilized debtor's lease may be assumed and assigned by the trustee pursuant to . . . §365(a)."

On this appeal, the Court had to "consider an additional and . . . different issue: May a rent-stabilized tenant prevent the assumption and assignment of his or her lease by claiming that the lease (or its value) is a 'local public assistance benefit' exempt from the bankruptcy estate?" The Trustee essentially argued that "his assumption and assignment of the

lease eliminate the protections afforded under the RSC and, therefore, . . . he may sell the lease to the landlord for the value that exists in the elimination of those protections." The tenant countered that "the lease (or its value) is a 'local public assistance benefit' because the value of the lease . . . is traceable to the protections afforded to her under the RSC."

The Court opined that resolution of these issues "may implicate other questions of New York law, including whether a tenant's rights under the RSC are property or personal rights." The Court noted that "[n]o New York cases directly address these contentions" and that "New York courts addressing the interaction of the Bankruptcy Code and the RSC have indicated that the rejection of a rent-stabilized lease by the trustee does not void or terminate the lease, and does not eliminate the protections of the RSC." However, such decisions did "not address the assumption and assignment of a lease and, thus, do not resolve this appeal."

Moreover, "[n]o New York courts have interpreted the phrase 'local public assistance benefit' in the context of DCL §282(2)." Two Bankruptcy Court decisions had permitted "the assumption and assignment of rent-stabilized leases or rights similar to RSC protections, with the consequent elimination of tenant protections. . . ." However, neither decision addressed a request for an exemption under DCL §282(2).

The Court concluded that "[g]iven the significance of these issues to landlords and tenants, as well as the complete absence of authority concerning the impact of DCL §282(2) on rent stabilized leases, it should not attempt to resolve these issues without first obtaining the views of the New York Court of Appeals." Thus, the Court certified to the Court of Appeals the question of "[w]hether a debtor-tenant possesses a property interest in the protected value of her rent-stabilized lease that may be exempted from her bankruptcy estate pursuant to [DCL] Section 282(2) as a 'local public assistance benefit?'" If the New York Court of Appeals accepts the case, it may "reformulate or expand the certified question as it deems appropriate." The Court did not intend "to limit the scope of the analysis by the Court of Appeals."

Santiago-Monteverde v. Pereira, 12-4131-bk, NYLJ 1202649199911, at *1 (2d Cir., Decided March 31, 2014). Before: Sack, B.D. Parker, and Raggi, C.JJ. Decision by B.D. Parker, C.J.

CONDOS/CO-OPS

Condominiums - Board Sued Sponsor, Sponsor Related LLC, Members of the LLC and Architect - Breach of Warranty, Negligence, Professional Malpractice, Fraud, Negligent Misrepresentation, Negligent Supervision and New York General Business Law (GBL) §349 - Court Denied Motions to Dismiss Most Claims - Court Dismissed "Piercing Corporate Veil" Claims - Split in Appellate Divisions As to Whether Sales of Condominiums Meet the "Consumer" Threshold Under GBL §349

On July 28, 2011, a Board of Managers of a condominium (Board) commenced an action against, *inter alia*, the condominium's sponsor, sponsor related defendants (sponsor defendants) and architect. The causes of action included claims for breach of contract, breach of express warranty, breach of common law implied housing merchant warranty, negligence, professional malpractice against the architects, fraud and negligent misrepresentation, violation of GBL §349(a), negligent supervision, specific performance and equitable relief.

The Board alleged, *inter alia*, that "all of the defendants failed to comply with the terms of the [subject] purchase agreement" by failing "to construct the building substantially in accordance with the Offering Plan [Plan], the Plans and Specifications" filed with the New York City (City) Dep't of Buildings, the City Building Code (Code), and local industry standards. The Board cited numerous "construction defects which have caused life, health and safety hazards to the residents of the Condominium."

The architect moved, pre-answer, to dismiss the complaint and all cross-claims, on the grounds that documentary evidence established that the Board's claims are barred by the Martin Act, the Statute of Limitations (SOL), the condominium purchasers lack of privity and that the purchasers were not intended beneficiaries of the architect's contracts. The architect had alleged that "he did not know the identity of any individual condominium unit owner, that he had no interaction or communication with any individual condominium unit owner and that he did not make any known false misrepresentations."

The court explained that there is a three-year SOL for a professional malpractice claim against an architect and such claim accrues "upon the actual completion of the work to be performed and the consequent termination of the professional relationship." An owner's claim against an architect accrues "when the designer completes its performance of significant (i.e. non-ministerial) duties under the parties' contract. . . ." Here, the complaint alleged that the architect had performed architectural services for the condominium until at least Aug. 20, 2009. The court found that the architect had "failed to submit documentary evidence conclusively establishing that the time in which to sue them had expired."

For the architect to establish its lack of privity defense and to defeat the Board's third-party beneficiary claim, the architect would have had to annex a copy of its contract with the sponsor demonstrating such fact. The contract had not been submitted. Thus, the architect's motion to dismiss the breach of contract claim was denied.

As to the claim that the architect had been negligent in failing "to exercise reasonable care and skill in the oversight of the construction . . ., contrary to the . . . [Plan], resulting in numerous construction defects," such violation sounded "in breach of contract rather

than tort. . . . A simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." The court found that the negligence claim was "unsustainable" since the complaint failed to allege facts showing that the architect owed a legal duty to the unit owners.

The architect asserted the unit owner's lack privity and preemption by the Martin Act as defenses to the professional malpractice claim. Based on the architect's failure to provide its contract with the sponsor and "a complete and properly authenticated copy of the. . . [Plan]," the court rejected the lack of privity defense. The court further noted that the Attorney General (AG) "bears sole responsibility for implementing and enforcing the Martin Act. . . ." The court found that the architect had failed to demonstrate that the malpractice claims "rest[ed] entirely on alleged omissions from filings required by the Martin Act and the [AG's] implementing regulations. . . ."

A negligent misrepresentation claim requires proof that a defendant was obligated "to use reasonable care to impart correct information due to a special relationship existing between the parties, that the information was false, and that a plaintiff reasonably relied on the information. . . ." The complaint alleged that the architect had "affirmatively misrepresented, as part of the . . . [Plan], a material fact about the condominium." The complaint cited the architect's representation, *inter alia*, that "the building would be constructed according to . . . the [Code] and they knew that the representations were false and misleading when made." The court held that the Board had adequately pled claims for fraud and negligent representation. Thus, the architect's motion to dismiss was granted only as to the negligence claim and denied as to the other causes of action.

Additionally, the sponsor moved pursuant to CPLR 7506, for an order "directing the Board to arbitrate its claims and dismissing the complaint." The sponsor also moved, in the alternative, to dismiss all or some of certain claims pursuant to CPLR 3013, 3016, and 3211(a)(3) and (7). The sponsor's attorney's affirmation demonstrated "no personal knowledge of the facts alleged in the complaint or in his affirmation" and was therefore of "no evidentiary value." The affirmation purported to provide a copy of the purchase agreement, but offered "no explanation of the basis of his knowledge." Since the exhibit was "not of undisputed authenticity and [was] not a self authenticating" document, the court disregarded the exhibit.

The sponsor contended that "unit owners, by purchasing their respective units, necessarily accepted the . . . [Plan] which contains the clause compelling arbitration" and that "the Board, as the representative of the . . . unit owners, is necessarily bound by that clause." However, the sponsor failed to annex the individual purchase agreements and instead, relied on its attorney's affirmation and his unsupported assertions that an exhibit was "a typical form purchase agreement." Since the Board was "not a signatory to any agreement to arbitrate with the sponsor," the court denied the sponsor's motion to dismiss the complaint and compel the Board to arbitrate.

The sponsor defendants had also moved, *inter alia*, to dismiss all piercing the "corporate veil" claims against sponsor related LLC and individual members of the LLC.

Nothing in the complaint asserted or suggested that the LLC or the subject individuals had "acted other than within their capacities as agents or principals of [LLC], or that any one of them failed to respect the separate legal existence of [LLC], or that anyone one of them treated [LLC's] assets as their own, or that anyone of [them] undercapitalized [LLC], or did not respect corporate formalities, or, in any other way, abused the privilege of doing business in the corporate form. . . ." Therefore, the court dismissed such causes of action.

The court also dismissed the negligence claims against the sponsor defendants since the complaint failed to demonstrate that they owed a legal duty to the unit owners apart from the contractual duties. However, the court found that the Board had adequately pled causes of action for fraud and negligent misrepresentation. Those claims arose from "different facts than the cause of action for breach of contract."

Additionally, the court denied the sponsor's motion to dismiss the fraud and negligent misrepresentation claim on the ground that the Board could not have relied upon any statements by them. The sponsor cited a paragraph in the purchase agreement which stated that purchasers acknowledge that they have not relied on any representation made by the sponsor defendants. However, the purchase agreement that had been submitted was disregarded since it was "incomplete, it is not of undisputed authenticity and is not self authenticating. . . ."

The sponsor had also moved to dismiss the GBL §349 claim on the grounds that the Board lacked standing under the Martin Act and the claim requires "a consumer oriented act or practice." The court opined that the sponsor had failed to demonstrate that such claim rested "entirely on alleged omissions from filings required by the Martin Act and the [AG's] implementing regulations. . . ." The court explained that "[a] breach of a private contract affecting no one but the parties to the contract, whether that breach be negligent or intentional, is not an act or practice affecting the public interest. . . ." The court further noted that there was "a split in the Appellate Departments as to whether sales of condominiums within a development meet the 'consumer' threshold. . . ." The court then held that pursuant to a controlling decision of the Appellate Division, Second Dep't, the Board had "sufficiently pled a claim for violations of [GBL] §349."

Caton Court Condominium v. Caton Development, 17044/11, NYLJ 1202631189300, at *1 (Sup., KI, Decided November 26, 2013), Rivera, J.

Condominiums - Construction Defects - Claims Against Architect and Engineer Dismissed - Sponsor and Contractor Had Settled - Martin Act - General Business Law (GBL) §§349 and 350 - Piercing the Corporate Veil

A condominium board of managers (Board) commenced an action against the Sponsor, the Sponsor's architect (architect), the Sponsor's engineer (engineer) (collectively referred to as movants) and the Sponsor's contractor, seeking damages arising from the alleged "faulty design and construction" of the condominium building. The subject Offering Plan (Plan) was filed with the Attorney General (AG) in May 2007. Title to the first unit had been transferred approximately two years later.

The Board alleged that unit owners (owners) "immediately began complaining" about "workmanship and construction," including defects with the HVAC system, mechanical and plumbing systems, the roof, the exterior, the cellar, apartment units, stairwells and corridors. The Board, Sponsor and contractor had entered into a settlement agreement.

The claims against the architect included claims for "common law fraud, deceit and misrepresentation," "deceptive acts and practices and false advertising in violation of [GBL] §349 and §350," "breach of contract, third party beneficiary," "negligence," "alter ego liability as against [the principal of the architectural firm]," and "aiding and abetting breach of fiduciary duties." Most of the same claims were asserted against the engineer. However, the Board was "not pursuing its claim against the [engineer] for fraud, deceit and negligent misrepresentation, GBL §349 and §350 or aiding and abetting breach of fiduciary duty. . . ." The court granted the movants' motion for summary judgment dismissing the complaint.

The architect asserted that at the time he issued his report and certification (report), there were no owners and he had no knowledge of who, if any, they might be. The engineer asserted that his services did not include "field supervision or supervision of any of the contractors, and . . . [he] did not certify the . . . [Plan]" or prepare reports included in the Plan. The movants further argued that the fraud, deceit and misrepresentation (fraud) claims are barred by the Martin Act.

The architect contended that there was "no private right of action for fraud or misrepresentation based upon misrepresentations or omissions by an architect in a certification and report contained within [a] . . . plan." The architect emphasized that such certifications and reports are required by the Martin Act and AG regulations, "which reserve exclusively to the [AG] all such claims and pre-empt all private causes of action such as the instant one." The engineer also argued that there were "no allegations . . . of any specific misrepresentation and/or omission of material fact by them or on their behalf." The movants further asserted as to the fraud claims, there is no "privity" between the Board and either movants.

Additionally, they argued that GBL §§349 and 350 were intended "to protect consumers at large" and "not individual [owners] in a single condominium . . . building." They also argued that the breach of contract claim should be dismissed because the movants performed their services "pursuant to a contract with the sponsor." That contract stated that nothing in the contract "shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner or the Architect." They contended that the Board is not a third-party beneficiary and lacks standing as to the breach of contract claims. Rather, the Board is at most,

"an incidental beneficiary." The movants also argued that the negligence claim was duplicative of the breach of contract claim and the defendants did not owe a duty to the Board.

The architect further asserted as to the alter ego liability claim, that there was no showing that "the owner, through its dominion, abused the privilege of doing business as a corporation" or that "the acts complained of were performed with malice and calculated to impair plaintiffs business for the personal profit of the defendant. . . ." He argued that the allegations were "conclusory" and did "not meet the pleading standard."

The movants further argued that as to the aiding and abetting breaches of fiduciary duties claim, the Board cannot show that the movants had "actual knowledge of the tort" and the claims should be dismissed because the Board had "been made whole through its settlement with the sponsor."

The Board countered that motions for summary judgment are premature since discovery was not complete. It asserted that discovery may show that the architect is "a serial abuser of the New York City Department of Buildings' Self-Certification Program for Architects." The architect had only produced an unsigned version of his contract with the Sponsor and the Board and argued that "factual gaps" preclude summary judgment.

The Board also argued that the fraud misrepresentation claims were not precluded by the Martin Act since they were not based on omissions in the Plan, but on "representations in the architect's [report] that [he] researched the facts stated in the architect's report," "researched the facts underlying those stated facts" and "stated that the report described the condition of the building that would exist upon completion of construction." The Board contended that these statements were "affirmative misrepresentations." The Board also argued that "[p]rivity or a close relationship between the parties is necessary for a claim of negligent misrepresentation but not for one of common law fraud." The Board further contended that the Sponsor could not have breached its fiduciary duties without the architect's report and the architect must have learned the details relating to the Sponsor's breach of fiduciary duty. The Board also argued that there were at least 15 significant construction/design deficiencies that were beyond the scope of the prior settlement.

The Board had submitted an attorney's affirmation and referred to "the attachments and memorandum of law with no affidavit from anyone with personal knowledge of the facts. . . ." The Board argued that the architect had to be deposed because he has "'less than a stellar reputation,' citing a newspaper article." The court opined that because some architects "may not respect [the architect's] designs, which is the crux of the referenced article," does not constitute "an evidentiary showing that further discovery is necessary by the Board." Since "the Board presented only arguments and . . . no evidence, much less evidence in admissible form that further discovery may lead to relevant facts that are essential in opposing the motions for summary judgment," the court held that the motions were not premature.

The court then acknowledged that "[c]laims of affirmative misrepresentation, as opposed to omission, are not pre-empted by the Martin Act." The court explained:

> the alleged misrepresentations here do not fall outside the scope of the Martin Act. While the courts have recognized common-law claims not pre-empted by the Martin Act, those claims have been based on affirmative misrepresentations that were made in the offering plan and then incorporated by reference into the contract of sale . . ., affirmative misrepresentations set forth in brochures, advertisements and purchase agreements . . . and affirmative

> misrepresentations in offering plan as to floor dimensions of purchasers' units. . . .
>
> The architect's report . . . in this proceeding follow the statutory language required by the Act and its regulations. There is no evidence from any plaintiff that a purchaser relied upon affirmative misrepresentations from some other source. In addition, the architect's [report] . . . describes the property as it was to be constructed based upon the plans and specifications, pursuant to the regulations. The statements at issue in the report . . . do not constitute material affirmative misrepresentations that would support a common-law claim that is not entirely dependent on the Martin Act for its viability. . . . Accordingly, the claim of common-law fraud, deceit and negligent misrepresentation is dismissed as pre-empted by the Martin Act.

The court further held that even if the fraud claims were not pre-empted by the Act, "they still would be dismissed." "A plaintiff alleging negligent misrepresentation must show either privity of contract between the plaintiff and the defendant or a relationship 'so close as to approach that of privity.'" A relationship "approaching privity," *i.e.*., that "defendant have an awareness that his or her statement is for a particular purpose," "a known party relies on the statement in furtherance of that purpose" and "there is some conduct linking defendant to the relying party and evincing its understanding of that reliance. . . ." The Board had not pled or provided evidence that "[owners] were 'known parties' to the movants at the time" of the subject statements. Moreover, a fraud claim "requires a 'particularized factual assertion which supports the inference of scienter.'" Additionally, the GBL claims did not allege "the acts or practices" that have "a broader impact on consumers at large" and were "limited to a single . . . building."

The court also dismissed the breach of contract claims based on the lack of privity and the inability to demonstrate that the owners were third party beneficiaries. The architect's affidavit stated that the unsigned copy of his contract was an accurate copy of the final agreement and the Board had merely speculated that "further discovery may reveal more on the issue of intent." Thus, the court found that the owners were "incidental rather than intentional beneficiaries and, . . ., without standing to bring a breach of contract claim."

The court dismissed the negligence claim because the Board had not demonstrated that a duty exists by either movant to the Board or the owners. Additionally, the court dismissed the "pierce the corporate veil" claim since the Board failed to demonstrate that the corporate entity was dominated as to the subject transaction and "such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences." The court emphasized that "evidence of domination alone is not sufficient without a showing that it led to inequity, fraud or malfeasance." The court also dismissed the aiding and abetting a breach of fiduciary duty claim since it was based on conclusory allegations, rather than "facts alleged from which it could be inferred that the defendants had actual knowledge of the complained-of breach. . . ." The court further found that the alleged building defects appeared to be "identical but for one item" to the items addressed in the prior settlement agreement. Thus, the court dismissed the complaint.

The Board of Managers of the Sevenberry Condominium v. N7B LLC, 23910/2010, NYLJ 1202652854743, at *1 (Sup., KI, Decided April 9, 2014), Pfau, J.

Condominiums - Construction Defects - Breach of Express and Implied Warranties - Negligent Construction/Supervision - Fraud/Misrepresentation - General Business Law (GBL) §§349-350 - Breach of Contract - Negligence - Breach of Contract/Third Party Beneficiary

A plaintiff Board of Managers (Board) commenced an action on behalf of unit owners (owners) "to recover compensatory and punitive damages allegedly sustained as a result of purported defects in the renovation" of the subject building. The plaintiffs asserted claims for, *inter alia*, "breach of express and implied warranties, negligent construction/supervision, fraud/misrepresentation, violation of [GBL] §§349-350, breach of contract, negligence, and breach of contract/third party beneficiary." The complaint named as defendants, the sponsor, the developer, the contractor, the sponsor's managing partner and general manager (managing partner), the architect and engineer and the sponsor's individual members (member or members). Two of the members were also members of the developer and the third member of the sponsor was the contractor's principal and founding member. Defendants had moved, pre-answer, for an order dismissing certain or all causes of actions against some or all of them.

Most of the condominium units had been sold pursuant to an offering plan (Plan) that had been accepted for filing by the Attorney General's (AG) office on July 11, 2008. The Plan contained the sponsor's representations that it would renovate the building substantially in accordance with the plans and specifications (plans) set forth in the architect's report, and that it had applied for a J-51 tax abatement.

The Plan appended a "Certification by Sponsor and Sponsor's Principals," executed by the sponsor's principals, individually and on the sponsor's behalf. The Plan also included the architect's report and a "Certification by Sponsor's Engineer." The engineer's certification stated that "the architect prepared 'building plans . . . approved by the [New York City] Building Department" and the engineer had read the architect's report "in its entirety and investigated with due diligence both the facts stated in it and the facts on which it was based, and that it accurately . . . described the building on completion of construction, assuming that construction was performed in accordance with its plans. . . ." The architect's certification, however, warned that its certification was "not intended as a guarantee or warranty of the physical condition of the property."

The purchase agreements (contracts) incorporated the Plan. The sponsor covenanted in the contracts that "the construction of the building, units, and materials, equipment and fixtures . . . is substantially in accordance with the [Plan] and the architect's report." The contract contained "a sunset provision" pursuant to which "written notice of defects had to be given by a date certain in order to invoke the sponsor's obligations to cure." The contracts also provided a purchaser's acknowledgment that "he or she '[had] not relied upon any architect's plans, . . . including . . . any relating to the description of physical condition of . . . the Building or the Unit. . . . " The Plan, in turn, provided that "the architect's statement to the 'Sponsor that the Building [had] been completed substantially in accordance with the [architect's] Plans. . . shall neither constitute a representation by [the architect] to the Unit Owners or to the Board . . . nor give rise to any claim by any Unit Owner or by the Board . . . against the Sponsor's Architect with respect to completion of construction or defects therein.'"

The Plan had become effective, a final certificate of occupancy (C of O), dated Apr. 6, 2009, had been issued and a declaration of condominium was filed on Apr. 17, 2009. The first closing occurred on Apr. 25, 2009.

The complaint alleged that the building had "substantial design and construction defects, inadequate and negligent workmanship, missing or defective materials, and gross deviations from the architect's report." The alleged defects included "water intrusion, mold infestation, foundation cracking, floor buckling, fire-safety issues, bulging and saturation in load bearing walls." The plaintiffs' consultants had allegedly found "significant construction deficiencies, sub-standard conditions, and instances of property damage, either resulting from design defects or from incomplete or inadequate workmanship."

The sponsor asserted that its managing partner had been named in a litigation based on "typographical error by the sponsor's attorney," *i.e.*, a draft condominium declaration, as annexed to the Plan, "incorrectly named" the sponsor's managing partner, as the sponsor. The sponsor noted that a final condominium declaration, had correctly named another LLC as the sponsor and the operating agreement for the sponsor's managing partner "restricted its activities to other properties not involving" the subject building. The plaintiff countered that the sponsor's managing partner was part of the sponsor member's "corporate empire and that the condominium's bank records reflected that [an individual member] had transferred funds" to and from various other related accounts. Although the court accepted the member's "innocent explanation," the court noted that such individual had not proffered any rebuttal affidavit with respect to such issue. The defense counsel had "pooh-pooh[ed]" the plaintiff's affidavit as "ambiguous and lacking in documentary support, while insisting that the generic language in the operating agreement of [sponsor's managing partner] beats her fairly specific affidavit." The court concluded that the members and the architect had failed to meet their heavy burden under CPLR 3211(a)(1) and those branches of their respective motions were denied.

The court further held that under Real Property Law §339-dd, "a condominium board of managers may assert on behalf of two or more unit owners 'any cause of action relating to the common elements or more than one unit.'" Since the complaint alleged numerous defects impacting the building's common areas, the court found that "the commonality elements required by the statute" were met and denied the members' motion to dismiss based on lack of capacity to sue.

The architect moved to dismiss the contract and negligence claims as time-barred. "CPLR 214(6) imposes a three-year statute of limitations [SOL] for professional malpractice (with certain exceptions not applicable here), 'regardless of whether the underlying theory is based in contract or tort.'" The court explained that "[a] cause of action to recover damages against an architect for professional malpractice accrues upon the work completion and the resulting termination of the architect's professional relationship with its client. . . ." Further, "[a] client's professional malpractice claim accrues when its architect completes performing significant, non-ministerial contractual duties. . . ." Here, the action was commenced more than three years after the final C of O and thus, the court held that the claims against the architect for breach of contract and negligence were time-barred.

The plaintiff had submitted an affidavit asserting that the unit owners had been advised by the sponsor that the architect had, but "failed to fulfill its responsibility for obtaining the J-51 tax exemption for the Building." The court noted "the obvious hearsay nature of [such] affidavit" and stated that "it contradicts plaintiff's complaint . . . and the [Plan], which placed

responsibility for applying for the tax abatement exclusively on the sponsor." Thus, such affidavit was "insufficient to rebut the architect's prima facie showing."

The court also found that the breach of express and implied warranties asserted against the sponsor were "legally identical" to the breach of contract claims, *i.e.*, the warranty claims were essentially a "redundant repleading of the contract claim" and they were dismissed.

The complaint also alleged that the sponsor breached its duty to "construct, supervise and manage the building" and sought punitive damages. The court explained that "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract has been violated." The court found that the plaintiff failed to establish that "the sponsor owed the unit owners a legal duty of care that was independent of its contractual duty that arose from its [contracts] with the unit owners." Moreover, adding the request for punitive damages could "not change the fundamental fact that it is duplicative of the contract claim." Accordingly, the court dismissed the negligent construction/supervision claims.

The court then explained that the common-law fraud, deceit and misrepresentation allegations, "for the most part" arise "out of the misrepresentations and omissions of the contents of the [contracts] and [Plan]." The court noted that the fraud claim was not pre-empted by the Martin Act since the complaint alleged "affirmative misrepresentations, rather than solely omissions. . . ." and that the fraud claim met "the particularity requirements of CPLR 3016 (b). . . ."

However, the court found that the fraud claim against the sponsor failed as a matter of law since it was "subsumed in the contract claim." The court explained that a claim "to recover damages for fraud does not lie where the only fraud asserted relates to an alleged breach of contract. . . ." Here, the complaint limited the "universe of misrepresentations and omissions to only those that are inconsistent with the express terms of the [contracts]." The complaint also lacked "supporting allegations that are collateral or extraneous to their express terms." The plaintiff had failed to allege or identify "what legal duty the sponsor owed to the prospective purchasers, other than the duty the sponsor owed them [contracts] and the [Plan]. . . ." Moreover, the complaint did not allege that the sponsor had a "'preconceived and undisclosed intention of not performing'" under the contracts.

Although the complaint alleged that "false statements were made '*outside* the [Plan] *after* [the] Units were purchased," such allegation was "not fleshed out by some concrete examples or affidavits, but is buried in a mass of the complaint's repetitive allegations about the [Plan's] misrepresentations and omissions." The contract claim and the fraud claim both alleged that "the sponsor failed to deliver to plaintiff and the . . . owners a well-constructed condominium with defect-free apartments/common areas and a J-51 tax abatement. The fraud alleged against the sponsor is based on the same facts that underlie the contract claim, is not collateral to the contract, and does not call for damages that otherwise would be unrecoverable under a contract theory. . . ." The court noted that fraud claims demand "a higher burden of proof than a contract claim" and dismissed the fraud claim "as duplicative of the contract claim."

The court held that the complaint's allegations as to deceptive practices in the advertisement and sale of the condominium units were "sufficient to state a claim under [GBL] §§349-350." This claim alleged that the sponsor had "prepared and disseminated 'promotional materials . . . and advertisements concerning the Building to consumers,' and that the representations contained therein and in the . . . plan were false and misleading." The court explained that "the Martin Act does not bar claims under [GBL] §349 or §350" and that the claims "are not preempted by the Martin Act."

The sponsor had argued that the subject dispute was "unique to the parties at this particular building and [did] not involve the public at large. . . ." The plaintiff asserted that "the Second Department, unlike the First Department, has held that the advertisement and sale of residential apartments is a consumer-oriented transaction within the meaning of §§349-350. . . ." The court stated that "[a] sale of space in the building was not private in nature or a single-shot transaction." Although several units had been sold, "the marketing campaign was still directed to the public at large." Therefore, the court held that the acts complained of were "consumer-oriented in the sense that they affected similarly situated consumers. . . ."

The court then held that the claims against the architect, "to the extent the claims against the architect sound in professional malpractice," were "untimely" and failed to state a cause of action. The plaintiff's claims were "contradicted by the 'no representations' and related disclaimer provisions in the [contracts], the [Plan], and the architect's certification." Moreover, the complaint pled "no facts indicating that plaintiff or the unit owners were in privity with the architect" and "[t]he agreement between the architect and the sponsor, . . ., [did] not reflect an intent that the unit owners be its beneficiaries." Accordingly, the court dismissed the contract claim against the architect.

The court further stated that all of the "fraud and related tort claims against the architect arise from the same provisions said to have been breached and seek the same damages, and thus merely duplicate the insufficient contract claim."

The court also dismissed the negligent misrepresentation claim on the grounds that the contracts provided that each purchaser had "relied on his [or her] own examination and investigation [of the building and the unit]." A claim for negligent misrepresentation requires "the 'existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff'. . . . Here, the negligent misrepresentation and other tort claims against the architect fail[ed] for lack of contractual privity or the functional equivalency of privity." Additionally, the plaintiff failed to identify "any specific actions or inactions on the architect's part that caused the complained-of defects in the building, nor does it offer an expert affidavit to correct this pleading deficiency. . . ." Therefore, the architect's motion to dismiss was granted in its entirety.

The complaint generically asserted the same claims against "the [sponsor's principals] as it does against the sponsor." The claims against the principals "sound in contract, express and implied warranties, negligent construction/supervision, fraud, and [GBL] §§349-350. . . ." For the reasons previously stated, the claims based on "express and implied warranties, negligent construction/supervision, and fraud" were dismissed. The claims against the principals for breach of contract and violation of GBL §§349-350 were found to be sufficient since the principals had "individually executed and delivered the sponsor's certification. . . ."

The complaint had broadly defined the term "Sponsor" to include both an entity owned by the managing members of the sponsor and the developer. The plaintiff believed that the assets and resources of corporate entities and the members had been "comingled and indistinct" and certain funds had been transferred among various accounts. The plaintiff also asserted that members had operated out of the same office. The court held that the plaintiff did not have a cause of action against such defendants. The alleged comingling of funds and fraudulent money transfers had "nothing to do with plaintiff's case-in-chief that the building and its units are of poor quality." Thus, all claims against the sponsor's general partner and the developer were dismissed with leave to amend to replead claims against such entities.

Finally, the court explained that "[a]n ordinary construction contract - i.e., one which does not expressly state that the intention of the contracting parties is to benefit a third party - does not give third parties who contract with the promisee the right to enforce the latter's contract with another, and such third parties are generally considered mere incidental beneficiaries. . . ." Here, members of the sponsor asserted that "there was no written contract between the sponsor and the contractor, 'since these entities were related.'" The court found that such "blanket denial fails to establish conclusively that plaintiff possesses no contract claim against the contractor. . . ." Thus, the court held that the claim against the contractor should not be dismissed.

Comment: The court had also explained that "an individual purchaser's time to give notice of defects under the sunset provision began to run from the time of closing of such purchaser's unit, rather than from the first date on which title to a unit was conveyed to a purchaser. . . ."

This case is of interest because so many new construction or "rehab" residential projects involve some type of construction defects. Many sponsors and condo boards attempt properly to address these issues and work out the issues in an amicable and responsible manner. Some boards and unit owners will exaggerate the defects. Moreover, some problems are attributable to a board's failure to properly maintain the property or equipment and/or provide timely notice of the problems to the sponsor. Many boards realize that they should try to resolve their issues at the table, in order to avoid a litigation battle that could require substantial assessments for legal fees and damage the reputation of the property in the real estate brokerage community and thereby hurt the value of their own units. Similarly, most sponsors do not want to incur legal costs for litigation and possible damage to their reputation. We usually see litigations when one or both parties are unreasonable.

The Board of Managers of 550 Grand Street Condominium v. Schlegel LLC, 503081/13, NYLJ 1202653110339, at *1 (Sup., KI, Decided April 4, 2014), Schmidt, J.

Condominiums - Board Had Standing Pursuant to RPL §339-dd to Commence Action Against Sponsor for Building Defects - However, Lawsuit Was Never Authorized In Conformance With Condominium By-Laws - Although Condominium Was Not Organized Pursuant to Business Corporation Law, BCL §708 Provides Clear "Relevant Authority" On the Subject of Board Action - Board's Failure to Convene Meeting To Enact Resolution Authorizing the Action, Required Dismissal of Action

A plaintiff condominium Board of Managers (Board) commenced an action against a condominium sponsor (Sponsor), seeking compensation for alleged construction defects. The Sponsor moved to dismiss the complaint pursuant to CPLR 3016 (b) and 3211(a), (1), (5) and (7). There are seven members and officers of the Board. Three members are affiliated with the Sponsor. The court dismissed the complaint.

The Board, alleging that there were "significant construction defects, building code violations, hazardous conditions, and other material deviations from the Offering Plan and Purchase Agreements" filed an action "pursuant to Real Property Law ['RPL'] §339-dd, as the representative of the unit owners of the Condominium." The causes of action, included breach of contract, breach of express warranty, breach of implied warranty, breach of fiduciary duties and a claim for an accounting.

The Sponsor argued that the Board lacked "standing and the legal capacity to sue because it has failed to authorize this lawsuit at an appropriately noticed meeting of the [Board]. . . ." The Sponsor acknowledged that RPL §339-dd conferred "standing and legal capacity upon a condominium board to prosecute" this kind of action. However, the Sponsor cited the Board's failure to comply with the condominium's By-laws (by-laws), with respect to the commencement of the action. The By-laws provided that:

> notice of regular meetings of plaintiff must be given to each of its members by personal delivery mail, facsimile, e-mail, or overnight delivery service at least three business days prior to the day named for such meeting. Section 9 . . . provides that special meetings may be called by the president or secretary on written request of any of its members on three business days' notice to each of its members, which is to be given by personal delivery mail, facsimile, e-mail, or overnight delivery service, and that such notice shall state the time, place, and purpose of the meeting. . . . that "the votes of a majority of the Members of the Board . . . shall constitute the decision of the Board. . . . that "any action required or permitted to be taken by the Board . . . may be taken without a meeting if all Members of the Board consent in writing to the adoption of a resolution authorizing such action, and the writing or writings are filed with the proceedings of the Board."

It was undisputed that "none of these procedures were followed here." A Sponsor member of the Board asserted that no meeting authorizing the commencement of this action had been properly noticed, since he had never received notice three days in advance of any such meeting. Moreover, no resolution had been adopted authorizing the commencement of the action. The court explained that "the failure to comply with procedures delineated in the bylaws in obtaining authorization to commence suit requires dismissal of the action."

The Board had argued that no corporate resolution, nor duly-noticed meeting, was required to authorize the commencement of the suit, based upon RPL §339-dd. That section provides that "[a]ctions may be brought or proceedings instituted by the board . . . in its discretion, on behalf of two or more of the unit owners, as their respective interests may appear, with respect to any cause of action relating to the common elements or more than one unit." Decisional precedent has held that a board "has standing to bring claims on behalf of individual condominium unit owners by reason of [RPL] §339-dd. . . ." The court explained that although RPL §339-dd does not require that there be a resolution enacted or a vote taken to commence litigation at a noticed meeting, "the legal effectiveness of the actions of the Board depends upon the Board acting as a body within the constraints of the by-laws."

The Sponsor contended that a Board may only act through a meeting of the Board, citing Business Corporation Law (BCL) §708(a), which provides that "[e]xcept as otherwise provided in this chapter, any reference in this chapter to corporate action to be taken by the board shall mean such action at a meeting of the board." The court stated that absent contrary authority "directly relevant to condominiums per se, notwithstanding that '[c]ondominium ownership is a hybrid form of real property, . . ., and the fact that a condominium, unlike a cooperative, is not organized pursuant to the [BCL] §708," BCL §708 "provides the clearest relevant authority on the subject of board action." Additionally, the condominium's By-laws "track the language of [BCL] §§708(b) and (c) in authorizing action without a formal meeting 'if all members of the board . . . consent in writing to the adoption of a resolution authorizing the action' and the resolution and written consents are filed with the minutes of the proceedings . . ., and in providing for waiver of notice upon appearance at a meeting and for participation by telephone, evidencing an intent to conform to the procedures set forth in the [BCL], as applicable."

Thus, the court held that although the Board had standing to maintain the action against the Sponsor, absent "any indication that it acted as a board by voting to authorize commencement of suit," the Sponsor's motion to dismiss "pursuant to CPLR 3211 (a) (3), must be granted as plaintiff lacked capacity to sue at the time the action was filed. . . ."

Comment: As this case illustrates, condominium and co-op boards sometimes fail to comply with their by-law procedures. Sometimes a board and/or its counsel will fail to carefully review by-law procedural requirements. In certain cases, boards have failed to hold required meetings because they believed that such meetings would be superfluous since minority opponents on a board would clearly be outvoted anyway, *i.e.*, holding a meeting would be a futile gesture. The problem with such approach is that it may violate express provisions of the by-laws. Moreover, although a majority of the board may feel confident that it has the votes to take an action, the failure to provide a meaningful opportunity for dialogue with board members who are likely to dissent, means that dissenting members have no opportunity to raise valid questions and perhaps share additional information which may impact the decisions of the presumptive majority.

The Board of Managers of the Clermont Greene Condo. v. Vanderbilt Mansions, LLC, 504278/2013, NYLJ 1202662428465, at *1 (Sup., KI, Decided July 2, 2014), Demarest, J.

Co-Ops - Objectionable Conduct - Co-Op Board's Decision to Terminate Proprietary Lease Upheld - Business Judgment Rule - Shareholders Repeatedly Denied Access For Waterproof Testing and Sought to Impose Conditions On Co-Op's Remedial Testing, Including Alternative Housing, Storage of Personal Property and Videotaping the Work

A defendant co-op corporation (co-op) had moved for summary judgment, granting a judgment on its counterclaim for a judgment of eviction and for an order dismissing several of the plaintiff shareholders' (shareholders) affirmative defenses. The shareholders had cross-moved for leave to amend their Reply and upon amendment, for summary judgment dismissing several of the co-op's counterclaims.

The shareholders had complained about, *inter alia*, leaks in their apartment. The co-op owns the building. A defendant condominium (condo) owns the exterior walls of the building. In response to complaints from the shareholders, the condo performed a waterproofing project (project). The co-op asserted that it paid for 60% of the $600,000 cost of the project. The shareholders "refused to pay maintenance and assessments relating to the costs of waterproofing." The co-op further alleged that the shareholders had refused requests for "access to their apartment for the purpose of performing water spray testing on the exteriors in order to troubleshoot the leaking problem, and to preserve the warranty for the waterproofing work performed." The co-op asserted that "without the testing, the . . . project could not be completed" and given the lack of access, the alleged leaks "could not be corroborated." The shareholders alleged that they refused to make maintenance and other payments because of the failure to remedy the leakage problem.

The co-op had commenced a nonpayment proceeding in Housing Court, seeking recovery of past due payments and access to the apartment. The Housing Court ordered the shareholders to provide access on Feb. 28, 2012 and on six additional days. However, on May 8, 2012, the Housing Court judge refused to compel the shareholders to provide additional access on May 14, 2012. The Housing Court judge ordered that "the access issue be determined at [a] trial" on May 23, 2012. Such ruling was made without prejudice to the co-op raising lack of access as a defense to the shareholders' warranty of habitability claim. The co-op thereafter discontinued the Housing Court proceeding.

Thereafter, the co-op held a shareholders' meeting at which 94.25% of the votes cast authorized termination of the shareholders' tenancy. The meeting was held pursuant to a notice alleging "objectionable conduct . . . for denying access." The co-op asserted that the eviction complied with the terms of the proprietary lease (lease).

The shareholders argued that the shareholders' meeting and vote for eviction had been motivated by the co-op's "frustration in not achieving the total relief it had sought in Housing Court," that "they had 'cured' their objectionable conduct," had "complied with [the co-op's] demands" and that the eviction claim was "brought in bad faith and without cause." They sought "a declaration that the termination of the . . . lease was illegal and an injunction barring" enforcement of the termination. The shareholders also sought an abatement of the maintenance payments and damages to their personalty and the co-op's alleged negligent efforts to remedy the problem.

The co-op cited the Business Judgment Rule and emphasized that it acted within the scope of its authority and in conformance with the lease. The co-op had invited the shareholders and their counsel to attend the "eviction" meeting. The lease required "an affirmative vote of 75% or more of the shareholders," to terminate a lease based on "objectionable conduct."

The co-op also alleged that it had tried to settle the access dispute a month before it had called the shareholders' meeting, the shareholders' excuses for not providing access were unfounded and the shareholders had demanded certain conditions in exchange for access and such demands were made in bad faith, *e.g.*, the demands included alternate housing during the waterproof testing period, the moving and storing of the shareholders' personal property and that the work in the apartment be videotaped.

The co-op noted that it was only after the shareholders decided to terminate the lease, that the shareholders allowed the necessary water testing. The co-op's engineer concluded that the leakage was caused by the shareholders as a result of their initial renovation of the apartment, during which a waterproofing layer had been removed from the apartment walls in the year 2000. The co-op argued that the shareholders' "persistent and disingenuous refusal to allow access constituted objectionable conduct" and had made a good faith decision and in furtherance of the co-op's business purposes.

The shareholders further argued that there were issues of fact as to the parties' respective conduct and they had allowed the co-op access to their apartment. They also sought "leave to amend their reply . . . to add a new affirmative defense" that the allegedly objectionable conduct had been cured and they were entitled to a cure pursuant to Real Property Actions and Proceedings Law (RPAPL), §753(4). They also contended that since they had provided access, there was no reason for the subject shareholders' meeting and that under the Business Judgment Rule, board action will not be upheld where it was taken in bad faith.

The shareholders sought dismissal of the co-op's counterclaim as to the removal of the waterproofing layer, since it allegedly occurred more than six years ago and the counterclaims are barred by the statute of limitations (SOL). They noted that since the co-op's superintendent claimed that he witnessed the removal of the waterproofing layer, the SOL should not be tolled on the grounds that the co-op had been deceived.

The Business Judgment Rule provides that "a court shall defer to a cooperative board's determination 'so long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith.'"

The Court of Appeals has further explained, "application of the business judgment rule was appropriate in order to balance the competing interests of a cooperative's need to protect the interest of the entire co-op community against the potential of abuse by a board's arbitrary decision making. . . . The Court of Appeals concluded that the offending shareholder's objectionable conduct must be proved with competent evidence, and . . . courts would uphold the decisions of said shareholders in deference to the business judgment rule in the absence of a showing of bad faith."

The co-op had noted that it had sent an e-mail to the shareholders' attorney advising her of the contemplated shareholder meeting "prior to both the date that the Housing Court judge directed [shareholders] to provide access and the date . . . that the same judge declined to sign the show cause order wherein [co-op] sought to compel [shareholders] to provide additional access." As to responsibility for delays with respect to the access, the court did "not find evidence of bad faith on [the co-op's] part." Although the shareholders claimed

that the co-op's actions were retaliatory, the lease granted the co-op a right to access and the co-op was not obligated by the lease to accede to the shareholders' demands for "alternative housing or other measures requested by [shareholders] as a condition for acquiring access."

The court found that the plaintiffs had "their opportunity to present their position," the shareholders vote to terminate the lease complied with the terms of the lease and "[t]here was competent evidence of [shareholders'] objectionable conduct to sustain such a vote."

Additionally, the court explained that absent "sufficient proof of a retaliatory motive," it "must defer to [the co-op's] decision under the business judgment rule." The court opined that even if the co-op caused some delays, its conduct was not "so extreme or disreputable as to represent bad faith, or to raise a material issue of fact with respect to bad faith." Thus, the court rejected the retaliation claim, found that the shareholders had not acted in good faith in withholding their maintenance and denying reasonable access and granted the co-op a judgment of possession.

The court also, *inter alia*, denied the motion for leave to amend the Reply to assert a cure pursuant to RPAPL §753(4). The court noted that RPAPL §753(4) "does not create a defense or cause of action, and is not the proper subject of a motion to amend a pleading." RPAPL §753(4) permits "the court in its discretion to stay the time for a tenant to cure a default under a notice to cure." Here, the lease authorized a super majority of the shareholders to evict the plaintiffs for objectionable conduct. The co-op was "not required to serve a notice to cure" and "the only question for the court is whether [the co-op's] action was taken for the . . . purposes of the cooperative, within the scope of its authority and in good faith."

The court further held that it lacked "discretion to stay the time to cure given that there is no time period to be extended." Furthermore, the court was "unable to fashion any just terms upon which . . . to grant a stay of the eviction, given the imbroglio of the relationship between the parties over the past three years." The co-op had acknowledged that the shareholders "will not lose their investment" since the lease requires that their co-op stock certificates be sold. The co-op stated that "it would seek the fair market price of the apartment and not proceed by auction, and affirm[ed] that [the shareholders] are entitled to the balance of the proceeds of the sales after deduction of any outstanding maintenance fees, costs of sale and attorneys' fees incurred by [the co-op] in this litigation." The court granted the shareholders leave to move pursuant to RPAPL §753(1) since the shareholders have two minor children.

The court also dismissed the co-op's counterclaims relating to removal of the waterproofing material, since they are barred by the SOL and the co-op had failed to address such counterclaims in its opposition papers. Finally, as to the shareholders' cross-motion to dismiss the co-op's counterclaim for expenses, including attorneys' fees, the court found that the shareholders had "not come forward with prima facie evidence justifying such relief."

Gordon v. 476 Broadway Realty Corp., Sup. Ct., N.Y. Co., Index No. 103951/12, decided 5/19/14, James, J.

Co-Op's Board of Directors' Termination of Proprietary Lease Upheld - Business Judgment Rule - Co-Op Boards Are Not Required to Inform Shareholders That They Have A Right to Have Counsel Present At A Board Meeting - Proprietary Lease Terminated Based On Objectionable Conduct - RPAPL 711 "'Competent Evidence' Standard Is Satisfied By Utilization of the Business Judgment Rule"

A cooperative corporation (co-op) had commenced a holdover proceeding against the respondents and undertenants pursuant to a Board of Directors (Board) decision "which terminated respondents' proprietary lease" (Lease) based upon "objectionable conduct." The co-op alleged that since 2005 "occupants and guests of [the premises] have engaged in . . . objectionable conduct including but not limited to violation of both the House Rules and [Lease]," and "have created a nuisance by repeated conduct after numerous letter[s], creating an unhealthy and unsafe environment for the other residents. . . ."

The trial focused on whether the Board's decision to terminate the respondents' tenancy should be "granted deference under the business judgment rule" The co-op presented six witnesses at trial. The respondents produced no witnesses. Evidence included "the House Rules, the [Lease], By-Laws, the Notice of Board Meeting (Notice), the . . . transcript of the Board Meeting and numerous letters from the Board to respondents concerning objectionable conduct."

The co-op had served a Notice dated Feb. 16, 2010 on the respondents. The Notice alleged, *inter alia*, substantial violations of the House Rules, Lease and applicable law and requested that respondents attend a Board meeting to be held on Mar. 24, 2010. The Notice stated that the Board will "address and allow you to respond to the objectionable conduct. . . ."

The Notice listed 744 incidents, with dates and times, and included references to "urinating and defecating in the hallways and elevators; loitering and smoking; illegal drug sales in and around the Building; and sexual activity in the stairwells." The Notice also noted that many incidents had been recorded and the respondents could view the security footage recordings prior to the Mar. 24, 2010 meeting. The Notice further explained that after the respondents have responded at the meeting, the Board will vote on whether the tenancy is desirable, whether the tenancy is objectionable, whether such conduct constitutes a nuisance and whether to terminate the tenancy and Lease.

The Board, the subject respondent and the co-op's counsel attended the Mar. 24, 2010 meeting. The respondent had acknowledged receipt of numerous letters from the Board relating to objectionable conduct and the Notice. Moreover, the subject respondent had read the Notice and discussed the Notice with her brother.

A co-op witness testified that following the meeting, the Board voted unanimously to terminate the Lease and then served a Notice of Termination. When the respondents and undertenants failed to vacate the premises, the Notice of Petition and Petition had been served. Another co-op witness described the camera system in the building. Additionally, a property manager testified that she had mailed approximately 20-40 letters to the respondents with respect to "incidents of objectionable conduct." This witness testified that the subject respondent had advised her that "she was unable to control the persons living in her

apartment." Another co-op witness described complaints that had been made by neighbors and residents about the objectionable conduct.

The court explained that *Levandusky v. One Fifth Ave. Apt. Corp.*, 75 NY2d 530 (1990) held that the standard of judicial review with respect to shareholder challenges of cooperative board of directors' decisions would be the "business judgment rule" and board decisions should be upheld if a board acted "for the purposes of the cooperative," "within the scope of its authority," and "in good faith." Judicial precedent further held that a proprietary lease could be terminated by a shareholder vote pursuant to a proprietary lease that authorized the termination of the tenancy based on objectionable conduct.

The court explained that "[i]n a typical residential holdover, RPAPL provides for judicial review of 'competent evidence' to substantiate that the tenant's alleged conduct is objectionable. In cooperatives, the 'competent evidence' that is the basis for the shareholder vote will be reviewed under the more deferential 'business judgment rule.'" Thus, courts are to defer to "the shareholders' vote and findings as 'competent evidence' of the tenant's objectionable conduct," *i.e.*, "the RPAPL 711 'competent evidence' standard [with respect to objectionable conduct cases] is satisfied by the utilization of the 'business judgment rule.'" Judicial precedent also held that "a [co-op's] board of directors alone may terminate the tenancy of a shareholder-tenant based on 'objectionable conduct' and without a shareholder vote" if so authorized by the organizational documents.

The court found that the subject Board's actions "were well within the scope of authority, legitimately furthered the corporate purpose and were made in good faith." The court noted the number of incidents, the fact that the incidents had been brought to the attention of the respondents in the course of several years, that the co-op had sent proper notices and provided the respondents with an opportunity to respond to the allegations. The subject respondent had declined to confront complaining witnesses and had failed to offer contradictory testimony to refute the video evidence. Moreover, the respondent had admitted that she could not ensure that the alleged wrongful conduct "would abate in the future." The court concluded that:

> The Board's actions not only furthered a legitimate corporate purpose but constitutes a fundamental responsibility to its shareholders and residents. The Board's actions furthered the best interest of all shareholders and their families and friends by promoting a healthy, clean and safe environment in the subject building. The Board's failure to act in the face of these allegations would amount to an abdication of its responsibilities and duties to all the shareholders. Respondents have not raised any allegation that the Board's actions were biased, fraudulent, discriminatory or engaged in favoritism. Rather, it appears from a review of the record that the Board's actions were deliberate, thoughtful and accommodating.

The respondents had argued that they were denied due process because the Notice did not advise the respondents that "they could have counsel present at the Board Meeting." There court explained that "[t]here is no case law that requires a cooperative board to place such language in a Notice for a Board Meeting" and "there is no right to counsel in a non-criminal matter."

The court further found that the Board had followed the procedures prescribed by the House Rules, the By-Laws, the Lease and the respondents had been afforded "due process."

They were aware of the complaints "for a lengthy period of time," "[t]hey knew the purpose of the Board Meeting and the specific allegations" and "they had more than forty days to review and prepare an adequate defense with or without counsel." Thus, the Board had acted "in good faith, within the scope of its authority and for a legitimate corporate purpose, thus satisfying the business judgment rule to which deference should be given by this Court." Accordingly, the court awarded the petitioner final judgment of possession.

1855 7 Ave. Housing Dev. Fund v. Wigfall, 81069/10, NYLJ 1202647519406, at *1 (Civ., NY, Decided February 20, 2014), Elsner, J.

Condominiums - Failure to Follow By-Law - "Fine" Procedures - Homeowner Associations (HOA) Board Imposed Large Fines and Barred Homeowners From Bringing Their Vehicle Into the Development Until They Removed Invasive Bamboo Landscaping - Business Judgment Rule Defense Rejected

The plaintiff homeowners live in a gated development that is governed by a home owner's association (HOA). The plaintiffs and the HOA had been sued by a neighbor in an action presently pending before another court. The plaintiffs had cross claimed against the HOA in the neighbor's action and had tried to settle the neighbor's action. The neighbor's complaint alleged that the plaintiffs had "previously planted an invasive form of bamboo . . . which has spread to the [neighbor's] property, causing property damage and rendering her yard unusable." The HOA was accused of "failing in its responsibility for landscaping and maintenance and for allowing this condition to continue."

In the subject action, the plaintiffs alleged that the HOA board (Board) has "imposed fines on the plaintiffs based on this bamboo infestation." The plaintiffs had been assessed fines of $14,000, of which they have paid more than $8,000. The plaintiffs are both in their 70's and had "never been and are not now in arrears of any monetary obligations" other than the subject fines.

The Board's attorney had advised the plaintiffs that "if the bamboo [was] not removed from [neighbor's] property and common area, fines on an escalated basis would be imposed. . . ." The plaintiffs alleged that the neighbor would not permit access to her property for the necessary remedial work and that even though they paid more than $8,000 in fines, "the Board continued to impose monthly fines of $1,000 each throughout this period."

The Board voted that "residents in arrears for over 60 days will have their vehicles denied access to [the development], and will be denied access to all amenities." Moreover, vehicles were not permitted to be parked near the gatehouse. Neither party submitted "an authenticated copy of the resolution, minutes of the meeting or any notice of the meeting."

The plaintiffs alleged that since the development's entrance is on an expressway and parking is approximately a mile away, the Board vote "effectively denies them access to the Premises." Moreover, since the neighbor had been denied access to the subject property, the plaintiffs contend that they could not abate the problem. They believed that the only "recourse would be to settle the [neighbor's action], and as to common areas, arrive at a settlement of cross claims with the HOA."

The HOA countered that the plaintiffs still have access to their home, "albeit not by vehicle." The HOA admitted that "the purpose of the new directive [was to] obtain remediation, i.e., settlement of the [neighbor's action]." The salient issue was not the merits of the neighbor's action, but whether the penalties had been "properly imposed."

The HOA had submitted letters from the HOA attorney threatening fines if the bamboo had not been removed. However, it did not provide a copy of a Board resolution "regarding the action required to be taken by plaintiffs . . . to avoid the penalties, an authenticated copy of the resolution, or the notice of the meeting or the minutes."

The plaintiffs were currently barred "from vehicular access to their home, denied use of [the development's] amenities" and faced escalating charges unless they cure the subject bamboo condition "or pay something to [the neighbor], conditions over which they have no

control, because [the neighbor's] assent is required." They must also do work on the HOA's common areas, which requires the consent of the Board. That also was out of the plaintiffs' control. Moreover, although the By-Laws contained a grievance procedure and a grievance committee, there was "no evidence that this procedure was followed" here.

The defendants appeared to be "arguing the merits of the [neighbor's action] to justify their imposition of . . . punitive . . . fines . . ., and that when that tactic failed, defendants escalated the stakes by imposing measures affecting the physical well-being of plaintiffs." Moreover, it was "questionable whether defendants followed . . . the Declaration and [By-Law procedures] in imposing" the subject measures and "a trier of fact could well interpret [the defendants' action] as a means of forcing plaintiffs into a settlement of [the neighbor's] Action."

The court held that the plaintiffs had demonstrated a probability of success on the merits, possible irreparable injury and "a balancing of equities in their favor" by showing that they were placed "in the untenable position of either entering into a settlement of [the neighbor's] Action or loss of their rights." The plaintiffs would "be required to surrender what may be legitimate claims against the HOA or defenses in [the neighbor's] Action in order to secure the continued use of [their home]." In contrast, the defendant could "be made whole by a payment of money." Thus, the court granted the plaintiffs' motion for a preliminary injunction.

The court further explained that the Business Judgment Rule did "not preclude review of improper decisions, as when the challenger demonstrates that a board's action has no legitimate relationship to the welfare of the organization, deliberately singles out individuals for harmful treatment, is taken without notice or consideration of relevant facts or is beyond the scope of the board's authority." The subject circumstances "could well bring this action within the orbit of the above exceptions [to the Business Judgment Rule] on the ground of unconscionable action on the board's part." Thus, the HOA was enjoined from "enforcing . . . any rule or resolution regarding the bamboo infestation," "levying or seeking to collect on any fine previously imposed, including the assertion of a foreclosure" and "denying plaintiffs the use and enjoyment of all amenities to which they otherwise would be entitled, including but not limited to access to the [development] and parking by their Premises."

Tucciarone v. Olde Oyster Bay Homeowners Assoc., 11231/13, NYLJ 1202631927128, at *1 (Sup. Ct., Nassau Co., Decided December 4, 2013), Palmieri, J.

Condominiums - Claim Sponsor Underfunded the Reserve Fund - Statute of Limitations - The Term "Total Price" Within the NYC Admin. Code §26-703 Means the Price in Effect Just Prior to the "Effective Date" - Sponsor's Principal Not Personally Liable

A defendant sponsor and defendant member and principal of the sponsor (principal) moved to dismiss a complaint which had been filed by the plaintiff condominium Board of Managers (Board). The offering plan (Plan) contains a Certification signed by the sponsor and principal (Certification), pursuant to which the defendants certified that the Plan and documents that "amend and supplement, it will, inter alia, 1) set forth the detailed terms of the transaction and will be complete, current and accurate; 2) afford potential investors, purchasers and participants an adequate basis on which to found their judgment; 3) not omit any material fact and 4) not contain any false representation or statement."

The complaint cited NYC Admin. Code § (Code) §26-703, which requires that "a Sponsor of a Condominium conversion provide a minimum Reserve Fund. . . ." (Fund). Pursuant to Code §26-703(b), the Fund may be established either by "a lump sum deposit equal to 3% of the total price . . . or through installments to be made over a statutorily prescribed time period, pursuant to a statutorily-prescribed calculation."

The plaintiff alleged that in creating the subject Fund, the Sponsor had used "the incorrect price in calculating its funding obligation." The plaintiff asserted that "the Sponsor was required to fund '3% of the sum of the cost of all units in the offering at the last price which was offered to tenants in occupancy prior to the effective date' . . . and that the calculation of the 'last price' is made by reference to relevant provisions in the . . . Plan, and the Fourth Amendment to the Plan dated February 14, 2005 which announced new . . . prices for all of the units. . . ."

The plaintiffs contended that the Fund had been underfunded in an amount of at least $522,760.00 and that all purchasers signed purchase agreements that incorporated the defendants' obligations in the Plan and that the Plan contained a section titled Reserve Fund which embodied defendants' "contractual obligation to properly fund the Reserve Fund. . . ." The plaintiffs sought a declaratory judgment, an "injunction directing Defendants to make additions to the . . . Fund which calculates 3% of the Total Price as $1,346,048.00" and asserted claims for "breaches of the . . . Plan."

The defendants argued that they had deposited the correct sum in the Fund using the installment method. They claimed that the Sixth Amendment had calculated the minimum Fund contribution as $823,288.00. That sum was calculated based on the last price offered to tenants before the Plan was declared effective.

The defendants further argued that the Board had acknowledged in its financial statements that the Sponsor had fully paid the "Fund Contribution." The defendants submitted evidence which allegedly refuted the plaintiff's allegation that "the insider price had been modified by the Fourth Amendment to the . . . Plan." The defendants contended that the Fourth Amendment modified only the outsider price and did not contain a new insider price offered to tenants in occupancy, which is the relevant price used in calculating the minimum reserve fund contribution. The defendants asserted that the Sixth Amendment, which became effective after the price increased to outsiders in the Fourth Amendment, continued to calculate the minimum reserve fund contribution of $823,288.00 and the Board's financial statements all reflect that the

amount required to be paid into the Fund was $823,288.00. The defendants also argued that this action is barred by the statute of limitations (SOL).

The defendant reasoned that the relevant dates for a SOL analysis are Aug. 2005, when a notice advised unit owners and purchasers that the minimum Fund contribution was set at $823,288.00, Aug. 19, 2005, the date that such figure was set forth in the Sixth Amendment and Aug. 23, 2005, the date on which the Sixth Amendment was served on all unit owners and unit purchasers. The defendants emphasized that such figure was specified in numerous Board financial statements and Plan amendments without challenge until the filing of this action, "more than 8 years after the figure was set." The defendants further argued that the plaintiff's claims were barred by the doctrine of laches since the Board and its resident owners had "unreasonably sat on their rights for more than eight years."

The plaintiff countered that its claims did not accrue until at least Jun. 2010, at least five years and 30 days after the conversion on May 20, 2005, or Aug. 2010, when defendants made their last payment. Since the action was commenced in 2013, the plaintiff believed that the action had been timely commenced.

The plaintiff also argued that the claims were not barred by laches because the defendants had not demonstrated how they had been prejudiced by any delay. Moreover, the plaintiff asserted that it lacked knowledge that the Fund was underfunded until the sponsor relinquished control of the Board and there was no voluntary or intentional abandonment of the plaintiffs' rights.

The court explained that "§26-702(b)(2) defines the term 'total price' as used in the relevant funding provisions, with respect to condominium conversions, as 'the sum of the cost of all units in the offering at the last price which was offered to tenants in occupancy prior to the effective date of the plan regardless of number of sales made.'"

An Appellate Division, First Dep't decision had held that the term "total price," "with respect to cooperative conversions," is "the price in effect just prior to the effective date and not, . . ., the price in effect during the purchase period, *i.e.*, the 'insider's price.'" The court explained that "[a]bsent governing Second Department authority to the contrary," that ruling is "authoritative."

The court then granted the defendants' motion to dismiss the requests for a declaratory judgment and for injunctive relief since the plaintiff had an adequate remedy at law through its breach of contract claims and dismissed all claims asserted against the principal personally and otherwise, denied the motion. Additionally, the court held that the defendants had not established the applicability of its laches defense. The court found that the complaint sufficiently stated a claim for breach of contract. The defendants' evidence did "not conclusively or utterly [refute] the Plaintiff's allegations" since there was support for the plaintiff's contention that, "because the insider period had expired before the Fourth Amendment was filed, the prices contained in that Amendment were necessarily offers applicable to all purchasers at that juncture, and there was no distinction in the prices offered or applicable to insiders and outsiders." Certain evidence demonstrated that the sponsor's final Fund deposit had been made in 2010 and therefore, the defendants did not establish that this action was time-barred.

The principal had executed the Certification "exclusively as [Sponsor's] principal, not separately or in his individual capacity." The plaintiff had not alleged that the Principal had acted fraudulently. Thus, the court found that there was "no basis for holding [the principal] personally liable."

Comment: Adam Leitman Bailey, counsel for the plaintiff, stated that this decision established a new precedent in the Second Dep't on the issues of sponsor Reserve Fund obligations and the statute of limitations with respect to such obligations.

Board of Managers of Cathedral Tower Condominium v. Sendar Associates, Sup. Ct., N.Y. Co., Index No. 601602/13, decided 5/20/14, Driscoll, J.

Co-Ops - Rights and Obligations of Holder of Unsold Shares - "Voting Control" vs. "Will Not Elect" Provisions - There Were Issues Of Fact As to Whether Defendant Had A Duty to Sell His Unsold Shares Within A Reasonable Time and Whether He Had, In Fact, Done So

This case involves a dispute between plaintiffs, a residential cooperative corporation (co-op) and members of its board of directors (Board) and the defendant, a holder of unsold shares in the co-op, over the defendant's "rights and obligations as a holder of unsold shares." The complaint alleged claims for "breach of fiduciary duty, breach of contract, and fraud, and for a declaratory judgment and injunctive relief." Each party had moved, *inter alia*, for summary judgment.

In 1983, the building had been converted to a co-op pursuant to a non-eviction plan. The defendant had purchased several apartments in the mid-1980's and in 1997, he purchased "unsold shares appurtenant to 36 additional apartments from the Coop's sponsor or the sponsor's successor in interest, some of which he later sold." Currently, the defendant is "the holder of unsold shares for 31 or 32 of the Coop's 72 units, . . . constituting approximately 45 percent of the Coop/s shares."

The Board is comprised of five members. The defendant was a member of the Board from 1984 to 2011. The plaintiffs alleged that the defendant had controlled the Board from 2000 - 2008 and had mismanaged the building. The plaintiffs also alleged that "after a new Board was elected in 2008, which included [defendant], numerous disputes arose, . . . over refinancing of the Coop's mortgage, building repairs, and maintenance charges." In Jan. 2011, at an annual shareholders meeting, five Board members were elected by the shareholders, none of whom had been designated by the defendant. The defendant had apparently "nominated his candidates after the allotted time to make nominations." The election had been certified and not subsequently challenged by the defendant. The defendant claimed however, that after the Jan. 2011 meeting, "the plaintiffs failed to call an annual shareholder meeting, as required by the By-Laws, or to call a special meeting to elect a new Board. . . ."

The co-op's By-Laws provide:

> "At least two Directors representing the Holder(s) of Unsold Shares shall be elected to the Board . . . of the Apartment Corporation for as long as the Holder(s) of Unsold Shares shall own and possess proprietary leases for at least fifteen (15) apartments. Upon the earlier of three (3) years subsequent to the Closing of Title with the Apartment Corporation or after fifty-one percent (51 percent) of the shares have been sold to other than the Holder(s) of Unsold Shares, such Holder(s) of Unsold Shares will relinquish control of the Board . . . if they have such control and will not elect a majority of the Directors of the Apartment Corporation even though the number of shares owned by them may enable them to otherwise do so."

The plaintiffs had commenced the subject action to resolve "the issue of whether [defendant] is entitled to cast his votes for all five seats on the . . . Board." The plaintiffs sought

a declaration that the defendant "may not elect more than a minority of the Board . . ., even though he may have the votes sufficient to do so," and "may cast his votes for only two of the five members of the Board . . . in any election in which he is entitled to vote."

The defendant sought a declaration that "he is entitled to vote all of his shares at Coop elections for any candidate for the . . . Board in addition to his two designated appointments as sponsor, and a declaration that plaintiffs have improperly and illegally failed to hold an annual shareholders meeting and failed to hold a special meeting to elect a new Board, and [sought] an injunction directing plaintiffs to do so."

After reviewing the law with respect to motions for summary judgment and interpretation of contracts, the court noted that the parties did "not dispute that under Article III, section 2 of the . . . By-Laws, [defendant] is a holder of unsold shares who owns more than 15 apartments, and that more than three years have passed since closing of title and more than fifty-one percent of shares have been sold to other than the holder of unsold shares." Thus, there was no dispute that the defendant was empowered "to designate two representatives to the Board . . ., and that the voting rights limits set out in Article III, section 2 apply to [defendant]." The parties argued, however, about the proper interpretation of Article III, section 2 language which required the defendant to "relinquish control of the Board" and precluded the defendant from electing "a majority of the Directors." They differed as to whether such clause restricts the defendant "to voting for only the two designated Board members and no others or whether he can also vote his shares for other candidates."

The court noted that the Attorney General's regulations prohibit "sponsors and holders of unsold shares from indefinitely controlling a cooperative's board of directors, and to that end, require that if the plan for conversion to cooperative ownership is presented as, or amended to, a noneviction plan, the 'sponsor and other holders of unsold shares must agree not to exercise voting control of the board . . . for more than five years from closing, or whenever the unsold shares constitute less than 50 percent of the shares, whichever is sooner.'" Those regulations apply "where there are no other limitations set out in a cooperative's offering plan or by-laws and where the offering plan or by-laws of a cooperative address the limits of a sponsor's control of a board . . . by incorporating the language of the regulation that a sponsor, or other holder of unsold shares, must relinquish voting control of the cooperative's board."

The court explained that judicial precedent has "narrowly construed the phrase 'voting control' to mean the power to nominate or designate a majority of board members, or to cause members to be elected that are on the sponsor's payroll or otherwise receive remuneration from the sponsor." Therefore, cooperative corporations "cannot prevent the [sponsor] from voting for any director unless it is shown that the director in question is on the [sponsor's] own slate or receives a salary or other remuneration from it." Thus, board control by a sponsor does not involve "disenfranchisement of the [sponsor] but rather its inability to designate related parties to fill a majority of the board member seats." Therefore, "when by-laws or offering plans provide that a sponsor 'shall relinquish control' or 'shall not exercise voting control' after a period of time or the happening of a particular event," such provision "merely prevents the designation, by a sponsor or holder of unsold shares, of candidates under its own control so as to create a majority of the Board. Unless a restriction on the sponsor's voting rights is specifically contained within the bylaws, offering plan or certificate of incorporation, a sponsor can vote for unrelated board candidates without limitation." However, courts have "distinguished the so-called 'voting control' cases from cases involving 'will not elect' provisions."

The court noted that although "it appears settled in the Second Department that 'will not elect' provisions prohibit a holder of unsold shares from voting its shares for more than one less than the majority of directors to be elected, the issue is not as clearly settled in the First Department." After reviewing appellate precedent, the court concluded that "appellate precedent in both the First and Second Departments [weigh] in favor of finding, in this case, that [defendant] . . . should be restricted to voting his unsold shares only for the two directors he is permitted to designate." Moreover, "Business Corporation Law §612(a) and the offering plan and By-Laws' provisions entitling shareholders to 'one vote for each share'" did not require "a different result." The by-laws did not bar a sponsor from "casting all its votes, but merely bar the sponsor from obtaining control of the board under certain circumstances."

The court also held that the plaintiffs had failed to demonstrate their entitlement to injunctive relief related to their breach of contract claim that the defendant had "breached an implied promise to sell all the unsold shares within a reasonable time." The court explained that even if the defendant had a duty, "as a holder of unsold shares amounting to less than a majority, to sell his unsold shares in a reasonable time, there are issues of fact as to whether he has done so." The court further noted that the parties had previously agreed that the co-op Board would "notice a shareholders meeting within 60 days after the issuance of a decision on the instant motion and cross-motion."

Comment: Jennifer L. Stewart, Esq. of Smith Buss & Jacobs, LLP, attorney for the plaintiffs, stated that the homeowners are now "one step closer to gaining control of their cooperative." However, she advised that the decision is being appealed.

420 W 206th Street Owners Corp. v. Lorick, 650403/12, NYLJ 1202647183703, at *1 (Sup. NY, Decided February 5, 2014), Coin, J.

PIERCING THE CORPORATE VEIL

Piercing the Corporate Veil - Plaintiffs Received Jury Verdict on Claim Involving Construction of Residence - Exercise of Dominion and Control Over An Entity Is Common In Closely Held Corporations and Is Not A Sufficient Basis to Pierce the Corporate Veil

Homeowners had obtained "a jury verdict in their favor in connection with the construction of their residence" against a corporate defendant ("A"). They then sought "to pierce the corporate veil of ['A'] in order to enter the Judgment they [had] filed against ['A''s] owner ['B']." Upon the consent of counsel, following a jury trial between the homeowners and "A", "the issue of corporate veil piercing was submitted to the court for determination."

The homeowners alleged that "B" "fraudulently dissipated all assets of ['A'] toward the latter part of 2008, when he was aware of a dispute with the [homeowners], thereby shielding himself from any potential judgment." The homeowners contended that "B" "deliberately abused the corporate form to cause them harm." They alleged that "B" "was never adequately capitalized; . . . commingled funds attributable to [the homeowners'] job with funds from other jobs run by ['B''s] brother and a corporation he owns, ['C']; that ['B'] used corporate funds for personal purposes; that ['B'] took $350,000 out of the corporation immediately before closing the corporate doors in order to repay himself a loan for which there are no source documents; and that ['B'] made no effort to maintain sufficient documentation to provide the [homeowners] with an appropriate opportunity to present their claim."

"B" countered that "A" "maintained appropriate corporate formalities and all the payments that were made toward the end of 2008 were appropriate and properly documented." "B" contended that "no funds were commingled;" rather ['A'] paid all of its creditors and had funds to do so when such debts became due." "B" further alleged that when "A"'s debts were paid, they were paid "while he believed he had a claim against the [homeowners]," and the homeowners had then "not asserted any monetary claim against ['A']." "B" asserted that "A"'s funds were used "to satisfy appropriate corporate obligations including documented loans" and there was no evidence of fraud.

The court explained that "[o]ne of the primary and completely legitimate purposes of incorporating is to limit or eliminate totally the potential personal liability of corporate principals." However, "[e]quity, . . ., will intervene to disregard the corporate form when the facts presented make such a determination necessary in order to avoid fraud or to achieve equity." The court further stated that a party seeking to pierce the corporate veil has the burden of establishing that:

> "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury". . . . The mere fact that a corporation was completely dominated by the owners and acted as their 'alter ego' without more, will not suffice to support the equitable relief sought. . . .

In determining a corporate veil claim, courts will consider the "failure on the part of the entity to adhere to corporate formalities;" "inadequate capitalization;" "commingling of assets;" and "use of corporate funds for personal purposes."

The court evaluated, *inter alia*, the testimony of "two excellent experts and a corporate accountant" on this "extremely complex matter." The testimony weighed "so evenly" that the court held that "the [homeowners] have failed" to demonstrate that they are entitled to "the somewhat extraordinary relief requested in the context of piercing the corporate veil." The court acknowledged that "B" "exercised dominion and control over the entity," but noted that "such is not only common in closely held corporations, but is simply not sufficient to apply the remedy sought herein."

Although the "corporate requirements were also often not met vis a vis loan approvals, there are records going back before the [homeowners'] job was even contemplated, demonstrating that ['B'] did loan substantial amounts of funds to the entity." Although certain loan documents were missing, "there are bank records of much of the same and the QuickBooks records, categorized by both experts as typical and appropriate for small construction companies such as ['A'], consistently [set] forth loan amounts by ['B'] to the corporation." Although "A" "did not keep the funds from its different jobs in separate bank accounts, its . . . files show that it did separately list all expenses from each separate job over the entire period of its existence." The court records showed "that more was received than expended over the years for" another job and that "B" expended monies over the years for personal expenses. However, the court believed that most of these funds "were utilized to reduce . . . loan accounts." Although "B" had "paid himself more than the loan documents and even the QuickBooks records showed he was owed, there was no claim either asserted against him at the time nor was there anything in writing setting forth that one was even contemplated. . . ." Additionally, the court found that it was probable that "A" had "underpaid its income taxes for years, . . ., [but] there [was] no connection between those acts and the corporation's breach of its contract with the [homeowners]."

Although the court found that "B" had "used the corporation for personal expenses and filed questionable tax documents, this is not a case where these actions were done in order to commit a wrong or fraud upon the [homeowners]." The court deemed it "significant that when the final payments by ['A'] were made, the [homeowners] had not written a word in their extensive communications with ['B'], that they had or were even contemplating a claim against ['A']." The court agreed with an expert's testimony that "A"'s "corporate books and records were . . . more detailed than those kept by closely held corporations in the construction business."

Accordingly, the court found that the homeowners were not entitled to pierce the corporate veil. Moreover, "B" was not "personally liable for the . . . judgment against ['A'] under BCL §1005, which limits corporate distributions to shareholders only after adequately providing for payment of its liabilities." Here, "there were no records of outstanding liabilities to the [homeowners] nor indeed even a writing suggesting one might be coming at some future date at the time that ['B'] made the final payments, the substantial bulk of which were not shareholder distributions; but, rather, payment of corporate debts." Accordingly, the court held that "B" was not liable for the judgment entered against "A".

Vivir of Li, Inc. v. Ehrenkranz, 043523-2009, NYLJ 1202664428605, at *1 (Sup., SUF, Decided July 1, 2014), Pines, J.

Claim that Defendants Wrongfully Copied Architectural Plans for Homes - Copyright Infringement - Digital Millennium Copyright Act - Copying Was Not So Close And Only Captured the "Generalities of the Style In Which Plaintiff Worked and Elements Common to All Homes" - Defendants' Houses Shared Plaintiff's General Style, But Took Nothing From His Original Expression

This case required the Second Circuit Court of Appeals (Court) to "explore the limits of copyright protection for architectural works." The case involved an appeal of a judgment of the United States District Court (trial court). The plaintiff alleged "copyright infringement and violations of the Digital Millennium Copyright Act [DMCA] against . . . Defendants involved in the construction and sale of houses built with architectural plans allegedly copied from Plaintiff's designs." The trial court dismissed the plaintiff's claims "against some Defendants, granted summary judgment in favor of the remaining Defendants, and granted attorney's fees to two Defendants. . . ."

The plaintiff asserted that "he created and . . . licensed numerous designs for colonial homes to two construction companies" and those "companies and their contractors infringed his copyright in these designs by using them in ways the licenses did not permit and after the licenses had expired." The defendants had allegedly also violated the DMCA. The defendants essentially contended that "their designs [did] not copy the protected elements of Plaintiff's designs." On appeal, the plaintiff "challeng[ed] the dismissal of his complaint, the grant of summary judgment to Defendants, the denial of summary judgment to [plaintiff], and the award of attorney's fees." The court held that "any copying of Plaintiff's designs extended only to unprotected elements of his works," and the "Plaintiff failed to plead a violation of the DMCA." The court further held that the trial court had applied the incorrect legal standard in awarding attorney's fees and remanded the matter to the trial court to apply the correct standard.

When the plaintiff was self-employed as an architect, he granted the defendants licenses to use several "colonial" designs he had created. After the licenses had expired, a defendant had allegedly hired other defendants "to customize his designs for their customers and continued marketing his designs, or customized versions thereof, without his consent." The defendants had allegedly "copied the overall size, shape, and silhouette of his designs as well as the placement of rooms, windows, doors, closets, stairs, and other architectural features." In addition to copyright infringement claims, the plaintiff asserted claims under the DMCA, which prohibits, *inter alia*, "'intentionally remov[ing] or alter[ing] any copyright management information.'" The defendants had moved to dismiss and made motions for summary judgment, *inter alia*, "on the ground that the designs they employed or created lacked substantial similarity" with the plaintiff's designs.

The court explained:

> . . . to make out a claim of copyright infringement for an architectural work - or any work - a plaintiff must establish three things: 1) that his work is protected by a valid copyright, 2) that the defendant copied his work, and 3) that the copying was wrongful. . . . The second and third elements - copying and

> wrongful copying - are often confused. . . . in many cases any copying of a work is wrongful, and . . . there is often no need to draw the distinction. Nonetheless, the distinction can be important. Not every portion or aspect of a copyrighted work is given copyright law's protection. Copying these aspects of a work is not wrongful, and thus not all copying is wrongful.

Additionally, "[w]hen an original work contains many unprotected elements, however, a close similarity between it and a copy may prove only copying, not wrongful copying. This is because the similarity may derive only from these unprotected elements."

In the subject case, the plaintiff's copyrights were valid and there was substantial evidence that the defendants copied the plaintiff's designs. However, the court found that "even assuming Defendants copied, they took only the unprotected elements of Plaintiff's work." Thus, "[a]ny copying was not wrongful and the district court correctly granted summary judgment."

The court acknowledged that works do not always "fall neatly into" "creative," "derivative work," or "compiled" categories. Rather, "[e]very kind of work at some level is a compilation, an arrangement of uncopyrightable 'common elements.'" The court noted that just as "[n]o individual word is copyrightable, but the arrangement of words into a book is" and "[n]o color is copyrightable, but the arrangement of colors on canvas is," similarly, "doors and walls are not copyrightable, but their arrangement in a building is." The court believed that "[l]abeling architecture a compilation obscures the real issue." Moreover, "[e]very work of art will have some standard elements, which taken in isolation are uncopyrightable, but many works will have original elements - or original arrangements of elements." The court stated that "[c]ourts should treat architectural copyrights no differently than other copyrights."

The court then noted that "[a]ny design elements attributable to building codes, topography, structures that already exist on the construction site, or engineering necessity should . . . get no protection." "Neoclassical government buildings, colonial houses, and modern high-rise office buildings are all recognized styles from which architects draw. Elements taken from these styles should get no protection." Additionally, "there are certain market expectations for homes or commercial buildings. Design features used by all architects, because of consumer demand, also get no protection."

Thus, even if the defendants had copied the plaintiff's plans, "they copied only the unprotected elements of his designs." Although the defendants' designs were, "in many respects, quite close [to plaintiff's designs]," that was not enough. "It proves at most copying, not wrongful copying." The court found that:

> many of the similarities are a function of consumer expectations and standard house design generally. Plaintiff can get no credit for putting a closet in every bedroom, a fireplace in the middle of an exterior wall, and kitchen counters against the kitchen walls. Furthermore, the overall footprint of the house and the size of the rooms are "design parameters" dictated by consumer preferences and the lot the house will occupy, not the architect. . . .
>
> Finally, most of the similarities between Plaintiff's and Defendants' designs are features of all colonial homes, or houses generally. So long as Plaintiff was seeking to design a colonial

> house, he was bound to certain conventions. He cannot claim copyright in those conventions.

The plaintiff had made "no attempt to distinguish those aspects of his designs that were original to him from those dictated by the form in which he worked." For example, the plaintiff alleged the subject designs incorporate similar front porches. The court noted that "a door centered on the front of the house is typical of many homes, and colonials in particular." The court also cited "subtle differences in the paneling, size, and framing of Plaintiff's and Defendants' doors. These differences are not great, but given the constraints of a colonial design, they are significant." The court also considered the windows, garage doors and window panes and stated that "the designs' shared footprint and general layout are in keeping with the colonial style." The court stated that there were "only so many ways to arrange four bedrooms upstairs and a kitchen, dining room, living room, and study downstairs" and the parties' "layouts are different in many ways." Moreover, "[c]opying that is not so close would - and in this case did - only capture the generalities of the style in which Plaintiff worked and elements common to all homes. Defendants' houses shared Plaintiff's general style, but took nothing from his original expression."

The court had also noted that:

> topography will often inspire, or . . . require, original architectural solutions that will be worthy of copyright. . . . There may also be original ways of representing existing topography. The topography itself, . . ., is uncopyrightable. If two architects submit competing bids for the same project, one cannot assert that the other's design infringed his copyright because their designs include reference to the same topography or share similarities dictated by that topography. One expects competent architects to accurately represent a construction site.
>
> . . . this only applies to existing topography, however, because existing topography is an uncopyrightable fact. An architect may be able to copyright his original proposals for alterations to the topography. On the other hand, such alterations may be dictated by good engineering practice or a customer requirement, in which case they may not be copyrightable. We leave exploration of these issues to future cases.

The plaintiff had "obliquely" suggested that the defendants "'removed' the copyright notices from his work, apparently by making photocopies of his drawings and omitting the copyright notices in the process." The court found that "[r]egardless of whether we construe this vague assertion as a DMCA claim or a copyright infringement claim, it was properly dismissed . . . because it had no support in the record and was never adequately alleged, despite the district court offering Plaintiff an opportunity to amend his complaint to clearly allege photocopying and removal of copyright management information from supposedly photocopied works." Thus, the court affirmed the district court's dismissal of such claims on summary judgment.

The court had also noted that "functional aspects of a work are governed by patent law, not copyright law." Although the plaintiff had asserted that his "houses are not in the

colonial style," the court found that he offered "no argument or evidence on this point, merely assertion." Thus, the court found such assertions to be "incredible."

Comment: Several years ago, I represented a developer in a litigation against a competing developer, which involved the copying of the architectural design of one of our client's new construction residential buildings. The competing developer had met with our client, allegedly under the "guise" of discussing a possible joint venture. My client allegedly provided valuable advice and insight to the competing developer. The competing developer thereafter hired the same architect that our client had hired and our client alleged that the architect had essentially done a "cut and paste job" of plans which had been paid for and which under the terms of a contract, were owned by our client. The competing developer utilized a similar "Y" shaped foundation and similar foundation and exterior building materials. He also hired the artist who had designed the client's marketing brochures and had allegedly tried to hire our client's senior marketing executive. The complaint alleged breach of contract claims against the architect and unfair competition and tortious interference with contractual relations against the competing developer. The two subject buildings were built along the same avenue in New York City in relative close proximity (across the street). The case was resolved by a settlement pursuant to which the competing developer changed, *inter alia*, the color of the exterior building finishes and the design of the water tower.

Zalewski v. Cicero Builder Dev., Inc., 12-3448-cv, NYLJ 1202658581049, at *1 (2d Cir., Decided June 5, 2014), Before: Katzmann, Ch.J., Wesley and Lohier, C.JJ. Decision by Wesley, C.J. Affirmed in part, and vacated and remanded in part.

BROKERAGE

Brokerage - Broker Expended Significant Effort Locating Apartment For Buyers Who Abandoned the Transaction and Purchased Another Apartment In the Same Building 18 Months Later - Test for Determining Whether Broker Was the "Procuring Cause" of A Real Estate Transaction

The issue in this case was whether the plaintiff broker (broker) had alleged facts "sufficient to establish its entitlement to a commission on the sale of real estate, where it expended significant effort locating an apartment for buyers who abandoned the transaction and purchased another apartment in the same building 18 months later." The court also clarified "the standard by which a broker may be found to have been the 'procuring cause' of a real estate transaction." The court found that the complaint sufficiently alleged that the plaintiff had been "a direct and proximate link between the introduction of defendant buyers and the seller and the consummation of the transaction to withstand defendants'' motion to dismiss."

In early 2006, the defendants retained the broker to help them purchase an apartment. Although the brokerage agreement was not reduced to writing, "the parties had an understanding that [broker] would receive a commission after securing a residence that met defendants' expectations."

The broker showed the defendants several apartments "over the first 18 months of the parties' relationship." In or around Oct. 2007, the broker introduced the defendants to a condominium which was under construction. After the defendants expressed an interest in the building, the broker brought them to the developer's office to view layouts and renderings and to the home of the developer's principal to view an example of the developer's work. The defendants allegedly "fell in love with the [p]roperty" and believed that "the developer's principal 'seem[ed] like a great guy.'"

The broker thereafter negotiated with the developer with respect to price, including "a post-purchase discount" if there was a subsequent sale of "a similar unit at a lower price, and specific design elements." The broker had also sent "a deal sheet to the developer. . . ." The contemplated price for two units was $11.5 million. Thereafter, the defendants, attorneys and the developer exchanged and reviewed a purchase/sale contract (contract). The broker alleged that the contract embodied "the same material terms as the deal sheet that [the broker] prepared."

Additionally, the broker contracted several possible architects and ultimately introduced "an internationally renowned architect, to defendants." The broker arranged for and attended a meeting with the developer at defendants' summer home. The broker characterized such meeting "as 'successful.'" However, in late Aug. 2008, the defendants "pulled out of the deal, stating that they had changed their mind[s] and were no longer in the market for a new home." The broker emailed a defendant eight months later to inquire whether the defendants had any renewed interest in purchasing a home, but she received no response. During such time, the broker continued to assist the defendant wife (wife) in her search for a "commercial property" for her business. Moreover, the wife "repeatedly confirmed that she and her husband were no longer seeking to purchase a residence and that they had no lingering interest" in the building.

However, in Feb. 2010, the defendants purchased a duplex condominium at the building, comprised of a different unit than the ones they had previously sought to purchase. The

broker alleged that the defendants "deliberately concealed their intention to purchase property at [the building] in order to avoid paying [the broker] a broker's commission." The broker thereafter commenced an action, alleging "breach of implied contract and unjust enrichment." The defendants moved to dismiss, asserting that the broker was not "the procuring cause of the real estate transaction," nor that it was otherwise entitled to a commission. The defendants emphasized that they never signed "the deal sheet or contract of sale for the first duplex, they ultimately purchased a different duplex . . . for $6.5 million, and . . . [the broker] was not involved in the purchase of the second duplex."

The trial court denied the motion to dismiss, noting that the defendants may have returned to the building "on a 'periodic basis' during the 18-month period between the abandonment of the first transaction and defendants' ultimate purchase, which would evince a bad-faith termination of the original transaction." The Appellate Division (court) affirmed.

The court explained that absent "an agreement to the contrary, a . . . broker will be deemed to have earned his commission when he [or she] produces a buyer who is ready, willing and able to purchase at the terms set by the seller. . . . A broker does not earn a commission merely by calling the property to the attention of the buyer. . . ." But a broker need not "have been the dominant force in the conduct of the . . . negotiations or in the completion of the sale'. . . . Rather, the broker must be the 'procuring cause' of the transaction, meaning that 'there must be a direct and proximate link, as distinguished from one that is indirect and remote,' between the introduction by the broker and the consummation of the transaction."

The three departments of the Appellate Division, other than the First Dep't have held that "if a broker 'does not participate in the negotiations, he must at least show that he created an amicable atmosphere in which negotiations went forward or that he generated a chain of circumstances which proximately led to the sale'. . . ."

The court explained that although it had cited and quoted from cases that have used the phrase "amicable atmosphere," it had not "gone so far as to adopt that specific standard." The court had suggested that a broker could be "the procuring cause if he or she 'brought' the parties together in an amicable frame of mind, with an attitude toward each other and toward the transaction in hand which permits their working out the terms of their agreement." However, the court "more frequently and recently applied the 'direct and proximate link' test. . . ." Moreover, "[t]he Court of Appeals has not sanctioned the 'amicable atmosphere' or 'amicable frame of mind' language. It ha[d], however, affirmed without opinion a finding that a broker was the procuring cause where it 'generated a chain of circumstances which proximately led to' a lease transaction. . . ." The Court of Appeals held that the broker "must be the procuring cause" and "there must be a direct and proximate link, as distinguished from one that is indirect and remote, between the bare introduction and the consummation."

The court opined that "[r]eliance on the creation of an 'amicable atmosphere in which negotiations went forward' seems to ignore the proximity element of the 'direct and proximate link' test" and "this continued deviation from the standard set forth by the Court of Appeals . . . has led to some confusion." In order to "reduce the confusion," the court reiterated that "the 'direct and proximate link' standard . . . governs determinations of circumstances under which a broker constitutes a procuring cause within the First Department." Such "standard requires something beyond a broker's mere creation of an 'amicable atmosphere' or an 'amicable frame of mind' that might have led to the ultimate transaction." However, the court explained that "a broker need not negotiate the transaction's final terms or be present at the closing. . . ."

The court found that "even under the more exacting 'direct and proximate link' standard," "the allegations . . . sufficiently state[d] that [the broker] was the procuring cause of defendants' purchase of the second duplex." The broker "brought the defendants to the building on several occasions; introduced defendants to the developer and attended several meetings between the developer and defendants; reviewed floor plans with defendants; negotiated favorable terms . . . on the original units; prepared a deal sheet . . . on the first duplex . . .; drafted a contract of sale; and connected defendants with [an architect]. . . ." The court found that such "actions . . . may have been a direct and proximate link between the introduction of defendants to the developer and defendants' purchase of the second duplex. . . ." However, the court held that "[w]hether [the broker] was the procuring cause 'is a question of fact'. . . ."

The court also opined that even if the broker could not prove that it was the procuring cause, it may prove that the defendants had terminated its activities "in bad faith . . . to escape the payment of the commission." Although 18 months had passed between "the abandonment of the first transaction and the conclusion of the second transaction, whether defendants withdrew from the first transaction in good faith [was] a question of fact to be decided on the evidence." The answer to such question "will depend on when defendants renewed their interest in [the building] and recommenced negotiations with the developer. . . ." The defendants may never have lost interest in the building, "but returned to it on a 'periodic basis,' which would evince an intent to terminate the first transaction and exclude [broker] from the second transaction to avoid paying a commission." At this stage of the litigation, the court could not "definitively conclude whether defendants abandoned the first duplex negotiation in good faith."

Moreover, the court could not determine whether "the completed transaction was fundamentally different from the abandoned transaction. . . ." Although the price paid was less than half of the price of the first duplex, the plaintiff alleged that "the two units they ultimately purchased were 'substantially identical' to the units that [the broker] had procured for them." During "the 18-month interval between the abandoned transaction and the consummated transaction . . . the economic downturn occurred, so the price of the allegedly similar units may have dropped precipitously during that time or defendants may have been able to negotiate a lower price."

The court further stated that whether the broker would be entitled to a commission on the abandoned transaction was also a question of fact. "A broker may be entitled to a commission where the buyer authorizes the broker to submit an offer to the seller but subsequently fails to execute or arbitrarily refuses to enter into a contract of sale. . . ." An executed contract "is unnecessary to hold defendants liable for the commission on the abandoned transaction, if [the broker] [could] prove that it had an implied contract with defendants, that a contract of sale was prepared on terms that [the broker] was authorized by defendants to offer, and that defendants' refusal to sign the contract of sale was arbitrary. . . ."

The defendants argued that the broker "failed to allege that it was authorized . . . to submit an offer to the seller." However, "if [the broker] has or obtains evidence of such authorization, [the broker] may amend the complaint to conform to the proof." Thus, whether the broker was authorized to submit the offer for the first duplex, was also a question of fact.

Finally, the court stated that the complaint alleged "a cause of action not for unjust enrichment but for quantum meruit" and "a motion to dismiss 'must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause

of action cognizable at law. . . ." Accordingly, the court affirmed the trial court's denial of the defendants' motion to dismiss.

Comment: Glen Lenihan, Esq. of Frydman LLC, counsel for the broker, opined that "real estate brokers have enormous protection under the law and this decision will benefit brokers and their clients by bringing greater clarity as to when brokers are entitled to commissions."

Wendy Michael, Esq. of Jacob, Medinger & Finnegan, LLP, counsel for the defendants, stated that "this decision was not appealed, since if the test for 'procuring cause' in the First Department is a 'direct and proximate link,' such test is favorable for defendants."

SPRE Realty, Ltd. v. Dienst, 651671/13, NYLJ 1202656182977, at *1 (App. Div., 1st, Decided May 20, 2014); before Acosta, J.P., Andrias, Saxe, Freedman, Feinman, JJ. Decision by Acosta, J. All Concur.

Real Estate Brokerage Fee Earned - Oral Brokerage Agreement Enforceable - If There Was No Agreement As to Amount of Commission, Broker Entitled to a "Reasonable" Commission - Dual Agency

A plaintiff licensed real estate broker (broker) commenced an action to recover a $10,000.00 commission for services rendered in connection with the sale of the defendant's home. The broker had entered into a written "dual agency" agreement with the buyers. The broker testified at a non-jury trial that "she had no expectation of compensation from the buyers, and had received no compensation from them."

The defendant had offered his house for sale on the internet pursuant to an advertisement which stated "no brokers." Although the defendant had placed a "for sale by owner" sign on the front of his house, the broker had contacted the defendant and advised the defendant of her status as a broker. The broker "showed the house to the buyers on multiple occasions with defendant's consent, and negotiated the sale of the house." The broker testified that she had, from the outset, advised the defendant that she had expected him to pay her a flat $10,000 commission for brokering the sale. The broker had forwarded to the defendant, a proposed commission agreement and a dual agency disclosure form. However, the defendant had refused to sign such form or agreement.

The defendant had entered into a contract to sell his house (contract) for $637,500.00 to the broker's buyers. The contract contained a representation that the broker "was the only broker with whom either the seller or the buyers had dealt." It further provided that the "Seller shall pay Broker any commission earned pursuant to a separate agreement between Seller and Broker."

The seller had testified that he had never agreed to pay the broker a commission and had never signed a separate brokerage commission agreement. After the sale was consummated, the defendant refused to pay the plaintiff a commission.

A Civil Court judge had dismissed the complaint, noting that the defendant "had refused to sign the dual agency disclosure form," the defendant's internet advertisement had indicated that he had no intent to hire an agent, the contract stated "that 'broker's fees are payable only upon proof of a separate *written* agreement' . . ., and that 'an alleged oral agreement is insufficient by the very terms of the contract.'" The Appellate Term (court) reversed.

The court explained that the contract acknowledged that the broker had been the sole broker involved in the transaction and provided that the seller would "pay Broker any commission earned pursuant to a separate agreement between Seller and Broker." Moreover, the contract did not require "that such agreement be written, contrary to the finding of the Civil Court." The court further noted that "an oral agreement to pay a real estate broker, whether express or implied, is enforceable. . . ."

The court emphasized that the broker "had rendered brokerage services which resulted in the sale of defendant's house" and "[t]he language of the contract . . . constituted an admission that plaintiff was due a broker's fee from defendant. . . ." The court concluded that the plaintiff had "sufficiently established that defendant had agreed that she was defendant's broker and, thus, that she had a right to recover a commission from him. . . ."

Since the defendant had not agreed to the payment of a commission in any specific amount, the court found that the broker was entitled "to be paid a commission in a reasonable amount." The court held that the broker's demand for $10,000.00, which was approximately 1.5686 percent of the purchase price, fell "within the parameters of a 'reasonable' commission," and therefore, the broker should be awarded such sum.

Comment: Occasionally, a seller will attempt to use in the negotiation of the sale price, the fact that he or she will be paying a brokerage commission. A seller may say something like "[R]emember, after I pay the commission, I am only netting 'X' dollars." Some sellers will then fail to pay the broker the commission owed or will attempt to negotiate a lower commission with the broker and pocket the difference. This is why purchasers' attorneys will attempt to negotiate provisions which explicitly provide that the seller will pay the brokerage commission and the seller will indemnify the purchaser from any claim by such broker.

Belinda G. Schwartz, Esq., Chair of Herrick, Feinstein LLP's real estate department, explained that "attorneys who represent purchasers, therefore ask for full brokerage representations and indemnification from the seller, that will survive closing or termination of contract and the commitment of the seller to pay the commission at closing. The problem is that if the representation is breached and the seller has no assets post-closing, the indemnity may be hard to enforce. Purchasers may ask for some 'backstop' for all of the seller's surviving representations and indemnities, but the ability to obtain that depends on the market. It is difficult to achieve in a 'seller's market.'"

Miranda v. Aliotta, 2012-2220 RI C, NYLJ 1202633774411, at *1 (App Tm., Decided December 9, 2013). Before: Pesce, P.J., Weston and Rios, JJ. All concur.

CONTRACTS

Development - Religious Corporation Law §12 - Developer and Church Signed A Memorandum of Understanding (MOU) For Sale and Development of Church Property - MOU Never Approved by Protestant Episcopal Church Authorities - Specific Performance and Injunctive Relief Denied - Lis Pendens Cancelled

The defendant Protestant Episcopal Church (Church) moved for "summary judgment dismissing the plaintiffs' demands for specific performance, injunctive relief and money damages other than out-of-pocket costs;" and "cancellation of the notice of pendency" (lis pendens) that had been filed by the plaintiffs. The court granted the Church's motion.

The dispute arose out of a "Memorandum of Understanding" (MOU), "concerning a proposed sale to plaintiffs of certain lots owned by [the Church]." The MOU contemplated development of a condominium, with certain units to be owned "by the Church and others to be sold to the public as market-rate residential apartments." The parties expected to enter into a purchase and sale agreement "upon the closing of a construction loan, and a development agreement for construction of the project. . . . The MOU imposed certain terms and conditions to be incorporated into the future agreements. . . ." The parties "committed to each use 'commercially reasonable efforts' to secure" 421-a tax abatement benefits prior to Jun. 30, 2008, which was the deadline for the expiration of the tax abatement program in the project's location. The MOU was signed on behalf of the Church by the then rector of the Church.

After signing the MOU, the plaintiffs did substantial work. They submitted construction plans to the NYC Dep't of Buildings, "obtained work permits, surveyed, cleared and excavated the site, began installing a foundation," applied for a preliminary certificate of eligibility for their tax abatements and obtained "a construction financing proposal" from a lender. The plaintiffs claimed that they spent at least $500,000 in connection with such work.

The parties never executed the purchase and sale of the development agreement and no further work was performed. More than four years after the MOU was executed, the Church advised the plaintiffs that it "received other offers for the development of the land." Although "the plaintiffs submitted, allegedly at the Church's request, a new proposal for the Project, . . ., the Church advised plaintiffs that it would not be moving forward with the MOU."

The plaintiffs then commenced the subject action and filed a lis pendens against the premises. After the Church moved to dismiss, the plaintiffs filed an amended complaint which sought "a declaratory judgment that the MOU [was] 'binding and enforceable';" "a judgment directing specific performance of the MOU;" "compensatory and consequential damages and lost profits caused by the Church's breach of the MOU and refusal to finalize the contract and transfer the property;" "a permanent injunction enjoining the sale of the property to anyone else;" and "unjust enrichment and quantum meruit for the reasonable value of the services plaintiffs rendered to the Church." The Church had moved for partial summary judgment, asserting, *inter alia*, that the plaintiffs' claims "are barred, in whole or in part, by Section 12 of the Religious Corporation Law [RCL]."

The Church asserted that:

> it is an incorporated Protestant Episcopal Church within the Episcopal Diocese of New York (the Diocese). . . . It has

> submitted a copy of the guidelines adopted and published by that diocese's Standing Committee regarding the sale of parish real property. . . . The Guidelines state that "[a]s soon as the outlines of a potential property sale . . . take shape," the parish should send a letter to the diocese "describing the transaction in enough detail so that financial considerations . . . can be assessed". . . . The Guidelines provide that "[w]hen the proposed sale . . . is in final form, the congregation makes formal application to the Bishop and Standing Committee for consent," which application shall include, *inter alia*, copies of "the complete signed contractual agreement" and "the Vestry resolution authorizing the property transaction". . . .

The Church emphasized that no final contract of sale had ever been agreed to, "the Vestry never met to authorize the transaction, no application to the Bishop or Standing Committee was ever even made and consent was never obtained. . . ." Moreover, "neither the Standing Committee nor the Bishop ever received an application by defendant to sell the real property to plaintiffs, and never approved or consented to any such transaction. . . ."

The court explained that "[t]he state may resolve disputes involving church property so long as doing so does not require consideration of doctrinal matters. . . . New York forbids a religious corporation from selling real property without first obtaining court approval [RCL] §12 [1]). Normally, notice of such petition must be given to the State Attorney General (Not-For-Profit Corporation Law §511 [b]). However, for churches belonging to certain hierarchical religious organizations, including the Protestant Episcopal church, the notice requirement is replaced by a requirement that the sale be approved by the appropriate supervisory figure or body prior to making the petition [RCL] §2-b [1][d-1])."

Land held by an Episcopal parish church usually "does not belong to the parish." "According to the constitution and canons of the Episcopal Church of the United States of America, 'all real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for . . . the Diocese . . . in which such Parish, Mission or Congregation is located,' . . . and it has . . . been held that in the event of a rupture between an Episcopal parish and its diocese governed by these canons, the parish's real property shall revert to the diocese from which it has disassociated itself or been expelled. . . . As a result, in order to sell real property, an incorporated Protestant Episcopal church must first obtain the consent of the bishop and the standing committee of the diocese to which the church belongs. . . . A contract concerning real property entered into by a church without such consent is 'void ab initio'. . . ."

The court found that the MOU could not be enforced as a contract to sell real property. "The Diocese Guidelines for the sale of property were never followed, and the required consent of the Bishop and Standing Committee to the sale was never obtained." In fact, "consent could not have been obtained without the contracts for sale and development - contracts which were never negotiated or executed during the four years of economic downturn." Thus, the court held that the plaintiffs were not entitled to specific performance compelling the Church to convey the property to them. "At most, a judgment of specific performance . . . will merely require the Church to submit the deal (if one is reached) to the Diocese, but the Diocese would be free to reject the proposal for any or no reason." Therefore, the court denied a permanent injunction enjoining the Church from "selling the property to anyone else." Since the judgment

demanded would not "affect the title to, or the possession, use or enjoyment of, real property," the lis pendens was cancelled.

The court further explained that "without the Diocese's approval, the MOU cannot, . . ., constitute a binding contract to convey real property," and therefore, the plaintiffs are not entitled to lost profits from any contemplated venture, since "such profits cannot properly be said to have been 'fairly within the contemplation of the parties to the [MOU] at the time it was made'. . . ." The court noted that "[t]o hold otherwise would make the Church the guarantor of the success of a development whose construction could not have begun without the approval of the Diocese, the court and a construction lender, none of whom were parties to the MOU or could be bound by [the subject local Church]. . . ."

Additionally, the court held that "[s]ince a contract exists which governs the subject matter of the parties' preparatory work for the contemplated deal, plaintiffs cannot maintain a quasi-contract cause of action for unjust enrichment or quantum meruit against the Church. . . ."

Accordingly, the court dismissed the plaintiffs' claims for specific performance, consequential damages and lost profits, an injunction barring the Church from selling the property to a third party and unjust enrichment and quantum meruit. The remaining claims were severed and will continue. The court also ordered the cancellation of the lis pendens.

Comment: This case illustrates when purchasing property from a religious organization, the purchaser should ascertain whether the religious organization's representatives have complied with their denomination's procedural requirements and New York State Religious Corporations Law. There have been situations where a well-meaning local religious leader made a poor business judgment with respect to the sale of real property. Disputes as to such transactions may arise because of, *inter alia*, a local religious leader's lack of real estate experience or because of disagreements as to what best serves the religious mission of the organization.

Additionally, when negotiating a purchase/sale contract with a developer, sellers should address the possibility that an economic downturn or other problem may cause the developer to delay moving forward. A developer which has encountered general market or other financial problems may try to keep a property "tied up" by filing a lis pendens while it waits for the market to recover or its other problems to be resolved. A market may not recover for several years and a price or other terms that looked fair several years earlier, may look inadequate and/or otherwise unfair several years later.

MG West 100 LLC v. St. Michael's Protestant Episcopal Church, 651170/2013, NYLJ 1202659640893, at *1 (Sup., NY, Decided June 3, 2014), Kornreich, J.

Contracts - Landlord's Attorney Invoked Attorney-Client Privilege and Refused to Answer Whether He Was Authorized to Sign A Settlement Agreement - Attorney May Have Lacked Actual Authority, But He Had Apparent Authority - Agreement Contained Essential Terms Necessary For A Complete Contract for the Sale of Real Property - Where Contract Is Silent to Terms of Financing, Purchaser Obligated to Tender Entire Balance Due At Closing - Seller Usually Bears Risk that Property Value Will Increase or Decrease During Contract Period - Increase In Value During the Contract Period Does Not Create Injustice or Inequity - Laches and Abandonment Arguments Rejected - Specific Performance Premature Since Plaintiff Failed to Substantiate Ability to Close - Tortious Interference With Contract - Conspiracy - Prima Facie Tort

The plaintiff (tenant) had commenced an action "to compel specific performance of a lease option to purchase real property." The defendant (landlord) had moved for summary judgment. In 2002, the tenant signed a ten-year lease for the property that was to be used as a gas station and convenience store. The lease granted the tenant an option to purchase the property (option). The option provided for an appraisal process to determine the fair market value.

The tenant alleged that in 2006, it served written notices on the landlord of its intent to exercise the option. No additional action was taken pursuant to such notices. In 2008, after certain disputes arose, the landlord commenced a summary proceeding to evict the tenant. The tenant thereafter commenced an action in the Supreme Court to compel a sale of the premises.

In July 2009, the parties met for settlement negotiations. The landlord attended the meeting, accompanied by his attorney ("B"). Following the meeting, on that same day, the tenant's attorney and the landlord, by "B", executed a letter agreement ("Agreement"). The Agreement stated "[t]his binding letter of understanding formalizes the agreement reached earlier today between [tenant] and [landlord], to be followed by a Contract of Sale ['Contract'] incorporating these terms." The Agreement further provided that the landlord, "will sell, and [tenant] will purchase, the property located at 360 Main Street, Armonk, New York, (the 'Premises'), at the . . . price of $1,625,000.00, subject to customary offsets and adjustments at closing."

The Agreement also stated that, although the parties "will execute a formal Contract . . . incorporating the terms now agreed upon' . . . the terms of this . . . agreement shall be binding . . . and may be enforceable in the event either party fails or refuses to execute a Contract . . ., or where otherwise permitted." Additionally, the Agreement provided that the pending New York Supreme Court action would be marked settled and "B" would discontinue, with prejudice, the pending summary proceeding. The Agreement was signed by the attorneys for both parties. "B"'s signature appeared under a line stating: "Above Terms Acknowledged and Agreed." "B" had faxed a cover letter transmitting the Agreement to the tenant's attorney. The cover letter stated: "My client has no problem doing a January 2010 closing which your client seemed to want, so we can go to contract now."

The parties thereafter filed a "stipulation discontinuing action," with the New York State Supreme Court. The stipulation was signed by counsel for each party. The parties also discontinued the summary proceeding. In Sept. 2009, "B" wrote to the tenant's counsel "requesting 'draft documents (contracts and leases) for our agreed upon settlement.'" "B" stated that "his client was 'anxious to execute all documents as soon as possible.'" In Mar. 2011, the tenant sent a letter to the landlord which stated his intention to exercise the option and referenced the 2009 "Binding Letter of Understanding."

In Dec. 2011, a bank commenced a foreclosure action against the landlord. The tenant's principal thereafter sent the landlord another letter restating "its intention to purchase the property pursuant to the . . . 2009 [Agreement]." On Jan. 31, 2002, the tenant's lease expired. In Feb. 2012, a company called "Gas Land entered into an agreement with [the landlord] to purchase the property" at a price of $3 million. The landlord thereafter commenced a new proceeding to evict the tenant.

The tenant then commenced the instant action seeking "specific performance of the [Agreement] or, in the alternative, specific performance of the March 2011 attempt to exercise the option. . . ." Gas Land thereafter purchased the bank's note and mortgage and substituted as the plaintiff in the foreclosure action. The landlord had consented to the foreclosure and agreed to cooperate with Gas Land in the action.

The tenant had also asserted claims against Gas Land for, *inter alia*, tortious interference with the tenant's contract with the landlord, "a conspiracy between the defendants to prevent the tenant from purchasing the property" and for "prima facie tort." The landlord asserted as affirmative defenses, *inter alia*, that the Agreement violated the statute of frauds (SOF), the tenant is guilty of laches and the Agreement is "uncertain in its terms."

The landlord had attended the 2009 settlement meeting accompanied by his attorney. However, he testified that "we didn't come to any conclusion on prices," he did not recall the figure of $1,625,000 being mentioned during the negotiations and he "largely could not recall the discussions that occurred." The landlord denied seeing the Agreement and denied that the parties had ever agreed on the terms contained therein. The landlord acknowledged that he had met privately with his lawyer, "B" both before and after the July 2009 settlement meeting.

"B" acknowledged that he signed the Agreement. He testified that "the letter 'was prepared by [the tenant's attorney] after" the settlement meeting and "summarized what we had discussed at the meeting." When "B" was asked whether the Agreement "accurately reflects what was discussed at the July 1, 2009 meeting," "B" answered, "To be honest, I'm not sure." "B" "invoked the attorney-client privilege and refused to answer when asked whether he was authorized to sign the [Agreement] agreement." He could not recall why he signed the stipulation discontinuing the prior action.

The tenant testified that the Agreement accurately reflected the agreement reached at the 2009 settlement meeting. The tenant asserted that following such meeting, he called the landlord to arrange a date for an environmental study, but the landlord had never responded. He stated that he continued to remind the landlord of his intention to purchase the property, "even mentioning in Christmas cards that he would be exercising the . . . option. . . ." and "he reiterated his intention to purchase the property whenever he met with, spoke to, or wrote to [the landlord]."

The landlord countered that the Agreement violated the SOF, since "B", not the landlord himself, had signed the Agreement. The landlord asserted that he never gave "B" "written authority . . . to sign a document authorizing the sale. . . ." He claimed he did not even

see the Agreement before commencement of the subject action and there was no communication from the tenant or its representatives until Mar. 2011, when the tenant attempted to exercise the option. The landlord had submitted its retention agreement with "B", which described "B"'s actual authority.

The landlord further argued that the Agreement failed to contain "all of the essential terms necessary for a sale of the property" and that the tenant's own attorneys at a court appearance, had acknowledged that a sale would require "the addition of terms to the contract of sale." The landlord also asserted that the tenant's 2006 attempt to exercise the option extinguished it, and "therefore, the [tenant's] attempt to exercise the option in 2011 was a nullity. . . ." The landlord also cited "the doctrines of abandonment, waiver, and laches."

Gas Land argued that "B" lacked written authority to settle the action, the Agreement failed to include all of the essential terms for a valid and binding agreement, plaintiff's claim was barred by the doctrine of laches and since the tenant lacked a binding contract of sale, Gas Land could not be liable for tortious interference with contract. Gas Land also emphasized that it had not entered into a contract with the landlord until after the tenant's lease had expired.

The court found that the Agreement was enforceable, that it contained all of the essential terms necessary to form a complete contract for the sale of the property and enforcement of the Agreement was not barred by the doctrines of abandonment or laches. However, the court declined to award specific performance since the tenant had failed to substantiate its ability to close. Moreover, Gas Land had failed to meet its "prima facie burden" for dismissal of the tortious interference claim. The court dismissed the tenant's conspiracy and prima facie tort claims.

CPLR 2104 provides that "[a]n agreement between parties or their attorneys relating to any matter in an action . . . is not binding upon a party unless it is in a writing subscribed by him *or his attorney.*" With certain exceptions, attorneys may bind clients to stipulations of settlement. However, "[w]ithout a grant of authority from the client, an attorney cannot . . . settle a claim, and settlements negotiated by attorneys without authority from their clients have not been binding." Stipulations of settlement entered into by attorneys will bind the client "where the attorney has actual authority from the client to settle the claim," or "where the settlement exceeds the attorney's actual authority, where the attorney was clothed by the client with apparent authority to enter into the settlement. . . ."

Here, although "B" may have lacked actual authority to settle the prior litigation, the court found that "B" "possessed apparent authority" to settle such litigation. The landlord and "B" had attended the settlement negotiations which contemplated an agreement as to the purchase price for the property. The landlord met with "B", both before and after the meeting and "B" acknowledged signing the Agreement and "the [tenant's] attorney and principal detrimentally relied upon that authority when the prior action was withdrawn." The court found that the landlord, by his conduct, had "clothed ['B'] with apparent authority to settle the action" and "it was reasonable for the plaintiff to rely upon ['B''s] authority."

The court also opined that it was the execution of the Agreement and not the exercise of the option that controlled with respect to the SOF. The landlord's signature on the lease which contained the option satisfied the SOF, and "the [Agreement] could, . . ., be viewed simply as an acknowledgment that the option had been exercised rather than a stand-alone contract for the sale of real property. . . ." There was also no basis to set aside the Agreement on

the grounds of "fraud, collusion, mistake or accident to relieve it from being bound by the [Agreement]. . . ."

The court further held that the Agreement contained the requisite essential terms for the sale of real property. The Agreement "lists the parties, the property to be conveyed, and lists a specific agreed upon price, . . ., it contains sufficient terms to satisfy the [SOF]. . . ." Moreover, the Agreement provided that it was to be "binding" and "enforceable" if either party failed or refused to execute a contract of sale.

The court also explained that where a real estate purchase/sale contract "is silent with respect to the terms of financing," it is assumed that the purchaser will "tender the entire balance due at closing. . . ."

The court also observed that the prior action had been withdrawn with prejudice in reliance upon such Agreement. Furthermore, the omission of a closing date "is not fatal to its enforceability. 'The law will presume a reasonable closing date, and the failure to close within that time period constitutes a breach'" of the implied covenant of good faith and fair dealing. The law will also "serve to fill in the remaining essential terms, such as 'the quality of title to be conveyed, and the risk of loss between contract and closing'. . . ." The court did not believe that the tenant's counsel's statement that the sale would require additional terms in the Contract was to be "a binding admission" that "the [Agreement] lacks sufficient terms."

Additionally, there was insufficient proof that the tenant had abandoned the Agreement. There was no "affirmative conduct by either party unequivocally conveying an abandonment of the contract." Rather, the tenant attempted in Mar. 2011, to exercise the option and had again expressed his desire to purchase the property in correspondence in early 2012. The landlord had, if anything, been "silent in the face of the [tenant's] attempts to purchase the property, which conduct does not amount to a 'mutual' or 'positive' abandonment." Thus, the court dismissed the affirmative defense of abandonment.

The court also dismissed the landlord's defense of laches. The landlord had not shown any prejudice, other than finding another buyer who was willing to pay more money and "[an] increase in market value of the property does not in itself create injustice or inequity. . . ." Additionally, "it is the contract vendee who generally bears the risk that the property will increase or decrease in value during the contract period. . . ." Here, the landlord had not demonstrated that the appraised value of the property had increased "from the time that the parties entered into the [Agreement]; rather, it has only shown that a single purchaser is willing to pay more."

The court found that "[u]nder the circumstances, the [tenant's] delay was not unreasonable." The tenant was already occupying the premises and paying rent when the parties signed the Agreement and, therefore, "there was clearly no perceived urgency to close so that the plaintiff could enter the premises." When the parties entered into the Agreement in July 2009, it was the landlord's attorney who suggested a Jan. 2010 closing date. The next "documented communication" regarding the sale was the letter from the tenant to the landlord in Mar. 2011, followed by communications in Jan. 2012. "Despite receiving these notices, [the landlord] never attempted to affirmatively repudiate the [Agreement] until the instant action was commenced." The court opined that the tenant's delay "was not so unreasonable as to deny it the remedy of specific performance." Additionally, the tenant's continual communications put the landlord on notice that the tenant intended to exercise the option. Thus, the court dismissed the landlord's defense of laches.

However, the court could not determine whether the tenant was entitled to specific performance since the tenant had not demonstrated that it was "ready willing and able to close 'within a reasonable time.'" The landlord, however, had not established that the tenant lacked the financial ability to close. Thus, neither party was entitled to summary judgment granting specific performance.

Although the court declined to dismiss the tortious interference with contract claim against Gas Land, it dismissed the conspiracy claim, "since New York does not recognize civil conspiracy as an independent tort," and the prima facie tort claim. Although the landlord "inflicted harm on the [tenant] by attempting to breach the contract," it could not be said that "[the landlord] did so out of disinterested malevolence. . . ."

Comment: When a real estate market is declining, some purchasers will attempt to "escape" their contractual obligations to close. They may try to renegotiate the price to a lower amount based on some "allegedly material" breach by the seller. In a rising market, some sellers may look to invalidate their sale contracts so that they sell the property to someone else at a higher price or try to renegotiate a higher price with their purchasers.

In the search for the truth, it is sometimes helpful to "follow the money." Here, the purchaser apparently didn't "race" to close during the soft 2008 - 2011 real estate recession and the seller didn't commence a declaratory judgment action or take other steps to affirmatively cancel the option. At some point, the seller commenced a summary proceeding. Here, the seller's new purchaser agreed to pay $3 million. Thus, if the option exercise was involved, the seller would receive about $1.4 million above the Agreement price.

Armonk Snack Mart, Inc. v. Robert Porpora Realty Corp., 52682/2012, NYLJ 1202637580284, at *1 (Sup., WE, Decided January 7, 2014), Connolly, J.

Option to Purchase Property Contained Sufficient Material Terms - Option Contracts Need Not Be Notarized Or Acknowledged - Tenant's Motion for Summary Judgment Denied On the Grounds That There Were Issues of Fact As to Whether the Option Was Forgery, Including Whether A Signatory to the Option Had Actual Or Apparent Authority

"A"'s entity subleased property from "B". "A" was a guarantor of the subtenant's obligations. "A" alleged that "B", as further consideration for the sublease, granted "A" "a written option to purchase the Property for $16 million" (Option). However, "A" alleged that "B" "would not confirm the validity of the [Option] grant or the exercise thereof when ['A'] sought to exercise the Option . . . ." "A" thereafter commenced the subject action against "B". "A" sought a declaratory judgment declaring that the Option and the exercise thereof was valid and enforceable, specific performance of the Option to Purchase and costs and disbursements.

"B" asserted as affirmative defenses, that "B" did not own the property, that neither defendant nor any authorized agent of the defendant ever executed the Option in favor "A", the parties never executed a writing which met the requirements of the New York Statute of Frauds (SOF) and the plaintiff failed to state a cause of action upon which relief may be granted.

"A" produced a copy of the one-page, handwritten Option. It stated:

> "I, Norman_____hereby represent that I am authorized to offer ['A'] the option to buy [the property] for $16 mm for 5 years with 5 percent increases after 3 years starting_____"

The Option concluded with the signature of "C", "next to an 'X' at the bottom of the page, with a notary stamp and signature by [the notary], without a jurat, but with a date which is hard to read but seems to say 'March 10, 2010.'"

"B" moved for summary judgment dismissing the complaint. "B" argued that "A" had "failed to produce a valid written contract with [d]efendant memorializing an agreement for the [Option]." "B" asserted that "'[t]he sheet of paper' plaintiff produced as the Option . . . 'is at best a handwritten paper which lacks facts or any specific information relating to the [Property] and mandatory terms of the agreement.'"

"B" proffered affirmations by two people, one of whom had signed the Option, which challenged the validity and authenticity of the Option. "B" contended that "A"'s neighbor (notary), had "improperly notarized the Option . . . outside the presence of the alleged signatory. . . ." "C" affirmed that he had "never appeared before any notary and signed [his] name to the purported option." "B" contended that the signature on the Option Agreement was a forgery based on the signatory's assertion that he had "never signed such an option agreement on behalf of [d]efendant or individually." "C" claimed that "A" had "'created' the Option."

"B" also argued that "C" had "lacked actual authority to offer or execute the Option . . on ['B''s] behalf." A managing member of "B"'s LLC, asserted that he approves "any business decisions relating to commercial and/or residential transactions [and] I am unaware that [d]efendant or any authorized agent entered into an option agreement with [p]laintiff." "C" also asserted that he is "B"'s employee and he is "not permitted to make any

independent decisions in relation to the operation and/or management of the [Property]. All matters must be approved by [the managing member]."

"A" countered that "B"'s summary judgment motion "was made 'prior to the close of discovery.'" "A" argued that he was unable to depose at least five relevant witnesses, including "his neighbor [the notary], . . ., who would purportedly testify that ['C'] had signed the handwritten option agreement in his presence."

"A" further argued that factual issues preclude granting summary judgment, including whether "C" actually executed the Option. Thus, the managing member of "B"'s LLC claimed he was "unfamiliar with the signature on the document" and "C" denied that he even signed the Option, claiming that "it was 'created by [p]laintiff.'" "A"'s opposing affidavit, alleged that "C" "executed both the sublease and the Option . . . in his presence."

The court stated that "A"'s testimony was "supported by copies of the sublease and the Option . . . in the record, which reflect nearly identical signatures by ['C']. In contrast, ['C''s] affirmation contains a very different, truncated signature." The court opined that the Option, if proven to have been signed by ['C'], "contains all the terms necessary to constitute an enforceable option." The court explained that the SOF is applicable and it was "satisfied by the document proffered by plaintiff."

The property was "identified, a price [was] specified, the price to increase yearly at 5 percent if not exercised within three years, and the term of the option [was] specified to be five years." The plaintiff had alleged that the Option Agreement was signed in 2010 and thus, it had not expired when the plaintiff attempted to exercise it. Moreover, the date written by the notary, "may be more legible on the original than on the copy in the papers, or it may be ascertainable once depositions have been held." The court stated that "[p]arol evidence to clarify the date of execution is permissible." Additionally, the court noted that "that there is no requirement in the statutes or the case law that an option contract be notarized or acknowledged."

The court concluded that there were "triable factual issues that preclude granting summary judgment," *e.g.*, whether or not "C" actually executed the Option on "B"'s behalf or is it a forgery and whether "C" had "actual or apparent authority" to execute the Option on "B"'s behalf. Additionally, "[c]onspicuously missing from this record are ['B''s] organizational documents and/or business records to establish the identity of ['B''s] managing members, employees and authorized agents at the time the Option . . . was allegedly executed."

Comment: Some people are surprised when they see that a substantial real estate transaction was seemingly handled in a relatively informal manner. Experienced real estate practitioners are not as surprised when they see a handwritten agreement that may or may not have been drafted or reviewed by an attorney. While such informality is not common in substantial transactions, it does occasionally occur.

Generally, property owners do not like to give options to purchase. They certainly do not like to give options that last for several years. Even the most successful real estate owners would concede that macro and micro economic factors, local market values, interest rates and the availability of financing are often difficult to predict for a five year period.

Since an option to purchase may have been extremely important to the parties, they should consult with counsel to make sure that such agreement embodies the material terms in clear language that addresses not only the terms of the purchase, but also details as to how the option could be exercised. This is particularly important since case law holds that an exercise of an option must strictly comply with the terms of the option agreement.

An option to purchase is an encumbrance that could "complicate" life for the owner with respect to financing, leasing and/or selling its property. When an owner does give a tenant an option to purchase, it is often because it is necessary to make a deal. Maybe the market was weak at the time of the transaction. Maybe a property's location, size, configuration or permitted use made the property difficult to lease.

Chan v. Driggs 808, 17238/12, NYLJ 1202632258047, at *1 (Sup., KI, Decided December 3, 2013), Silber, J.

Contracts - Anticipatory Breach - Notice of Pendency Will Be Cancelled If Seller Posts An Undertaking of $1.15 Million, Unless Purchaser Then Posts A Bond Of $500,000

A plaintiff purchaser (purchaser) commenced an action to compel specific performance of a purchase/sale contract (contract) relating to real property and had filed a Notice of Pendency (Notice). The defendant seller (seller) moved "to cancel the [Notice] pursuant to CPLR 6514(b), or in the alternative, pursuant to CPLR 6515."

The contract was entered into in July 2011. The price was $3.2 million. The contract provided, inter alia, that the seller would not convey any interest in the property without the purchaser's approval. The contract also provided that if the purchaser breached the contract and such breach was not cured within ten business days after notice provided by the seller, then the seller could cancel or terminate the closing escrow and keep the deposit "as its sole . . . remedy and as liquidated damages." If the seller breached the contract and such breach had not been cured within ten days after Notice given by the purchaser, the purchaser could terminate its contractual obligations or seek specific performance. The closing date could be extended provided that the purchaser made certain "extension payments."

In Feb. 2013, the seller sent the purchaser a Notice of Cancellation of the contract, citing a conversation wherein the purchaser allegedly admitted that it was unwilling to provide the next required extension payment. The seller deemed such unwillingness to constitute an anticipatory breach and accelerated the contract's default provisions. The purchaser denied that it was unwilling or unable to close and argued that even if it had failed to timely make the extension payment, the contract required the seller to give the purchaser a notice to cure before it could terminate the contract, provided that the seller was not in default.

The purchaser thereafter commenced the subject action. The purchaser sought specific performance, "a $150,000 lien on the property representing the amount of its security deposit, a lien in excess of $1 million representing investments and improvements it made on the property during the contract period, and damages in excess of $1 million." The purchaser alleged that the seller breached the contract by selling its membership interests to an apparent relative of the seller's managing partner and by attempting to terminate the contract and cancelling the closing due to the purchaser's alleged unwillingness to provide the required extension payment. The purchaser also alleged that "the attempt to terminate the contract without first giving a notice to cure also constituted a breach."

A seller's principal alleged that he had been advised by one of the purchaser's principals that the purchaser was unable to make the required extension payment and close. Moreover, in a federal court litigation, the purchaser had alleged that it could not purchase the subject property and had abandoned the subject project, because of wrongful conduct by a third party who was to help with financing. The seller argued that the purchaser's assertions in the federal action constituted admissions that the purchaser lacked the required financing.

The seller argued that the Notice should therefore be cancelled or "the Court should condition the continuation of the [Notice] upon a requirement that the parties post undertakings in an amount fixed by the Court." The seller asserted that its bond should not exceed $672,000, the damages sought in the federal action by the purchaser, and the purchaser should be required to post a $3.2 million bond, the purchase price.

The purchaser countered that its principals had "sufficient cash on hand" and the federal action dispute did not impair its ability to close. The purchaser also argued that the seller's letter accusing the purchaser of anticipatorily breaching the contract, was itself an anticipatory breach by the seller and the purchaser was entitled to notices to cure. The purchaser further alleged that the transfer of the seller's interest was done to appropriate the purchaser's "development" work and such transfer was to a related party who wanted to take over the project. The purchaser had allegedly spent approximately $800,000 for, inter alia, land use approvals, relocation of electrical lines and environmental reviews. The purchaser also argued that an undertaking "would not adequately protect it given the uniqueness of the property."

The court found that cancellation of the Notice, pursuant to CPLR 6514 was not warranted. However, the court required "contingent double bonding pursuant to CPLR 6515." CPLR 6514(b) authorizes the court to cancel a Notice, "if the plaintiff has not commenced or prosecuted the action in good faith." Here, the seller had failed to establish that the purchaser had commenced the subject action in bad faith.

CPLR 6515 authorizes the cancellation of a Notice, "upon such terms as are just . . ., if the moving party shall give an undertaking in an amount to be fixed by the court, and if:

> 1. the court finds that adequate relief can be secured to the plaintiff by the giving of such an undertaking; or
>
> 2. in such action, the plaintiff fails to give an undertaking, in an amount to be fixed by the court, that the plaintiff will indemnify the moving party for the damages that he or she may incur if the notice is not cancelled.

Thus, under CPLR 6515's "'double bonding' approach," a court may cancel a Notice "upon the posting of [a] bond by the defendant unless plaintiff posts an undertaking that will indemnify the defendant for any damages flowing from the [Notice]."

Although "consideration of the likelihood of success on the merits is 'irrelevant to determining the validity of [a] [Notice],' . . . it is proper to consider the likelihood of success on the merits when considering whether to discretionarily cancel a [Notice] pursuant to CPLR 6515. . . ." The court considered the purchaser's likelihood of success on the merits to be "low," since it must show that it was "ready, willing, and able to perform" and the purchaser's allegations against its co-venturer in the separate federal action, appeared to demonstrate that the co-venturer's actions had "interfered with the [purchaser's] ability to obtain the necessary financing it needed to close on the sale." Moreover, even if the purchaser's principals personally had the funds to close, "the ability to pay is irrelevant if these parties were not ready or willing to pay . . . unless the purchase was financed by a loan." The court then explained that:

> [a]n anticipatory breach by the party from whom specific performance is sought excuses the party seeking specific performance from tendering performance, but not from the requirement that the party seeking specific performance establish that he or she was ready, willing, and able to perform. . . .

Based on "the unique nature of real property," the court opined that "adequate relief cannot be afforded to the [purchaser] simply by requiring the [seller] to post an undertaking pursuant to the 'single bonding' approach in CPLR 6515 (1)." The double bonding

approach provided for in CPLR 6515(2), "is considered preferable even where the plaintiff's likelihood of success is doubtful. . . ."

The court found that the seller's proposal that it be required "to post a bond for $672,000, the amount of the damages sought to be recovered in the federal action," was insufficient. The complaint sought to recover $1.150 million dollars. The seller disputed some of the alleged expenses. The court stated that such dispute should be determined through the "litigation process" and "not on this motion." Moreover, although it may be appropriate to "consider whether the property [had] increased in value during the contract period in considering the amount of an undertaking necessary to protect the [purchaser]," the record lacked evidence as to the current appraised value of the property.

Accordingly, the court held that the seller "should . . . post a bond in the amount of $1.15 million, representing the . . . [purchaser's] deposit" and the aforementioned development expenses. The court further held that the seller's request that the purchaser post a bond in the amount of the purchase price was excessive. The court concluded that if the seller posts a bond of $1.150 million, the Notice will be cancelled unless the purchaser posts a bond of $500,000.

Crestwood Loft Partners v. Crestwood Station Plaza, 58594/2013, NYLJ 1202634502221, at *1 (Sup., WE, Decided December 11, 2013), Connolly, J.

Plaintiff's Claims That Defendant Defrauded Relatives Out of Their Interest In Their Mother's Home Barred by Statute of Limitations - Plaintiff Waited Eight Years Beyond the Six Year Statute of Limitations, Based On Sporadic Empty Promises From His Brother - That Showed A Lack of Diligence

The plaintiff had commenced an action against his older brother ("A"), claiming that "A" defrauded him and his siblings of the profits of their mother's home (home). The plaintiff alleged that "A" had "leveraged the value of the home to acquire other properties for ['A''s] and ['A''s girlfriend's] personal gain instead of treating the property as part of their mother's estate." The plaintiff asserted "claims for breach of fiduciary duty, conversion, fraud, intentional infliction of emotional distress and [for] an accounting."

In 1978, the mother executed a will which provided that upon her death, her assets would be distributed one-third to her husband and the remainder equally to her five children. After the mother's husband had died and the mother had become ill, "A" had allegedly suggested to the mother that she transfer her home to one of her other sons ("B"), who was living with her at the time and advised the mother that such "transfer would be valid under the Medicaid transfer law." "A" had allegedly advised the mother that the home "would be transferred back to her estate upon her death." The plaintiff further alleged that "A" had persuaded the mother to appoint him as co-transferee since "B" was "incompetent to manage the home."

The mother transferred the property to "A" and "B". When the mother passed away, "A" served as executor for her estate. Thereafter, "A" "allegedly 'secretly induced' ['B'] to transfer his interest in the property to him." "A" paid "B" $3,000 and "B" moved out of the home. "A" thereafter rented out the property. "A" recorded the transfer in 1998 and advised his siblings, including the plaintiff, of the transfer. The plaintiff alleged that "A" promised to manage the home as "an income-producing property and distribute . . . profits . . . to each of the sibling-beneficiaries." The siblings agreed and waited to receive their share of the profits. "Fourteen years later, ['A'] still had not distributed any profits to his siblings."

The plaintiff alleged that "A" had engaged in a series of transactions involving the home, but kept the profits for himself and his girlfriend. "A" allegedly used mortgage proceeds to make other investments and this continued for more than a decade. The plaintiff alleged that "A" had knowingly made misrepresentations to the siblings in order "'to lull [them] not to make further inquiries' and 'to hide his fraudulent conduct.'" "A" allegedly advised his siblings that "things were moving very slowly" and he was not sure when the property would become profitable, there was no money for distribution and "A" "'was broke' due to upkeep expenses."

The plaintiff filed his complaint in July 2012 and thereafter filed three amended complaints. The defendants moved to dismiss on the grounds, *inter alia*, that the plaintiff's claims are barred by the Statute of Limitations (SOL). The defendants argued that the plaintiff knew of the wrongdoing as early as 1998, when "A" had advised the plaintiff that "B" had sold his interest in the home to "A". They also argued that the plaintiff had no interest in the property since the property had been removed from the mother's estate after the 1989 transfer to "A" and "B".

The court explained that "an action based upon fraud must be brought within the greater of six years . . . of the alleged fraud, or two years from when a plaintiff was aware or should have been aware of enough facts such that he could have discovered the fraud with reasonable diligence. . . ." Here, the alleged fraud, *i.e.*, "A"'s "acquisition and misappropriation of the . . . home - arguably first occurred in 1989, when ['A'] gained partial control of the home and promised to transfer the home back to his mother's estate upon her death." The defendants and the plaintiff seemed "to identify the fraud as occurring nine years later in 1998, when ['A'] induced ['B'] to sell him his interest in the property." "A" had recorded the sale in Mar. 1998 and told the other siblings about the sale on or about Apr. 1, 1998.

The court reasoned that "[u]sing the latest of the dates - April 1, 1998, when Plaintiff became aware that ['A'] had not transferred the house back to their mother's estate and in fact put the home entirely in his own name - Plaintiff had until April 1, 2004 (six years later) to file his complaint. Plaintiff did not bring this action until . . . more than fourteen years after the sale occurred and eight years after the limitations period had expired."

The plaintiff countered that "the doctrine of equitable tolling or equitable estoppel" is applicable and that "he only discovered his brother's fraud in January 2011." He claimed that "A" had "'knowingly made misrepresentations . . . to lull" the beneficiaries into not making further inquiries "and 'to hide his fraudulent conduct.'" The plaintiff asserted that "after many years of trusting ['A'], he finally 'peeked behind the curtain' in 2011 and learned what ['A'] was doing." The court explained that:

> the doctrines of equitable tolling or equitable estoppel may be invoked to defeat a [SOL] defense when the plaintiff was induced by fraud, . . . to refrain from filing a timely action. . . . Equitable tolling applies where a defendant's fraudulent conduct results in a plaintiff's lack of knowledge of a cause of action. . . . A plaintiff must establish that the defendant wrongfully concealed material facts, which prevented plaintiff's discovery of the nature of the claim, and that plaintiff exercised due diligence in pursuing the discovery of the claim during the period plaintiff seeks to have tolled. . . . Equitable estoppel, on the other hand, permits the tolling of the [SOL] in extraordinary circumstances where the plaintiff knew of the existence of his cause of action, but the defendant's misconduct caused him to delay in bringing suit. . . . Under either doctrine, the plaintiff must show that his failure to act was not due to lack of diligence on his part during the period he seeks to toll.

The plaintiff knew in 1998 that "A" had not returned the house to the estate as he had promised and instead, "had taken sole possession of it." The court opined that even if "A" had lulled the plaintiff for a time, "when years went by with no follow-through a reasonably diligent plaintiff would have undertaken some inquiry." The plaintiff was obligated "to investigate ['A''s] activities long before January 2011" and the plaintiff could have discovered each of the real estate transactions since "they were all matters of public record." Apparently, the only thing that the plaintiff did in 2011, "was look at public records" something "he could have done at any time."

The court further opined that "[w]hile patience and trust in one's older brother may be reasonable for a time, waiting eight years beyond the six-year [SOL], with only sporadic

empty promises from the brother in that entire period, plainly demonstrates the lack of diligence that bars equitable relief from the limitations period." Thus, the court held that the plaintiff's claims were "untimely."

Stuart v. Stuart, 12-CV-5588, NYLJ 1202634501891, at *1 (SDNY, Decided December 10, 2013), Seibel, J.

CONDEMNATION

Eminent Domain - Claimant Cannot Be Compensated For Increase in Value that Resulted From the Plan For Which the Property was Condemned - City's Expert Lacked Credibility As to Why Claimant's Properties Had Been Condemned

This decision involved the issue of which "zoning should be applied to the damage parcels . . ., for the purpose of determining the value of those parcels on the date they were acquired . . . through eminent domain."

The claimants' properties (Properties) had been vested by the City of New York (City) pursuant to an "Urban Renewal Area plan" (Plan). The Properties were taken to create a public open space and an "underground parking garage under the site [Project]." On the vesting date, the Properties "were zoned C6-4.5, which permits development of a floor area ratio (FAR) of 12." The Properties were previously zoned as C6-1, which permitted development of an FAR of 6. They had been rezoned in 2004 to include "creation of an open space and underground parking facility." The salient issue was "whether the rezoning . . . to C6-4.5 was part of the [Project] for which the [Properties] were taken, and therefore should not be considered in valuing the property pursuant to the project influence or Miller rule." The Properties had been rezoned at the same time that the Plan had been amended to create the Project.

U.S. v. Miller, 317 US 369 (1943), held that when valuing a property for condemnation purposes, "the property should be neither enhanced or diminished by the impact of the project on the value of the property." *Miller* explained that:

> the "market value" of property condemned can be affected, adversely or favorably, by the imminence of the very public project that makes the condemnation necessary. And it was perceived that to permit compensation to be either reduced or increased because of an alteration in market value attributable to the project itself would not lead to the "just compensation" that the Constitution requires. On the other hand, the development of a public project may also lead to enhancement in the market value of neighboring land that is not covered by the project itself. And if that land is later condemned, whether for an extension of the existing project or for some other public purpose, the general rule of just compensation requires that such enhancement in value be wholly taken into account, since fair market value is generally to be determined with due consideration of all available economic uses of the property at the time of the taking". . . .

The claimants argued that the Project was only the creation of a half block of public open space with an underground parking garage and that the rezoning of surrounding blocks was not part of the Project, "but a generic area wide rezoning." They stated that it was unnecessary to rezone the Properties to create the Project, and that the creation of the Project was not necessary to the rezoning. They further argued that "not valuing their [Properties] based on the zoning in place at the time of vesting would constitute a denial of equal protection."

The City countered that the "Project" included not just the open space and parking garage, but also "the entire rezoning of the blocks surrounding [the Project], as well as the amendments the text of the zoning resolution, the amendments to the . . . [Plan], and the special

permits approved for various parking facilities." The City contended that "all of these actions were related and were part of a comprehensive plan that was aimed [at] stimulating private development of large office buildings in downtown Brooklyn."

Following a hearing, the court explained that "the term project can have different meanings in the different contexts." The court noted that:

> New York State Eminent Domain Procedure Law defines a "Public Project" as "any program or project for which the acquisition of property may be required for a public use, benefit or purpose." EDPL §103(G) The term "program" is not a defined term and is somewhat elastic. However, there are certain characteristics of a program, as the term is commonly used, which can be read into the definition in EDPL §103(G). The use of the term "any program" to define a "public project" indicates that a project can include a series of related actions as opposed to being limited to a single distinct action or development. Also, the term program can encompass series of planned actions where not all of the included actions may be realized. Lastly, it also includes more than physical buildings or structures.

The court stated that "[g]iven the rationale of the project influence rule, a comprehensive land use plan can be considered a 'program' within the meaning of the definition of 'public project'" and "[t]he intent of the project influence rule is ensure that a condemned property is valued as if the project never occurred." Appellate court decisions had applied the Miller rule "to exclude the effect of zoning overrides on the value [of] a property taken through eminent domain where the override and the taking were both part of a comprehensive plan."

The court then found that the City had "rezoned the [Properties], as part of the Brooklyn Downtown Plan, which is a comprehensive plan. The rezoning of the . . . [Properties] was part of a larger rezoning of the surrounding blocks." As part of the same zoning map application, the City Planning Commission (CPC) had "also approved zoning changes [to] . . . other areas in Downtown Brooklyn." There were 21 other related items that had been "considered by the [CPC] concurrently with the zoning map application." The court observed that "[e]ach of the separate actions by themselves were not sufficient to achieve the goal of the plan, which was to encourage the development of large office buildings."

The claimants attempted to distinguish a prior case by arguing that the subject zoning "was generic, in that it increased the allowable density but did not require that office towers be built." In fact, "hotels rather than office buildings were built around" the subject area. The court explained that the fact that the City encouraged, rather than required, private development of offices, did not mean that the rezoning and related actions "were not all part of a comprehensive plan." Rather, it meant that the City "believed, mistakenly as it turned out, that the incentives created by the related actions would be enough to induce developers to build . . . office buildings." Moreover, "rezoning either the [Properties] or the larger area was not necessary in order to create" the Project and the creation of such "was not necessary to the rezoning."

The court acknowledged that "[i]t was not necessary to rezone the [Properties] in order to develop the public open space. Even if the CITY did not want to map the area as a park, in order to have more design flexibility, it could have left the sites zoned as C6-1 and still have developed them as a public open space." The City "had to approve a special permit for a parking

garage whether the sites were rezoned or not" and the Project could have been developed even if "the larger surrounding area had not been rezoned." Although the rezoning was not necessary to develop the Project, it did not mean that the rezoning and the Project were not part of the same larger project. The evidence established that "the City would not have condemned the [Properties] to create [the Project] without the rezoning and the other related actions."

The claimants argued that since it was not necessary to rezone the Properties to create the Project, the City's "actual purpose for rezoning them was to create development rights on the [Properties] that the CITY could sell after acquiring them." The City denied that, but the court found that the City's expert's assertion that the City included Properties in the rezoning "because it was inconsequential whether or not they were rezoned, lacks credibility." The court found such explanation to also be "at odds with how the CITY dealt with similar situations."

The court reasoned that the "only logical explanation . . . as to why the CITY included [the Project] in the rezoning, was [the claimant's expert's] contention that the CITY wanted to create additional development rights that it could sell to adjoining property owners. The only result of rezoning the [Properties] was to increase the developable floor area of the sites." However, the court stated that "even if the CITY did rezone the [Properties] for the purpose of creating additional developable floor area, that would not require a different result." "[I]f the CITY had rezoned the [Properties] . . ., in order to create air rights it could sell to owners of adjoining properties, this would evidence that the rezoning and the condemnation were part of the same project." The court further stated that:

> While there is serious question whether it would be a proper use of either the zoning power or power of eminent domain to upzone property that the CITY intends to condemn in order to sell the newly created developable floor area, this question is not before the Court.
>
> The propriety of the CITY's exercise of its zoning power and eminent domain would have had to have been challenged directly and can not be attacked collaterally in this proceeding. This proceeding is only to determine the amount of compensation to which the owners . . . are entitled. In this joint hearing, the Court is only called upon to decide if valuing the subject properties as rezoned is barred by the project influence rule.

The court then held that valuing the Properties based on the prior zoning, rather than the rezoning, would not violate equal protection. Although an owner "is generally entitled to have his property valued at its highest and best use at the time of taking, the Miller rule carves out an exception where there is an increase in value is a result of the project or plan for which the property was condemned." Here, there was no evidence that there had been "any other rezoned parcels which the CITY valued, for condemnation purposes, based on the higher C6-4.5 district" and this was not a case "where the CITY left the [Properties] out of a larger rezoning because it intended to acquire them." It was also "not a situation where the CITY refused to approve plans submitted by the owners. . . ."

Thus, the court held that the acquisition of the Properties and the rezoning of the Properties and the larger area around the Properties "were part of a comprehensive plan, together with the other related actions listed in the rezoning application. . . ." Accordingly, "valuing the

[Properties] based on the rezoning is barred by the project influence rule, and the [Properties] must be valued based on the prior zoning of C6-1."

Matter of NYC Urban Renewal Area, 33132/2008, NYLJ 1202627013288, at *1 (Sup., KI, Decided October 11, 2013), Saitta, J.

FORECLOSURES

Foreclosures - Lender Who Became Owner and Holder of Note And Mortgage Upon Merger With Original Lender, Had Standing and An Assignment Was Not Required - Borrower Failed to Demonstrate that Discovery Would Lead to Relevant Evidence And Facts Essential to Justify Opposition Were Exclusively Within Knowledge and Control of the Lender - Ongoing Discussions About Possible Modification Is Not A Defense - Lenders Are Not Obligated to Modify Mortgages

The court granted a plaintiff lender's motion for summary judgment in an action to foreclose a mortgage. The court rejected the borrower's defense of lack of standing. The defense of lack of standing is not jurisdictional in nature and the borrower had waived such defense by failing to assert such defense in its pre-answer motion to dismiss or answer. Moreover, such defense lacked merit since the plaintiff had become the owner and holder of the note and mortgage upon its merger with the original lender. Thus, "[n]o showing of any assignment of the note and mortgage or other transfer of the note to the plaintiff is required. . . ."

The borrower had also failed to "offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff." The court noted that "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment" is insufficient.

Additionally, the court rejected the borrower's defense based on "ongoing discussions . . . regarding a possible modification of the subject loan." The court explained that "a mortgagee has no obligation to modify a mortgage loan prior to or after a default. . . ." The court further stated that the borrower could challenge the amount owing at proceedings conducted by a referee who would compute the amounts owing.

The court also rejected the borrower's defense based on the lender's "settlement of litigation in other forums and its notification that defendant . . . is entitled to some form of remuneration under the terms of such settlement. . . ." The borrower had argued that such settlement demonstrated that the lender had engaged "in deceptive acts and improper practices such as the 'robo-signing' of litigation documents" and such improper conduct estops the lender from enforcing its contractual remedy of foreclosure and sale in the subject action. The court rejected such defense based on relevancy. The court rejected certain other defenses, granted the lender's motion for summary judgment and ordered the appointment of a referee to compute.

CitiMortgage, Inc. v. Vatash, 42886/2010, NYLJ 1202631927454, at *1 (Sup. SUF, Decided November 4, 2013), Whelan, J.

Foreclosures - Homeowner Alleged That Lender Was On Notice Of Alleged Fraudulent Scheme - Mortgage Electronic Registration Systems, Inc. (MERS) - Expired Notice of Pendency Cannot Be Revived -

This case involved the issue of "whether a mortgage lender can ignore signs of a '"foreclosure rescue' scheme simply because the title to the . . . property appears to be in order." Defendants MERS and a lender (lender) had moved for summary judgment dismissing the complaint. The complaint sought, *inter alia*, "to quiet title." The Appellate Division, First Dep't (court) held that since the defendants' evidence was not in admissible form, they failed "to establish prima facie that they are bona fide encumbrancers." Moreover, the plaintiff raised "triable issues of fact as to defendants' notice of the alleged fraud." The court also stated that discovery had not been completed and "plaintiff may be able to raise additional issues of fact" upon acquiring additional evidence "that remains in defendants' exclusive possession." Accordingly, the court affirmed the trial court's denial of the defendants' motion to dismiss. However, the court held that the trial court decision had "improperly granted plaintiff's cross motion to extend her notice of pendency" since "an expired notice of pendency cannot be revived."

The plaintiff and her mother had owned their home until Sept. 2004, "when a tax lien of more than $23,000 was recorded against the property." The plaintiff was thereafter approached by a neighbor, who said she "knew someone who could help." The neighbor introduced the plaintiff to defendant "A". "A" persuaded the plaintiff to transfer ownership of the property to her. The plaintiff alleged that she thought that she was "merely acquiring a loan to help her pay the tax arrears and improve her credit. . . ." The plaintiff had instead conveyed title to "A" in Sept. 2005. The transfer was recorded in the Office of the City Register in Jun. 2006.

The plaintiff made monthly mortgage payments to "A" until she "unexpectedly received mail addressed to defendant ['B'], followed by foreclosure papers. Unbeknownst to plaintiff, ['A'] had conveyed title to ['B']." "B" "apparently had no intention of purchasing a house." The plaintiff alleged that "B" was a "'straw buyer' in the scam." At the closing of the sale to "B", "B" applied for and obtained a loan from the lender for the entire purchase price of $500,000. The lender acquired a purchase money mortgage on the property. MERS was named on the mortgage as the lender's nominee and the mortgagee for purposes of the recording.

"B"'s deposition testimony indicated that "even he may have been a victim of the scheme, since he was unwittingly coerced into purchasing plaintiff's house with a loan he claimed he could not afford." At least one representative of the lender attended "B"'s closing, in addition to "A" and several other defendants. "B" had never met anyone from the lender "and did not fully understand that he was purchasing a home." "B" had not even seen the home before closing and was unaware that the plaintiff was living there. "B" believed that "A" and others, "for some unexplained reason," were "helping him 'sign for' a house despite his repeated statements that he did not earn enough money to pay a mortgage."

An appraisal of the plaintiff's home, that was provided at "B"'s closing, "was rife with errors indicative of fraud." The "appraiser significantly reduced the square footage of

comparable properties as a means to inflate the value of plaintiff's house." The lender recognized such errors, and "its employee-reviewer noted that 'the estimated value d[id] not appear to be supported' by the appraisal." The lender thereafter reduced the loan amount from $580,000 to $500,000 before approving "B"'s loan.

"B" signed the lender's loan application for the first time at the closing. Although "B"'s application stated that he earned $10,500 per month, the lender's loan file lacked proof of "B"'s income or credit history. There was no indication that the lender had "requested or examined ['B''s] paystubs, tax returns, or credit report." The lender nevertheless approved a loan to "B" in the amount of $500,000.

In 2007, after the lender filed a foreclosure action against "B", the plaintiff commenced the subject action, asserting claims for, *inter alia*, equitable mortgage, relief pursuant to Art. 15 of the New York Real Property Actions and Proceedings Law to quiet title, and Real Property Law (RPL) §329, to have "A" and "B"'s deeds and the defendants' mortgage declared void. While discovery was underway, the defendants moved for summary judgment, "arguing that [the lender] was a good faith encumbrancer for value and . . ., therefore, they maintained a valid mortgage on the subject property."

The trial court found that there were material issues of facts related to the lender's"actual or constructive knowledge of the fraudulent transfer to "A" and the conveyance to "B". The trial court removed a stay of discovery that had been triggered by the defendants' summary judgment motion and extended the duration of the plaintiff's notice of pendency, which had expired nearly a year earlier.

The Appellate Division explained:

> The rights of an encumbrancer for value are protected "unless it appears that [the encumbrancer] had previous notice of the fraudulent intent of [its] immediate grantor, or of the fraud rendering void the title of such grantor" (Real Property Law §266;. . . . A mortgagee will be charged with constructive notice if it is "aware of facts that would lead a reasonable, prudent lender to make inquiries of the circumstances of the transaction at issue". . . . If a "reasonable inquiry" would reveal some evidence of fraud, then failure to "make some investigation" will divest the mortgagee of bona fide encumbrancer status. . . .
>
> A mortgagee may make a prima facie showing that it is a bona fide encumbrancer by presenting a title search showing a clear chain of title. . . . To raise an issue of fact in response, the opposing party must offer evidence to justify requiring the mortgagee to engage in an inquiry regarding title or fraud (see id.), for example, evidence that the moving party possessed documents indicating that the opposing party was in possession of the property. . . .

The court found that the defendants "failed to make a prima facie showing that they [were] entitled to bona fide encumbrancer status because their proffered title search was neither an official search nor 'certified' by the searching company. . . ." Although the party opposing summary judgment may "demonstrate acceptable excuse for . . . failure to meet the strict requirement of tender in admissible form, . . . the movant is not accorded that luxury; its evidence must be in admissible form. . . ." Since the defendants' title search was not in

admissible form, the court did not consider it as evidence that the lender was a bona fide encumbrancer.

Even if the defendants were bona fide encumbrancers, they would not have been entitled to summary judgment since the plaintiff had come forward with evidence that "defendants had notice of the underlying fraud." The court emphasized that a) "B" applied for the loan for the first time at his closing, b) "B" was a buyer who had no intention of purchasing a home and "appears to have been coerced into attending the closing - without any proof that he had an ability to repay it" and c) there was no evidence that the lender had examined "B"'s "paystubs, tax returns, or credit history before approving his loan application." The court opined that "[t]hese suspicious aspects of the transaction present issues of fact pertaining to [the lender's] knowledge of the foreclosure rescue scam."

Additionally, the "faulty appraisal" raised "an inference that [the lender] had notice of the underlying fraud." Although the lender had reduced the loan amount, "the fact that the initial appraisal was overstated would lead a reasonably prudent lender to investigate further to determine whether the prospective borrower was involved in a transaction free of fraud." Had the lender conducted a reasonable inquiry into the legitimacy of the sale by "A" to "B", "it could have discovered plaintiff's competing claim." Thus, the court declined to grant summary judgment to the defendants.

Additionally, "there may be evidence in the [defendants'] exclusive possession that would enable plaintiff to present other triable issues of fact." The plaintiff had served interrogatories requesting the names of employees who were involved in the "B" closing and those interrogatories remained unanswered. Also, the plaintiff "would likely seek to depose any of [lender's] employees who approved ['B''s] loan." The plaintiff had also demanded production of documents relating to the lender's underwriting policies and involvement in the "B" closing. Those documents had not been produced. The court noted that "the underwriting policies would be elucidative of whether [the lender] would customarily approve a $500,000 loan without verifying the intended borrower's financial condition. If [the lender] would ordinarily deny such a loan application, then its approval of the loan to ['B'] would indicate that it had at least an inkling that the conveyance was illegitimate."

Moreover, even if the lender lacked knowledge of the plaintiff's particular claim to the property, "the presence of fraud alone - even absent knowledge of the ultimate victim's identity - ought to counsel a lender against proceeding with a transaction without conducting a reasonable inquiry." "If [the lender] had actual or constructive knowledge that the ['B'] closing was blighted by fraud, its knowledge would be enough to render the protection of [RPL] §266 inapplicable." Thus, the court found that, at the very least, the plaintiff should be entitled to complete discovery.

The court then held that the trial court lacked authority to extend the plaintiff's notice of pendency, since the plaintiff had not moved for an extension until after the notice had expired.

Comment: The court had also observed that "[f]oreclosure rescue scams, . . . are often perpetrated by self-described 'experts' who prey upon vulnerable homeowners as foreclosure looms" and that the foreclosure rate for the New York and New Jersey region "hovers around eight percent, double the national average."

Miller-Francis v. Smith-Jackson, 1805/07, NYLJ 1202629685221, at *1 (App. Div., 1st, Decided November 21, 2013), Before: Gonzalez, P.J., Mazzarelli, Acosta, Renwick, JJ. Opinion by Acosta, J. All concur.

Foreclosures - Lender Did Not Abandon Foreclosure By Not Moving to Fix Defaults Within One Year - Lender Complied With Mortgage Foreclosure Conference Requirements and the "Stay" of All Motions Imposed By 22 NYCRR 202.12 - a (c)(7) - Lack of Knowledge or Understanding of Legal Process, Inability to Read or Write English and Participation in Court Scheduled Settlement Conferences Are Not Reasonable Excuses for Failure to Serve An Answer or Otherwise Appear

A lender commenced a mortgage foreclosure action, alleging that the defendant had defaulted in her payment obligations. The defendant had been served with process. The action had been commenced by the filing of a summons and complaint on Sept. 13, 2010. In Nov. 2011, the defendant was notified that a conference in the "specialized mortgage foreclosure part" was scheduled for Jan. 30, 2012. That conference was adjourned until Apr. 16, 2012, in order to provide an interpreter for the defendant. After several conferences, the last of which occurred on Aug. 29, 2012, "the matter was marked as 'not settled.'"

Following the transfer of this case from the conference part to the IAS part, the lender moved for an order fixing the default and for an order appointing a referee to compute. The defendant cross-moved to dismiss the complaint or vacate her default and for leave to file a late answer. The court granted the lender's motion and denied the defendant's motion.

CPLR 3215(c) requires a plaintiff to move for judgment within one year following a default in answering in order to avoid dismissal due to abandonment, except in cases wherein "sufficient cause is shown why the complaint should not be dismissed." A showing of sufficient cause requires the "proffer of a reasonable excuse for the delay in moving and a showing of the meritorious nature of the complaint. . . ." Trial courts have discretion to determine what constitutes "reasonable cause."

Delays engendered by the newly enacted mortgage foreclosure conference requirements, "coupled with the 'stay' of all motions imposed by the provisions of 22 NYCRR 202.12 - a (c)(7), have been held to constitute sufficient cause for not moving to fix defaults within the one year time period imposed by CPLR 3215(c). . . ." Here, the lender demonstrated that its motion "to fix defaults was made within one year of the release of the action from the 'conference part.'" Therefore, "the presumption of abandonment that would otherwise arise under CPLR 3215(c), is neutralized, if not negated, entirely." Thus, the court denied the defendant's motion to dismiss pursuant to CPLR 3215(c), since there was "sufficient cause for the delay in moving" and the lender had meritorious claims for foreclosure.

With reference to the defendant's motion to vacate her default and for permission to serve a late answer, the court explained that "[t]he failure to proffer an excuse found reasonable by the court obviates the need for inquiry into the issue of the existence of a meritorious defense. . . ."

The defendant's excuses were "her inability to read or write English, her lack of knowledge and understanding of legal processes and procedures and her participation in the court scheduled settlement conferences. . . ." Appellate authority has held that "confusion or ignorance of the law, legal processes and/or court procedures do not constitute reasonable excuses for the failure to answer or otherwise appear. . . ." Moreover, people with "disabilities such as blindness or illiteracy are not per se excused from the terms of their contracts as they are

obliged to employ reasonable efforts to understand the contents thereof prior to signing. . . ." Thus, "[a] party whose mastery of English is imperfect must make reasonable efforts to have the document made clear to him or her. . . ."

A family member had allegedly read the summons and complaint to the defendant and had "advised that the papers . . . 'had to do with" the "home and mortgage." The defendant "failed to detail facts tending to show that such a reading satisfied her duty to undertake the requisite reasonable efforts to have the contents of the papers served made clear to her." Under the circumstances, the court held that any inability by the defendant "to comprehend the words and warnings spread across the summons and warning notices included therein and on a separate paper served does not constitute a reasonable excuse for her default in answering. . . ."

The court noted that "participation in statutorily mandated settlement conferences, which are scheduled . . . after the time in which an answer is due, may not, in itself, serve as a de facto extension of the time to answer and/or a reasonable excuse for a default. . . ." The court opined that "[t]o hold otherwise would effect an unfounded judicial transformation of the limited scope and objectives of the simple settlement conference procedures legislatively imposed by CPLR 3408 into a revocation of longstanding rules and laws governing defaults which the legislature chose not to alter. . . ."

The court also warned that participation in "pre-action and/or post-action loan modification discussions is alone insufficient to constitute a reasonable excuse for a default in answering, especially where the default in answering remains unchallenged by the party in default for a lengthy period of time. . . ." Here, defense counsel had been retained approximately "three years ago but no application to vacate the default was brought until this cross motion was made some ten months after the original . . . return date of the plaintiff's motion in chief." The court further stated that "a successful claim that settlement negotiations constitute a reasonable excuse for a default must be premised upon allegations of a good faith belief in potential settlement which finds substantial evidentiary support and a justifiable reliance upon such good faith belief. . . ." Here, there was no such showing.

With respect to the defendant's claim that she had been misled by the lender representatives and had relied upon such misrepresentations, the court stated that the "bald, conclusory and unsubstantiated claims of defendant . . . regarding purported utterances and representations made by the plaintiff's agents that deterred defendant from timely appearing herein by answer or otherwise are insufficient to constitute a reasonable excuse for her default."

Finally, the court stated that even if a reasonable excuse for the default had been proffered, the defendant failed to demonstrate a "meritorious defense." Accordingly, the defendant's motion to dismiss or for leave to vacate her default in answering and for leave to serve a late answer was denied and the lender's motion to fix the default and the appointment of a referee to compute amounts due was granted.

Onewest Bank v. Navarro, 33644-10, NYLJ 1202634501647, at *1 (Sup., SUF, Decided November 11, 2013), Whelan, J.

Foreclosures - Condominiums - Lender's Blanket Mortgage Was A "First Mortgage" and Entitled to Priority Over Condominium's Lien for Unpaid Common Charges - RPL §339-z

A plaintiff lender sought to foreclose on a consolidated mortgage which encumbered three residential units and a commercial garage unit in a condominium building. The defendant condominium sponsor (sponsor) and owner of the mortgaged units had defaulted on the mortgage. The defendant Board of Managers (Board) counterclaimed and cross-claimed to foreclose a statutory lien for unpaid common charges. Each party sought summary judgment, claiming that they were "entitled to priority over the other lien under New York's Condominium Act, RPL §§339-d-339-kk." The court granted the plaintiff's motion for summary judgment and denied the Board's motion for summary judgment.

In Sept. 2007, a lender had extended a loan to the sponsor, secured by a mortgage on five residential units and a commercial garage unit. The mortgage had been consolidated with three prior recorded mortgages given to the sponsor. The consolidated mortgage was recorded on Nov. 27, 2007. The plaintiff had acquired the subject loan by assignment, on July 21, 2010. On Aug. 13, 2009, the Board "recorded liens for unpaid common charges on three of the five residential units and the garage." RPL §339-z provides that "[t]he board of managers, . . ., shall have a lien on each unit for the unpaid common charges thereof, together with interest thereon, prior to all liens except only. . . (ii) all sums unpaid on a first mortgage of record. . . ."

The issue was the plaintiff's mortgage "an unpaid first mortgage of record," as the term is used in RPL §339-z, "but otherwise undefined in the Condominium Act." The Board argued that the plaintiff's mortgage was "not a first mortgage because it is a blanket mortgage that was not for the purchase of a unit."

The court explained, *inter alia*, that "[a]bsent a controlling statutory definition, the court must construe the statutory terms according to their usual and commonly understood meaning." If statutory terms are unambiguous, courts will "give effect to that plain meaning, as a statute's express terms are the best indicator of legislative intent."

RPL §339-z did not embody "any limitation to mortgages for the purchase of units." The Condominium Act addresses blanket mortgages, but did not prohibit a blanket mortgage from being a first mortgage. The court reasoned that if the legislature had intended "to limit first mortgages to . . . mortgages given for the purchase of condominium units or to exclude blanket mortgages from first mortgages of record," "the statutes would have so provided."

Judicial precedent defined "a first mortgage of record as the earliest recorded mortgage." Since the term "first mortgage of record" in the Condominium Act constituted "legislation in derogation of the common law," it "must be construed strictly." Moreover, "[t]he legislature's expression most indicative of its intent, its unambiguous statutory terms, leaves no reason to resort to statutory construction."

However, the court believed that the policies behind the Condominium Act supported the court's conclusion. The court reasoned that giving priority to an unpaid mortgage recorded prior to an unpaid lien for common charges, whether the mortgage is for the purchase of a unit or not, "provides an incentive to banks to extend mortgages for the purchase of units." The court could not "conceive of how limiting first mortgages to purchase money mortgages

would discourage sponsors from retaining units" and opined that even if RPL §339-z's legislative terms and intent required reading such statute together with related federal statutes in order to construe the state statute, the result would not change.

Additionally, the condominium's by-laws did not invalidate the subject first mortgage on the grounds that the mortgage was given to a sponsor, rather than a unit owner. The by-laws permit unit owners to give first mortgages, but do not bar a sponsor from also giving a first mortgage. The by-laws did not expressly define a "unit owner." They provided, *inter alia*, that "various business entities, including a limited liability company like the sponsor . . ., may own units. . . ." The by-laws also permit the sponsor to vote as a unit owner.

The court noted that to interpret the by-laws as "excluding the sponsor from the definition of a unit owner actually would leave the Board . . . completely bereft of the remedy they seek, as By-Laws . . . obligate only unit owners to pay common charges." Thus, the court held that the sponsor was a unit owner that could give a first mortgage and foreclosure of the plaintiff's mortgage lien extinguished the Board's lien.

The Board contended that even if the plaintiff held a first mortgage, "only the initial mortgage, not any mortgages consolidated with it, are entitled to priority over the lien for common charges." The court stated that "[s]ince the consolidation and recording of [the consolidated mortgage] acquired by plaintiff predated its acquisition or other involvement, as well as the recording of the [Board's] lien for common charges, plaintiff's lien based on that single mortgage retains the same priority as when that mortgage was recorded."

The court rejected the Board's argument that since "the payment of taxes on the mortgaged units was [sponsor's] obligation, plaintiff's payment of these taxes was voluntary" and therefore, such monies should not be "added to the mortgage debt that is superior to the [Board's] lien." The plaintiff had voluntarily paid the taxes "to protect its and the Board's interest in the property against penalties that would be a lien with priority over both their interests." The plaintiff could "recover the tax payments from the owner through equitable subrogation, but the mortgage also entitles plaintiff to add the payments to the mortgage debt." Thus, the Board's lien "is subordinate to plaintiff's mortgage because it is a first mortgage of record, not because plaintiff is entitled to recover the mortgage debt from the Board through equitable subrogation."

Accordingly, the court granted summary judgment of foreclosure to the plaintiff and extinguished the Board's lien for common charges, except to the extent that surplus proceeds remained.

AMT CADC Venture v. 455 CPW, 810109/2011, NYLJ 1202626669728, at *1 (Sup., NY, Decided October 30, 2013), Billings, J.

Foreclosures - Court Ventured Into "Uncharted Depths of New York Law Involving the Relatively New Obligations of A Creditor When Foreclosing A Marital Property" - Lender Failed to Comply With RPAPL §1304 - Presumption of Regularity With Respect to Mailings Is "Alive and Well" - No Legislative Or Regulatory Guidance On Penalty For Violations Of RPAPL §1304

A husband had obtained a mortgage on his marital residence. He is "the sole obligor on the note and mortgage, and . . . the sole name on the title to the property." Thereafter, his wife commenced an action for divorce. The husband permitted the wife to live at the residence during the divorce action provided she paid the mortgage. The wife failed to make such required payments, failed to advise her husband of her default and never forwarded mail from the lender. The lender thereafter commenced a foreclosure action.

The husband asserted that "the lender failed to comply with Real Property Actions and Proceedings Law . . . §1304" (§1304). After the husband failed to negotiate a resolution with the lender, he "moved to compel disclosure and preclude proof at trial or, in the alternative, dismiss the action" based on the lender's failure to comply with §1304. That "new section" requires that a "creditor must send a notice to the borrower indicating the loan is in default, offering the borrower guidance on how to avert foreclosure and seek the assistance of professional counsel." The notice must be sent "by registered or certified mail and also by first-class mail to the last known address of the borrower, and if different, to the residence that is the subject of the mortgage."

The husband demanded that the lender produce evidence that the required notice had been sent. The lender's response included:

> (1) a copy of the initial notice required by statute;
>
> (2) a copy of a "proof of filing statement" issued by the New York State Department of Banking [Banking Dep't], but without any certification of the statement or any affidavit from any officials of the Banking Department;
>
> (3) a copy of a second notice, dated November 1, 2011, addressed to the husband at the marital residence address;
>
> (4) a copy of a tracking report from the United States Post Office regarding a letter allegedly sent to the borrower. [Tracking Report]

Thereafter, the husband sought proof that the notice of mailing had been received, information as to whether the notice was returned as "undeliverable" and whether the notice was sent by registered or certified mail. The lender argued that "it did not possess these requested items and had no legal obligation to prepare documents that it did not possess." The husband then made the subject motion.

The court rejected the lender's argument that the borrower had not requested summary judgment or judgment dismissing the claims and the court could only compel further disclosure. The notice of motion asked that the court strike the complaint and contained "a 'general relief' clause, seeking such 'other and further relief as is just and proper.'"

The legislative history of §1304, reflected an intent to require "mortgage holders to give borrowers an opportunity to remedy any default." Specifically, 90 days prior to commencing a foreclosure action, a lender must provide a borrower with notice to consider "recasting or otherwise modifying the mortgage or taking other steps to avoid foreclosure."

The court noted that §1304 requires both a registered or certified mailing and a first class mailing of the same notice. Here, the husband denied that the notice had ever been received and, in essence, was asking for "the equivalent of an 'affidavit of mailing,'" *i.e.*, "a sworn statement by someone acting on behalf of the lender in which the affiant attests that the notice required by §1304 was actually mailed on a specific date and time to the address set forth on the envelope." The lender's counsel, "by omission," acknowledged that "the lender does not have any affidavit of mailing and apparently, no witness who could attest, under oath, to the mailings as required by . . . §1304." The lender argued that the court should not bar "a witness for the bank appearing at trial and testifying, based on some undisclosed business records, that the mailings were timely sent." The lender's counsel had not identified any bank document "which would serve as a foundation for a witnesses verification of the disputed mailings."

The court explained that §1304 notices "permits - if not requires - dismissal of the action." The legislature had been concerned that "a typical lack of communication between distressed homeowners and their lenders prior to the commencement of litigation, [would lead] to needless foreclosure proceedings." The court also noted that "the common law doctrine of presumption of regularity is still alive - and well - in New York State despite arguments to the contrary." Thus, "a letter or notice that is properly stamped, addressed, and mailed is presumed to be received by the addressee" and "a simple denial of receipt" is "insufficient to rebut this presumption." Furthermore, "[t]he presumption of receipt may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed." The court then explained:

> The burden is on (the party obligated to provide notice) to present an affidavit of an employee who personally mailed the verification and/or denial, or on the other hand, an affidavit of an employee with personal knowledge of the office's mailing practices and procedures. Such individual must describe those practices or procedures in detail, explicitly denoting the manner in which she/he acquired the knowledge of such procedures or practices, and how a personal review of the file indicates that those procedures or practices were adhered to with respect to the processing of that particular claim.

The lender had failed to establish "regularity in mailing practice or a specific mailing sufficient to shift the burden of proof." There was no sworn statement by any bank official regarding the mailing or regarding the practices followed by the bank in mailing the notices under RPAPL §1304. There was "no evidence on any aspect of the banks' mailing compliance with the law. The mere production of a photocopy of the statutory notice, unsigned, generated by a computer, and addressed to the borrower, does not establish its mailing by either first class mail or certified or return receipt mail, as the statute requires."

The lender attempted to use a "printed 'tracking confirmation' for the certified mailing from the Post Office." The lender's attorney did not attest that he had "any first-hand knowledge of the process or protocol for the Post Office." The copy of the print was "uncertified, and there [was] no accompanying attestation to justify describing it as a business record of the Post Office." Although the notice referred to "a 'label number,' which matche[d] a number located on the top of an October 4, 2011 letter to defendant," there was "no sworn statement linking these two numbers or establishing their correlation." The court declined to "speculate on what the tracking report means or what conclusions, if any, are to be drawn from the report." A "copy of a single-page, unverified form does not create a presumption of the mailing of certified or registered notice as required in . . . §1304."

The lender also sought "to establish a presumption of receipt by another somewhat unorthodox method." The lender identified "a single page copy of a report from the . . . Banking Department" which allegedly "details compliance by the lender with the requirements of RPAPL §1306." The lender's counsel was "not qualified to authenticate the document, or even lay its foundation for consideration by the court." RPAPL §1306 "requires certain filings with the Banking Department." The document did not indicate what was mailed on the specified dates. There was no indication that the Banking Department document had to be submitted under oath and there was "no certification by the Banking Department regarding the accuracy of the record or any claim that it would otherwise fall within the ambit of CPLR §4518 (c)." The court opined that this "orphan document" "is not evidence of mailing the notices required by . . . §1304." It merely showed that "the lender told the Banking Department that it mailed something to the borrower" on the subject dates.

Moreover, even if the Tracking Report or the Banking Department records showed the certified mailing of the §1304 notice, there was no evidence of the second mailing required by the statute, *i.e.*, "the first-class mailing." Although the lender produced a second letter, there was no evidence from the Post Office or an affidavit of mailing from the lender or its agent. Appellate authority requires "an 'affidavit of service' to establish 'proper service' of the §1304 notices." The second letter lacked 14-point type as required and failed to contain the consumer guidance that the statute dictates. The court found that the second letter was not a §1304 notice. Rather, it was a simple default letter. Additionally, the U.S. Postal Service's tracking e-mail showed "a certified letter having been sent merely to Ridgewood, NY without indicating a specific address" and that would be insufficient proof of service of the ninety day notice.

Although the husband may have been "entitled to dismissal for the failure of the lender to establish a condition precedent to filing the complaint," the court "in the exercise of its equitable powers," would not do so. Rather, the court stayed the mortgage foreclosure until the lender complied with the §1304 notice requirements.

Although courts have imposed sanctions "on lenders for violation of their duty to 'negotiate in good faith' during mandated conferences under CPLR §3408," there is "simply no legislative or regulatory guidance on a penalty to be imposed when the violations stem from non-compliance with . . . §1304." The court explained, "[i]n the absence of a specifically authorized sanction or remedy in the statutory scheme, the courts must employ appropriate, permissible, and authorized remedies, tailored to the circumstances of each given case."

The court then reasoned that if the foreclosure were dismissed, as some courts have suggested would be appropriate for violations of the notice requirements, lenders could "simply resend the notices, . . . wait 90 days and then pay a modest filing fee and then commence

a second foreclosure action, seeking to recover the interest, unpaid principal, fees and costs (and attorneys' fees), all of which have accrued since the date of the first missed payment." At the end of such process, "the borrower will be no better off because he remains liable for the entire unpaid debt under the loan documents." The court opined that "the borrower is worse off because the amount of the debt has increased during the two-year period in which this foreclosure action has been pending, making a recasting of the mortgage more costly, if not prohibitively so."

The court decided that it would not permit the bank "to escape the consequences of its failure to follow the dictates of . . . §1304." The court reasoned that it was "inconceivable that the legislature . . . would simply allow the lenders 'a do over' without any penalties." The court therefore held that to effectuate "the intention of the legislature and provide a 'just and proper' relief to this homeowner," it should enjoin the lender "from collecting from the borrower any interest, fees, penalties or attorneys' fees due and owing on the mortgage or the underlying note from 90 days prior to the date of the filing of the complaint in this matter until the bank follows the requirements of . . . §1304, provides the 90-day notices as required, engages in the settlement conferences required by CPLR 3408 and moves to vacate the stay imposed by this court." The court further held that "any claims for any interest, fees or costs due from 90 days prior to the date of the filing of the complaint to the lender's compliance with . . . §1304 and CPLR 3408 and submits a motion to vacate the stay . . . in this case are permanently barred from collection."

Kearney v. Kearney, 11/6131, NYLJ 1202629913517, at *1 (Sup. MO, Decided November 7, 2013), Dollinger, J.

LAND USE

Land Use - Development - Town Allegedly Retaliated Against Plaintiffs After Plaintiffs Released YouTube Video Opposing Town's Proposed Housing Project - First Amendment - Equal Protection - Substantive Due Process

A federal magistrate judge (Magistrate) recommended that the defendant Town's motion to dismiss be granted as to the plaintiffs' First Amendment and Due Process claims, denied as to plaintiffs' Equal Protection claim and that the plaintiffs be given leave to replead. Both parties filed objections.

The plaintiffs had alleged that "the Town had violated their constitutional rights." The plaintiffs asserted that "after they released a video on YouTube opposing the Town's proposed housing project" (project), the Town "retaliated against them by releasing its own rebuttal YouTube video, targeting plaintiffs' home with baseless summonses and interfering with [the husband plaintiff's] plumbing license." The plaintiffs asserted First Amendment, Equal Protection and Substantive Due Process claims. The Town moved to dismiss the complaint.

The Magistrate had opined that the complaint contains "plausible allegations that a municipal custom or policy caused the violations" and recommended that "the case not be dismissed under the Rooker-Feldman doctrine" (federal court should not hear what is essentially an appeal from a state court judgment). The Magistrate recommended that the plaintiff's "First Amendment retaliation claim . . . be dismissed without prejudice and that plaintiffs be permitted to replead to allege a concrete harm." The Magistrate also recommended that the Substantive Due Process claim "be dismissed without prejudice on the ground it is unripe and that it be raised anew after final judgment by the . . . Town Court." Additionally, the Magistrate recommended that the Equal Pro tection claim proceed "as a class-of-one violation based on [a] retaining wall summons."

The complaint alleged that the plaintiff had released a YouTube video opposing the project. Shortly thereafter, the Town released its own video supporting the project. The Town's video publicized information about the plaintiffs' real estate taxes. A councilwoman allegedly told the plaintiffs that "the rebuttal video was specifically made in response to plaintiffs' video criticizing the Town." A day after the Town "voted on and approved a change in zoning to accommodate the . . . project," the plaintiffs received a summons "for a stone retaining wall on the boundary line between plaintiffs and their neighbor [summons], yet the neighbor was not ticketed." After the plaintiffs proved that "the neighbors owned the wall, the summons against plaintiff was dismissed." However, "the neighbor was not ticketed."

On the day after the project was approved, the plaintiffs were also ticketed because they lacked a certificate of occupancy (C of O) for their home. The plaintiffs thereafter requested "a town inspection to obtain approval for a 'letter-in-lieu' of a [C of O]" (Letter). The town inspector (inspector) thereafter issued "a 'Final Inspection for Construction prior to 1934,' which found that the structure was safe and the Letter was approved."

Approximately eight months later and allegedly without reason or justification, the plaintiff wife was advised that "the . . . Letter had been 'discredited.'" The plaintiff husband (husband) was allegedly told by the inspector that the inspector was being "written up for not doing his job when he inspected plaintiffs' home and that the subsequent denial of the Letter was part of a 'witch-hunt' against plaintiffs." After speaking with the inspector, the husband called a

Town official, who advised the husband "it was not safe to speak on his Town issued cell phone and that he would call [the husband] back from his private cell phone." The Town official allegedly thereafter told the husband that the Town attorney had demanded that the inspector be written up. The Town official further allegedly stated that the Town attorney had stated that the order came from "higher ups," specifically the Deputy Supervisor for the Town and that in his 24 years, he never saw the Town go after anyone so strongly.

The federal District Court (court) stated that "[a]ccepting the foregoing as true, plaintiffs' allegations raise an inference that the Town had a policy or custom of targeting private citizens who criticized the Town's actions." Accordingly, the Town's motion to dismiss the case based on Monell v. Dep't of Social Services of City of New York, 436 U.S. 658 (1978), was denied because the complaint contained "plausible allegations that a municipal custom or policy caused the violations."

With respect to the First Amendment Retaliation Claim, the court explained that:

> To establish a retaliation claim under §1983 in cases involving criticism of public officials by private citizens, a plaintiff must show that "(1) his conduct was protected by the First Amendment and (2) such conduct prompted or substantially caused defendant's action".... In addition, the Second Circuit generally "impose[s] an actual chill requirement for First Amendment retaliation claims".... ("[P]rivate citizens claiming retaliation for their criticism of public officials have been required to show that they suffered an 'actual chill' in their speech as a result")....
>
> "However, in limited contexts, other forms of harm have been accepted in place of this 'actual chilling' requirement".... Thus, the Second Circuit has described "the elements of a First Amendment retaliation claim in several ways, depending on the factual context".... "Despite these limited exceptions, as a general matter, First Amendment retaliation plaintiffs must typically allege 'actual chilling.'"

The plaintiffs argued that the summons for the retaining wall, which actually belonged to the neighbors, was evidence of a "concrete harm." The plaintiffs had to respond to "the summons, execute a land survey and coordinate with the ... Inspector to prove that the retaining wall was not theirs." The plaintiffs contended that had they failed to respond to the summons, a warrant would have been issued for their arrest and they would have been imprisoned. They contended that the Magistrate "overlooked these scenarios by finding that the ... summons was de minimus." The court explained that "First Amendment harm cannot be based on speculation or supposition" and concluded that the allegations did not amount to First Amendment harm.

A county District Court (County Court) had dismissed the summons for the lack of a C of O. The court dismissed the plaintiffs' First Cause of Action without prejudice and gave the plaintiffs permission to amend their complaint to allege a concrete harm.

The court then dismissed the plaintiffs' Due Process claim without prejudice. The plaintiffs had argued that such claim should be dismissed without prejudice because the C of O issues had not been decided by the County Court. However, while the motion was pending, the County Court dismissed the Town's claims.

With respect to the Equal Protection claim, the court explained: "Because plaintiffs bring their equal protection claim pursuant to the Fourteenth Amendment and 42 U.S.C. §1983, federal law applies to their claim and . . ., they were not required to bring a motion to dismiss in state court prior to filing their federal complaint.

The court adopted the Magistrate's recommendation that the Town's motion to dismiss be denied as to the plaintiffs' Equal Protection claim. Accordingly, the Town's motion to dismiss the complaint based on Monell grounds was denied and the motion to dismiss was denied with respect to the Equal Protection claim. The motion to dismiss the plaintiffs' First Amendment Retaliation and Due Process claims were dismissed without prejudice.

LaVertu v. The Town of Huntington, 13-CV-4378, NYLJ 1202658316846, at *1 (EDNY, Decided June 2, 2014), Feuerstein, J.

DEVELOPMENT

Development - Defamation - Plaintiff Developer's "SLAPP" Suit Alleging Defamation Against Community Opponents Dismissed - Appellate Division Affirmed

The plaintiffs had commenced an action to recover damages for defamation. The trial court granted the defendants summary judgment dismissing the complaint pursuant to Civil Rights Law (CRL) §§70-a and 76-a and awarded the defendants' attorney's fees. The plaintiffs appealed. The defendants cross-appealed from the trial court's denial of their motion for summary judgment on their counterclaim for punitive damages. The Appellate Division, Second Dep't (court) affirmed the trial court decision.

The property had previously been used as a tennis and racquet club. The club was a "nonconforming use under applicable zoning regulations." The plaintiffs intended to convert the property to a children's day camp (camp) and sought the approval of the Chief Building Inspector (Inspector) of the local town (Town). The plaintiffs wanted the Inspector to agree that the camp use would be "an interchangeable nonconforming use of the property," and therefore, a variance would not be needed.

The Inspector agreed that the plaintiffs' proposed plan "did not constitute a change or expansion of the preexisting nonconforming use of the . . . property." Community opponents then filed with the Town Zoning Board of Appeals, an application to review the Inspector's approval. "A flyer was distributed, which contained the names and contact information of the defendants, who were the president and vice president of one of the [opposing] civic organizations, urging residents to attend a public hearing. . . ." "The flyer suggested that the plaintiffs did not care about and had lied about the environmental impact of the proposed development. . . ."

The plaintiffs thereafter commenced the subject action, alleging, *inter alia*, that "statements in the flyer constituted defamation." The defendants counterclaimed that "this action was a strategic lawsuit against public participation," *i.e.*, a SLAPP suit, as defined in CRL §§70-a and 76-a and sought an award of attorneys' fees and punitive damages.

The court explained:

> Civil Rights Law §76-a was passed to protect citizens facing litigation arising from their public petitioning and participation. . . . by deterring strategic lawsuits against public participation, termed SLAPP suits. Related provisions . . . include [CRL] §70-a, which permits a defendant in such actions to recover costs and an attorney's fee, and CPLR 3211(g) and CPLR 3212(h), which require the plaintiff, on a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action or for summary judgment pursuant to CPLR 3212, to demonstrate that the action "has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law". . . .

The court found that the defendants had "established, prima facie, that the plaintiffs were public applicants and that the suit concerned a communication that was 'materially related' to the defendants' efforts to report on, comment on, or oppose the plaintiffs' application (see [CRL] §76-a[1][a]). . . . the statements at issue were made in an effort to garner

support for the defendants' opposition to the plaintiffs' proposed plan to develop the . . . camp. . . ." Additionally, the court found that the plaintiffs had "failed to demonstrate a substantial basis in fact and law . . . in support of their allegations that the challenged statements amounted to defamation per se . . ., that the statements were known to be false by the defendants, or that they were made with reckless disregard for the truth. . . ."

Accordingly, the court affirmed the summary judgment which dismissed the complaint and granted the defendants attorneys' fees. The court noted that "[t]he defendants established, prima facie, their entitlement to an attorney's fee under the [CRL], and in opposition, the plaintiffs failed to show that their claims had a substantial basis in fact and law." The court also affirmed the dismissal of the counterclaim for punitive damages. The defendants had failed to demonstrate that the lawsuit had been commenced "solely to harass, intimidate, punish, or otherwise maliciously inhibit their rights to free speech, petition, or association. . . ."

Comment: Just as a community group may think that a developer has tendered a misleading presentation about a contemplated project, a developer may think community opponents have issued untrue and misleading statements about a contemplated project. Developers know that individuals do not want to be named in a lawsuit. A defendant will not only incur expensive legal fees, but must disclose a pending litigation on mortgage, credit card and job applications, etc. Moreover, a defendant must live with uncertainty as to their ultimate liability on a very large monetary claim.

To an individual that opposes a proposed development, those consequences could be extremely intimidating. Thus, the Legislature has sought to protect free speech and the right to participate in a public approval process, by enacting, *inter alia*, CRL §§70-a and 76-a and courts will not hesitate to dismiss SLAPP suits.

The foregoing does not mean that developers are completely powerless to protect their interests from overly aggressive opponents. Thus, some false statements that are made with knowledge of their falsity or with reckless disregard, provided certain other elements of a cause of action are demonstrated. Opponents to a project may engage in other conduct that is violative of civil or criminal laws, *e.g.*, assault, trespass, vandalism, harassment, larceny, damage to property, etc. Additionally, under the "Noerr-Pennington doctrine," a competitor may oppose a project by making complaints to public authorities, without violating the anti-trust laws, provided that such complaints were not a "sham."

Since the courts, media and local public officials usually find law suits against a project's opponents to be repugnant, most developers and their counsel prefer to meet opposition based upon misinformation, with an aggressive effort to expose the misinformation by disseminating the "real facts," *e.g.*, correction of the misstatements and information as to a contemplated project's potential to provide jobs, tax revenue, additional housing and/or retail, etc.

Southampton Day Camp Realty, LLC v. Gormon, 32983/11, NYLJ 1202661184483, at *1 (App. Div., 2nd, Decided June 25, 2014), Before: Skelos, J.P., Dillon, Roman, Maltese, JJ.

Development - Injunction to Stop Development Denied - Although Required Referendum for A Proposed Annexation Was Not Held, Plaintiffs Waited About Seven Years - Developer Already Invested Approximately $25 Million Dollars - Statute of Limitations - Laches - Official's Conflict of Interest

This dispute involved development of a 396-unit townhouse project (project). Pursuant to the terms of a May 2006 confidential agreement, the defendant developers and others planned to acquire property for the project in the defendant Village and a defendant Town. The plan contemplated that part of the Town property would be annexed by the Village. The Town and the Village found that it was in the public interest for the Village to annex about 240 acres from the Town.

The Village annexed the property pursuant to a local law, which was filed with the Secretary of State in Dec. 2006. The 2006 local law "failed to mention the zoning classification," which had been referred to in the underlying order of annexation. That omission was corrected by a local law in 2008. Thereafter, an environmental review of the project was conducted in 2008 and 2009. In May 2010, the Village entered into a development agreement (Agreement) with the developers. The developers agreed to "complete or provide financial guarantees to construct a wastewater treatment plant. . . . The Village Planning Board certified subdivision approval and the final subdivision plat was filed in June 2011. Building permits were issued for . . . model townhouses, which were completed by July 2012."

In Oct. 2012, permits for Phase I of the project and wastewater treatment plant work were granted. That month, several plaintiffs in the subject case commenced "a declaratory judgment action challenging the 2011 final subdivision approval." In Apr. 2013, a trial court dismissed that action as time-barred and noted that it "would not have granted injunctive relief since those plaintiffs established neither a likelihood of success nor that the equities weighed in their favor."

Thereafter, construction continued and the developers completed the wastewater treatment plant. They also obtained 127 building permits and, by Jan. 2014, were in various stages of construction on 84 units. The developers alleged that they had already spent approximately $25 million on the project.

In Jan. 2014, the plaintiffs commenced the subject action, seeking a permanent injunction. They alleged, *inter alia*, that "the 2006 annexation was void because inhabitants of the annexed area had not voted on the issue of annexation, that the [Agreement] was void because the then Mayor of the Village . . . had a conflict of interest, and that the 2008 local law, as well as zoning determinations, had various defects." The plaintiffs moved for a preliminary injunction and a temporary restraining order (TRO).

A trial court had granted a TRO and a preliminary injunction which stopped construction, with limited exceptions. The Appellate Division (court) had previously permitted the completion of 12 buildings that had already been framed. The defendants argued, *inter alia*, that the lengthy delays in commencing the subject action, as well as the fact that the earlier action had been dismissed, "weigh[s] strongly against finding that plaintiffs met their burden of establishing a likelihood of success."

The court explained that "[r]esidents of an area proposed for annexation have the right to vote whether to approve the annexation. . . ." However, the "plaintiffs waited over seven years before challenging the annexation [and] [d]uring such time extensive governmental activity occurred - ranging from review under the [SEQRA] to various zoning determinations - and, in reliance thereon, the project defendants expended significant money." There was no evidence that the plaintiffs who lived in the annexed area or other residents of that area, did not receive Village municipal services during the past seven years or were barred from participating in Village governmental activities, "including providing input to the Planning Board regarding the proposed project as it progressed."

The court found that the failure to conduct a referendum did not leave the annexation "subject to being set aside at any time in the future without regard to any time limitation." The court explained that "[a] statute of limitations may apply even when conduct inconsistent with a statute or the state constitution is alleged. . . ." Although "a [s]tatute of [l]imitations does not have the effect of curing the underlying wrong," it "extinguishes the right to judicial relief." Thus, the court held that given the seven year delay in commencing an action, they failed to demonstrate a likelihood that a challenge to "the annexation based upon the failure to conduct a referendum. . . ."

The plaintiffs also alleged that the 2010 development agreement was void because the Village mayor had "a conflict of interest arising from the 2009 acquisition of some project property by himself and his parents. . . ." There is a three year statute of limitations with respect to such claim and such deeds had been a matter of public record since 2009. Thus, "[a]ny conflict was known or should have been known as of the execution in 2010 of the [Agreement], which was also a public document. This action was not brought until 2014."

The court explained "[l]ong delays can be relevant to the issue of whether equitable injunctive relief should be granted. . . . Although plaintiffs allege some unsavory (or worse) conduct by certain people involved . . . in the project, it is not clear from this record whether they can successfully show that the project defendants engaged in such conduct so as to prevent them from relying on equitable defenses such as laches. . . ." The court also emphasized that "that plaintiffs [had] been aware of the . . . project for many years, with at least one of them having sold property to [the developer's entity] in 2006, many live nearby and are capable of observing the ongoing construction, and some participated in the 2012 lawsuit challenging the final subdivision approval. No appeal was taken from the dismissal of that lawsuit" and although that construction has been "ongoing since 2012, plaintiffs did not commence this action until January 2014."

The plaintiffs claimed that they had not discovered the May 2006 confidential agreement until 2013. However, their claims were not based primarily on that agreement, but rather upon the "aged defects in public actions by various Village entities." Moreover, the project "was well under way at the time that plaintiffs commenced this action. . . ." Additionally, the delay in commencing this action was "significant and a route around the time-related issues to the merits has not been clearly plotted in the papers before us." Since the plaintiffs failed to make "a 'strong showing' of likelihood of success on the merits" and the court rejected the plaintiffs' other arguments, the court denied the motion for a preliminary injunction.

Rural Community Coalition, Inc. v. Village of Bloomingburg, 518404, NYLJ 1202667903261, at *1 (App. Div., 3rd, Decided June 5, 2014), Before: Lahtinen, J.P., McCarthy, Rose, Egan Jr. and Lynch, JJ. Decision by Lahtinen, J.P., McCarthy, Rose, Egan Jr. and Lynch, JJ., concur.

ADVERSE POSSESSION

Defendant's Claim of Prescriptive Easement And Request For Permanent Injunction Enjoining the Plaintiff From Interfering With the Easement Rejected - "Hostile" Element Not Established - Plaintiff Had Permitted Others to Traverse His Property As A "Neighborly Accommodation" Because It Benefitted the Plaintiff's Stores As Well As Other Stores - Even If A Prescriptive Easement Had Been Established, the Proposed Use Would Have Exceeded the Extent of the Easement

A plaintiff sought a declaration that the defendants did not possess a prescriptive easement, dismissal of the defendants' counterclaims, or in the alternative, a declaration that "the proposed increased uses exceed any existing limited prescriptive easement, which would then constitute trespass, and a permanent injunction enjoining defendants from trespassing over plaintiff's property to gain access to the rear of the [defendants'] premises." The defendants sought a declaration that they and their tenants have a prescriptive easement over the plaintiff's property and a permanent injunction enjoining the plaintiff from interfering with such easement.

This action involved adjoining single story properties that contained retail stores fronting on a commercial road (road). Parking lots were located at the rear of the premises. A small parking area behind the defendants' premises, was used by the defendants' retail tenants, mostly for store owner parking. The defendants' tenants also had rear entrances to their businesses.

In order to access the defendants' parking area in the rear entrance of the defendants' tenants' businesses, vehicles and pedestrians must "cross over plaintiff's private parking lot." The defendants' tenants' stores are all accessible from the road.

The plaintiff had acquired the property that adjoins the defendants' property in 1974. In 2011, the defendants obtained land use approvals which would permit the opening of a restaurant in one of defendants' vacant storefronts. The plaintiff had commenced an Art. 78 petition challenging such permits. The plaintiff's petition had been dismissed in a prior court decision.

The court explained that "'[a]n easement by prescription is demonstrated by proof of the adverse, open and notorious, and continuous use of the subject property for the prescriptive period,' which is *ten years*. . . ." Here, the "defendants' traversing of plaintiff's parking lot was open, notorious, and continuous for the prescriptive period." The salient issue involved the question of hostility.

The court further explained that:

> [i]t is well-settled that a prescriptive easement arises by the adverse, open, notorious and continuous use of another's land for the prescriptive period. . . . Generally such use of a right-of-way is presumed to be adverse and casts the burden on the owner of the servient tenement to show that the use was by license. . . .
>
> However, the presumption is inapplicable when the general public uses the subject area, as is the case here. . . . Thus, defendants are

required to prove that their traversing of plaintiff's parking lot is adverse/hostile, in order to establish the existence of a prescriptive easement in their favor.

The plaintiff's manager's testimony described the defendants' tenants' businesses as "a dry cleaner, a shoe repair shop, a beauty parlor and . . . former gift shop." Such testimony also described "their customers and their hours of operation." The plaintiff complained that "the former gift shop" had now been leased to an Italian restaurant.

At one time, a plaintiff's security guard asked pedestrians crossing the plaintiff's property where they were going. The defendants' tenants complained and ultimately, the manager told the tenants that "their customers could continue to traverse the [plaintiff's] lot to access the [defendants'] property."

The contemplated restaurant would have seating for 45 customers, plus counter service and would operate past 9:45 p.m., Monday through Thursday. The plaintiff alleged that none of the defendants' other tenants operated that late at night. The defendants' tenants are responsible for clearing snow and ice. Trucks, including refrigerated trucks, will make deliveries four times a week and refrigerated garbage room would be required for the restaurant. Moreover, a septic system would have to be upgraded to accommodate the restaurant. The plaintiff concluded that "the number of people, customers and employees of the restaurant, will be greater than the number of people" the plaintiff's manager had seen in eighteen years with other defendants' tenants. The plaintiff's existing stores include an "optician, a frame store and toy store that close about 6:00 p.m., and a deli that remains open until 8:00 p.m., and a market that closes at 7:00."

The plaintiff further testified that members of the public traverse his lot and the defendants' property and that he "permits such access as a matter of willing accord and neighborly accommodation. . . ." The plaintiff denied that it interfered with pedestrians crossing its lot to the defendants' lot because it was a "benefit to all the stores for the customers to cross and to shop." The plaintiff confirmed that he had discontinued the security guard and his tenants "still benefit from shoppers going from one store to another." Thus, he claimed that he permits patrons of other stores to traverse his property because of the "mutual benefit." The plaintiff acknowledged there were a few instances when he deviated from such practice and explained the circumstances relating thereto.

Additionally, the plaintiff testified that he had commenced the subject action "to protect himself from liability, as well as to avoid additional expenses with regard to lighting his property, snow removal and security due to the increased traffic during late hours, beyond that which has existed for forty years." The plaintiff "anticipated increased traffic of people visiting a successful restaurant will result in patrons parking in his lot, decreasing available spots for his tenants' customers, thereby negatively impacting on his tenants and his business." Parking on the plaintiff's property had never been allowed by anyone other than the plaintiff's tenants, employees and customers. The plaintiff also noted that the proposed restaurateur has a nearby restaurant "with cars or trucks delivering pizzas all afternoon."

The defendants testified that there was no longer a lease with the restaurant, although they were still discussing a possible tenancy. He acknowledged that he was "unaware of a grant or permission by [plaintiff] to access the [defendants'] property, nor did he ever seek permission from [plaintiff], though [defendants'] tenants, employees, invitees, customers and delivery trucks have been traversing the [plaintiff's] property since at least the late 1970's."

The court found that the proposed restaurant would "vastly" exceed "the limits of any prior permissive use and such use must be enjoined." The court further found that the plaintiff had previously acted to "protect his property interest when others have 'abused the privilege' afforded them by his 'neighborly accommodation.'" The court noted that the plaintiff had "consistently opposed any expansion of the unspoken, but nonetheless, [permitted] use granted by [plaintiff] to the public at large and to [defendants]."

The court held that the defendants failed to establish "by clear and convincing evidence hostility to rebut the permissive public use of the [plaintiff's] parcel," *i.e.*, the plaintiff's conduct demonstrated "neighborly accommodation," rather than "hostility." Therefore, the court found that "no prescriptive easement exists." Moreover, even if the defendants had been able to establish a prescriptive easement, "the right acquired by prescription is commensurate with the right enjoyed" and "[i]f the proposed use exceeds any arguable right enjoyed by Defendant."

Comment: Robert M. Calica, Esq. of Rosenberg Calica & Birney LLP, counsel to the plaintiff, observed that the prescriptive easement never ripened because his client established that "its conduct was a 'neighborly accommodation' which could now be revoked." He also noted that this case is of interest because it confirms that an "intensification" of the use of an easement by prescription is impermissible and may be permanently enjoined.

Colin Realty Co., LLC v. Manhasset Pizza, Sup. Ct., Nassau Co., Index No. 6563/11, decided 11/18/13, Murphy, J.

ENVIRONMENTAL

Environmental - Subsequent Owner Not Obligated to Provide Financial Assurance For Ongoing Remedial Action At Former Hazardous Waste Storage Facility - Regulations Inapplicable Where Owner Never Had Or Was Required to Have A Hazardous Waste Treatment, Storage Or Disposal Facility Permit

The petitioners had commenced an Art. 78 proceeding to challenge a determination by the NYS Dep't of Environmental Conservation (DEC). The determination required the petitioners to, *inter alia*, "provide financial assurance for ongoing corrective action at a former hazardous waste storage facility."

The court explained that the issue of "whether a subsequent owner of property formerly used as a permitted hazardous waste treatment, storage or disposal (hereinafter TSD) facility is subject to the requirement set forth in ECL article 27, title 9 and the regulations enacted by [DEC] . . . to provide financial assurance for the ongoing performance of corrective action on the property," is "apparently one of first impression in the courts of this state." Based upon a review of "the applicable statutes and regulations, and . . . in view of the absence of any express language to that effect therein," the court held that "a subsequent owner is not, without more, subject to such requirements."

"A" owned and operated a metals recovery facility. "A" had obtained a permit to operate a hazardous waste storage facility on the property. After the permit expired in 1992, "A" ceased operations and, pursuant to DEC requirements, "was directed to take certain corrective action to address contaminated soil and groundwater on the property." Pursuant to a 1994 consent order ("A" Order), "A" was obligated to submit "'a detailed post-remedial operation and maintenance plan,' construct an on-site corrective action management unit (CAMU) to hold approximately 21,000 tons of treated soil, and provide financial assurance for the plan." "['A'] recorded a declaration of covenants and restrictions, which provided public notice of, among other things, the ['A' Order] and information about the contaminants found on the property and the existence of the CAMU."

In 1999, "A" sold the property to "B". In 2005, "B" sold the property to petitioner "C". "C" thereafter sold part of the property to petitioner "D". "D" thereafter "assumed responsibility for conducting environmental monitoring and testing and general oversight of the CAMU."

In 2007, the DEC commenced an enforcement proceeding against "B" and the petitioners, alleging that "they were current or former owners and/or operators of a facility" and that they had "failed to provide the requisite financial assurance to guarantee completion of the corrective action. . . ." The DEC and "B" had entered into a consent order, pursuant to which "B" agreed to secure financial assurance. The DEC had moved for an order without a hearing against the petitioners. An administrative law judge (ALJ) found that the petitioners were "jointly and severally responsible for providing financial assurance" and were responsible for "civil penalties for their failure to do so." The NYS Commissioner of Environmental Conservation adopted most of the ALJ's report. The petitioners then commenced the subject Art. 78 proceeding to annul the Commissioner's determination. Although the trial court dismissed the petition, the Appellate Division (Court) reversed.

The court observed that "the regulatory framework appears to contemplate that corrective action - and attendant financial assurance requirements - are to be imposed as a condition of obtaining a permit to operate a TSD facility." Here, however, the DEC had not determined that the petitioners were TSD owners or operators and there was no evidence that they had ever been required to obtain a TSD permit for the property.

The DEC had argued that the petitioners were "responsible for providing financial assurance by virtue of their ownership of a solid waste management unit." The petitioners argued that "the financial assurance requirement [was] applicable only to owners and/or operators of a TSD facility who were, at some time, actively involved in the treatment, disposal or storage of hazardous waste, subject to the permit requirements of 6 NYCRR part 373. . . ."

The court found that "the statutory and regulatory framework" did not support the DEC's determination that the financial assurance requirements apply to the petitioners. There was "nothing in the plain language [of the subject statutes] or DEC's enabling regulations [which] imposes the financial assurance requirement on subsequent owners of a former TSD facility that never had, or were required to have, a TSD permit or were parties to a corrective action order on the property in question." The court opined that "the clear language of the ECL and regulations expressly links the financial assurance requirement with a permitted TSD facility. As mere subsequent owners of property where a former TSD facility was present, petitioners do not fall within the purview of such requirement."

Moreover, "the mere presence of the CAMU does not subject petitioners to the financial assurance requirement." The court explained that the DEC, in essence, sought "to impose strict liability to provide financial assurance, in perpetuity, on all subsequent owners of property on which a former TSD facility was operated." The court reasoned that had that been the Legislature's intent, "it would have done so expressly." The court noted that "the Legislature did exactly that in the context of New York's 'Superfund Law,' which requires the owner of an inactive hazardous waste disposal site, and/or any person responsible for the disposal of hazardous wastes at such site, to take remedial action. . . ." Thus, the court concluded that "if the Legislature had intended to impose liability on landowners for providing financial assurance under New York's version of [The Federal Resource Conservation and Recovery Act] - without regard to whether they had ever operated a TSD facility on the property in question - clear language to that effect could easily have found its place in the statute and regulations."

Accordingly, the court found that the DEC's interpretation of the subject regulations was arbitrary and capricious and affected by an error of law and the court annulled the DEC's determination. The court noted that the DEC may still seek redress from those who remain obligated to provide financial assurance such as a former TSD facility owner and/or party to the consent order and the DEC may seek "appropriate relief against petitioners under the Superfund Law, if circumstances arise in the future where that law is implicated." The DEC had not claimed that the property "currently presents a significant threat to public health or the environment."

Matter of Thompson Corners, LLC v. New York State Department of Environmental Conservation, 516042, NYLJ 1202655832833, at *1 (App. Div., 3rd, Decided May 15, 2014), Before: Peters, P.J., Stein, McCarthy and Egan Jr., JJ. Decision by Stein, J., all concur.

Environmental - Claim to Recover Costs For Remediating A Building Contaminated by the Sept. 11, 2001 Attack On the World Trade Center Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act Rejected - Attack Constituted An "Act of War" For Purposes of CERCLA's Affirmative Defense and Defendants Entitled to Judgment On the Pleadings

A real estate developer sued the owners and lessees of the World Trade Center (WTC) and the owners of the airplanes that crashed into it, under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The plaintiff sought to recover "costs incurred in remediating a nearby building contaminated by the September 11, 2001 attack on the World Trade Center" (attack). The trial court found that the attack "constituted an 'act of war' for purposes of CERCLA's affirmative defense, and . . . the defendants . . . were entitled to a judgment on the pleadings." The Second Circuit Court of Appeals (Court) agreed. The Court explained:

> Although CERCLA's strict liability scheme casts a wide net, an "act of war" defense avoids ensnarement of persons who bear no responsibility for the release of harmful substances. The attacks come within this defense. . . . CERCLA was not intended to create liability for the dispersal of debris and wreckage from a catastrophe that was indistinguishable from military attack in purpose, scale, means, and effect. Both the President and Congress responded to the [attack] by labeling them acts of war, and this classification warrants notice, and perhaps some deference, in the CERCLA context. The decisive point is that the [attack] directly and immediately caused the release, and were the "sole cause" of the release because the [attack] "overwhelm[ed] and swamp[ed] the contributions of the defendant[s]."

After the attack, the plaintiff began renovating a 12-story office building into a hotel. State and Federal environmental agencies (agencies) notified the plaintiff that part of its building may contain "finely-ground substances from the [WTC], including concrete, asbestos, silicon, fiberglass, benzene, lead, and mercury: so-called 'WTC Dust.'" The agencies required the plaintiff to perform "costly remediation" work and the plaintiff sought to recover such costs from the defendants.

The Court explained that CERCLA's "act of war" defense requires that "the alleged polluter . . . prove by a preponderance of evidence that the release of a hazardous substance was caused 'solely by . . . an act of war.'"

The trial court had noted that "the attacks were 'unique in our history,'" that "al-Qaeda's leadership 'declared war on the United States, and organized a sophisticated, coordinated, and well-financed set of attacks intended to bring down the leading commercial and political institutions of the United States," that Congress and the President had recognized al-Qaeda's attacks as an "act of war" and "sent U.S. troops 'to wage war against those who perpetrated the attacks and the collaborating Taliban government,'" and two prior Supreme Court decisions had held that "the attacks 'were acts of war against the United States.'" The trial court further found that "the 'act of war' was the sole cause of any release of hazardous

substances from the [WTC's] collapse" because the attack "overwhelm[ed] and swamp[ed] the contributions of the defendant[s]." The trial court noted that its decision was tailored to the subject facts and "was not necessarily applicable in contexts presenting different considerations, such as 'cognate laws of insurance' or the Anti-Terrorism Act of 1992."

CERCLA imposes strict liability for hazardous waste cleanup "on certain persons who arrange for the disposal or treatment of hazardous waste, and on certain persons who transport hazardous waste." CERCLA embodies three affirmative defenses. CERCLA provides "[t]here shall be no liability under [CERCLA] for a person otherwise liable" where the damages were "caused solely by," an act of God; an act of war; an act or omission of an unrelated third party; or any combination of the foregoing paragraphs.

The term "'Act of war' is undefined" in the statute and the legislative history is silent on the intended meaning of the term. The Court considered "the bare meaning of the . . . phrase" and "its placement and purpose in the statutory scheme." Generally, CERCLA is to be read broadly and its exceptions are "generally read narrowly," in order to "accomplish [CERCLA's] remedial] goals." CERCLA was intended "to ensure that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." The Court opined that such purpose would not be served by "imposing CERCLA liability on the airlines and the owners (and lessors) of the real estate. . . . The attacks wrested from the defendants all control over the planes and the buildings, obviated any precautions or prudent measures defendants might have taken to prevent contamination, and located sole responsibility for the event and the environmental consequences on fanatics whose acts the defendants were not bound by CERCLA to anticipate or prevent."

The Court acknowledged that "the . . . attacks were not carried out by a state or a government." However, "[w]ar, in the CERCLA context, is not limited to opposing states fielding combatants in uniform under formal declarations." Moreover, "the . . . attacks were different in means, scale, and loss from any other terrorist attack." The Court also cited congressional authorization for the President to use military force pursuant to the War Powers Act. The President had declared the September 11th attacks to be "acts of war and treated them as such."

The Court believed that its interpretation was "not at odds with precedent that 'act of war' is construed narrowly in insurance contracts." "The purpose of an all-risk insurance contract is to protect against any insurable loss not expressly excluded by the insurer or caused by the insured." Thus, "[a] narrow reading of a contractual act of war' exclusion thus achieves the parties' contractual intent, insulating the policyholder from loss. The remedial purpose of CERCLA is both different and unrelated."

Additionally, the Court's interpretation is not "at odds with the Anti-Terrorism Act ('ATA'). . . . The purpose of the ATA was '[t]o provide a new civil cause of action . . . for international terrorism that provides extraterritorial jurisdiction over terrorist acts abroad against United States nationals'. . . . The statutory exception for an act of war" under ATA defines an act of war "as 'any act occurring in the course of - (A) declared war; (B) armed conflict, whether or not war has been declared, between two or more nations; or (C) armed conflict between military forces of any origin." Thus, acts of war "are distinguished from acts of terrorism."

The plaintiff argued that such distinction should be applied in the CERCLA context. However, ATA was intended "to differentiate between acts of terrorism and acts of war, while CERCLA is silent as to terrorism." Thus, "in the CERCLA context, an event may be both

an act of war and an act of terrorism; under the ATA regime, it may not." Moreover, "ATA applies solely abroad, whereas CERCLA only applies domestically."

The plaintiff also asserted that "the composition of the [WTC Dust] would have been less harmful but for actions previously taken by the owners of the airplanes and the real estate." The Court found that such argument did "not raise an issue of fact" or warrant discovery. In the CERCLA statute, "[t]he phrase 'act of war' is listed in parallel with 'act of God.'" The Court reasoned that "[i]t would be absurd to impose CERCLA liability on the owners of property that is demolished and dispersed by a tornado. A tornado, which scatters dust and all else, is the 'sole cause' of the environmental damage left in its wake notwithstanding that the owners of flying buildings did not abate asbestos, or that farmers may have added chemicals to the soil that was picked up and scattered."

Additionally, the Court denied the plaintiff's claim for common-law indemnification that "[u]nder New York law, an indemnitor must bear some fault for the damages suffered by the indemnitee, whether on account of negligence, equitable considerations, or statutory requirements."

Thus, the Court held that the act of war defense barred the CERCLA claim and since "no legal duty or equitable consideration obligated the defendants to remediate WTC Dust" from the plaintiff's building, the common law indemnity claim was also dismissed.

Finally, the plaintiff had argued that the attack was covered by "the third-party affirmative defense, but that discovery would be required for defendants to meet their burden on that defense." The Court held that since the claims were barred by the act-of-war defense, it "need not decide whether they would also be barred by the 'third-party' defense."

In re September 11 Litigation: Cedar & Washington Asso., LLC v. The Port Authority of New York and New Jersey, 10-4197, NYLJ 1202653920509, at *1 (2d Cir., Decided May 2, 2014). Before: Jacobs, Cabranes, and Livingston, C.JJ. Decision by Jacobs, C.J.

MISCELLANEOUS

Executor Surcharge In Sum of $630,000 Plus Interest for Breach of Fiduciary Duty in Selling Real Estate Property Grossly Below Its Fair Market Value

In a contested accounting proceeding, the movants had moved pursuant to CPLR §3212 for "an order granting partial summary judgment and seeking an order surcharging the executor the sum of $630,000 plus statutory interest for breach of his fiduciary duty in selling estate property grossly below its fair market value of $1.3 million." The decedent had died on Mar. 31, 2009. All of the residuary legatees and the Charities Bureau of the New York State Attorney General objected to an accounting on various grounds. The subject motions addressed an "objection relating to the sale of the decedent's real property below market value."

The decedent owned a brownstone building located in Brooklyn. The executor had entered into a contract to sell the property to the purchaser, a personal acquaintance of the executor. On Apr. 12, 2011, the executor sold the property for the sum of $670,000. Three days later, the purchaser sold the property for $1.3 million.

The movants asserted that the executor had "breached his fiduciary duty to the estate beneficiaries by selling the property below fair market value, failing to exercise due diligence and prudence in marketing the property to obtain the highest price for the property, and engaging in a sale of the property that was not an arm's length transaction. The movants contend that [the executor] was negligent in underselling the house to his personal acquaintance for a 'sweetheart price,' who then 'flipped' the property three days later at fair market value."

The executor argued that the house had been in "dilapidated condition and in need of major repairs and that $1.3 million was not the fair market value of the house. . . ." The executor had "no explanation for how the house resold for double its price within three days."

The court explained:

> EPTL 11-1.1(b) (5) (B) provides that a fiduciary is authorized to sell estate property "[a]t public or private sale, and on such terms as in the opinion of the fiduciary will be most advantageous to those interested therein." In performing his fiduciary duty as executor for the decedent's estate, [the executor] was required to use good business judgment for the benefit of the beneficiaries. . . . To the extent that the sale of the house does not meet this standard, the beneficiaries of the estate may seek to surcharge him. . . . To obtain such a surcharge, it must be shown that the fiduciary acted negligently and "with an absence of diligence and prudence. . . ."

The movants argued that the subject sale was "not an arm's length transaction, was not most advantageous to the beneficiaries, and was not entered into with due diligence." The executor had retained a real estate agent who allegedly "had virtually no experience with listing and marketing property in the Brooklyn real estate market." The executor had not consulted with any other real estate company, nor had he hired a brokerage firm based in Brooklyn since he did not "know anyone out there." The executor testified that the real estate broker was "related to his family" and he "trusted . . . that he would handle it well." The

movants asserted that the broker had been hired not because he was the best qualified and able to obtain the best price, but merely because the executor had a personal relationship with him.

The movants emphasized that the property was sold at below market value to a personal acquaintance of the executor, rather than to "a bona fide purchaser." The executor and the purchaser knew each other from having attended "the same church bible study group" and they worked together on the board of a not-for-profit corporation, in which the purchaser was the chairperson. The executor further testified that he and the purchaser knew each other for several years prior to the sale, and the broker had been hired to work as security for the purchaser's not-for-profit corporate events. The executor claimed that he had been advised "the property was in bad condition and unsafe to show to purchasers." The executor confirmed that the broker had presented him with no other purchasers and he was unaware that the purchaser had resold the house for $1.3 million.

On the motion for summary judgment, the executor did not submit an affidavit in opposition, nor did he submit affidavits from the purchaser, the broker, prior counsel, or any other individual with personal knowledge of the facts. Rather, the executor submitted only an affirmation by his current counsel. The court noted that an attorney's affirmation "is devoid of any personal knowledge of the facts and, as such, offers no probative value."

The court found that the executor had "breached his fiduciary duty by failing to exercise due care and diligent effort in selling the house to maximize the benefit for the decedent's beneficiaries and the property at below fair market value to the detriment of the beneficiaries."

The executor had not obtained a current appraisal of the property, had not spoken with any realtors in Brooklyn to ascertain the sale price of comparable properties in the neighborhood, had not visited the property for a lengthy period prior to the sale, did not know how the property was being advertised, did not know how many people, if any, had been shown the property and he had never had any repair or maintenance work done on the property. The "date of death" appraisal valued the property in early 2009 at $800,000. The New York City Dep't of Finance had assessed the property value at "$1.1 million for tax year 2010/2011 and assessed the property's value at $1.3 million for tax year 2011/2012."

Additionally, the contract of sale between the purchaser and the buyer that the purchaser had flipped the property to had been executed on Mar. 4, 2011, one month prior to the Apr. 12, 2011 sale by the executor. Thus, the court observed that there had been a purchaser "ready, willing, and able to buy the property for $1.3 million during the same period that [executor] sold the property for $670,000." The court opined that "the fair market value at the time of sale was double [the executor's] selling price."

The court found that the executor had:

> made no efforts to broadly market the house, did not have any appraisals done to determine the market value of the house, did not hire an independent experienced broker familiar with selling Brooklyn properties, relied solely on a personal friend to sell the house who presented only one buyer, a mutual acquaintance to whom [executor] grossly undersold the property, all to the detriment of the beneficiaries. [Executor's] opposing argument that $1.3 million was not the fair market value of the property consists of sheer speculation and unsubstantiated hearsay.

> [Executor] proffers no evidentiary proof in admissible form sufficient to require a trial on material issues of fact.

Accordingly, the court found that the executor had "breached his fiduciary duty by selling the property below its fair market value of $1.3 million, by failing to sell the property on terms that were most advantageous to the estate beneficiaries, and by failing to exercise good business judgment in the sale of the property." The court therefore surcharged the executor in the amount of $630,000, constituting the difference between the property's fair market value at the time of the sale and the price that the executor had sold the property for. The court also awarded 6% interest.

Comment: This case illustrates, *inter alia*, that fiduciaries, whether executors, receivers, partners nor otherwise, have a duty to act in a reasonably prudent manner when disposing of real estate (and other) assets. What is reasonable depends upon the circumstances. Here, the property was being sold in a local market where neither the executor nor the real estate broker had experience selling homes. Not only was no appraisal obtained, but there was no effort to consult with local brokers to ascertain comparable price comparisons and other relevant information.

The executor had apparently failed to ascertain exactly what the physical condition was and the cost of necessary repairs. There was no evidence that the property had been aggressively marketed, and in fact, the evidence indicated that it had not been aggressively marketed.

There is no rule that a fiduciary must retain a real estate broker who is located in the neighborhood where the property is located. Today, substantial information is available on the internet, it is easy to market property on multiple websites and it is easy to ascertain what nearby homes have sold for. However, while websites like Zillow and Street Easy can provide significant useful information, they are sometimes of limited value since they often lack information as to, *e.g.*, the interior improvements that may have been made to a particular property, the actual physical condition of a property that had recently been sold, the circumstances relating to such recent sales, recent trends or negative facts that impact a subject property. Publicly reported prices usually do not reveal whether a particular sale was a "fire sale" because, *e.g.*, the sellers had gone bankrupt, were going through a divorce or had an immediate need for the proceeds because of a sudden need to relocate.

A property may have unique characteristics that could materially impact a value. For instance, a residential building may contain some retail space which is located at a highly visible well-trafficked intersection.

Dexter Guerrieri, President of Vandenberg, The Townhouse Experts, who specializes in NYC townhouse sales, noted that some owners will say "[t]his is America. I can ask as high a price as I want to!" However, "sleepless nights and aggravation are the hallmarks of sellers who realize after-the-fact that they didn't set the right sales price. Price too low, and you leave money on the table. Price too high, and you risk lost rental income and opportunity costs from a protracted sales process. It usually results from too little information about market values. Without exaggeration, we have seen homes overpriced by two million dollars or more that sit on the market for two years and sometimes longer. It is extremely difficult for agents who occasionally sell in the area to interpret limited data. And that is without taking into consideration the all-important location, location, location. Basing an estimated value on price per square foot is only useful as a generality when comparing one year's sales to the next. It really is not a fair standard of measurement in determining individual property values."

Mr. Guerrieri emphasized that "value depends on intangibles only a local broker knows. For example, configuration, degree of renovation and the precise block and side of the street. Ideally a homeowner will select an agent who spends all day every day in the local market and is a leader in numbers of sales in their particular sub-market."

Andrea Levine, Broker/Owner of Keller Williams Realty Gold Coast, located in Great Neck, New York, asserts that "sellers are better off using a local real estate agent then trying to sell the property themselves through websites like Zillow, Trulia or Street Easy. First statistics show that most purchasers will adjust their offers downward from the asking (or market value) price by an amount equal to the Real Estate Agent's commission since their rationale is that the seller will not be paying a commission, hence the asking (market value) is worth that much less.

Second, by law, a real estate broker that has a contractual agreement with the seller must place the seller's interests above the interests of everybody else and must give undivided loyalty to the seller. When someone attempts to sell their own home without a broker and a buyer's broker brings a potential buyer, the broker does not have such obligations to the seller. In fact, the buyer's broker's responsibility is to their customer/client and the seller has no representation."

Ms. Levine explained that "most of the internet residential real estate services take information from the local Multiple Listing services, including listing price and sales of similar properties in the vicinity of your home. They then apply an algorithm and come up with a market value for your property. I have never spoken with an algorithm to discuss the condition of the property (needs a new roof, oil tank is buried in the front yard, rooms cluttered, pet odor, windows need replacement, on and on and on). When was Zillow in your home to consider that the kitchen was renovated three years ago at a cost of $125,000? Does Zillow, Trulia or Easy Street know that the finished basement with a full bath was constructed without a permit and therefore, you will be unable to obtain a Certificate of Occupancy for the work. A finished basement with a Certificate of Occupancy is worth more than one without a Certificate of Occupancy. If Zillow, Trulia, Street Easy, etc. make a mistake in representing the condition of your home, do you have responsibility? Who will qualify the purchaser, *i.e.*, does the purchaser have to sell his or her home in order to buy your home, can the purchaser provide proof of funds, mortgage commitment, etc.? This illustrates the value that a knowledgeable local real estate broker brings to the table in order to establish the correct market value of your property."

Although internet services provide valuable information for sellers and purchasers. I agree with the foregoing broker observations. Having said that, I also recognize that some sellers are willing to and are capable of selling their own properties. They may either be experienced or they are able to obtain advice from experienced people and are willing to do their own investigative work and expend the substantial time and effort necessary to sell their property. However, as the subject case illustrates, when the seller has fiduciary duties, it must act in a reasonably prudent manner. An executor cannot take risks that may be permissible if the executor were acting solely for its own account.

Matter of Billmyer, 2009-1485/B, NYLJ 1202652592957, at *1 (Surr., KI, Decided April 14, 2014), Surrogate Torres.

Purchaser of Residential Mortgage-Backed Securities Sued Claiming Fraud, Negligent Misrepresentation, Aiding and Abetting A Fraud and Rescission

This action arose from the plaintiffs' investment in residential mortgage-backed securities (RMBS) that were issued or underwritten by the defendants. The defendants moved to strike the complaint pursuant to Federal Rules of Civil Procedure (FRCP) 12(b)(1) and (6).

The complaint alleged that the defendants had engaged in improprieties in connection with "the creation, offering, and sale of certain RMBS." The claims included "common law fraud, fraudulent concealment, and, in the alternative, negligent misrepresentation, . . ., claims of aiding and abetting fraud or, alternatively, a claim of rescission based on mutual mistake."

The plaintiffs had purchased more than $243 million worth of RMBS certificates from the defendants. The plaintiffs alleged that the defendants failed to reveal in any "Offering Materials [OM] that originators systematically abandoned their underwriting standards [standards], thereby reducing the quality of loans in the securitization pool [pool] by making it less likely that borrowers would be able to repay." They further alleged that the defendants "manipulated and failed to disclose the true results of their due diligence vendors' [DD Vendor] review of the . . . pools." The plaintiffs also alleged that the defendants understated the Loan to Value (LTV) and Combined Loan to Value (CLTV) ratios of the pools "by overstating the appraised values of the underlying properties." The plaintiffs further alleged misrepresentations about the owner-occupancy status of mortgaged properties and the failure to transfer certain mortgages and notes [mortgages] to the RMBS trusts.

In the OM, the defendants represented that the underlying loans (loans) conform "with originators' underwriting guidelines [guidelines] or possessed sufficient 'compensating factors' to justify inclusion in the securitizations." The defendants had represented that they do their own "redundant due diligence review of loans made by the originators." The complaint alleged that the defendants "knew that 'the originators systematically abandoned their . . . guidelines,'" "ignored red flags during the due diligence process" that indicated that the loans, "neither complied with the . . . guidelines nor had any compensating factors." The plaintiff contended that the defendants and their DD Vendor had access to and performed due diligence on loan files and, therefore, "either knew or was reckless in not knowing that the originators had abandoned their . . . guidelines."

The plaintiffs cited a Federal Housing Finance Agency (FHFA) forensic review of loans. The FHFA found that "80 percent of the loan files it reviewed 'had not been written within the stated guidelines, or otherwise breached Defendants' representations." Moreover, a DD Vendor report showed significant failures to comply with the "originator's guidelines" or lacked "sufficient compensating factors to justify purchase." Additionally, a DD Vendor employee testified in an unrelated action that the vendor's employees were urged by their supervisors, at the behest of their clients, to "approve loans that did not satisfy . . . guidelines and lacked compensating factors."

As to one of the securitizations, the defendants allegedly knew that the originator had abandoned standards since the defendants had a "warehouse lending arrangement" with the originator and "were permitted to conduct loan review on-site."

The court found that the plaintiffs had sufficiently alleged that defendants "knew facts or had access to information suggesting that their public statements were not accurate."

The plaintiffs allegations raised "a strong inference that Defendants either knew or were reckless in not knowing that their [OM] falsely stated that the loans comprising the securitizations at issue met originators' . . . guidelines."

The plaintiffs had also alleged that "the originators deliberately inflated their appraisals" and that "Defendants were aware of this inflation by virtue of their own due diligence" and that such "inflated appraisals led to artificially low [LTV] and [CLTV] ratios. . . ." The plaintiffs' statistical study indicated that the defendants significantly understated the weighted average LTV and CLTV ratios. The plaintiffs' "loan-level investigation also found that owner-occupancy rates in [certain] trusts were overstated by 20.2, 22, and 16.1 percent."

The court found, however, that the allegations were insufficient "to raise a strong inference of scienter with respect to misrepresentations about LTV ratios and owner-occupancy rates." Although the magnitude of an inaccuracy may "sometimes provide circumstantial evidence that a fraud defendant made her false statements knowingly or recklessly," generally, "such evidence must be supported by additional circumstantial evidence in order for the plaintiff to carry her pleading burden, particularly where the originator of the false information is a third-party." The plaintiffs had not pled "sufficient facts to demonstrate that Defendants knew about the overvalued appraisals allegedly performed by the originators, or about misstatements regarding owner occupancy." The plaintiffs had not pled facts showing that the defendants had "double-checked the appraisal values and owner-occupancy information provided by the originators" and the facts alleged did not "raise a strong inference of scienter with respect to these categories of alleged misrepresentations."

The court found that the plaintiffs had sufficiently pled that defendants "falsely represented that the investment ratings provided by credit rating agencies" were false and that the defendants "knew that the information provided to the credit rating agencies - e.g., that the loans complied with originators' . . . guidelines - was false. To the extent that the alleged misrepresentations regarding credit ratings [were] based on" the defendants' knowledge of the "originators' abandonment of . . . guidelines," such claims adequately pled scienter. With respect to misrepresentations involving the LTV/CLTV ratios and owner occupancy rates, however, the complaint did not adequately plead scienter.

The plaintiffs had also alleged that the defendants "frequently did not assign the underlying mortgages and notes to the issuing trusts, contrary to their representations." Such allegations were insufficient to raise a strong inference of scienter and fraud claims regarding faulty transfer of mortgages and notes were dismissed.

With respect to alleged false representations as to conformance with guidelines, the defendants argued that the statements were not materially misleading since "the [OM] disclosed that originators might make exceptions to their . . . guidelines" and that "the inclusion in the [OM] of a 'repurchase or substitute' provision, under which Defendants pledged to repurchase or substitute for non-compliant loans in the mortgage pool, put Plaintiffs on notice that non-compliant loans would be included in the . . . pool of mortgages." The defendants further argued that the plaintiffs failed to allege "sufficiently particularized" allegations since "they do not necessarily relate to the loans" backing the subject certificates. Other courts had held that "such disclosures or warnings do not give notice to investors of the defendant's 'wholesale abandonment of . . . standards.'" Further, "the repurchase or substitute" provision "did not give notice that originators had engaged in a wholesale abandonment of their . . . guidelines." Based on the plaintiffs' own statistical analysis of the loans and the FHFA Report, the court found that such allegations were sufficient to "raise an inference that the originators

systematically abandoned their . . . guidelines with respect to the loans" and, "[i]n not disclosing this alleged practice, the [OM] contained material misstatements or omissions."

Since the defendants "knew that the risk presented by the underlying loans could not be properly assessed by the rating agencies, the representation in the [OM] that credit ratings reflected credit quality was false and misleading." Thus, the court held that the complaint sufficiently pled misstatements regarding credit ratings.

With respect to reasonable reliance, the court explained that the plaintiffs were not required to conduct an investigation of "loan tapes" that were available. Prior judicial precedent held that "even in the face of knowledge that many of the originators supplying loans to these [pools] engaged in dubious underwriting practices, 'the [government-sponsored enterprises] were entitled to rely on defendants' assertion that the loans that underlay these particular securities complied with the guidelines set out in the offering materials.'" Moreover, the plaintiffs had alleged that they had performed "extensive due diligence before purchasing the Certificates, including analyzing 'the quality of the collateral' (including average FICO scores, LTV ratios, and occupancy type), the anticipated credit ratings, and the quality of the originators and servicers." The court explained that "[g]iven that sophisticated plaintiffs are not required to 'conduct their own audit' in order to rely on a defendant's allegedly fraudulent representations, the plaintiffs had alleged sufficient facts to plead justifiable reliance."

The court rejected the defendants' argument that the plaintiffs failed to plead "loss causation," since they had not alleged facts, "if proven, would show that [their losses were] caused by the alleged misstatements as opposed to intervening events." The defendants had also argued that the plaintiffs had not pled "cognizable damages," since they had "not sold the Certificates on which their claim is based and, . . ., continue[d] to receive underlying interest payments." The court stated that "fraud damages equal the difference between the price paid for an asset and its true value as of the date of the sale." The court found that the plaintiffs had adequately alleged that "the Certificates are worth far less than they paid for them and that their true value would have been much lower at the time of sale had [defendants] disclosed, inter alia, that originators had systematically abandoned their . . . standards." Thus, the motion to dismiss for failure to plead cognizable damages was denied.

The court then held that the plaintiffs failed to plead facts demonstrating the special relationship which is necessary to sustain claims for negligent misrepresentation and fraudulent concealment. The plaintiffs argued that the defendants had "superior knowledge of essential facts." However, they had failed to cite any case "involving RMBS in which a negligent misrepresentation or fraudulent concealment claim ha[d] been permitted to proceed on this theory." Since New York courts have routinely dismissed such claims, the court dismissed such claims. The court also denied the motion to dismiss with respect to the aiding and abetting of fraud allegations.

Finally, the court dismissed the rescission claim since "the statements regarding title transfer in the [OM] were forward looking in that they contemplated Defendants' future obligations under the contracts." The court noted that "[t]he doctrine of mutual mistake affords equitable relief only where the parties were mistaken as to facts *existing* at the time the contract was entered into." Since the plaintiffs did not plead mutual mistake as to a then existing fact, the court dismissed the rescission claim. Thus, the court granted in part and denied in part, the defendants' motion to dismiss.

Landesbank Baden-Württemberg v. RBS Holdings USA Inc., 12 Civ. 5476, NYLJ 1202652232036, at *1 (SDNY, Decided April 9, 2014), Gardephe, J.

Class Action Inappropriate To Determine Hurricane Sandy Damages - Breach of Warranty of Habitability - Unjust Enrichment - Constructive Eviction

The plaintiffs commenced a "putative bilateral class action." They sought "to represent a class of all renters in the State of New York against a defendant class of all landlords in the State of New York to obtain rent rebates for violations of the warranty of habitability [Warranty] caused by Superstorm Sandy (the Storm)." The court addressed issues relating to "the suitability of the class representatives, due process, and . . . other serious problems." Many of such questions "will ultimately be adjudicated in a class certification motion." However, "given the myriad unprecedented issues - both factual and legal - and the enormous cost of discovery, the court stayed discovery pending the resolution" of this summary judgment motion by defendants. The plaintiffs had cross moved to file an amended complaint.

On Oct. 29, 2012, "the Storm hit New York, causing devastation to millions." The law in New York "guarantees the habitability of all rental residences" and landlords throughout the state have strict liability "to ensure their tenants reside in livable conditions." Landlords are obligated to "rebate rent for days when conditions were not habitable due to the Storm. Such rebates are discounted by the value of landlords' mitigation efforts." The salient issue was "how the vehicle of a class action can be used when so much of the damages sought - and damages are really all that is at issue - turn on fact specific inquiries, based on myriad variables such as where each building is located, how badly it was affected by the Storm, what mitigation efforts were made by the landlord, the terms of each tenant's lease, and so much more."

One proposed class representative ("A") lives in a building where the landlord utilized a generator to provide elevator service, lighting for common areas, heat and hot water, after Con Edison (Con Ed) had turned off electricity. The landlord also provided free services, including, *inter alia*, complimentary meals, bottled water, . . ., [and] charging stations for cell phones and computers. "A" sought a rebate for the time when her apartment was "uninhabitable," "without electricity, heat, hot water and/or elevator service." She also claimed that her circumstances were "typical of the average New York State renter who suffered through the Storm."

A second proposed class representative ("B") had left her apartment before the Storm and stayed with friends and family and returned after conditions were back to normal. "B" apparently had no interest in returning to her apartment until after her college classes had resumed, "well after services in her apartment were fully restored."

A third proposed class representative ("C") lived in a building where stoves and hot water were not dependent on Con Ed electricity and had remained operational. Her apartment lacked heat during the subject period. However, "C" had left her apartment before the Storm and did not return until after electricity had been restored. Her landlord had asserted a counterclaim, alleging, *inter alia*, that this tenant had caused her apartment "to be infested with bedbugs," and the bedbugs had spread throughout the building.

The complaint alleges causes of action for breach of the Warranty and unjust enrichment. After some class discovery, the plaintiffs sought "broad and expensive electronic discovery to which defendants objected."

The Warranty is codified in RPL §235-b. It "places an unqualified obligation on the landlord to keep the premises habitable" and the tenant's obligation to pay rent "is dependent

upon the landlord's satisfactory maintenance of the premises in habitable condition." The fact that the Storm had caused the habitability issues, was irrelevant since the landlord's obligations under RPL §235-b are "unqualified."

The Court of Appeals has explained that each case must turn on its own special facts and "*the proper measure of damages . . . is the difference between the fair market value of the premises [if] they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach.*" Moreover, "*the finder of fact must weigh the severity of the violation and duration of the conditions giving rise to the breach as well as the effectiveness of steps taken by the landlord to abate those conditions.*"

Since the Warranty applies to parties to the lease, the court dismissed the claims against the non-landlord defendants, *i.e.*, the defendant managing agents (agents). The court also dismissed the plaintiffs' unjust enrichment claim. Since the warranty claim arises from leases, *i.e.*, written contracts, the Warranty "cannot give rise to the quasi-contract, unjust enrichment cause of action." The court stated that "rent is the property of the landlords, not the . . ., and can only be recouped from the former. Absent veil piercing allegations, there is no basis to maintain a claim against" the agents. Moreover, the plaintiffs may not maintain claims for constructive eviction since such claim requires "wrongful acts by the landlord." Here, "the issues were caused by the Storm, not landlords."

Two to three proposed class representatives had not left their apartments because of "uninhabitable conditions caused by the Storm." They had left their apartments because "they did not want to be in their apartments during the Storm." Thus, the court held that "[a] rent rebate would be a windfall, not compensation for lacking a habitable residence." The Warranty is therefore inapplicable. Additionally, two of the proposed class representatives were "not typical of the proposed classes," they had "not suffered through harsh" Storm conditions, "they were somewhere else" and they had "no [RPL] §235-b claim and therefore cannot be class representatives."

The court then explained that "[w]hether a lawsuit qualifies as a class action . . . 'rests within the sound discretion of the trial court.'" Pursuant to CPLR 901(a), five conditions must be met before class action status may be granted, *e.g.*, numerosity, common questions of law and fact that predominate over individual issues, claims or defenses of representative parties are typical of the class, a class action is "superior" to other available remedies. Since the court was not dealing with a class certification motion, it did not address every factor in detail. The subject motion was intended "to dispose of proposed classes which are so legally defective on their face as to not even merit class-discovery."

The court found that there was "simply no way to make class-wide determinations about landlords' mitigation efforts or the effects of the outages in each area or, for that matter, each building (e.g. those with generators, without elevators, or using natural gas or oil for hot water or heat)." Additionally, the plaintiffs' class could not include tenants outside of Manhattan, since "conditions varied greatly by county" or other parts of New York State, "(where conditions varied even more, and local landlord-tenant laws differ)."

The court also stated that even a class comprised of tenants in a single building may not be viable, since even in the same building, "mitigation may have varied apartment by apartment (e.g., ground floor apartments had flooding, but no elevator concerns)." Further, damages may depend on whether the tenant had a rent regulated or market lease or no lease and "[c]omputing damages in any way other than tenant-by-tenant runs the risk of glossing over the needs of each tenant and the individual efforts of each landlord." At most, the court would

"consider a plaintiff class limited to specific buildings where it can be demonstrated that the tenants of such buildings endured similar conditions and received similar mitigation."

The court then held that there could not be a defendant class in this action because such class "would violate due process" and "the fact specific nature of determining each landlord's mitigation efforts is not compatible with the commonality and numerosity factors." Moreover, "a defendant class requires closer scrutiny . . . to assure fairness to absent members based on long-standing due process protections. . . ." and thus, "defendant class actions are seldom certified." Additionally, "computing damages in a §235-b case is simply too fact specific to be amenable to a defendant class" and "the impracticability of managing such a class is exemplified by the Herculean task of enforcing judgements [sic] against and collecting damages from every landlord in the state."

A significant "benefit of having a defendant class is avoiding relitigating the same threshold issue, especially when there is a risk of inconsistent rulings." However, the issue of the landlords' §235-b liability was "uncontroverted." The key issue is "how much each landlord must pay to each tenant, an inquiry requiring building-by-building, and perhaps tenant-by-tenant discovery. This arduous task cannot be eschewed, gutting the efficiency of utilizing a class action."

Accordingly, the court held that the viability of the case as a bilateral class action "is gravely in doubt. Although it may be possible to name a discreet group of landlords and find appropriate building representatives to serve as plaintiffs, the only way to expeditiously accomplish the . . . goal of recouping compensation for all Storm-related, [Warranty] claims is to utilize the capable services of Housing Court." The court stated that the "Housing Court is duly equipped to mete out justice to pro se tenants who come forward with meritorious claims." Furthermore, "[t]he forthcoming class certification motion will afford plaintiffs an opportunity to address the concerns raised in this decision." However, the court warned that the plaintiffs "should not expect certification absent concrete, specific, and practical solutions to such concerns, especially when victims of the Storm may have superior means to obtain compensation."

Comment: Disclosure - My firm represented certain defendants.

The court had also noted that "many landlords and tenants may not wish to use the legal system to address Storm-related claims." They may have worked out "their own settlements, such as voluntary rebates or factoring in Storm-issues into lease renewal negotiations." The court further opined that a "class opt-out process would raise a host of issues, especially if such settlements were not done with legal formality."

Mara Levin, Esq. and Janice Goldberg, Esq. of Herrick, Feinstein LLP, were attorneys for certain defendants. Ms. Levin stated that "the Court dismissed the complaint as to two of the three plaintiffs, and the third plaintiff, who the Court permitted to amend her complaint, decided not to do so. While a Notice of Appeal was filed, it was not perfected within the prescribed time set forth in the Section 600.5(d) of the Appellate Division, First Department Rules." Ms. Levin further noted that "while rarely used, a summary judgment motion before a class certification motion and without full discovery, may be a very useful tool to dismiss a class action which, on its face, cannot possibly meet the statutory requirements necessary to sustain certify the class."

Adler v. Ogden Cap Properties, 650292/2013, NYLJ 1202633381044, at *1 (Sup. NY, Decided December 11, 2013), Kornreich, J.

Real Property Tax Exemptions for Religious Organizations - Pagan Group Entitled to Exemptions

A petitioner had appealed from a trial court order which had dismissed the petitioner's applications for real property tax exceptions (exemptions) pursuant to Real Property Tax Law (RPTL) Art. 7, to review three determinations of a Town Board. The Board had denied the requests for the exemptions.

The petitioner, a not-for-profit religious corporation, owns a three-acre parcel of real property. The property consisted of a 12-bedroom main house, a caretaker's cottage, an "outdoor temple and 'processional paths.'" The petitioner was "the corporate entity for the Cybeline Revival" (Revival), a pagan following founded in 1999, but which has ancient origins." The Revival believes that "the divine feminine, the mother goddess Cybele, is present in everything, thereby creating a connection in all living things, as well as giving rise to an obligation to do charitable work and a responsibility to improve the conditions of all people, particularly women."

The petitioner had received tax-exempt status from the Internal Revenue Service and sought an exemption under RPTL 420-a. The trial court had denied the Town's motion for summary judgment and the petitioner's cross motion for summary judgment. Following a non-jury trial, the trial court dismissed the petition, on the grounds that "the property primarily is used to provide affordable cooperative housing to a small number of co-religionists, with the religious and charitable uses of the property being merely incidental to that primary nonexempt use." The Appellate Division, Third Dep't (court) reversed and held that the petitioner was entitled to the exemption.

> To qualify for the exemption:
> (1) [petitioner] must be organized exclusively for [the] purposes enumerated in the statute, (2) the property in question must be used primarily for the furtherance of such purposes, . . . (3) no pecuniary profit, apart from reasonable compensation, may inure to the benefit of any officers, members, or employees, and (4) [petitioner] may not be simply used as a guise for profit-making operations. . . .

The salient issue was whether the property was "primarily used for religious or charitable purposes." Property uses "that are 'merely auxiliary or incidental to the main and exempt purpose and use will not defeat the exemption'. . . ."

In 2002, "A", the head of the Revival, had purchased the property, together with three other women, "with a goal of establishing affordable housing for transsexual women, and they established a not-for-profit corporation to manage the property. Three of the owners were members of the [pagan] religion and began practicing it on the property. . . ." The fourth owner sold her interest to a fourth Revival adherent.

The owners had dedicated the property as "the home of the religion, transferred title to petitioner and held a formal ceremony dedicating the property to the Mother Goddess." The religion had seven priestesses. Each priestess' room had an alter and there was a main alter on the building's main floor. Certain "charitable guests" and "four 'spiritual seekers'" had "resided temporarily on the property" between 2009 and 2011. No guests were required to pay

for their stay and there was "little . . . financial support provided by guests." Certain religious practices were conducted on the property, *e.g.*, rituals related to marriage and death and "celebrations pertaining to physical changes in a woman's lifetime." There was also "religious instruction and spiritual counseling," and several other religious ceremonies and events, including a "more secular, bisexual brunch."

The court found that the petitioner primarily used the property for "religious and charitable purposes." Although the Town argued that the property was used primarily for cooperative housing, the court concluded that the petitioner had "just continued the property's former residential use," while also conducting its religious and charitable activities "throughout the property on a regular basis." The court noted that the religion stressed "communal living among its adherents, as well as providing hospitality and charity to those in need, and the members consider this property the home of their faith. . . ." Accordingly, the court reversed and held that the petitioner was entitled to the exemption.

Maetreum of Cybele v. McCoy, 515598, NYLJ 1202629484850, at *1 (App. Div., 3rd, Decided November 21, 2013). Before: Lahtinen, J.P., McCarthy, Spain and Egan Jr., JJ. Opinion by McCarthy, J. All concur.

Tax Certiorari - Tax Assessment For Not-For-Profit Country Club Reduced

This case involved an appeal by, *inter alia*, a County Board of Assessors (County), in consolidated tax certiorari proceedings pursuant to Real Property Tax (RPTL) Law Article 7, to review real property tax assessments for three tax years. The trial court had awarded reductions and directed that tax overpayments be refunded, with interest.

The petitioner, a country club, owns approximately 123 acres of property "on which it operates a private, not-for-profit, golf course [Club]." The parties had agreed that, "the property should be assessed as a private, for-profit golf course" and the proper approach for valuation should be the income capitalization method. The parties also agreed that the real estate taxes should be considered when computing the property's fair market value. They differed on how to do so.

The Club's appraiser, in essence, "converted the leases for his comparable properties into gross leases, under which the owner, rather than the lessee, is obligated to pay the real estate taxes, and utilized the 'assessor's formula,' pursuant to which a factor is added to the capitalization rate to account for real estate taxes." The appellant County's appraiser assumed "a triple net lease, under which the lessee, not the owner, is obligated to pay real estate taxes." Under the County's approach, "the expense of real estate taxes is accounted for in the fair market rent for the property, and need not be accounted for in the capitalization rate." The County's appraiser also "downwardly adjusted his rent-to-revenue ratio, used in determining the fair market rent for the property, to account for high real estate taxes in the subject location."

The trial court "adopted the approach proposed by the Club, which resulted in a reduction of the original assessed value." The salient issue on appeal was whether the approach utilized by the Club's appraiser and adopted by the trial court, "was 'fair and nondiscriminating,' was 'acceptable,' and resulted in a fair market value assessment of the subject property," or, whether, as the County argued, "it resulted in improper 'double counting.'"

> The Club's appraiser explained:
>
> a key difference between a gross lease and a triple net lease is the manner in which the responsibility to pay real estate taxes is allocated. Under a gross lease, the landlord or owner is responsible for paying the real estate taxes on the property. Under a triple net lease, the tenant assumes the responsibility of paying the real estate taxes. All other things being equal, the rental payment under a triple net lease would be lower than the rental payment under a gross lease, since the tenant under a triple net lease assumes the additional financial burden of paying the real estate taxes on the property. . . . "[i]f an operator knows he can lease the same golf course and not pay taxes compared to the same golf course that has to pay taxes, he can pay more rent [for] the one with no taxes, so the taxes [are] critical as an operating expense."

Under a municipal lease, the property is owned by the municipality and neither the tenant nor the municipal owner pays taxes on the tax-exempt property. The County's appraiser opined that:

> Since the determination of an appropriate real estate tax burden is the ultimate objective in this valuation, the most mathematically accurate approach to value begins with an analysis of fair market rent to include the operator's occupancy costs associated with real estate taxes. Or in other words, the equivalent additional amount of rent that a Lessee would be willing to pay if not responsible for payment of taxes.
>
> The County's appraiser explained that:
> the preferred valuation method assumes a triple net lease. Because the burden of real estate taxes is already accounted for in the decreased rental value under a triple net lease, [The County's appraiser] did not add a tax load factor to the capitalization rate when computing value pursuant to his income capitalization analysis.

The court explained that "'[a]ny fair and nondiscriminating method' that will achieve the tax assessment goal of arriving at a fair market value result is acceptable. . . ." The court further noted that a "very similar situation arose in Matter of Mill Riv. Club v. Board of Assessors, 48 AD3d 169. Mill River Club observed that:

> The difficulty, . . ., is that the lease of a tax-exempt property does not fit neatly into either a triple net lease or gross lease category because, where the leased property is tax-exempt, neither the tenant nor the owner pays real estate taxes. Additionally, as the County itself conceded, tax-exempt municipal and state golf courses are not operated with a view toward maximizing profits; rather, they are generally designed to provide affordable play, with fee structures set by the municipality or the State to advance that goal. As a result, tenants of tax-exempt courses generally receive lower golf revenues in exchange for the tax exemption. . . .

The appellants argued that the owner of the municipal golf course "does not pay real estate taxes, as is the case with a triple net lease." However, the Club countered that "neither does the tenant, as is the case with a gross lease, which typically has the effect of increasing the amount in rent the tenant may be expected to pay."

The Appellate Division, in Mill River stated that it could not find that the trial court had erred in adopting the County's "triple net lease assumption for tax-exempt comparables," since "'the rental income actually received by a municipality from a tax-exempt golf course, expressed as a percentage of actual revenue, can certainly be viewed as being net' of any real estate taxes." Mill River "reasonably took account of the somewhat reduced golf revenues generated at municipal courses by rejecting the market rent percentage of 30 percent for golf fees proposed by the County in favor of a reduced percentage of 27 percent, considering all issues, including a tax component." The Appellate Division had found that such approach was not an "error."

The subject court explained that "[a]lthough the valuation method accepted in Mill River Club was different from the method accepted by the Supreme Court in the case at bar, we nevertheless conclude that it was within the Supreme Court's discretion to determine that the

approach advocated by the . . . Club's appraiser was the most appropriate under the circumstances," "assuming the majority of comparable properties were operating under gross leases or, in the case of the municipal leases, the equivalent thereof; 'grossing up' the leases where appropriate, assuming the subject property would operate under a gross lease; and employing the assessor's formula, including a tax load factor in the capitalization rate." The court held that "the methods advocated by the . . . Club were fair and nondiscriminating, and were therefore 'acceptable'. . . ."

Accordingly, the court held that the trial court had not "double counted" when it adopted the Club's appraiser's approach. The trial court had proceeded with the "the gross lease assumption, real property taxes were not a part of the equation until factored into the capitalization rate." The court opined that "[i]t was reasonable to accept [the Club's appraiser's] gross lease assumption, based, inter alia, on his determination to treat the municipal leases as gross leases because the tenants thereunder were not required to pay real estate taxes since the property was tax exempt." Moreover, "in treating the municipal leases as gross leases, [the Club's appraiser] properly made adjustments to the rent-to-revenue ratio in order to account for any restrictions which might be placed on greens fees." It was also "proper to add a tax load factor to the capitalization rate in order to account for the cost of real estate taxes. . . ."

Thus, the court affirmed.

Hempstead Country Club v. Board of Assessors, 2010-09220, NYLJ 1202627381463, at *1 (App. Div., 2nd, Decided November 6, 2013), Before: Dillon, J.P., Dickerson, Hall, Austin, JJ. Decision by Dickerson, J. Dillon, J.P., Hall and Austin, JJ. concur.

EXHIBIT "A"

RULES OF CONSTRUCTION INTERPRETATION*

* This outline is an updated and expanded version of an outline that was prepared by New York State Supreme Court Justice Lucy Billings in June 2005. The author acknowledges the valuable research assistance of Rebecca Sawhney, Esq. of Herrick, Feinstein LLP.

RULES OF CONTRACT CONSTRUCTION RELATING TO REAL ESTATE AND OTHER CONTRACTS

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A. AMBIGUITY

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   a. This rule is especially significant in the context of commercial real property transactions, where stability and predictability is of paramount concern, and the transactions are generally negotiated between sophisticated, counseled businesspersons at arm's length. M & R Rockaway, LLC v. SK Rockaway Real Estate Co., LLC, 74 A.D.3d 759, 759 (2010); Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d at 475; Wallace v. 600 Partners Co., 86 N.Y.2d 543, 548 (1995); 150 Broadway N.Y. Assoc., L.P. v. Bodner, 14 A.D.3d 1, 6 (1st Dep't 2004).

   b. Even if novel or unconventional or seemingly unfair or imprudent, if clear, complete, and capable of implementation and enforcement, a provision is to be applied according to its terms, without considering parol evidence, *i.e.*, evidence

outside the document. Wallace v. 600 Partners Co., 86 N.Y.2d at 548.

c. Merely alleging that the meaning is other than the lease's understandable and unequivocal terms is insufficient to permit consideration of parol evidence. Ruttenberg v. Data Davidge Sys. Corp., 215 A.D.2d 191, 193, 197 (1st Dep't 1995).

d. As long as the lease is otherwise enforceable according to its terms, the court may not imply a provision to cover a contingency where the circumstances surrounding formation of the contract indicate the parties must have foreseen the contingency and did not include further terms to address such contingency. Zidi v. New York Bldg. Contractors, Ltd., 99 A.D.3d 705, 707 (2012); Reiss v. Financial Performance Corp., 97 N.Y.2d 195, 199 (2001); Rowe v. Great Atlantic & Pacific Tea Co., 46 N.Y.2d 62, 72 (1978).

2. If a Lease Provision Is Facially Ambiguous: courts may consider parol evidence of the parties' intent. RM Realty Holdings Corp. v. Moore, 64 A.D.3d 434, 440-41 (2009); Greenfield v. Phillies Records, 98 N.Y.2d at 569; Continental Cas. Co. v. Rapid-Am. Corp., 80 N.Y.2d 640, 651 (1993); Ronbet 366 LLC v. Tobias, 19 A.D.3d 102, 2005 WL 29648 (1st Dep't June 2, 2005); Korff v. Corbett, 18 A.D.3d 248, 794 N.Y.S.2d 374, 377 (1st Dep't 2005).

a. Courts will interpret ambiguities as a matter of law, unless the parties' intent depends on the extrinsic evidence's credibility. Doldan v. Fenner, 309 A.D.2d 1274, 1275 (4th Dep't 2003);

Stuyvesant Plaza v. Emizack, LLC, 307 A.D.2d 640, 641-42 (3d Dep't 2003).

b. Extrinsic evidence, such as the parties' past practice and course of conduct or industry custom, is merely an interpretive tool. E.g., Johnson City Professional Firefighters Ass'n, Local 921 v. Village of Johnson City, 75 A.D.3d 805, 808 n.2 (2010); Continental Cas. Co. v. Rapid-Am. Corp., 80 N.Y.2d at 651; Vasilakos v. Gouvis, 296 A.D.2d 668, 669-70 (2d Dep't 2002). It may not be used:

i. To create an ambiguity. Madison Ave. Leasehold, LLC v. Madison Bentley Associates LLC, 8 N.Y.3d 59, 73 (2006); South Rd. Assoc., LLC v. International Bus. Machs. Corp., 4 N.Y.3d 272, 278 (2005); Reiss v. Financial Performance Corp., 97 NT.Y.2d at 199; Kass v. Kass, 91 N.Y.2d 554, 568 (1998); Petracca v. Petracca, 302 A.D.2d 576 (2d Dep't 2003).

ii. To create a contractual right independent of an express source in the lease. Johnson City Professional Firefighters Ass'n, Local 921 v. Village of Johnson City, 75 A.D.3d at 808 n.2; Aeneas McDonald Police Benev. Assn. v. City of Geneva, 92 N.Y.2d 326, 333 (1998); Hotopp Assocs. v. Victoria's Secret Stores, 256 A.D.2d 285, 286-87 (1st Dep't 1998); Reiser, Inc. v. Roberts Real Estate, 292 A.D.2d 726, 728 (3d Dep't 2002); Dierkes Transp. v. Germantown Cent. School Dist., 295 A.D.2d 683, 684 (3d Dep't 2002).

iii. Where the parties' intent to follow or depart from the practice or custom is unclear. Executive Off. Network v. 666 Fifth Ave. Ltd. Partnership, 294 A.D.2d 166, 168 (1st Dep't 2002).

3. Courts Determine Whether a Provision Is Ambiguous: By considering the entire lease, the parties' relationship, and the circumstances of the lease's execution, without considering extrinsic evidence. In re Lehman Brothers Inc., 478 B.R. 570, 591-92 (2012); South Rd. Assoc., LLC v. International Bus. Machs. Corp., 4 N.Y.3d at 278; Greenfield v. Philles Records, 98 N.Y.2d at 569; Reiss v. Financial Performance Corp., 97 N.Y.2d at 199; Doldan v. Fenner, 309 A.D.2d at 1275. A provision may be ambiguous when it:

a. Refers to a term or person incapable of definition or identification or susceptible to varying reasonable interpretations without extrinsic evidence. Time Warner Entertainment Co. v. Brustowsky, 221 A.D.2d 268 (1st Dep't 1995); Stuyvesant Plaza v. Emizack, LLC, 307 A.D.2d at 641.

b. May be read to produce contradictory results, and the varying interpretations are irreconcilable. Executive Off. Network v. 666 Fifth Ave. Ltd. Partnership, 294 A.D.2d. at 168; Ruttenberg v. Data Davidge Svs. Corp., 215 A.D.2d at 197; KSI Rockville v. Eichengrun, 305 A.D.2d 681, 682 (2d Dep't 2003).

B. CONSIDERATIONS IN INTERPRETING AN UNAMBIGUOUS OR AN AMBIGUOUS PROVISION OR

IN DETERMINING WHICH OF CONFLICTING PROVISIONS APPLIES

1. Where a Lease Makes Clear the Parties' Intent: provisions are to be construed to carry out that plain purpose according to the common and legal meanings of the terms involved. RM Realty Holdings Corp. v. Moore, 64 A.D.3d at 438; Kass v. Kass, 91 N.Y.2d at 566; Continental Cas. Co. v. Rapid-Am. Corp., 80 N.Y.2d at 654; Teig v. Suffolk Oral Surgery Assocs., 2 A.D.3d 836, 837-38 (2d Dep't 2003); DelDuca v. DelDuca, 304 A.D.2d 610, 611 (2d Dep't 2003). (Sometimes what is the "plain meaning is in the eye of the beholder. Thus, judges at different levels of the court system and on the same level, have disagreed as to the "plain" meaning of words (See Roberts v. Tishman Speyer, 13 N.Y.3d 270 [2009], affirming 62 A.D.3d 71 [1st Dep't 2009] reversing 2007 N.Y. Misc. Lexis 9117; 2007 NY Slip. Op. 32639 [U]. This case involved determination of the "plain meaning of a statute").

2. Where One Party Drafted the Lease: it is to be construed against the drafter and in favor of the non-drafting party. Westfield Family Physicians, P.C. v. Healthnow new York, Inc., 59 A.D.3d 1014, 1016 (2009); Uribe v. Merchants Bank of N.Y., 91 N.Y.2d 336, 341 (1998); Guardian Life Ins. Co. of Am. v. Schaefer, 70 N.Y.2d 888, 890 (1987); 150 Broadway N.Y. Assoc., L.P. v. Bodner, 14 A.D.3d 1 at 8; Croman v. Wacholder, 2 A.D.3d 140, 143 (1st Dep't 2003). Some parties will provide that a contract was "jointly" drafted, so as to avoid application of such presumption.

3. Courts Avoid Interpretations That Would Render a Provision Ineffective. Two Guys from Harrison-N.Y.

v. S.F.R. Realty Assoc., 63 N.Y.2d 396, 403-404 (1984); 150 Broadway N.Y. Assoc., L.P. v. Bodner, 14 A.D.3d 1 at 6; Excel Graphics Tech. v. CFG/AGSCB 75 Ninth Ave., 1 A.D.3d 65, 69 (1st Dep't 2003); Helmslev-Spear, Inc. v. New York Blood Ctr., 257 A.D.2d 64, 69 (1st Dep't 1999).

4. Practical Effect: Interpretation of a lease provision or the determination of which provision applies is to be consistent with the circumstances being addressed and consider whether they would render the interpretation or application of the provision unrealistic. Wallace v. 600 Partners Co., 86 N.Y.2d at 547-48; DelDuca v. DelDuca, 304 A.D.2d at 611; Petracca v. Petracca, 302 A.D.2d at 577; Tri-Messine Constr. Co. v. Telesector. Resources Group, 287 A.D.2d 558 (2d Dep't 2001).

C. FACTORS DETERMINING WHICH OF CONFLICTING PROVISIONS APPLIES:

1. A provision applicable to the specific circumstances supersedes a generally applicable provision. Isaacs v. Westchester Wood Works, 278 A.D.2d 184, 185 (1st Dep't 2000).

2. Whether permitting a generally applicable provision to supersede a specifically applicable provision would negate the latter and impose terms absent from its own plain terms. Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d at 475; Bombay Realty Corp. v. Magna Carta, 100 N.Y.2d 124, 127 (2003); 350 E. 30th Parking v. Board of Mgrs. of 350 Condominium, 280 A.D.2d 284, 287 (1st Dep't 2001); Ring v. Arts International, Inc., 7 Misc. 3d 869, 792 N.Y.S.2d 296, 301 (Civ. Ct. N.Y. Co. 2004).

3. Whether the provision to be applied is reasonably clear, complete, and capable of implementation and enforcement in isolation from other provisions. Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d at 476; Wallace v. 600 Partners Co., 86 N.Y.2d at 548; Ring v. Arts International, Inc., 792 N.Y.S.2d at 301.

4. Whether the parties could have negotiated and explicitly included other terms in the applicable provision instead of the terms there, had the parties intended those other terms to apply to the circumstances. TAG 380, LLC v. ComMet 380, Inc., 10 N.Y.3d 507, 513 (2008); Vermont Teddy Bear v. 538 Madison Realty Co., 1 N.Y.3d at 476; Rowe v. Great Atlantic & Pacific Tea Co., 46 N.Y.2d at 72.

II. EXAMPLES OF HOW STANDARD COMMERCIAL LEASE PROVISIONS ARE CONSTRUED

A. THE CASUALTY PROVISION: imposes liability on the landlord for damage to leased premises caused by a casualty that renders all or part of the premises unusable.

1. Typically Supplants the Tenant's Remedies Under N.Y. Real Prop. Law (RPL) §227

a. Where leased premises are "untenantable, and unfit for occupancy" for reasons unattributable to the tenant, the tenant may be relieved of its obligation to pay rent, if the tenant (i) surrenders possession of the premises and (ii) has not waived this statutory right to cancel the lease. RPL § 227.

b. In a standard commercial lease, a tenant may waive its rights under RPL § 227 and agree that a casualty provision governs instead. Schwartz,

Karlan & Gutstein v. 271 Ventura, 172 A.D.2d 226, 228 (1st Dep't 1991); Milltown Park v. American Felt & Filter Co., 180 A.D.2d 235, 237 (3d Dep't 1992); 241 West 37th Street Associates v. International Fashion Club, Inc., N.Y.L.J., June 28, 2000, at 29 (Civ. Ct. N.Y. Co.).

2. What Constitutes a Casualty

a. Flooding in the leased premises caused by defects in exterior walls that were not part of the leased premises qualifies as a "casualty," for which the building owner is solely responsible. While rain is foreseeable, a resulting rise and infiltration of ground water are not, unless the tenant has a reason to know that heavy rains pose a flood risk. 241 W. 37th St. Associates v. Intl. Fashion Club, N.Y.L.J., June 28, 2000, at 29.

b. Conditions arising out of the World Trade Center attack; see, e.g., 130 William LLC v. International Systems Group Inc., Finkelstein & Ferrara, 3 Landlord-Tenant. Prac. Rep., Dec. 2002, at 13.

i. Where tenants established that access to their leased premises was barred or conditions emanating from the disaster site rendered the premises unusable for a period following September 11, 2001, they were entitled to full rent abatements. See, e.g., 85 John St. Partnership v. Kaye Ins. Assocs., 261 A.D.2d 104, 105 (1st Dep't 1999); Johnson v. Cabrera, 246 A.D.2d 578, 579 (2d Dep't 1998).

ii. Although telephone, internet, or other services may have been interrupted longer, if the tenants could use their space and its plumbing, electrical, heating, and ventilating systems fully, and the lease did not obligate the landlord to provide the interrupted services, the tenants were not entitled even to partial abatements.

iii. The casualty provision also permits recovery for cleaning attributable to the disaster, if cleaning is the landlord's obligation under the lease, even though another provision may deny a setoff or reduction in rent due to the landlord's noncompliance in other circumstances. 241 West 37th Street Associates v. International Fashion Club, Inc., N.Y.L.J., June 28, 2000, at 29. See 85 John St. Partnership v. Kaye Ins. Assocs., 261 A.D.2d at 105; Dinicu v. Groff Studios Corp., 257 A.D.2d 218, 224 (1st Dep't 1999); Union City Union Suit Co. v. Miller, 162 A.D.2d 101, 104 (1st Dep't 1990).

3. The Requisite Notice by the Tenant of the Casualty: Regular rather than registered or certified mail, as well as oral and personal means, to notify the landlord of burst pipes and flooding did not bar an abatement claim for a condition that rendered the premises unusable for many months. The casualty provision's "immediate notice" supersedes the registered or certified mail requirement in a separate lease provision. Not only does that separate notice provision except other notice provisions, but those time and resource consuming requirements for a writing and cumbersome mailing

procedure are not specifically intended for a casualty or consistent with or realistic in exigent circumstances. Ring v. Arts International. Inc., 792 N.Y.S.2d at 300-301.

4. The Requisite Notice by the Landlord of the Premises' Restoration: The casualty provision required the landlord to serve a further notice of the premises' restoration only to trigger the obligation to resume paying rent, but not to prevent the lease's termination. Vermont Teddy Bear v. 538 Madison Realty Co., 1 N.Y.3d at 476.

B. RENT ESCALATION PROVISIONS

1. Rent Based on Wage Escalation: Some standard commercial leases base rent increases on building employees' minimum wage rate increases. When a new collective bargaining agreement has added rates for new categories of entry level employees, which rate becomes the basis for rent increases?

   a. The court permitted a landlord to charge rent based solely on the highest entry level rate, because it applied to the largest category of employees, so this calculation resulted in less unjust enrichment to landlords than the lowest entry level rate would to tenants. Sage Realty Corp. v. Omnicom Group, 183 Misc. 2d 574, 578 (Sup. Ct. N.Y. Co.), aff'd, 278 A.D.2d 57 (1st Dep't 2000).

   b. The court required rent to be computed based on the rates paid all four categories in proportion to each category's representation in the work force, adopting a middle ground that prevents any unjust

enrichment to either side. 1411 Trizechahn-Swig v. Henry I. Siegel Co., 2001 NY Slip Op 40449 (Civ. Ct. N.Y. Co. 2001), N.Y.L.J., May 9, 2001, at 20.

i. This more precise formula is consistent with the lease's purpose to establish a cost of living adjustment, a measure of which is actual wage costs. S.B.S. Assocs v. Weissman-Heller, Inc., 190 A.D.2d 529, 530 (1st Dep't 1993); Rudd v. 176 West 87th Street Owners Corp., N.Y.L.J., Jan. 5, 2000, at 27 (Sup. Ct. N.Y. Co.)

ii. To adopt a rate applicable only to a new, higher paid category of workers would substitute the contract between landlords and the union for the leases between landlords and tenants. See Backer Mgt. Corp. v. Acme Quilting Co., 46 N.Y.2d 211, 217-18 (1978).

2. Real Estate Tax (Additional Rent) Escalation:

a. Intended to provide relief for the landlord where an assessed tax required actual payment. Barnan Associates v. 196 Owners Corp., 56 A.D.3d 309, 311 (2008); Ran First Assoc. v. 363 E. 76th St. Corp., 297 A.D.2d 506, 509 (1st Dep't 2002); S.B.S. Assocs v. Weissman-Heller, Inc., 190 A.D.2d at 530; Fairfax Co. v. Whelan Drug Co., 105 A.D.2d 647, 648 (1st Dep't 1984); 1100 Ave. of Ams. Assocs v. Bryant Imports, 161 Misc. 2d 582, 584, 586 (App. Term 1st Dep't 1994), aff'd, 234 A.D.2d 101, 102 (1st Dep't 1996).

b. Calculated using tax payments landlords actually are obligated to pay. S.B.S. Assocs. v. Weissman-Heller, Inc., 190 A.D.2d 529; Fairfax Co. v. Whelan Drug Co., 105 A.D.2d 647.

c. Where a tax abatement decreases the actual amount of tax payable on the building even though the assessed amount of tax increases, additional rent based on the increased assessment not requiring actual payment would provide the landlord a windfall not contemplated by the rent escalation provision. Ran First Assoc. v. 363 E. 76th St. Corp., 297 A.D.2d at 509; 1100 Ave. of Ams. Assocs. v. Bryant Imports, 234 A.D.2d at 101-102; S.B.S. Assocs. v. Weissman-Heller Inc., 190 A.D.2d at 529-30; Fairfax Co. v. Whelan Drug Co., 105 A.D.2d at 648.

III. THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

A. ALL CONTRACTS IN NEW YORK EMBODY AN IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IN THEIR PERFORMANCE.

1. The Contracting Parties Impliedly Pledge Not to Injure Each Other's Right to Receive the Benefits of the Bargain. Mendez v. Bank of America Home Loans Servicing, LP, 840 F.Supp.2d 639, 652 (2012); 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 153 (2002); Dalton v. Educational Testing Serv., 87 N.Y.2d 384, 389 (1995).

2. This Pledge Does Not Imply Obligations Inconsistent With the Contract's Express Terms, but Does Encompass Any Promises a Reasonable Person Would

Understand to Be Included. Mount Sinai Hosp. v. 1998 Alexander Karten Annuity Trust, 110 A.D.3d 288, 298 (2013), 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d at 153; Dalton v. Educational Testing Serv., 87 N.Y.2d at 389; Chemical Bank v. Stahl, 272 A.D.2d 1, 14 (1st Dep't 2000); Rooney v. Slomowitz, 11 A.D.3d 864, 867 (3d Dep't 2004).

a. Although parties who are not fiduciaries are entitled to act in their own interests rather than as fiduciaries to another party, implicit in the lease, viewed as a whole, is a reasonable expectation that no party will purposefully prevent the premises' use or devalue the premises more extensively or longer than necessary. Rowe v. Great Atlantic & Pacific Tea Co., 46 N.Y.2d at 69; Chemical Bank v. Stahl, 272 A.D.2d at 14; Tapps of Nassau Supermarkets v. Linden Blvd., 269 A.D.2d 306, 307-308 (1st Dep't 2000); Cherry v. Resource Am., 285 A.D.2d 989 (4th Dep't 2001).

b. A reasonable tenant would not have entered a lease permitting the landlord to prevent the premises' use, and a reasonable landlord would not have entered a lease permitting a tenant not to pay rent or return the premises undamaged upon termination, arbitrarily, unreasonably, or indefinitely, depriving the other party of the lease's primary benefits. 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d at 153; Rowe v. Great Atlantic; & Pacific Tea Co., 46 N.Y.2d at 69; Zuckerwise v. Sorceron Inc., 289 A.D.2d 114 (1st Dep't 2001); Cherry v. Resource Am., 285 A.D.2d 989.

B. RELATIONSHIP BETWEEN BREACH OF THE IMPLIED COVENANT OP GOOD PAITH AND'FAIR DEALING AND "BREACH OF CONTRACT

1. A Claim That a Contracting Party Acted in Bad Faith and Dealt Unfairly with Another Party: may be duplicative of a breach of contract claim. In such case, the court may find a breach of a contractual requirement, but nothing broader. E.g., Van Valkenburgh, Nooger & Neville v. Hayden Pub. Co., 30 N.Y.2d 34, 40 (1972).

2. Arbitrary, Irrational, or Manipulative Action in Exercising Discretion Otherwise Permitted Under the Lease while not violating an express lease term, may constitute a breach of the covenant of good faith and fair dealing. Dalton v. Educational Testing Serv., 87 N.Y.2d at 389; LaBarte v. Seneca Resources Corp., 285 A.D.2d 974, 975 (4th Dep't 2001); Cortale v. Educational Testing Serv., 251 A.D.2d 528, 530 (2d Dep't 1998); Times Sq. Stores Corp. v. Bernice Realty Co., 141 A.D.2d 585, 586 (2d Dep't 1988).

   a. The court may find no breach of a narrow contractual requirement, but find a breach of the broader covenant of good faith and fair dealing. Zuckerwise v. Sorceron Inc., 289 A.D.2d 114; Cherry v. Resource Am., 285 A.D.2d 989; Ring v. Arts International, Inc., 792 N.Y.S.2d at 306-308.

   b. Reliance on a technical provision, to obliterate a substantial right or insulate a party from liability for preventing the continued tenancy or collection of rent, may be unjustified. Zuckerwise v. Sorceron Inc., 289 A.D.2d 114; Chemical Bank v. Stahl, 272 A.D.2d at 14-15; Tapps of Nassau

Supermarkets v. Linden Blvd., 269 A.D.2d at 307-308; Times Sq. Stores Corp. v. Bernice Realty Co., 141 A.D.2d 585.

c. A party that disputes its lease obligation because of another party's noncompliance with a lease provision may reserve that right, perform the obligation, permit both parties to realize the lease's benefits, and seek recovery from the other in the event performance was not required.

Not performing, risking that performance may have been required, may unjustifiably thwart the premises' use and occupancy, the payment of rent, or the lease's other salient purposes. Chemical Bank v. Stahl, 272 A.D.2d at 14-15; LaBarte v. Seneca Resources Corp., 285 A.D.2d at 974-75.

d. While the court might find a breach of a narrow contractual requirement causing specific damages, the court also might find actions "so manifestly harmful" to respondent as to breach the covenant of good faith and fair dealing and cause broader damages. Van Valkenburgh, Nooger & Neville v. Hayden Pub. Co., 30 N.Y.2d at 40. See Zuckerwise v. Sorceron Inc., 289 A.D.2d 114; Cherry v. Resource Am., 285 A.D.2d 989; Ring v. Arts International, Inc., 792 N.Y.S.2d at 308.

IV. ENFORCEABILITY OF ORAL MODIFICATIONS: when an oral waiver of a right under a written lease is admissible and effective, even though the lease requires modifications of its terms to be in writing. See Beway Realty v. C.N. Fulton Deli, 5 Misc. 3d 1015 (Civ. Ct. N.Y. Co. 2004), N.Y.L.J., Oct. 20, 2004, at 25 (attached).

A. WRITTEN LEASE PROVISIONS THAT THE LEASE MAY NOT BE MODIFIED ORALLY ARE ENFORCEABLE. N.Y. Gen. Oblig. Law § 15-301(1); Klein v. Klein, 79 N.Y.2d 876, 878 (1992); Richardson & Luca, Inc. v. New York Athletic Club of City of N.Y., 304 A.D.2d 462, 463 (1st Dep't 2003); Joseph P. Day Realty Corp. v. Lawrence Assocs., 270 A.D.2d 140, 141 (1st Dep't 2000); Garofalo Elec. Co. v. New York Univ., 270 A.D.2d 76, 80 (1st Dep't 2000).

B. THE BAR TO AN ORAL MODIFICATION MAY BE AVOIDED BY: (1) PARTIAL PERFORMANCE PURSUANT TO THE MODIFICATION OR (2) EQUITABLE ESTOPPEL. Messner Vetere Berger McNamee Schmetterer Euro RSCG v. Aegis Group, 93 N.Y.2d 229, 235 (1999); Rose v. Spa Realty Assocs., 42 N.Y.2d 338, 343-44 (1977); Richardson & Lucas, Inc. v. New York Athletic Club of City of N.Y., 304 A.D.2d at 463.

1. Partial Performance: Oral modification of a written lease is enforceable based on partial performance of the modified terms only if the party seeking to uphold the modification partially performs under its terms and detrimentally relies on it, and the partial performance is unequivocally referable to the modification. Martini v. Rogers, 6 A.D.3d 404 (2d Dep't 2004).

   a. Actions by the party seeking to enforce an oral modification, when those actions are consistent with the original lease obligations, do not constitute the requisite partial performance unequivocally referable to the oral agreement. Joseph P. Day Realty Corp. v. Lawrence Assocs., 270 A.D.2d at 142; Martini v. Rogers, 6 A.D.3d 404; SAA-A. Inc. v. Morgan Stanley Dean Witter & Co., 281 A.D.2d 201, 203 (1st Dep't 2001).

b. Forbearance from performing a lease obligation may be consistent with performance of an oral modification, but such inaction does not demonstrate an unequivocal act or attempt to perform the oral agreement. Messner Vetere Berger McNamee Schmetterer Euro RSCG v. Aegis Group, 93 N.Y.2d at 236.

c. Purposefully withholding a right under the lease may demonstrate action in detrimental reliance on and referable to an oral modification. Messner Vetere Berger McNamee Schmetterer Euro RSCG v. Aegis Group, 93 N.Y.2d at 236; Martini v. Rogers, 6 A.D.3d 404.

2. Equitable Estoppel: established where one party to a written lease and its oral modification induces another party's significant and substantial detrimental reliance on the oral modification. Eujoy Realty Corp. v. Van Wagner Communications, LLC, 22 N.Y.3d 413, 426 (2013); Rose v. Spa Realty Assocs., 42 N.Y.2d at 344; Stendig, Inc. v. Thorn Rock Realty Co., 163 A.D.2d 46, 49 (1st Dep't 1990).

a. This reliance estops the inducing party from raising the writing requirement to bar the oral modification's enforcement. Rose v. Spa Realty Assocs., 42 N.Y.2d at 344, 346.

b. Conduct constituting the reliance and triggering the estoppel must be incompatible with the written lease. Rose v. Spa Realty Assocs., 42 N.Y.2d at 344; American Prescription Plan v. American Postal Workers Union, AFL-CIO Health Plan, 170 A.D.2d 471, 472 (2d Dep't 1991).

c. Thus, purposefully withholding a right under the lease also may constitute the alternative basis to enforce the oral modification: equitable estoppel. Rose v. Spa Realty Assocs., 42 N.Y.2d at 344; Richardson & Lucas, Inc. v. New York Athletic Club of City of N.Y., 304 A.D.2d at 463; American prescription Plan v. American Postal Workers Union, AFL-CIO Health Plan, 170 A.D.2d at 472.

V. MATERIALITY OF A BREACH

A. MATERIAL BREACH OF CONTRACT RULE

1. A party's performance under a contract is excused where the other party has substantially failed to perform its side of the bargain, or, synonymously, where that party has committed a material breach. Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc., 500 F.3d 171, 186 (2007).

2. When one party has committed a material breach of a contract, the nonbreaching party is discharged from performing any further obligations under the contract, and the nonbreaching party may elect to terminate the contract and sue for damages. Doner-Hedrick v. New York Institute of Technology, 874 F.Supp.2d 227, 242 (2012).

B. DETERMINING MATERIALITY OF A BREACH

1. The question of materiality of a breach is one of degree, to be answered, if there is doubt, by the triers of fact, and, if the inferences are certain, by law. Homebridge Mortg. Bankers Corp. v. Vantage Capital Corp., 2008 WL 5146957; Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc., 500 F.3d at 186; Bear, Stearns Funding,

Inc. v. Interface Group-Nevada, Inc., 631 F.Supp.2d 283, 295-96 (2005); Magi communications, Inc. v. Jac-Lu Associates, 410 N.Y.S.2d 297, 299 (1978); Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 243 (1921).

a. In most cases, the question of materiality of breach is a mixed question of fact and law--usually more of the former and less of the latter--and thus is not properly disposed of by summary judgment. Bear, Stearns Funding, Inc. v. Interface Group-Nevada, Inc., 631 F.Supp.2d at 295; Jacob & Youngs, Inc. v. Kent, 230 N.Y. at 243.

2. Distinguishing between material and non-material breach cannot be settled by a formula; instead, the law employs a standard of materiality that is necessarily imprecise and flexible. Bear, Stearns Funding, Inc. v. Interface Group-Nevada, Inc., 631 F.Supp.2d at 296; Restatement (Second) of Contracts § 241 cmt. a (1981).

3. A breach is not material, and the aggrieved party is not excused from performance of its obligations, if the breaching party has substantially performed its end of the contract. Barbagallo v. Marcum LLP, 925 F.Supp.2d 275, 287 (2013).

4. For a breach of a contract to be material, it must go to the root of the agreement between the parties, and must defeat the object of the parties in making the contract. Bear, Stearns Funding, Inc. v. Interface Group-Nevada, Inc., 631 F.Supp.2d at 295.

a. Materiality goes to the essence of the contract. That is, breach is material if it defeats the object of the parties in making the contract and deprives the injured party of the benefit that it justifiably

expected. Doner-Hedrick v. New York Institute of Technology, 874 F.Supp.2d at 242; ESPN, Inc. v. Office of Com'r of Baseball, 76 F.Supp.2d 416, 421 (1999).

b. Materiality does not depend upon the amount of provable money damages; it depends upon whether the nonbreaching party lost the benefit of its bargain. ESPN, Inc. v. Office of Com'r of Baseball, 76 F.Supp.2d at 421.

c. Even if the breach "goes to the root of the agreement," the court must also consider other factors, such as those cited by the Restatement (Second) of Contracts § 241:

i. The extent to which the injured party will be deprived of the benefit which he reasonably expected;

ii. The extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

iii. The extent to which the party failing to perform or to offer to perform will suffer forfeiture;

iv. The likelihood that the party failing to perform or to offer to perform will cure the failure, considering all the circumstances including any reasonable assurances;

v. The extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. Encompass Ins. Co. of

America v. English, 2013 WL 796309; Donovan v. Ficus Investments, Inc., 872 N.Y.S.2d 690 (2008).

C. CONSEQUENCES OF A MATERIAL BREACH

1. Once a party has materially breached a contract, the other party can elect to either terminate the contract and recover damages (liquidated or otherwise), or it can continue the contract and recover damages solely for the breach. Barbagallo v. Marcum LLP, 925 F.Supp.2d at 291.

   a. A party can indicate that it has elected to continue the contract by continuing to perform under the contract or by accepting the performance of the breaching party, though this rule assumes the aggrieved party is aware of the breach and can therefore make a meaningful election of its remedies. Barbagallo v. Marcum LLP, 925 F.Supp.2d at 291.

   b. Once a party elects to continue the contract, it can never thereafter elect to terminate the contract based on that breach, though it retains the option of terminating the contract based on other, subsequent breaches. Bigda v. Fischbach Corp., 898 F.Supp. 1004, 1011 (1995).

2. Even if the breach of contract caused no loss or if the amount of the loss cannot be proven with sufficient certainty, the injured party is entitled to recover as nominal damages a small sum fixed without regard to the amount of the loss, if any. ESPN, Inc. v. Office of Com'r of Baseball, 76 F.Supp.2d at 421.

3. Punitive damages are generally not available, but may be recoverable if necessary to vindicate a public right. Runge v. Erie Ins. Group, 2010 WL 5860401; New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 315 (1995). Punitive damages are limited to circumstances where it is necessary to deter defendant and others from engaging in "gross" and "morally reprehensible" conduct that is of "such wanton dishonesty as to imply a criminal indifference to civil obligations." Rodriguez v. Allstate Ins. Co., 931 N.Y.S.2d 462, 467 (2011); New York Univ. v. Continental Ins. Co., 87 N.Y.2d at 315-16. A claim for punitive damages as an additional and exemplary remedy for breach of contract requires that:

   a. Defendant's conduct be actionable as an independent tort;

   b. The tortious conduct have been of egregious nature;

   c. The egregious conduct have been directed to the plaintiff; and

   d. It must be part of a pattern directed at the public generally. Dinstber v. Allstate Ins. Co., 974 N.Y.S.2d 171, 172; New York Univ. v. Continental Ins. Co., 87 N.Y.2d at 316.

D. Where one breach of a lease covering all aspects of the landlord-tenant relationship causes no damage to the other party, the breach may be so insubstantial as not to excuse the other party's nonperformance. Hadden v. Consolidated Edison Co. of N.Y., 34 N.Y.2d 88, 96-97 (1974); Garofalo Elec. Co. v. New York Univ., 300 A.D.2d 186, 189 (1st Dep't

2002); Pay-Co Asphalt v. Heartland Rental Props. Partnership, 278 A.D.2d 295 (1st Dep't 2000). E.g.:

1. The breaching party performed all its other obligations under the lease and in no way frustrated the lease's purposes or impaired or undermined the lease's value to the other party. Hadden v. Consolidated Edison Co. of N.Y., 34 N.Y.2d at 96-97; Garofalo Elec. Co. v. New York Univ., 300 A.D.2d at 189; Edgewater Constr. Co. v. 81 & 3 of Watertown, 252 A.D.2d 951, 952 (4th Dep't 1998).

2. The other party in turn received all the benefits of the breaching party's promised performance. Hadden v. Consolidated Edison Co. of N.Y., 34 N.Y.2d at 96-97; Garofalo Elec. Co. v. New York Univ., 300 A.D.2d at 189; Pay-Co Asphalt v. Heartland Rental Props. Partnership, 278 A.D.2d at 296.

3. Excusing the other party's nonperformance would produce a forfeiture of a substantial entitlement and the other party's unjust enrichment. Hadden v. Consolidated Edison Co. of N.Y., 34 N.Y.2d at 97.

VI. THE TERMS OF OPTION AGREEMENTS ARE TO BE STRICTLY ENFORCED

A. CONSTRUCTION

1. An option to buy contained in a lease must be exercised strictly in the manner specified; in exercising the option, the lessee must strictly comply with all terms and conditions of the option agreement. Tsoulis v. Abbott Bros. II Steak Out, Inc., 82 A.D.3d 1612, 1613 (2011); Neuhaus v. McGovern, 758 N.Y.S.2d 461, 462 (2002).

2. In construing the agreement for an option to purchase, the court must construe the agreement as made and not make a new agreement by construction. Gateway Towers, Inc. v. Tishman Realty & Const. Co., Inc., 49 A.D.2d 542, 543 (1975); Sandberg v. Reilly, 223 A.D. 57, (1st Dep't 1928).

B. DEFINITENESS OF OPTION REQUIRED

1. An option to purchase, as part of a lease, will not be specifically enforced in equity where it is vague and indefinite. Mandel v. National Ass'n Bldg. Corp., 200 A.D. 767, 772 (1922).

2. An option is void as insufficient to satisfy the statute of frauds where the material terms necessary to the purchase option are missing. Mandel v. National Ass'n Bldg. Corp., 200 A.D. at 769. Therefore, an option which does not properly identify the land involved, or where the price is indefinite or uncertain, is unenforceable. Sautkulis v. Conklin, 1 A.D.2d 962, 962 (2d Dep't 1956); Brandenburger & Marx v. Heimberg, 34 N.Y.S.2d 935, 938-39 (Mun. Ct. 1942).

C. INTENT OF THE PARTIES GOVERNS

1. The intent of the parties governs the interpretation of an option to purchase. Three Star Offset Printing, Inc. v. Daniels, 58 A.D.2d 862, 862 (1977).

2. In construing leases to effectuate the intention of the parties with regard to options to purchase, the parties' intent is not to be gathered from one phrase, alone, but from all the language used. Wells v. Fisher, 205 A.D. 212, 214 (1923). Any doubt should be resolved against the grantor who, having the power to stipulate in his or

her own favor, neglected to do so. Wells v. Fisher, 205 A.D. at 214.

3. The question of the parties' intent is one of fact, precluding summary judgment in an action for specific performance of the purchase option. Three Star Offset Printing, Inc. v. Daniels, 58 A.D.2d at 862.

EXHIBIT "B"

LEGAL FEES

SUPREME OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

PRINCES POINT, LLC, a New York limited liability company,

Plaintiff,

Index No. 601849/08

Amended Referee's Report [1]

-against-

AKRF ENGINEERING, P.C., MUSS DEVELOPMENT, LLC, ALLIED PRINCES BAY CO., ALLIED PRINCES BAY CO., #2, L.P., JOSHUA L. MUSS, individually and as a partner of Allied Princes Bay Co., and Allied Princes Bay Co., #2, John Doe (s) Partners, John Doe (s) individuals and John Doe (s) entities,

Defendants.

----------X

REPORT TO SUPREME COURT, NEW YORK COUNTY: PART IAS 53

By decision and order of the Honorable Charles E. Ramos dated January 31, 2014, the issue of the calculation of defendants' reasonable attorneys' fees and costs incurred in litigating this action, was referred for assignment to a Special Referee to hear and report with recommendations.

The instant matter was assigned to the undersigned Special Referee on April 4, 2014, at which time counsel for the respective parties appeared. Appearances were as follows:

For Plaintiff,
Mr. John S. Ciulla, Esq.
and Mr. Ryan J. McMahon, Esq.

For Movant/Defendants
Joshua L. Muss, Muss Development, LLC,
Allied Princes Bay, Co., Allied Princes

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[1]This Amended Referee's Report is being issued to correct an inadvertent error made on Page 4 of the Referee's Report dated August 13, 2014. By letter dated August 21, 2014, counsel for the parties consented and confirmed that the correct number of attorneys who performed services in the instant matter for which an award for attorney's fees is sought is 3, rather than 31.

Rosenberg, Calica & Birney, LLP
100 Garden City Plaza
Garden City, New York 11530

Bay Co. #2, L.P. (the "Muss Defendants"),
Mr. Adam J. Stein, Esq.
and Ms. Darlene Fairman, Esq.
Herrick, Feinstein, LLP
2 Park Avenue
New York, N.Y. 10016

The matter was conferenced on April 4, 2014. The parties stipulated on the record that they would submit affirmations with respect to the referenced issue, rather than to offer testimony, pursuant to 22 NYCRR§202.46[b].

Contentions

In plaintiff's attorney affirmation, it is contended that the Muss defendant's request for an award of attorney's fees in the amount of $952,086, plus costs in the amount of $48,924.66, is not supported by the submitted billing records (i.e., invoices), in that they have failed to establish that the hourly rates charged by Herrick, Feinstein, LLP, the law firm that represented them in the instant matter, are reasonable within the legal community, and further, because such records contain pervasive "block" billing entries that reflect time which in many respects are "redundant, excessive, unnecessary and inefficient." Plaintiff maintains that a 50% reduction of the total sum sought by the Muss defendants is warranted.

In the defendants' attorney affirmation, it is contended that the total sum of $1,001,010.46 in attorney's fees and costs sought by the Muss defendants is a reasonable amount for this contentious, complicated commercial litigation that commenced in 2008, and a litigation in which the Muss defendant were 100% successful. It is also contended that billing rates of more than n $1,000 per hour are not uncommon for New York commercial litigation law firms of Herrick, Feinstein, LLP's size or larger, and that the fact that the Muss defendants, as sophisticated clients, paid the attorney's fees and costs at the law firm's billing rates is evidence of

the reasonableness of such rates. It is further contended that the entries set forth in the submitted invoices are contemporaneous and detailed and, further, that "block" billing does not render such invoices "per se" unreasonable.

Law

An award of attorney's fees must be supported by proof of billing and services rendered (*see, Cwiklinski v. Cwiklinski*, 115 AD2d 951 [4th Dept. 1995]). In determining the appropriate attorney's fees, certain factors are to be considered by the courts, such as the time and labor required; the difficulty of the questions presented; the skill required to perform the service, including the lawyer's experience, ability and reputation; the amount involved; and the benefit resulting to the client from the services (*see, Matter of Freeman*, 34 NY2d 1, 9 [1974]; *Morgan & Finnegan v. Howe Chemical Co., Inc.*, 210 AD2d 62 [1st Dept. 1994]).

A lawyer may of course perform certain "non-lawyer" work, such as clerical work of filing papers, but such work may command at a lesser rate. In other words, the dollar value of the work is not enhanced just because a lawyer performs it (*see, In the Matter of Rahmey v.* Blum, 95 AD2d 294, 301 [2nd Dept. 1983]).

Moreover, the court may form an independent judgment from the facts and evidence before it, as to the nature and extent of the services rendered, make an appraisal of such services, and determine the reasonable value thereof (*see, Bankers Federal Sav. Bank, FSB v. Off West Broadway Development*, 224 AD2d 376, 378 [1st Dept. 1996]).

Analysis

Here, I find that the documentary evidence submitted by Herrick, Feinstein, LLP, the law firm representing the Muss defendants in the instant matter, sufficiently demonstrates

that the Muss defendants are entitled to an award of reasonable attorney's fees and costs in the total sum of $1,001,010.46 (*see, Spangenberg v. Chaloupka*, 229 AD2d 482, 484 [2nd Dept. 1996]).

Specifically, I find that the affirmation and invoices submitted by Herrick, Feinstein, LLP reflect that 3 attorneys and 5 paralegals, together with 28 other employees, performed a range of services in the instant matter, beginning in 2008, and ending in 2013. I also find that Scott Mollen, Esq., an attorney renowned in the field of real estate law, charged the Muss defendants at the rate of $770 per hour, the highest rate of any other attorney at the firm, and that "L. Temp," charged at the rate of $185 per hour, the lowest rate of any other attorney or paralegal employed at the firm.

I find that such rates charged by the law firm are not unreasonable within the New York legal community, given the documentary evidence submitted, including published articles of the subject, and fee applications charged by previous counsel of plaintiff. I also find it significant that the Muss defendants paid the attorney's fees and costs charged to them by Herrick, Feinstein, LLP (*see, Century 21 Real Estate, LLC v. Bercosa Corp.*, 666 F. Supp.2d 274, 298 [EDNY 2009]-[Where the Court determined that courts in the Circuit assess attorney's fee application using the "lodestar method," under which a reasonable hourly rate is multiplied by a reasonable number of hours expended. The court also determined that the lodestar method, however, does not simply rely on a mechanical application of an attorney's claimed hours and rates, but rather, a court considering a fee application must determine "what a reasonable, paying client would be willing to pay," in light of all the relevant circumstances of the case]).

Additionally, I find that entries set forth in the invoices submitted by the law firm representing the Muss defendants are descriptive and concise, and are not "redundant, excessive unnecessary and inefficient," as argued by plaintiff. I also find that such entries are in "block form," in that each timekeeper entered a description of the work performed at a particular time, and the total amount of time spent performing the work (*see, Daniele v. Puntillo*, 97 AD3d 512, 513 [1st Dept. 2012]). However, I find that this "block form" does not render the invoiced amounts "*per se*" unreasonable, as also argued by plaintiff (*see, J. Remora Maintenance, LLC v. German Efromovich*, 103 AD3d 501, 503 [1st Dept. 2013]). .

Consequently, I find that given the time and labor required in this complicated, commercial litigation; the difficulty of the issues presented; the skill required to perform the services, including the experience, ability and reputation of the attorneys involved; the amount involved[2]; and the benefit resulting to the client from the services, the Muss defendants are entitled to an award in reasonable attorney's fees against the plaintiff in the amount of $952,086, plus costs in the amount of $48,924.66, totaling the sum of $1,001,010.66 (*see, Matter of Freeman, supra; Morgan & Finnegan v. Howe Chemical Co., Inc., supra*).

Conclusion

Upon review of the documents submitted, I find that the Muss defendants are entitled to an award of reasonable attorneys' fees against plaintiff in the amount of $952,086, plus costs in the amount of $48,924.66, for an award in the total sum of $1,001,010.66.

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[2]It is undisputed that the instant action arose out of a real estate agreement executed by the parties, pursuant to which plaintiff agreed to purchase from the defendants a 23-acre parcel of waterfront property in Staten Island, New York that had been previously listed by the Department of Environmental Conservation ("DEC") as a hazardous waste site.

Accordingly, upon presentation of the referenced issue, on a motion made pursuatnt to CPLR§4403, I report and recommend that the court confirm this amended report.

Date: August 22, 2014.

Respectfully submitted,

Lancelot B. Hewitt

Lancelot B. Hewitt,
Special Referee

SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
560 Wheeler Road, Hauppauge, NY 11788
(631) 234-5588

REAL PROPERTY UPDATE

Presenters:

Scott E. Mollen, Esq.
Partner - Herrick, Feinstein, LLP - NYC
Regular Columnist - New York Law Journal

Gerard J. McCreight, Esq.
Matrix Investment Group

NOVEMBER 18, 2014
SCBA Center - Hauppauge, NY

MARKET CONDITION UPDATE

Has Steady Growth Returned?

By: Gerard J. McCreight, Esq., EVP/Chief Legal Officer

The Matrix Group
Commercial Real Estate Company
Port Jefferson Station, NY

- ***The Economy***
  - To answer the title of this update … Yes.
  - Continued steady growth is the forecast for our economy.
    - Internationally, developed economies throughout the world are seeing measured growth and emerging economies are stabilizing with less systemic risks.
    - Stability will benefit US markets
  - Debt levels around the world and monetary policies will drive international investors to the commercial real estate market in the US
  - Interest rates in the US will remain low.
  - Unemployment rate for the US fell to 6.1% in August of 2014, the lowest level since the 2008 financial crisis.
  - In 2014, GDP has been growing by 4.2% and consumer spending will rise in the upcoming holiday season.
  - These fundamentals are creating high consumer confidence heading into 2015.
  - All of these factors should drive rent higher and increase occupancy
  - The outlook for commercial real estate continues to be strong despite recent volatility in the stock market.

- Worries about a slowing economy in Europe and other parts of the world make it less likely central bankers will raise their benchmark interest rates.

- ***Current Market Conditions***
  - Moderate sustained growth forecast for all categories.
  - Vacancy rates, absorption and rent will continue to grow.
  - Less construction activity than before the financial crisis of 2008 will lead owners to redevelop space.
    - Shows tightening demand which is a good indicator for coming years
  - Transactions will continue to strengthen in primary, secondary and tertiary markets.
  - ***Commercial Office***
    - Improved business sentiment and employment prospects have sustained the recovery in this sector.
    - Vacancy rates are down and rent growth is up.
      - In the second quarter of 2014, vacancy rates and rental growth were 14.5 and 3.1 percent respectively
      - Last year, in the second quarter of 2013, vacancy rates were 15.2% and 2.5%.
    - Net absorption also increased
      - 15.4 million square feet of vacancies were absorbed in the second quarter of 2014.
      - Compare with 10 million square feet of space in the second quarter of 2013.

- Challenges exist in that tenants are still seeking efficiencies in space utilization and are trying to develop flexible arrangements lease arrangements.
- There is relatively little new supply coming to market in most cities.
- Redevelopment and refurbishing existing spaces will prove beneficial to owners.

- ***Housing Market***
  - Home prices may be plateauing across the US.
  - Still, asking prices for homes has accelerated in 40 of the largest 100 metro areas in October compared to last year.
  - The asking prices for homes rose 1% nationally in October over the previous month and increased 6.4% annually, which was still down from the 10.3% annual rise in October of 2013.
  - While price gains slowed in 60 metro areas and accelerated in 40 of them, the actual asking prices only fell in 9 metro areas.
  - The acceleration in asking prices is concentrated in the Midwest and the south, while the slowdown is mainly in the west coast and Las Vegas.
    - Prices didn't accelerate more than 10 percentage points in any metro area — Dayton, Ohio, came the closest with a 9.1 percentage point drop.
    - Prices slowed by more than 10 points in 12 metro areas, most dramatically in Las Vegas (which had a 21.8 point drop).

        - Due to balancing of the recovery; the area that rebounded fastest are slowing and the areas that required more fundamental improvement are showing gains.
    - This is in contrast to the S&P/Case-Shiller's 20-city composite index released last month.
        - U.S. home prices rose by just 0.2% in August 2014 over the previous month, slower than the 0.6% rise in July.
    - Still, house prices increased by 5.6% in annually in August, which was the slowest pace since annual growth in November 2012, and slower than annual growth of 6.7% in July 2014.
    - Slower rising home prices bode well for the housing market's continuing recovery nearly seven years after the market's historic collapse, economists say.
    - Price appreciation is slowing most in big cities where gains were sharpest in recent years due to investor demand for foreclosures and distressed properties.
    - Prices have been rising slowly all along in markets that didn't see such feverish investor buying.
    - Interest rates will remain low and will help housing stay affordable which is critical to drawing in the next generation of first-time buyers.
- ***Industrial***
    - Increases in online shopping, international trade and manufacturing will continue to provide support for the industrial sector.

- Industrial vacancy has dropped by almost a percentage point in the past year.
- Manufacturing construction has increased by nearly eight percent in the past year.
- Rent increases are up to 4.5% in 2014 from 1.6% growth in 2013.
- Vacancy declined to 10.8% from 11.9% in 2013.
- Warehouse and distribution centers will continue to benefit from on-line retailers looking for ease of delivery continue to drive demand.

- ***Multi Family***
  - Apartments are still the leading sector in commercial real estate.
  - Investors are on track to buy more multifamily properties this year than last year
  - Last year apartment sales topped the peak year of the last real estate boom.
    - Investors bought $105.4 billion in apartment properties in 2013.
    - That's higher than the $99.4 billion in apartment properties they bought in 2007—the peak year of the real estate boom before the Global Financial Crisis.
  - Two-thirds of the sales of apartment properties so far in 2014 happened in just ten markets.
    - Earlier in the recovery, most sales were concentrated in six top coastal cities. The top ten now includes New York, Los Angeles, San Francisco, Dallas, Atlanta, Seattle, Houston, Washington D.C., Phoenix and Denver.

        - Investors bought more the $2 billion in apartment properties in each of these leading cities.
        - Select secondary markets are experiencing an uptick in sales velocities. Philadelphia, Orange County and Portland have all doubled their volume so far this year compared to the same period last year.
    - Capitalization rates, which represent the income from a property as a percentage of the sale price, now average 5.8 percent nationally, according to Jones Lang LaSalle.
    - Strong fundamentals support the market
        - Demand for apartments is strong.
        - Rents are expected to keep growing considerably faster than inflation.
    - The percentage of occupied apartments rose again to reach 95.8 percent in the second quarter, 2014.
    - Rents grew at an average of 3.3 percent across the country over the last 12 months.
- ***Retail***
    - Rental vacancy and effective rents continued to improve with increasing consumer confidence.
    - Vacancy was reduced by fifty basis points to 11.7%.
    - Effective rents increased by fifty basis points in 2014 at over 2013.
        - Twenty basis point increase in 2013 over 2012.

- Retail also enjoys slowly declining vacancy and more construction—but again from a low base.
- Retail is divided between successful properties and others, being dated and in the wrong locations.

- ***Lending***
  - There are choices for borrowers and available capital.
  - The mortgage markets have been helped by low interest rates, improving property prices and strengthening fundamentals.
  - All these trends have helped more borrowers qualify for loans.
  - Lenders have been also been encouraged to make more capital available for lending due to strong returns.
  - Multifamily sector seeing very strong support.
  - Multifamily mortgage debt outstanding rose to $930 billion, an increase of $13.0 billion from the first quarter of 2014.
  - The level of commercial/ multifamily mortgage debt outstanding increased by $24.9 billion to $2.56 trillion in the second quarter of 2014.
  - Growth is also speeding up: the second quarter of 2014 was 1 percent higher than the increase in the first quarter.
  - There are a variety of lenders available
  - Three out of the four major types of lenders increased their lending.
    - Banks and thrifts saw the largest increase in dollar terms in their holdings of commercial/multifamily mortgage debt at $16.3 billion, or 1.8 percent.

- Life insurance companies increased their holdings by $4.3 billion, or 1.3 percent, and
- REITs increased their holdings by $2.3 billion, or 6.3 percent.

- The only type of lender that made fewer loans involved securitized lenders that raise capital by issuing commercial mortgage-backed securities, collateralized debt obligations and other asset-backed securities.
    - Their commercial/ multifamily mortgage debt outstanding decreased by $2.3 billion, or 0.4 percent

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