LJN LAW JOURNAL NEWSLETTERS

NEW YORK REAL ESTATE LAW REPORTER®

ALM.

Volume 39, Number 1 • September 2022

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Transitional Housing Arrangements Are Not Illusory Tenancies

By Nativ Winiarsky

The Appellate Division Second Department recently issued a landmark ruling in *Sapp et al v. Clark Wilson et al*, __ AD3d __, 2022 NY Slip Op 04184 (2nd Dept. 2022) (*Sapp*) concerning two hot button issues; namely illusory subtenancies and status of transitional occupants.

In a 3-1 decision dated June 29, 2022, containing a vigorous dissent, the majority both affirmed a lower court ruling that occupants entering into possession pursuant to transitional housing agreements are not tenants with standing to claim rent stabilized rights and that such transitional housing agreements are not, per se, illusory subtenancy schemes designed to extract rents beyond the legal regulated rents.

By way of brief background, the New York City Department of Homeless Services (DHS) entered into a contract with certain service providers (Service Provider) to provide transitional housing and services to homeless individuals and families pursuant to the Neighborhood Based Cluster Transitional Residence Program (Cluster Program). Pursuant to this contract, the Service Provider provided services to the homeless individuals and families, including food services, child care services, and health services. Thereafter, the Service Provider entered into a Transitional Cluster Lease Agreement with an outside agency which provided that a certain number of apartment units were to be made available to homeless families and individuals in buildings owned by the defendant-owners (Owners). DHS would refer homeless families and individuals to the Service Provider, and they would then be placed in these units. Rent was paid by the Service Provider from the monies received from DHS pursuant to their contract.

The Plaintiffs are recipients of transitional housing and services for homeless individuals, who were placed in the owners' apartments by DHS under the Cluster Program. At some point, DHS advised the Owner that its building would no longer be used in the Cluster Program and the Plaintiffs were informed that

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they would be transferred to other shelters. Thereafter, DHS informed the Plaintiffs that it was terminating its relationship with the service provider at all of the owners' buildings.

The Plaintiffs then commenced separate actions alleging that they had been deprived of the benefits of rent stabilization by an illusory tenancy scheme. The Plaintiffs sought vacancy leases in their own names, and related relief. The Owners subsequently moved for summary judgment and for ejectment of the Plaintiffs.

In a decision dated Oct. 10, 2018, the lower court granted the Owners' motion for summary judgment, stating that whether Plaintiffs are entitled to vacancy leases under the Rent Stabilization Code (RSC) turned on whether they should be viewed as tenants within the meaning of the RSC. Under the RSC, a "tenant" is "[a] ny person or persons named on a lease as lessee or lessees, or who is or are a party or parties to a rental agreement and obligated to pay rent for the use and occupancy of a housing accommodation." (9 NYCRR §2520.6 [d]). Based thereon, the lower court ruled that these Plaintiffs were never tenants of the Owners inasmuch as they were never named on a lease and were never parties to a rental agreement obligating them to pay rent. Accordingly, the Plaintiffs were found not entitled to the protections of the RSC and subject to eviction.

At the Appellate Division, the court held that resolution of the standing issue was unnecessary, however, because, even assuming arguendo that the appellants are properly treated as subtenants, the Owners demonstrated that the prime tenancies were not illusory. Specifically, and citing to the Court of Appeals case of Matter of Badem Bldgs. v Abrams, 70 NY2d 45, 52-53 (1987), 510 N.E.2d 319, 517 N.Y.S.2d 450, the court stated that ""[a]n illusory tenancy is defined generally as a residential leasehold created in a person who does not occupy the premises for his or her own residential use and subleases it for profit, not because of necessity or other legally cognizable reason." An illusory tenancy scheme generally exists, for example, where the "prime tenant" rents a rent-stabilized apartment, which it never intends to occupy, and then subleases it for an amount in excess of the legal rent so as to make a profit. In such a case, the prime lease is nothing more than a contrivance with no legitimate purpose, and thus, are not entitled to legal recognition.

In this case however, the leases did not lack a legitimate purpose. The subject premises were leased to, and by, the Service Providers for the "legally cognizable reason" of providing transitional housing in accordance with the terms of the Cluster Program run by the City.

The Appellate Division further held that the undisputed facts that the units in which the Plaintiffs resided were leased to the Service Providers pursuant to their agreements with DHS, and that the leases expired by their terms upon termination of such agreements, established the bona fides of the tenancy of the entity asserted to hold the status of prime tenant, i.e., the Service Providers. "Under these circumstances, the owners demonstrated, prima facie, that the appellants were not entitled to vacancy leases and related relief because illusory tenancies were not created to deprive them of the benefits of rent stabilization." (Sapp, *7-8)

The Plaintiffs had argued that the leasing of units to both Service Providers was a scheme to deprive the appellants of the benefits of Rent Stabilization Law. The Appellate Division however found such a theory to be untenable because the leases to the Service Providers were made to comply with the Cluster Program. Under the Plaintiffs' logic, the Own-

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Nativ Winiarsky is the senior litigation partner at Kucker Marino Winiarsky & Bittens.

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New York Real Estate Law Reporter® (ISSN 0894-4903) is published monthly by Law Journal Newsletters, a division of ALM Global.

Telephone: (800) 756-8993
Editorial e-mail: ssalkin@alm.com
Circulation e-mail: customercare@alm.com
Reprints: www.almreprints.com

New York Real Estate Law Reporter 021873
Periodicals Postage Paid at Philadelphia, PA
POSTMASTER: Send address changes to :
ALM Global
150 East 42 Street, Mezzanine Level
New York, NY 10017

Published Monthly by:
Law Journal Newsletters
1617 JFK Boulevard, Suite 1750, Philadelphia, PA 19103
www.ljnonline.com

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ers should not have allowed any apartments to be leased to the Service Providers because doing so created an illusory tenancy. However, such refusal would have left DHS without the transitional housing that it needed to fulfill its mandate of providing housing to homeless families. Thus the Appellate Division found that even if the Cluster Program, which was eventually ended by the City, was problematic, this did not make the tenancies created in conformance therewith unlawful.

This important decision provides much needed clarity as to the status of transitional occupants put into occupancy pursuant to the Cluster Program which has again been recently revitalized by DHS. Any other finding would have spelled the death knell for the program as Owners would be loath to rent such units to DHS if the transitional occupants would have been entitled to permanent rent stabilized protection.

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DEVELOPMENT

Local Law Prohibiting Drive-Through Windows Requires Full Environmental Assessment Form

Miranda Holdings, Inc. v. Town Board of the Town of Orchard Park

2022 WL 2092594
AppDiv, Fourth Dept.
(memorandum opinion)

In landowner's article 78 proceeding/ declaratory judgment action challenging the town's enactment of a local law prohibiting use of drive-through windows in an architectural overlay district, the town appealed from Supreme Court's grant of the petition. The Appellate Division affirmed, holding that the town had failed to comply with the State Environmental Quality Review Act (SEQRA).

Landowner sought approval of a commercial structure with a restaurant that included a drive-through window. A 2019 local law prohibits the use of drive-through windows in the Architectural Overlay District. Landowner brought this article 78 proceeding contending that the local law was adopted in violation of SEQRA because the town failed to treat the law as a "Type I" action. Supreme Court granted the petition and the town appealed.

In affirming, the appellate Division rejected the town's contention that the local law regulated only design, not sue. The court emphasized that the law defined drive through windows by describing their use — allowing transfer of food to a vehicle — rather than by describing their appearance. Because the local law changed an allowable use in an area affecting more than 25 acres, the town was obligated to treat the proposed local law as a Type I action, which required preparation of a full Environmental Assessment Form (EAF). Because the town completed only a short-form EAF, the local law was invalidly enacted.

Redevelopment Project Did Not Transfer Inalienable Parkland

61 Crown Street, LLC v. City of Kingston Common Council

2022 WL 2162701
AppDiv, Third Dept.
(Opinion by Pritzker, J.)

In neighbors' challenge to the city's approval of a redevelopment project, neighbors appealed from Supreme Court's grant of summary judgment to the city. The Appellate Division affirmed, holding that the city had not alienated parkland or engaged in spot zoning.

In 2016, the city requested proposals to redevelop city-owned land including an outdoor parking lot and defunct parking garage, together with a smaller privately owned parcel. The city's land, located in a historic district, is also located within a mixed-use overlay district. The private parcel was located outside those districts. In 2019, a contract vendee of the private parcel applied to amend the zoning map to include the parcel in the mixed-use district, and the city approved the amendment conditioned on an affordable housing component for that parcel. In 2020, neighbors brought this action, contending that the rezoning was spot zoning, and also seeking to enjoin the city from alienating the city-owned land on the ground that some of the land was inalienable parkland. Supreme Court granted summary judgment to the city.

In affirming, the Appellate Division conceded that public events were occasionally held in the disputed area but held that those events were temporary and sporadic and did not evince a clear intent by the city to treat the area as parkland. The existence of a concrete patio, movable picnic tables and painted hopscotch boards were also insufficient to establish an intent to dedicate the land as parkland. Moreover, the court indicated that even if the public treated the area as a park, the public's use had little bearing on whether the city permanently dedicated the land as a park. The court then rejected neighbors' spot zoning claim, noting that the private parcel was adjacent to the mixed-use district, and that the affordable housing requirement was consistent with the city's comprehensive plan for the area.

Comment

In the absence of an unequivocal manifestation of intent to dedicate land as permanent parkland, courts tend to reject claims that a municipality has impliedly dedicated the land for park use, precluding alienation without the approval of the state legislature. In *Glick v. Harvey*, 25 N.Y.3d 1175, the Court of Appeals refused to issue an injunction against New York City's planned transfer to NYU of interests in four municipal parcels which had featured open space used by the public for many

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years. The court noted that the areas were designated as streets on City maps, and that although the Department of Parks and Recreation (DPR) developed some of the open space, it did so pursuant to agreements with the Department of Transportation expressing an understanding that management by the DPR was to be temporary and provisional. The court emphasized that for an implied dedication to occur, the acts of the landowner indicating an intent to dedicate its land to public use must be clear and unequivocal, and here, the City had not shown such a clear and unequivocal intent.

A transfer of property to management by the DPR is insufficient to establish that the land has been dedicated to park use. In affirming the denial of a petition by an environmental organization to block New York City's release of certain land on the Harlem River for non-park uses, the First Department concluded, in *Bronx Council for Env't Quality v. City of New York*, 177 A.D.3d 416, that a pier under the jurisdiction of the DPR, bearing DPR signage and referred to as a park by the DPR and other entities was not by itself proof of an intent by the City to commit the pier permanently to use as parkland when the park was fenced-off and closed to the general public for most of the time after the transfer to DPR.

By contrast, at least one court has held that if an instrument conveying, or providing access to, the land includes a restriction limiting it to park uses there is an issue of fact as to whether the land has been dedicated to park use. In *Clover/Allen's Creek Neighborhood Ass'n LLC v. M&F, LLC*, 173 A.D.3d 1828, the Fourth Department allowed a suit by a preservation company seeking to block development on private land to proceed to determine whether Town easements which provided that the properties were to be used as a "pedestrian pathway" for "public use" could be considered an express or implied dedication. The easements, which were not subject to a reversionary interest, required the Town to restore the easement property to "a park like condition" after construction of the pedestrian pathway.

Absent an express agreement like the one in Glick indicating that use of the land as a park was understood to be temporary, public use of the land for an extended period, generally decades, makes it more likely that courts will find an implied dedication. The Second Department in *Village of Croton-On-Hudson v. Westchester Cnty.*, 38 A.D.2d 979, granted an injunction against defendant county, which had plans to construct a waste disposal site over a plot of land in use for over 45 years as a public park, concluding that the county could not construct the site without legislative approval as the longevity of the use for park purposes constituted a dedication and acceptance by implication. But in *Coney Island Boardwalk Cmty. Gardens v. City of New York*, 172 A.D.3d 1366, the Second Department rejected an action by a community garden group to block City's amphitheater project upon a community garden which had been intermittently used for less than two decades and for the latter decade, on an unlicensed basis. The court reasoned that, like in *Glick*, management of the lot by the DPR was understood to be on a temporary and provisional basis.

Town Board Took Requisite Hard Look At Environmental Impact Of Mixed-Use Development

Save the Pine Bush, Inc. v. Town of Guilderland
205 A.D.3d 1120
AppDiv, Third Dept.
(Opinion by Egan, Jr., J.)

In an environmental group's article 78 proceeding challenging a SEQRA findings statement and site plan approval for a mixed-use development, the group appealed from Supreme Court's denial of the petition and dismissal of the proceeding. The Appellate Division affirmed, holding that the planning board's findings statement was supported by the requisite hard look at environmental factors.

In 2018, the town rezoned a mall and adjacent land in proximity to the Albany Pine Bush to permit denser residential and commercial development. Developer then sought subdivision and site plan approval to build several buildings on land previously used as a pig farm. The planning board declared itself lead agency and issued a positive declaration, requiring preparation of a draft environmental impact statement (EIS). The board ultimately accepted the final EIS and issued a findings statement determining that the project minimized any adverse environmental impacts to the maximum extent possible, and appropriately balanced environmental protection against social and economic considerations. The board then conduced a public hearing on site plan approval and granted that approval. In a proceeding brought by other petitioners, the Appellate Division ultimately upheld the planning board's environmental review. Litigation by the environmental group in this proceeding had been stayed pending resolution of that proceeding, but the stay was lifted after that decision. Supreme Court the concluded that the parallel proceeding was dispositive on the merits and dismissed the proceeding.

In affirming, the Appellate Division first held that preclusion principles did not bar the environmental group from challenging the planning board's decision, noting that the group was not a party to the other proceeding. But the court then held that stare decisis principles nevertheless required the group do identify compelling reasons for departing from the earlier determination. The court then focused on claims not addressed in the earlier proceeding. The court rejected the group's claim that the planning board erroneously concluded that the project would have no adverse impact on significant flora and fauna, noting that the planning board had properly found that the sites had already been disturbed

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by previous human development and did not contain habitats that would support the species identified by the environmental group. The court then turned to the claim that the board had ignored the use of pesticides, noting that developer had represented that no pesticides would be used. The court then concluded that the board had taken the requisite hard look at environmental factors.

Court Rejects Claim of Conspiracy to Violate Vested Rights

Naegele v. Fox
2022 WL 1931090
AppDiv, Fourth Dept.
(memorandum opinion)

In neighbors' action seeking removal of walls and fill placed by landowner, landowner appealed from dismissal of his counterclaim alleging that neighbors had conspired with town officials to violate his constitutionally protected vested rights. The Appellate Division affirmed, holding that landowner had failed to substantiate the counterclaim with detailed factual information concerning the alleged conspiracy.

Neighbors have been engaged in an ongoing dispute over residential construction on landowner's parcel. During the pendency of landowner's proceeding challenging the town's determination that landowner had violated provisions of the town code, the town enacted new zoning provisions, and neighbors brought the current action alleging causes of action based on violations of the new provisions of the code, they sought removal of walls and fill, among other relief. Landowner counterclaimed, alleging that neighbors, one of whom is the town clerk, conspired with town officials to violate his vested rights. Supreme Court dismissed the counterclaim on the ground that a conspiracy claim under 42 USC §1983 can only be brought against someone acting in an official capacity. Landowner appealed.

In affirming, the Appellate Division first held that Supreme Court had erred in holding that a private actor may not be held liable on a conspiracy claim. But the court nevertheless held that Supreme Court had properly dismissed the counterclaim because it contained only vague and general repetitions of landowner's prior claims that the neighbor who was a town clerk had a conflict of interest and had communicated with certain government actors to convince them to take adverse action towards the project.

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REAL PROPERTY LAW

Buyer's Anticipatory Repudiation Results In Forfeiture of Down Payment

Hegeman Plaza, LLC v. Burgan
2022 WL 2057801
AppDiv, Second Dept.
(memorandum opinion)

In buyer's action for specific performance of a sale contract, buyer appealed from Supreme Court's grant of summary judgment to seller permitting seller to retain the down payment. The Appellate Division affirmed, holding that buyer's anticipatory repudiation entitled seller to retain the down payment.

Buyer contracted to buy from sellers in a transaction that was intended to be part of a 1031 exchange for the sellers. The buyer agreed to cooperate with the seller in completing that exchange. The contract also included a provision prohibiting assignment of the contract without the consent of the sellers. The day before closing, buyer sought to take title under a newly formed LLC, and sellers refused to consent. Buyer's lawyer informed sellers that if they did not consent to the assignment and change their documents, buyer would not cooperate with the sellers at closing. Sellers then cancelled the contract and buyer brought this action for specific performance. Sellers counterclaimed to retain the down payment, and Supreme Court awarded sellers summary judgment on that counterclaim.

In affirming, the Appellate Division held that the statements by buyer's lawyer constituted an unequivocal expression of intent not to perform. That repudiation relieved sellers of their obligation to perform and entitled them to recover damages for breach. Since the contract permitted sellers to retain the deposit upon termination due to the buyer's fault, Supreme Court properly awarded summary judgment to sellers on their counterclaim for return of the down payment.

Constructive Trust Claim Supports Notice Of Pendency

Minzer v. Minzer
2022 WL 2057830
AppDiv, Second Dept.
(memorandum opinion)

In former owner's action to impose a constructive trust on real property and to recover damages for unjust enrichment, transferee appealed from Supreme Court's grant of a preliminary injunction and denial of transferee's motion to dismiss the complaint and cancel the notice of pendency. The Appellate Division modified to deny the preliminary injunction, holding that former owner had failed to demonstrate a likelihood of success on the merits.

Former owner contracted to sell the subject property to transferee in October 2018, and the sale closed the following month when former owner executed a deed to transferee. Former owner alleges that transferee promised to reconvey the subject property to transferee after obtaining a mortgage, and failed to transfer the property. In this action for unjust enrichment and to impose a constructive trust, Supreme Court

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Real Property Law

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granted a preliminary injunction to former owner.

The Appellate Division modified, holding that former owner had failed to establish a likelihood of success on the merits because the alleged promise was not contained in the contract of sale, which included a merger and integration clause. The court held, however, that Supreme Court had properly denied transferee's motion to dismiss and motion to cancel the notice of pendency, noting that an action to impress a constructive trust on real property qualifies as on in which the filing of a notice of pendency is allowed.

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LANDLORD & TENANT LAW

Double Rent Holdover Provision Enforceable; Late Fee Unenforceable As a Penalty

ESRT 501 Seventh Avenue, LLC v. Regine, Ltd.
2022 WL 2068834
AppDiv, First Dept.
(memorandum opinion)

In commercial landlord's action for rent and late charges, tenant appealed from Supreme Court's grant of summary judgment to landlord in the amount of $858,809.94. The Appellate Division modified and denied the motion to the extent it sought late charges, and remanded for a determination whether the late fees were reasonable.

The long-term lease between landlord and tenant, originally signed in 2003, provided that tenant would be liable for a 5% charge on all outstanding arrears, and that tenant would be liable for 200% of the monthly rent for any holdover period. By its terms, the lease expired in June 2020. Tenant fell behind in rent payments beginning in 2019, but remained in possession past the expiration of the lease term. Landlord brought this action to recover rent and the late charges, and Supreme Court granted landlord's summary judgment motion. Tenant appealed.

In modifying, the Appellate Division first held that landlord had established its entitlement to summary judgment on the claim for rent because tenant did not dispute landlord's assertions that tenant had failed to pay the amounts due. Because the lease required tenant to pay any disputed bills and contest them afterwards, disputes over those bills would not defeat landlord's summary judgment motion. The court held, however, that the lease's 5% late charge was unenforceable as against public policy because it resulted in an annual rate in excess of 25%. Although landlord had voluntarily reduced the late fee, the court remanded for a determination whether the fees, after the reduction, were unreasonable. The court did hold, however, that the holdover rent provision was enforceable as liquidated damages.

Comment

Courts enforce holdover provisions in commercial leases that call for two to three times the lease rent. For example, in *Tenber Assocs. v. Bloomberg L.P.*, 51 A.D.3d 573, 574 (2008), the First Department held that a liquidated damages provision requiring payment of two times the monthly lease rent in the event of a holdover was enforceable where a commercial tenant held over in possession of the subject premises after the conclusion of their 10-year lease. The Court denied tenant's challenge to the provision as an unenforceable penalty, noting that tenant failed to establish the amount fixed was disproportionate to the probable loss (*See also*, *Thirty-Third Equities Company LLC v. Americo Group, Inc.*, 294 A.D.2d 222 (1st Dept 2002) (holdover liquidated damages at two-and-one-half the lease rent upheld); *Federal Realty Limited Partnership v. Choices Women's Medical Center, Inc.*, 289 A.D.2d 439 (2d Dept 2001) (holdover liquidated damages at three times the lease rent upheld)).

By contrast, when a holdover provision expressly entitles landlord to an amount in excess of landlord's actual damages, the provision constitutes an unenforceable penalty. For example, in *555 West John Street, LLC v. Westbury Jeep Chrysler Dodge, Inc.*, 149 A.D.3d 796, 798 (2017), the Second Department held unenforceable a liquidated damages provision that entitled landlord to $5,000 per day, in addition to actual damages, for each day tenant remained in possession after the date specified in the parties' agreement. The court held that the $5,000 per day provision constituted a penalty because the lease already entitled landlord to any actual damages landlord sustained as a result of tenant's holdover of the unimproved portion of landlord's lot where tenant stored extra vehicles.

Courts will not enforce late fee provisions in leases when the fees total more than 25% per annum of the lease, a usury limit imposed by N.Y. Penal Law §190.40. For example, the First Department in *Cleo Realty Associates, L.P. v. Papagiannakis*, 151 A.D.3d 418 (2017), held that a lease provision requiring a 4% per month late fee, totaling 48% per year, was rendered unenforceable by N.Y. Penal Law §190.40 which makes it a criminal offense to charge interest more than 25% total year. (*See also*, *Sandra's Jewel Box Inc. v. 401 Hotel, L.P.*, 273 A.D.2d 1, 3 (2000) (holding the lease's late charge provision as unenforceable as it awarded a 365% per annum penalty which goes against the public policy concerns expressed in N.Y. Penal Law §190.40); *Clean Air Options, LLC v. Humanscale Corp.*, 142 A.D.3d 923, 924 (2016) (holding a late fee which resulted in an annual interest rate of 78% as unreasonable and confiscatory in nature and thus unenforceable)) (*But see*, *K.I.D.E. Assocs., Ltd. v. Garage Ests. Co.*, 280 A.D.2d 251, 254

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Landlord & Tenant

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(2001) (upholding a late fee charge of 5% per month given that the term was in a commercial lease negotiated by sophisticated businesspersons, tenant submitted no evidence suggesting that the late charge was unreasonable or against public policy, and the court made no mention of the criminal usury offense).

Extrinisic Evidence Inadmissible to Vary Terms of Lease Agreement

Hylan Ross, LLC v. 2592 Hylan Boulevard Fitness Group, LLC
2022 WL 2232079
AppDiv, Second Dept.
(memorandum opinion)

In landlord's action against tenant and guarantor for breach of a lease, landlord appealed from Supreme Court's grant of summary judgment to tenant dismissing the complaint. The Appellate Division affirmed, holding that extrinsic evidence was inadmissible to vary the terms of the lease agreement. Landlord and tenant entered into a lease agreement to take effect after landlord constructed a building. The agreement provided that landlord would obtain any and all approvals and building permits and would obtain a certificate of occupancy for the building. The lease gave landlord 18 months to obtain those approvals and gave tenant a right to terminate the lease if landlord proved unable to obtain the approvals within the 18 month time frame. Two years after the agreement was executed, tenant sent landlord a notice indicating that it was terminating the lease due to landlord's failure to obtain the required approvals. Landlord rejected the notice, contending that it had timely obtained all approvals required to construct the building. Landlord then brought this action for breach of the lease agreement, and Supreme Court granted summary judgment to tenant. Landlord appealed.

In affirming, the Appellate Division rejected landlord's contention that the approvals included only those approvals necessary to commence construction and did not include permits which could be obtained only after substantial completion of the building. The court concluded that it could not accept landlord's contention without adding a term to the agreement. The court also held that it could not rely on the parties' communications or on industry standards to modify the clear term of the lease, especially given the merger clause in the agreement.

Unsigned Lease Agreement Not Binding

Family Health Management, LLC v. Roban Developments, LLC
2022 WL 2068827
AppDiv, First Dept.
(Opinion by Rodriguez, J; concurring opinion by Scapulla, J.)

In prospective tenant's action for conversion, landlord appealed from Supreme Court's grant of tenant's summary judgment motion. The Appellate Division affirmed, holding that the parties' lease agreement was not binding because tenant never signed it.

Prospective tenant paid $96,000 into its lawyer's IOLA account, $24,000 for two months of security and $72,000 for six months of increased rent. The lawyer then transferred the $96,000 to landlord's general account. Tenant, however, never signed the lease agreement, although tenant or its guarantors did sign various exhibits to the lease. Tenant then brought this action to recover the $96,000 from landlord, contending that landlord had converted the funds. Supreme Court agreed and awarded summary judgment to tenant. Landlord appealed.

In affirming, the Appellate Division held that prospective tenant was not bound by the lease agreement, because signing was a condition precedent to the formation of a binding lease agreement. The court then held that the $96,000 constituted a specific identifiable fund that could support a conversion claim. Justice Scapulla, concurring for herself and Justice Kennedy, contended that the funds had been commingled in the lawyer's IOLA account, and could not constitute an identifiable fund. She concluded, however, that summary judgment was properly granted to the tenant on an unjust enrichment theory.

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EMINENT DOMAIN LAW

Claimants Failed to Establish That Property Would Have Been Rezoned

Pacific Carlton Development Corp. v. New York State Urban Development Corp.
2022 WL 2232095
AppDiv, Second Dept.
(memorandum opinion)

In a proceeding for compensation for loss of property through eminent domain, claimants appealed from Supreme Court's award of $22,206,000. The Appellate Division affirmed, holding that claimants had failed to establish that the property would have been rezoned to a C6-2A district.

Claimants owned four parcels included in the Atlantic Yards project. One was improved as an office building with 6 above-ground levels, and the other three were minimally improved. Claimants contended that there was a reasonable probability that the parcels would have been rezoned to C6-2a, which permits an FAR of six, and that the highest and best use was a mixed-use structure spanning all four lots. Claimant argued that the city's pursuit of transit-oriented development would have led to the rezoning of the parcels. Condemnor contended that if the parcels were to be rezoned, it was more likely that they would have been rezoned C4-4A, which permits an FAR

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Eminent Domain

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of 4. After a non-jury trial, Supreme Court agreed with the city that the likely rezoning would have been to C4-4A, and awarded compensation on that basis. Claimant appealed.

In affirming, the Appellate Division held that Supreme Court, in its discretion, property credited the testimony of condemnor's expert, who testified that the rezoning actions around the condemned property demonstrated that the city would have prioritized other policy preferences over a desire for density near transit hubs.

Increased Award Proper Where Prior Regulation Might Have Constituted a Taking

Matter of New Creek Bluebelt, Phase 4
2022 WL 1481636
AppDiv, Second Dept.
(memorandum opinion)

In a condemnation proceeding, both the city and the claimant appealed from Supreme Court's award, after a nonjury trial, of $669,000 in compensation for the city's taking of landowner's parcel. The Appellate Division affirmed, holding that the court properly increased the award based on the reasonable probability that wetlands regulation of the property had constituted a taking, and that the court properly discounted the award based on the cost of a potential taking challenge.

Claimant owned at 21,000 square foot vacant parcel of land on Staten Island's eastern shore. The parcel was zoned residential but had been designated as wetlands, which precluded residential development. Subsequently, the city acquired the property by eminent domain as part of a stormwater management project. Claimant sought compensation. Supreme Court awarded $669,000 based on its finding that there was a reasonable probability that the wetlands regulation would be found to be an unconstitutional taking, entitling claimant to a premium above the regulated value.

In affirming, the Appellate Division held that in light of the 84% diminution in value caused by the wetlands regulation, together with a prohibition on development, claimant had established that there was a reasonable probability that the wetlands regulation would be found to constitute a taking. The court then held that Supreme Court had properly discounted its award by making deductions for the $350,000 cost of taking challenge and for the risk of the challenge.

Comment

When the government condemns property subject to existing regulations, the just compensation awarded may be increased if the owner shows a reasonable probability that the regulation(s) would constitute an unconstitutional taking through what courts call the "reasonable probability-incremental increase rule." This rule was first used in *Matter of Town of Islip*, 49 N.Y.2d 354, in which the Court of Appeals affirmed that claimants showed a reasonable probability that the town's zoning as applied to their property was an unconstitutional taking since the existing residential zoning deprived them of the reasonable use of property surrounded by public highways.

Determining the incremental increase in just compensation is a fact intensive. However, in establishing this increase at least two courts have started with a multiplier of 75% of the unregulated value of the land, subject to adjustments. In *Berwick v. State of New York*, 159 A.D.2d 544, the Second Department held that the trial court's award, based on 75% of the land's unregulated value to account for the likelihood of a successful regulatory takings claim, should be reduced by an additional 32-34% to reflect the facts that the land was prone to daily flooding and that federal water pollution statutes could impact developability of the land. In *In re New Creek Bluebelt, Phase 4* (dealing with the same development as the case about which this comment concerns), 122 A.D.3d 859, the court used the factors identified in *Penn Central Transp. Corp. v. City of New York*, 438 U.S. 104, to affirm the lower court's holding that claimant had established a reasonable probability that the wetlands regulations relating to New Creek were an unconstitutional taking because they made it highly improbable that the state's Department of Environmental Conservation would ever issue a permit to develop the property in accordance with the properties' zoning, which allowed one- and two-family dwellings. The court held that claimant was entitled to the regulated value of the land plus an increased increment of 75% of the difference between the property's unregulated value and its regulated value. In arriving at the unregulated value, the lower court took into account the extraordinary costs of developing the property.

By contrast, when regulations have a lesser impact on landowners' property, claimant is not typically entitled to any increment above regulated value. In another lawsuit pertaining to the Bluebelt, *In re City of New York*, 60 Misc.3d 232, the Supreme Court rejected landowners' claim that the wetlands regulations constituted a taking because, in analyzing the neighboring property alongside the property at hand — both used by the same party as one economic unit — the regulations did not proscribe all or even most economic use of the parcels.

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