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FINKELSTEIN NEWMAN FERRARA LLP

BUILDING GONE WILD!

In *Matter of USA Niagara Dev. Corp.*, Settco, LLC, sued for the value of its "trade fixtures" when ownership of its building was transferred to USA Niagara Development Corp. by "eminent domain" -- the government taking of private property.

The building was situated on more than 3 acres in the City of Niagara Falls and, back in 1991, a well-known architect was hired for an improvement project which included an amusement park, retail mall, and entertainment facility. However, more than half of the retail spaces never rented and the entire facility closed less than six months later. The building remained unoccupied for about a decade, and Settco acquired the property in 2001. USA Niagara thereafter wanted to convert the parcel into a convention center. After the taking occurred, Settco filed suit against USA Niagara for $20 million, seeking compensation for 373 items Settco contended were "trade fixtures." When the Niagara County Supreme Court denied the fixture claim, the company appealed to the Appellate Division, Fourth Department.

Apparently, the building was in such disrepair "birds had nested in the heating units ... there were pools of standing water in the building" resulting in "significant mildew and mold," and numerous "cats had taken up residence ... and were using a sand pit ... as a litter box."

While Settco was entitled to compensation for the taking of its property, none of the 373 items listed was "used for business purposes at or near the time of the taking." In addition, Settco was unable to prove "any business loss with respect to the items for which it sought compensation," since it had never conducted business in the building.

So, we guess you could say, Settco's fixture claim was condemned from the very start.

FLOAT LIKE A BUTTERFLY!

In *Matter of Save the Pine Bush, Inc. v. Planning Bd. of Town of Clifton Park*, Save the Pine Bush challenged the Clifton Park Planning Board's acceptance of Donald Greene's site plan.

Greene proposed to construct industrial buildings on a parcel of undeveloped land which was identified as a habitat for the endangered "Karner Blue Butterfly."

When the Planning Board determined the project wouldn't have a negative impact on the environment, and granted site-plan approval, Save the Pine Bush brought a special case -- pursuant to CPLR Article 78 -- to set aside the Board's determination. After the Schenectady County Supreme Court dismissed the proceeding for "lack of standing," Save the Pine Bush appealed to the Appellate Division, Third Department. In the absence of a "specific environmental injury," and since none of the group's members lived in proximity to the property to have a "legally protectable interest," the AD3 affirmed the dismissal.

That must have stung!

HOW DOES A LEASE AFFECT A PROPERTY'S VALUE?

In *936 Second Ave. L.P. v. Second Corporate Dev. Co., Inc.*, Second Corporate Development Co. (Second) leased three adjoining buildings -- with 22 rent-regulated apartments and four retail stores -- to 936 Second Avenue (936) by way of a 20-year net lease. The parties' agreement provided if 936 exercised a renewal option, "the annual rent would be seven percent of the value of the [leased] premises as of the date of commencement of each successive 10-year period."

The document further provided if the parties couldn't agree on the property's value, they could each seek their own appraisal.

When a dispute arose, Second's appraiser valued the property at $7.1 million, 936's appraiser came back with $3.43 million -- with the latter expert having "considered the effect of the net lease on the value of the premises."

936 later asked a court to declare that the net lease and all its terms had to be considered when calculating the property's value. When the New York County Supreme Court disagreed with that position, the company appealed to the Appellate Division, First Department, which affirmed.

When the dispute reached our state's highest court, the New York State Court of Appeals determined "valuations of land must take into consideration all encumbrances, including restrictions as to its use, unless there is a clear provision to the contrary." Since it impeded the property's "highest and best use," the net lease couldn't be disregarded. ["If the parties to a lease desire to exclude that encumbrance in valuing the property, they need only include language to that effect in their agreement. Indeed, courts have routinely enforced such provisions."]

We'll second that!

FAMILY FEUD!

In *Beshara v. Beshara*, Antoinette and George Beshara were battling over their respective interests in their deceased mother's property.

Before she died, Marie divided ownership of the disputed parcel between herself and George as "joint tenants." A few months later, Marie relinquished her remaining interest to Antoinette.

When Marie died, Antoinette asked the Kings County Supreme Court to recognize she was the owner of an "undivided one-half interest in the real property." But since the validity of her deed was contested, her request was denied.

On appeal, the Appellate Division, Second Department, found the mother's signature on the duly notarized deed couldn't be challenged without "proof [of an irregularity] so clear and convincing so as to amount to a moral certainty." Since that high burden wasn't met in this case, the AD2 believed Antoinette's request should have been granted.

Survey says?

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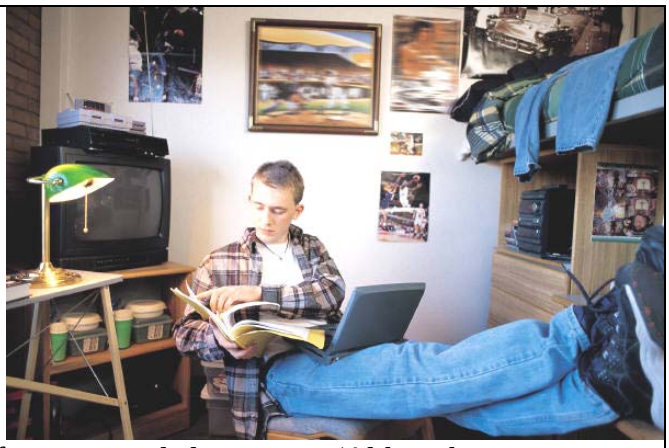
WHEN'S A DORM A DORM?



In *Matter of 9th & 10th St. LLC v. BSA of City of New York*, 9th & 10th St. LLC filed suit against the Board of Standards & Appeals (BSA) to compel the agency to provide 9th & 10th with a permit to build a proposed dormitory.

9th & 10th wanted to construct a 19-story structure, whose use was restricted to a "Community Facility." While the idea was to provide housing for "college or school students," BSA was concerned the dorm might later may be converted into an apartment complex and denied a permit on the grounds there was insufficient evidence the building could, in fact, be used for its intended purpose. (Although an apartment building was lawful, that kind of structure was restricted to 10 stories rather than the proposed 19.)

To qualify as a dorm, a building needs to be "operated by, or on behalf of, at least one college or school." 9th & 10th failed to provide an adequate "institutional nexus" despite its production of a lease to "University House Corps.," a 9th & 10th-created entity which promised to rent out the units to students.

When the New York County Supreme Court denied 9th & 10th's challenge, the company appealed to the Appellate Division, First Department, which was of the opinion that a building permit couldn't be refused on the basis of "a possible future illegal use."

BSA then appealed to our state's highest court which held that when there is a reasonable apprehension a building's planned use isn't legally permissible, the City isn't "required to let the property owner build the building and see what happens."

The Court of Appeals was of the opinion that seeking assurances from the developers wouldn't suffice as it "would create needless problems" if the 19-story structure were erected and couldn't be used "in a legally-permitted way. The City would then face a choice between waiving the legal restrictions and requiring the building to remain vacant or be torn down."

Since the BSA was trying to avoid that dilemma, the Court of Appeals reinstated the Supreme Court's denial of the challenge.

Are sweet dreams made of this?

WHO'S THE VILLAGE IDIOT?

In *Schutz-Prepscius v. Incorporated Village of Port Jefferson*, Carol Schutz-Prepscius tripped on a sidewalk which ran along Maria Maldonado's property at 1523 Main Street in Port Jefferson. Maldonado claimed that the sidewalk was dangerously defective due to the roots of a large tree, which elevated parts of the sidewalk.

The Town Code allows a nuisance case to be filed when the Village Clerk is given notice of the defective condition prior to the injury. Although the Clerk had no record of the sidewalk's condition, Maldonado claimed she called the Village Planner before the accident and was instructed to notify the Village Parks Department of the condition. (Maldonado supposedly did so.)

When the Suffolk County Supreme Court denied the Village's request to dismiss the case, it appealed to the Appellate Division, Second Department.

The AD2 affirmed the outcome because Maldonado's contact with the Village Parks Department -- as directed by the Village Planner -- may have eliminated the need for written notice to the Village Clerk.

Is there no estopping Maldonado now?

NO RENT FOR ILLEGAL MULTIPLE DWELLING

In *Misir v. Gilbert*, Jerry Misir sued to recover rent from his tenant, Mae Ann Gilbert, for the period May 2005 through August 2006.

While the monthly rent was only about $800, Gilbert wouldn't pay because the building was supposedly being used as "an illegal multiple dwelling" and there was a breach of a state housing law known as the warranty of habitability.

In addition to evidence a prior case had been dismissed due to the building's "illegal multiple dwelling" status, Gilbert produced copies of "two notices of violation" which reflected the basement's illegal conversion to a third apartment.

Misir countered with "certificates of correction" from the New York City Department of Buildings indicating, as of December 10, 2005, the basement unit was no longer "illegal." As a result, the Queens County Civil Court awarded Misir all the rent sued for, less a ten percent decrease due to apartment related conditions.

On appeal, the Appellate Term, Second Department, thought the Civil Court "erred in allowing retroactive recovery of rent." The AT2 believed Misir forfeited his ability to collect the money while the building was illegally configured and adjusted the judgment from $11,520 to $6,247.74 -- which encompassed 21 days in December and the reduced (post-abatement) rent for January through August, 2006.

Good luck getting the Appellate Division to correct that.

"STORM IN PROGRESS" BARS RECOVERY

In *Marchese v. Skenderi*, Vincent Marchese -- an employee of the New York City Department of Environmental Protection -- was injured while conducting a water meter inspection at Albert Skenderi's Staten Island residence. (As he descended a staircase outside of Skenderi's home, Marchese slipped and fell on a wet step.)

Under New York law, homeowners may be free of liability when a storm is the injury-causing condition. After the Richmond County Supreme Court denied Skenderi's request to dismiss the case, he appealed to the Appellate Division, Second Department.

Since the evidence established it was snowing at the time of his fall, Marchese's case got a particularly frigid reception from the AD2 and was dismissed.

AD2 SAYS: LANDLORDS NEED NOT MITIGATE

In *Rios v. Carrillo*, Maria Rios leased a residential apartment to Alfredo Carrillo for a period of two years. A year into that lease, Carrillo left the apartment, stopped paying rent, and claimed he did so with Rios's consent. Rios didn't agree and, in 2003, sued to recover the monies due.

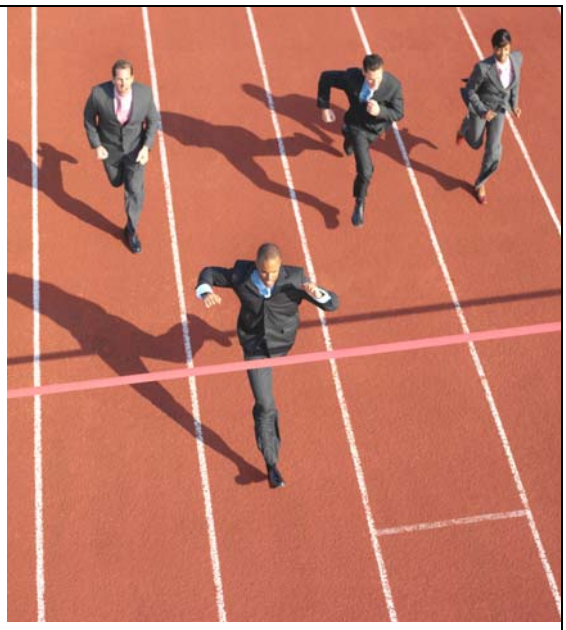
Since Rios hadn't demonstrated she attempted to "mitigate" or reduce her damages by re-renting the space, advertising its availability and/or listing the apartment with real-estate brokers, the Queens County Supreme Court decided she wasn't entitled to the cash and dismissed her case. On appeal, the Appellate Division, Second Department, reversed.

While Carrillo argued a landlord should have a duty to take action, the AD2 found "well-settled law in [New York] imposes no duty on a residential landlord to mitigate damages."

As the Court of Appeals noted in *Holy Properties v. Cole Productions*, 87 N.Y.2d 130, 637 N.Y.S.2d 964 (1995), unlike other contracts, "leases have been historically recognized as a present transfer of an estate in real property," a sort of "hybrid" between a contract and a conveyance in land. Therefore, since landlords aren't required to re-rent or otherwise assist the tenant find a replacement during the lease term, Carrillo remained liable for all monies that accrued in his absence.

Only the Court of Appeals can mitigate that.

RUN WITH THE LAND



How enforceable are deed related land-use restrictions and do they run in perpetuity? Those were the questions reviewed by the New York State Court of Appeals in *328 Owners Corp. v. 330 W. 86 Oaks Corp.*

A five-story townhouse located at 330 West 86th Street in Manhattan became property of the City of New York after an in rem tax foreclosure. At that time, the property had numerous code violations and "was in deteriorated condition and in need of rehabilitation."

The Department of Housing Preservation and Development (HPD) labeled the property an Urban Development Action Area Project (UDAAP) because the building impeded "sound growth and development of the municipality." (UDAAP's purpose is to incentivize owners to renovate and rehabilitate properties.)

Under the program, HPD sells the property to tenants at an appraised value, rather than at the market rate. In return, the tenants promise to remove all code violations and hazardous conditions and maintain the existing tenants' rents for two years. If the tenants cannot or will not purchase the property, HPD then sells the property to the highest bidder.

HPD offered the occupants of 330 West 86th Street an option, through June 30, 1998, to purchase the building for $340,000, subject to City Council and mayoral approval. On June 29, 1998, the tenants exercised the option and formed 330 West 86 Oaks Corp. (Oaks Corp.) to acquire the property.

On January 26, 1999, HPD asked the City Council to make certain findings, required by law, to qualify the property as a UDAAP, and asked the Mayor to authorize the property's disposition. In March of 1999, the Council found the property "impaired" and eligible for UDAAP. The Council also approved the waiver of certain land-use review procedures by finding the project consisted "solely of the rehabilitation or conservation of existing private or multiple dwellings or the construction of one to four unit dwellings without any change in land use permitted by local zoning."

When the Mayor approved the conveyance, the City sold the building to Oaks Corp., on June 22, 1999, for $340,000.

The deed included a "description of the disposition area, the City Council resolution approving the UDAAP (including the Project Summary) and the Mayoral approval," contained "numerous references in the recitals to the property's UDAAP designation" and to the legal restrictions that accompanied that status. Additionally, the deed recited as follows:

> WHEREAS, the project to be undertaken by [Oaks Corp.] consists solely of the rehabilitation or conservation of existing private or multiple dwellings or the construction of one to four unit dwellings without any change in land use permitted by existing zoning.

The language of the deed's habendum clause wasn't as specific. That clause stated the property was subject to applicable laws, the buyers would remedy any violations within six months, and the rent for existing tenants would be frozen for two years.

The habendum clause also indicated the "agreements and covenants set forth in the Deed shall run with the land" and "shall inure to the benefit of the City and shall bind and be enforceable against [Oaks Corp.] and its successors and assigns."

Rather than address the code violations, on February 13, 2001, Oaks Corp. sold the building to 330 West 86th Street, LLC (330 West) for $1 million. (330 West allegedly planned to demolish the existing structure and erect a high-

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RUN WITH THE LAND

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rise apartment building in its place.)

Before the sale closed, 328 Owners Corp., the owners of a neighboring structure, filed suit in New York County Supreme Court seeking a declaration that the deed restricted "the use of the land and that the new owner and any successors or assigns" had to "act within those constraints." (Of course, that determination would prevent the construction of a high-rise.)

The City asserted two cross-claims. The first sought a declaration the property could only be used for "conservation" or, in the alternative, for the construction of one- to four-unit multiple dwellings. The second sought to permanently enjoin the owner and any successors from using the premises except for those purposes.

In response to the parties' motion for summary judgment, the New York County Supreme Court dismissed all claims against Oaks Corp. (the seller) and partially granted 328 Owners Corp.'s and the City's motions, ruling that the property could "not be used other than for (a) rehabilitation or conservation of the existing building thereon, or (b) construction of one to four unit dwellings without any change in land use." While the court subsequently denied reargument, it amended its original decision and found the restrictions applied to subsequent owners.

On appeal, the Appellate Division, First Department, disagreed and held there was no "intent by the original parties to the deed that the covenant run with the land nor did it touch and concern the land." The New York Court of Appeals disagreed with the AD1 and reinstated the Supreme Court's amended order and judgment.

Once again, 328 Owners Corp. and the City contended the deed evinced the parties intended to restrict the use of the land, and those limitations applied to subsequent owners. 330 West argued the habendum clause, which often describes the extent of the interest conveyed, didn't adequately describe any restrictions applicable to anyone other than Oaks Corp.

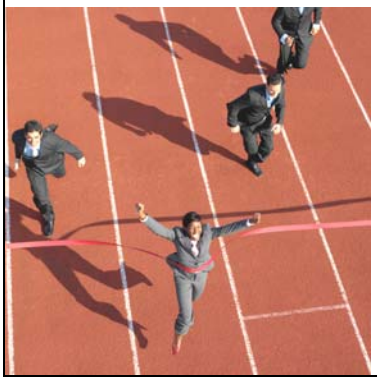
The Court of Appeals rejected 330 West's arguments and observed, "While it is true that the habendum clause is generally the best depiction of an interest conveyed, the inquiry is not that narrow." The Court continued, "[e]very instrument creating [or] transferring ... an estate or interest in real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law."

Taking into account all the pertinent facts and circumstances, our state's highest court concluded the restrictions in this case limited the property's use and bound 330 West and all subsequent purchasers.

First, the Court determined the parties intended the covenants to "run with the land." (The references in the deed to the statutory restrictions, the language stating the covenants would run with the land, and the low purchase price, were all factors which reinforced that determination.)

Second, the covenants "touched" and "concerned" the land because, under the deed, the duty to rehabilitate the building was ongoing in nature and wasn't extinguished when the property was transferred. Additionally, 330 West accepted title with notice of the deed's restrictions and the pending lawsuit's allegations.

Third, the City could enforce this covenant against 330 West because there was "privity of estate," since 330 West's rights and interests in the property could be traced back to the City by way of the deed.



Despite the adverse ruling, all was not lost. The Court suggested these deed restrictions would not run "in perpetuity" and once the governing restrictions expired "by their own terms" or an owner made a special application to the court to "extinguish" them "by reason of changed conditions or other cause," a different use of the property might be realized at some future point.

So, as far as real estate is concerned, "hope" -- rather than deed restrictions -- springs eternal.

A "GOOD SAMARITAN" GETS SUED

In *McDaniel v Keck*, Donna McDaniel's son was injured on property owned by Manhattan Country School Farm (MCSF).

MCSF -- a private school and "working farm" -- allowed its employees' children to visit and use its facilities. On the day Ethan visited, Bronxville Elementary School (Bronxville) was also enjoying the use of the farm and happened to have brought along a nurse, Nancy Keck.

Ethan was playing in the barn when he was hit in the right eye by a loose wire. Although he wasn't a Bronxville student, Keck examined him, applied ice to his eye, and supposedly advised the child's father to seek a physician's assistance if the eye worsened.

Donna testified that Keck told her to treat Ethan's eye with ice but didn't suggest the injury warranted a doctor's care. (Keck allegedly indicated the redness and swelling were "normal.")

An ophthalmologist eventually diagnosed Ethan suffered from an eye infection and, after "several surgeries," the entire right eye was removed.

When the Delaware County Supreme Court dismissed the personal-injury lawsuit brought against Bronxville and Keck, Donna appealed to the Appellate Division, Third Department, which affirmed the outcome.

The case turned on whether the "Good Samaritan" law applied to Keck's conduct.

Under that particular statute, Keck was only liable for acts amounting to "gross negligence" when performing her duties without compensation at "the scene of an accident or other emergency, outside a hospital."

Since she was only obligated to render care to Bronxville students, had no duty to assist Ethan, intervened "at the scene of an accident" and lacked appropriate medical equipment, the AD3 concluded the Good Samaritan law shielded Keck from liability in this instance.

McDaniel certainly didn't get a Keck out of that.

EPSOM WASN'T RESPONSIBLE FOR INJURY

In *Vucetovic v. Epsom Downs, Inc*., Dzafer Vucetovic was injured on property maintained by Epsom Downs, Inc. (Epsom).

The City of New York removed a tree in front of Epsom's building, leaving a tree stump inside the cobblestone-lined tree well, which was installed prior to Epsom's acquisition of the building.

While walking along the sidewalk, Vucetovic tripped on the cobblestone and injured himself. He later sued claiming a violation of New York City law which "imposes tort liability on property owners who fail to maintain City-owned sidewalks in a reasonable safe condition."

After the New York County Supreme Court granted Epsom's request to dismiss the case -- on the ground that the tree well wasn't a part of the sidewalk -- both the Appellate Division, First Department, and, the New York State Court of Appeals later affirmed.

Since tree wells are "City-owned," and local law didn't expressly transfer liability to private landowners, our state's highest court wouldn't allow Vucetovic's case to survive.

Guess who needed a good soak after that news?

STEAK SAUCE SCANDAL

In *Preston v. Peter Luger Enters., Inc.*, Lucy and Kevin Preston filed suit based on "strict products liability, breach of implied warranty, and negligence" for injuries Kevin suffered while opening a bottle of Peter Luger steak sauce.

After the Essex County Supreme Court granted Luger's request to dismiss the "strict products liability" and "negligence" claims, and, denied the Prestons' request for relief on a "breach of warranty" claim, an appeal ensued.

The Appellate Division, Third Department, found Luger's expert established the product's bottle necks were thicker than "industry standards" and "every single bottle" was thoroughly inspected during the production process. The Prestons' expert, on the other hand, failed to provide sufficient support for either the "strict liability" or "manufacturing defect" theory.

Because it didn't sell the allegedly defective bottle to the grocery store where the Prestons had purchased the product, Luger also argued that the "chain of custody" had been broken and the item might have been mishandled by a third-party.

Since the Prestons' proof was legally inadequate and there's "almost no difference between a prima facie case in negligence and ... strict liability," the AD3 thought Luger rightfully staked an entitlement to dismissal of those claims.

PASS THE SCHLAG!

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