FINKELSTEIN NEWMAN FERRARA LLP

The Real Estate Litigation Leaders

January/February 2009
Issue 49

Inside this issue

There's No Comparison.................1

Not a Very Tastee Outcome.................... 2

Will It Float?

Seller Wasn't Liable For Flooding

Tenant Protections In A Soft Market.............. 3

"Delete This Immediately!"

HUD Regulation Unconstitutional..........5

How Did The AD1 Profit From This?

This Much Can Be Told............................6

Why Wasn't This Senior Evicted?............7

Joan Crawford's Torch Song?

No License, No Commission

Bridal Wars..................8

THERE'S NO COMPARISON

In *Matter of General Electric Co v. Assessor of the Town of Rotterdam*, General Electric (GE) sought review of the Town of Rotterdam's property-tax assessments for the years 2003 and 2004.

GE owned a 325-acre parcel of land consisting of 43 buildings, four of which were plants and facilities for steam- and gas-turbine and generator-development laboratories.

Between 1999 and 2003, GE made $59 million in property improvements which included railroad service, storm sewers, steam plant and tunnels. Next to that property was a smaller parcel consisting of 19 buildings used for "research, development, manufacture and marketing of electric turbine generators, steam turbines and gas turbines."

GE's appraiser, John Coyle, used a "sales comparison" approach, and calculated the market value of GE's property at $30,850,000. Rotterdam's appraiser, Pamela Brodowski, used the "reproduction cost new less depreciation" approach (RCNLD), and estimated the property's market value at $249 million for 2003 and $251 million for 2004.

While the Schenectady County Supreme Court found Brodowski's assessment too high, it adopted her approach, and set the market value at $126.4 million for 2003 and $129 million for 2004. GE appealed, arguing the RCNLD analysis was erroneous, and the comparable sales approach was the "preferred method for valuing large industrial complexes for assessment purposes when evidence of a recent sale price is lacking."

On appeal, the Appellate Division, Third Department, cautioned about the use of the RCNLD method because it was "likely to result in overvaluation" and has "generally been limited to properties deemed specialties." Yet, the court faced a dilemma. Although the properties shared some similarities, a significant portion of the adjoining lot was used for "warehousing, professional and medical offices, ... retail, restaurant purposes ... and 650 residential units." Since Coyle failed to make adjustments in his valuation for those additional uses, the AD3 didn't find his approach an adequate market value guide and that left the RCNLD approach as the "sole remaining accepted method for valuing property."

GE wasn't able to bring a good thing to life.

NOT A VERY TASTEE OUTCOME

In *Mirra v. Tastee Pattee,* Salvatore Mirra started a holdover proceeding when his commercial tenant, Tastee Pattee, remained in its space after its month-to-month tenancy ended. Tastee claimed that it paid $100,000 to Mirra in exchange for a written lease. However, Mirra and his witnesses countered that the money was repayment of a debt owed to the landlord under a profit-sharing arrangement. The Kings County Civil Court found Mirra's testimony "credible" and awarded him possession of the space. (Despite a typo on the deed, Mirra established he was the property's owner and that appropriate notices terminating the tenancy had been given.)

On appeal, the Appellate Term, Second Department, concluded the $100,000 payment wasn't a defense to the holdover, particularly in the absence of any allegations or proof as to what the terms of that "future lease" were.

In other words, Tastee Pattee got cooked real good.

WILL IT FLOAT?

In *Bouchard v. Champlain Enterprises, Inc.,* Gilles Bouchard and Champlain Enterprises were general partners in a venture to construct and operate a Lake Champlain marina and boat storage facility. Enterprises contributed an initial $500,000, but each was obligated to pay one half of all capital improvements. Although Enterprises continued to remit payments, Bouchard refused to make any contributions. When the partnership later defaulted on its mortgage, Enterprises purchased the marina at a foreclosure sale and excluded Bouchard from the marina's operations.

After suit was filed, the Clinton County Supreme Court found Bouchard breached the partnership agreement and owed Enterprises $1,144,319. On appeal, the Appellate Division, Third Department discredited Bouchard's argument he never consented to marina expenditures — such as a pool, a gazebo, tennis courts, and boat house — since his construction company built the boat house and his signature was required for the payment of those improvements.

Will these parties be sailing on?

SELLER WASN'T LIABLE FOR FLOODING

In *Kasten v. Golden*, Avi Kasten entered into a contract to buy an abandoned home from Howard Golden. The agreement provided the property was being sold "as is" and the purchaser was required to undertake his own inspections before consummating the deal. An amendment further provided the house was being sold "without any claims, promises, or express or implied warranties regarding its condition."

Of course, after purchasing the home, pipes burst and the basement flooded. When litigation ensued, the Nassau County Supreme Court granted Golden's request to dismiss the case. On appeal, the Appellate Division, Second Department, affirmed the dismissal. Since he agreed to purchase the property "as is" — with faulty plumbing and all — Kasten couldn't claim that the property hadn't been delivered as promised. Furthermore, he signed a contract amendment disclaiming reliance on any promises as to the home's condition and releasing Golden from all liability.

We're thinking Kasten was flooded with emotion when he got that decision.

Editorial Board:
Executive Editor: Lucas A. Ferrara, Esq.
Managing Editor: Helen Frassetti

Finkelstein Newman Ferrara LLP
Daniel Finkelstein, *Senior Partner*
Jonathan H. Newman, *Partner*
Lucas A. Ferrara, *Partner*
Glenn H. Spiegel, *Partner*
Jarred I. Kassenoff, *Partner*
Melissa Ephron-Mandel, *Of Counsel*
Robert C. Epstein, *Of Counsel*
Suzanne R. Albin, *Of Counsel*

Associates:
Barry Gottlieb
Konstantinos G. Baltzis
Brian Zwaig
James P. Tracy
Damon P. Howard
Glenn Berezanskiy
Alex Daigle

Law Clerk:
George Parpas

SUBSCRIBE! If you would like to receive an electronic version of our firm's newsletters; please use the following link: www.fnfllp.com/optin.html

Disclaimer:
This publication is designed to provide accurate information on the subject matters addressed. It is distributed with the understanding that the publication is not intended to render legal or other professional advice. If such expert assistance is required, readers are encouraged to consult with an attorney to secure a formal opinion. Neither the publisher nor its contributors are responsible for any damages resulting from any error, inaccuracy, or omission contained herein.

© Finkelstein Newman Ferrara LLP **Attorney Advertising**

TENANT PROTECTIONS IN A SOFT MARKET

"What should landlords and tenants be thinking about in this depressed-market environment?"

It's a question we're asked virtually every day.

Our firm's transactional counsel, Robert C. Epstein, has some insightful and timely analysis — which should be particularly useful for commercial tenants about to enter into new lease agreements or renewals.

With the tightening of the credit markets and increasing economic concerns, some tenants appear to be postponing leasing decisions while awaiting the impact on the leasing market. Obviously, as the market softens, rents will drop, rent concessions will increase and work letters will improve. All of that is good news for tenants. On the other hand, a softening market will lead to other risks for tenants, and therefore will require tenants to shift their focus in negotiating leases.

Here's a list of some lease issues that will become more important to tenants if the market continues to soften.

1. Nondisturbance Protection. Almost all leases provide that the lease is subordinate to the lien of existing and future mortgages and ground leases. That means that if the mortgagee were to foreclose or the ground lease were to terminate, the mortgagee or ground lessor would have the right to terminate the existing leases and evict the tenants. While credit was readily available and building values were increasing, buildings and ground leases were being sold and refinanced over and over again, resulting in corresponding increases in the size of loan payments. Accordingly, unless market rents continue to rise enough to cover mortgage payments, the risk of mortgage and ground lease defaults will rise.

Due to the potential increase in the incidence of defaults, tenants should try to require their landlords to provide nondisturbance agreements from their mortgagees and ground lessors. In essence, nondisturbance agreements prohibit lenders and ground lessors from terminating leases and evicting tenants in the event of a default so long as the tenants continue to abide by the provisions of their leases. The lease remains in place between the tenant and the successor landlord. In the absence of nondisturbance protection, a tenant could find itself with a terminated lease after investing substantial sums in improving its space or negotiating a below-market rent. While it is unlikely that a performing tenant will be evicted in a softening market, it is better to avoid that risk altogether by obtaining a nondisturbance agreement.

If a tenant is unable to obtain a nondisturbance agreement, it should at least request a representation from its landlord that it has not received a notice of default from its mortgagee or superior lessor; although this will not protect a tenant from a future such default, at least the tenant will know that it is not signing a lease with a landlord who may already be having problems with its lender or lessor.

cont'd on pg. 4

"DELETE THIS IMMEDIATELY!"

Very little is sacred these days ... particularly when you're involved in litigation.

And, with increasing frequency, we're seeing cases won (or lost) based on the content of a party's electronic communications.

According to a recent blog post by Roger Matus — a commentator on the use of e-mails, IMs and messaging technologies — here are the "Top 10" phrases that will get you in trouble, or flag a problem:

1. "I could get into trouble for telling you this, but..."
2. "Delete this email immediately."
3. "I really shouldn't put this in writing."
4. "Don't tell So-and-So." Or, "Don't send this to So-and-So."
5. "She/He/They will never find out."
6. "We're going to do this differently than normal."
7. "I don't think I am supposed to know this, but..."
8. "I don't want to discuss this in e-mail. Please give me a call."
9. "Don't ask. You don't want to know."
10. "Is this actually legal?"

"If you find yourself typing one of these phrases," Matus writes, "perhaps you should delete the entire email."

 cont'd from pg. 3

2. Subleasing. Leases almost always provide that the landlord's approval is required before a tenant may sublet its premises or assign its lease. In order to prevent a tenant from circumventing such approval requirement, an assignment is typically defined to include the transfer of a majority of the interest in the tenant (for example, if the tenant were a limited liability company, a transfer of more than 50% of the interest therein would be deemed to be an assignment). There are typically a number of other limitations, such as prohibitions against subleasing to other tenants or prospective tenants of the building or at rental rates below the rates then being offered by the landlord, that make it more difficult for a tenant to sublease or assign in a softening market. In the event of a business slowdown, a tenant may find itself with the need to reduce the size of its premises or restructure, including by recapitalizing, selling or merging. Consequently, a tenant expecting a slowdown should focus on softening the provisions in its lease that will make it more difficult to dispose of its premises. For example, at minimum the landlord should not be permitted to unreasonably withhold its approval to a sublease or assignment (or, in the provision addressing tenant alterations, to alterations that may be necessary in order to sublease or assign). The tenant should also be permitted to sublease its space at a rental lower than the rent it pays, even if below market, and to sublease or assign to other building tenants or prospective tenants so long as the landlord does not then have comparable space available. The use permitted by the tenant in the premises should be sufficiently broad to enable the tenant to sublease or assign to as many prospects as possible (for example, the use clause should permit office use as opposed to law firm use).

> **"The softening of the economy will improve the leverage tenants have in negotiating their leases."**

The tenant should also be permitted to engage its own broker to assist it in its efforts to assign or sublease as opposed to using the landlord's leasing agent; the landlord's leasing agent may have a conflict of interest since it might seek to lease the landlord's space ahead of the tenant's. With respect to restructuring, the tenant should be permitted to merge or sell a majority interest so long as it maintains a minimum net worth. The net worth should ideally be pegged to the lease obligation, such as a net worth equal to some multiple of the annual rent. Most leases provide that the minimum net worth must be the greater of the tenant's net worth on the date of the lease or the date immediately preceding the sale or merger, but this might require a net worth that is much greater than is reasonably required to assure the availability of assets needed to pay the rent during the lease term.

3. Build-Out. Leases often provide that the landlord will furnish the tenant with funds for the tenant to use in improving their premises or that the landlord will carry out all or some of the work needed to improve the premises for the tenant's occupancy. If a tenant is concerned that the landlord might default in its obligations to provide such funds or perform such work due to the weakening economy, it needs to protect itself. With regard to the funding of the improvements, the tenant could require the landlord to place the funds in escrow upon lease signing to ensure their availability or require that the landlord's contractor furnish a labor and material payment bond or a performance bond. Another alternative would be for the tenant to reserve the right to complete the work if the landlord fails to do so and offset the cost of such completion against the rent.

4. Services. Most leases require the landlord to provide some services and utilities to the tenants, such as cleaning, common area maintenance and repair, heating and air-conditioning, electrical power and water, and elevator services. If the landlord fails to provide such services due to insufficient funds, the tenant might not be able to continue to occupy its premises. Accordingly, if a tenant is concerned that such a situation could arise and does not want to be limited to attempting to terminate the lease by suing for constructive eviction, it should try to negotiate for the right to provide its own such services and deduct the cost from rent. Obviously, in a multi-tenant building, it would be more difficult for a tenant to provide a service that is furnished by the landlord on a building-wide basis, such as air-conditioning. However, a tenant might be able to make arrangements that are sufficient in the short term to enable it to remain in occupancy pending resolution of the landlord's situation.

cont'd on pg. 6

HUD REGULATION UNCONSTITUTIONAL

In *Linares v. Jackson*, Elias Linares filed suit against Alphonso Jackson, as the Secretary of the United States Department of Housing & Urban Development (HUD), asserting the unconstitutionality of a regulation — 24 C.F.R. section 247.10 — which provides, upon a determination that a certain HUD-owned project must be rehabilitated or demolished, HUD may terminate a tenant's occupancy.

Linares claimed the regulation was unlawful since it didn't afford HUD's tenants "due process." The agency saw the case as "moot" because Linares was no longer an HUD tenant and therefore no longer under threat of eviction.

Even though Linares was no longer in occupancy of the unit, the District Court for the Eastern District of New York (EDNY) found the regulation "facially unconstitutional" and enjoined its enforcement.

The tenant did what most in his situation would have done, "relocate rather than run the risk of summary eviction in order to preserve the justiciability of [his] federal lawsuit." As far as the EDNY was concerned, Linares's departure didn't divest it of power to adjudicate the dispute, particularly since other tenants subject to "no cause" evictions would benefit from the outcome.

We ain't got cause to say nothing further.

HOW DID THE AD1 PROFIT FROM THIS?

In *First Hudson Capital v. Seaborn,* First Hudson filed a holdover proceeding against Ron Seaborn for charging his roommates "more than a proportional share of the rent" in violation of law — Rent Stabilization Code § 2525.7(b).

The New York County Civil Court awarded possession to First Hudson and denied Seaborn's motion to vacate the warrant of eviction. When the Appellate Term, First Department, affirmed, Seaborn appealed to the Appellate Division, First Department.

Since section 2525.7(b) didn't mention lease termination, the AD1 believed "neither the Appellate Term nor this Court may develop its own 'common-law jurisprudence' in an area as thoroughly legislated and highly regulated as the rent stabilization laws in New York City." It further observed that prior to the law's enactment, a landlord couldn't bring a case "for rent profiteering with respect to a roommate."

The appellate court went out of its way to distinguish First Hudson's case from *West 148 LLC v. Yonke,* which allowed a landlord to pursue an eviction because the tenant advertised the premises as a hotel and charged "roommates" twice the regulated rent. As for other cases that allowed an eviction, the AD1 said "they should not be followed."

In a dissent, Justice Saxe indicated he would have affirmed the Appellate Term's decision "which applied the rule it has developed through its own common law jurisprudence since the enactment of [§ 2525.7(b)]" that eviction could be sought when there was "egregious profiteering" by a tenant.

Saxe criticized his colleagues for relying on case law decided long before the law's enactment and accused them of "trotting out a worn and tired proposition from McKinney's Statues, a compendium of aphorisms where even a casual researcher can find some support for nearly any proposition, however dubious, sought to be advanced."

Saxe challenged the majority's assertion courts shouldn't develop precedent in this area, arguing the statute's "provisions, its nuances, its silences, and its legislative history ... are and always will be subject to the scrutiny and interpretive powers of common law judges doing what they are empowered to do - decide cases."

Hopefully, the Court of Appeals will get to decide this one.

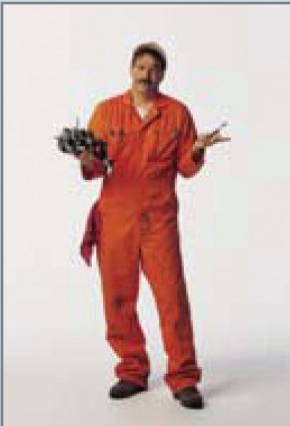
 cont'd from pg. 4

5. Termination Option. If a tenant is concerned that its business might slow due to a recession and therefore that it might be unable to pay the rent, it may want to try to negotiate for a termination option. Termination options are difficult to achieve, and when they are obtained they typically include a number of landlord protections. These include the obligation of the tenant to reimburse the landlord for its out of pocket expenses incurred in connection with the lease, such as the unamortized cost of the build-out, free rent and commissions. They also typically require that the tenant provide a few months of notice prior to the effectiveness of the termination in order to afford the landlord the opportunity to re-rent the space, as well as the payment of a few months of rent to provide the landlord with a cushion in case it has trouble re-leasing the premises. Termination options also normally may not be exercised until after a minimum portion of the lease term has expired. Such options may also be limited to a portion of the premises, as opposed to the entirety of the space, such as a particular floor or floors of a multi-tenant premises.

Obviously, if a tenant is a single purpose entity or is otherwise insolvent and there is no guaranty of the lease by a third party, the tenant will have a de facto termination option. In such event, it can just shut its doors and its exposure will be limited to its security deposit. Also, as discussed above, a tenant can still take advantage of its ability to sublease or assign in order to reduce its leasehold obligations if it is unable to negotiate for a termination right.

The softening of the economy will improve the leverage tenants have in negotiating their leases. This should result in lower rents and increased concessions. However, it will also require tenants to place a greater emphasis on issues that were of less concern when the economy was strengthening. A failure to focus on these issues could cause more harm than the higher rents and smaller concessions faced by tenants in a strengthening market.

THIS MUCH CAN BE TOLD



In Master Mech. Corp. v Macaluso, Master Mechanical Corp. (MMC) hired James Macaluso to secure bids for "heating, ventilating, and air conditioning (HVAC) work" and entered into a non-disclosure contract wherein Macaluso agreed he wouldn't reveal certain "trade secrets" acquired during the course of his employment. He was also prohibited from engaging in any HVAC and/or plumbing business with any of MMC's customers for up to two years following termination.

When he later formed his own company and left MMC, his former employer sought a preliminary injunction from the Suffolk County Supreme Court stopping Macaluso from disclosing confidential information and soliciting business from MMC's clients.

After the Suffolk County Supreme Court denied MMC's request, an appeal to the Appellate Division, Second Department, followed.

By the time the appeal was heard, part of MMC's case was "academic," since two years had elapsed since Macaluso's departure and he was thus free to solicit clients. As for the injunction preventing the disclosure of confidential information, MMC was unable to establish two essential elements upon which such equitable remedies are predicated — that it could "succeed on the merits" and that it would suffer "irreparable harm." Therefore, the denial of injunctive relief was allowed to remain undisturbed.

How masterly mechanical was that?

WHY WASN'T THIS SENIOR EVICTED?

In 2308 *Hughes Ave. Realty Corp. v. Longo,* Hughes Avenue Realty Corp. — a Bronx landlord — filed a case against Frances Longo who had lived in a rent-regulated apartment in the building for nearly 60 years. Apparently, police received complaints of her daughter's (Barbara's) repeated misconduct which included "repeated antisocial behavior in common areas," the destruction of another tenant's – Becerra's — mail, and the vandalism of that tenant's mailbox; behavior which required police intervention and caused Becerra to leave the building.

When the Bronx County Civil Court denied Longo's request to dismiss the case and awarded possession of the apartment to the landlord, she appealed to the Appellate Term, First Department, which affirmed the outcome. Since Longo was unable to control her daughter and couldn't present a "credible rehabilitation plan," the possessory judgment against the tenant was permitted to stand. Interestingly, "in view of the extreme hardship that would result from a forfeiture," Frances was allowed to stay in the unit if she "permanently removed her daughter from the building."

So Longo, Barbara!

JOAN CRAWFORD'S TORCH SONG?

In *Crawford v. City of New York,* Joan Crawford sued the City of New York and Petrocelli Electric Co. for injuries suffered when a traffic pole fell on her head.

Since Petrocelli had a contract with the City to perform maintenance, Crawford invoked the doctrine of "res ipsa loquitur," and claimed Petrocelli breached its obligation to maintain the street fixture. Petrocelli argued it didn't have actual or constructive notice of any danger, and was only required to perform repairs when notified by the City to do so. Petrocelli also claimed the doctrine didn't apply because the company didn't have exclusive control over the pole — as the public and fire department supposedly had "unfettered access."

After the New York County Supreme Court denied Petrocelli's request to dismiss the case, the Appellate Division, First Department, reversed because the company lacked the requisite degree of control. While Petrocelli had access to internal mechanisms, it wasn't responsible for the fixture's inspection or maintenance.

Hide them wire hangers!

NO LICENSE, NO COMMISSION

In *Klein v. Antebi, Elliot Klein* sued to recover a real-estate brokerage commission from Morris Antebi. Klein was a licensed New York real-estate broker who entered into a confidentiality and commission agreement with Antebi concerning three parcels of land in Harrisburg, Pennsylvania. The latter document provided that upon closing, Antebi would be obligated to pay Klein a "brokerage commission of a certain percentage of the purchase price."

Klein drove with Antebi to Pennsylvania, introduced him to the seller of the properties, and viewed the properties with the buyer. Of course, once the deal closed, Antebi refused to pay the brokerage commission, citing a Pennsylvania law — Real Estate Licensing and Registration Act — which exempted him from having to pay the fee since Klein wasn't a licensed broker in that state.

Klein argued the law didn't apply because he hadn't supplied "any significant brokerage services" in that jurisdiction.

When the Kings County Supreme Court eventually dismissed the case, Klein appealed to the Appellate Division, Second Department, which affirmed. The AD2 thought the mere introduction of the parties fell within the law's purview and, without a Pennsylvanian license, Klein was precluded from recovering a fee.

We're sure that got no Penn State cheer.

BRIDAL WARS

In *Baccash v. Sayegh,* Iman Baccash owned "Bridal Couture" — a bridal gown boutique — and opted to purchase "Peggy Peters," a nearby bridal shop.

Instead of structuring the deal as an asset sale, Iman's attorney negotiated a stock purchase, which obligated Baccash to "assume [Peggy Peters's] trade debt and a bank loan guaranteed by the prior owner."

Baccash claimed her lawyer committed malpractice by failing to advise her of the deal's terms and by defaulting in a lawsuit creditors had started against the two companies.

Because the Nassau County Supreme Court found the attorney lacked "ordinary reasonable skill and knowledge," Baccash was awarded $53,000.

On appeal, the Appellate Division, Second Department, found Baccash "failed to prove that she suffered any direct damages as a consequence of [her attorney's] alleged acts of legal malpractice."

Since Baccash wasn't personally affected by her lawyer's actions — her corporate entity was — and the company had a "separate legal existence," Baccash couldn't prove she personally sustained any damage due to the purported malpractice. As a result, the AD2 divorced the parties from further litigation.

Did the AD2 leave Baccash at the altar?

FINKELSTEIN NEWMAN FERRARA LLP
225 Broadway, 8th Fl.
New York, NY 10007
212-619-5400
www.fnfllp.com

PRESORTED
STANDARD
U.S. POSTAGE
PAID
LIC, NY 11101
PERMIT # 159

"Yes We Can!"

www.nyreblog.com