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# NEW YORK CITY DEFEATS INDIA

The U.S. Supreme Court, in *Permanent Mission of India to the UN v. New York City*, has reinforced the validity of a tax lien filed by the City of New York on a building owned by the country of India.*

Under New York law, property owned by a foreign nation and which is used exclusively for diplomatic offices or for the residence of an ambassador is exempt from tax, while any buildings, or portions of buildings, owned by a foreign sovereign and used for all other purposes are taxable.

India owns a 26-story building used for its permanent mission to the United Nations. Part of the structure is used for tax-exempt purposes, but 20 of the floors are used to house employees below ambassadorial ranking. When New York City taxed those 20 floors, India refused to pay and amassed a tax assessment of some $16.4 million.

These charges eventually converted to a lien on the property and the City filed suit in state Supreme Court seeking a judicial declaration that the lien was valid. (While the City conceded that India was immune from enforcement, it still sought a declaration as to the lien's validity since the municipality's experience with foreign governments revealed that liens were usually satisfied upon receipt of a judicial imprimatur. Second, by operation of federal law, foreign aid could be reduced by 110% of any outstanding debt. And third, the lien would be enforceable against a third-party, should India later attempt to sell or convey the property.)

India removed the case to federal District Court and sought the dispute's dismissal, arguing it was immune from suit in a U.S. court. The District Court concluded that it had jurisdiction over the matter and upheld the tax lien. On appeal, the U.S. Court of Appeals for the Second Circuit affirmed. India then appealed to the U.S. Supreme Court, which also affirmed.

Foreign governments have always received immunity from U.S. courts -- first by court created legal doctrine and then by federal statute. The U.S. affords foreign nations this protection because it is believed that these kinds of disputes are best handled by the State Department, and not by our courts.

In 1976, Congress passed the Foreign Sovereign Immunities Act (FSIA) to codify (and amend) that immunity. The FSIA carved out a number of exceptions, including suits "in which ... rights in immovable property situated in the United States are in issue."

India contended that the exception only applied to lawsuits contesting ownership or possession of immovable property. The City argued that the exception encompassed "additional rights" which included tax liens. The U.S. Supreme Court sided with the

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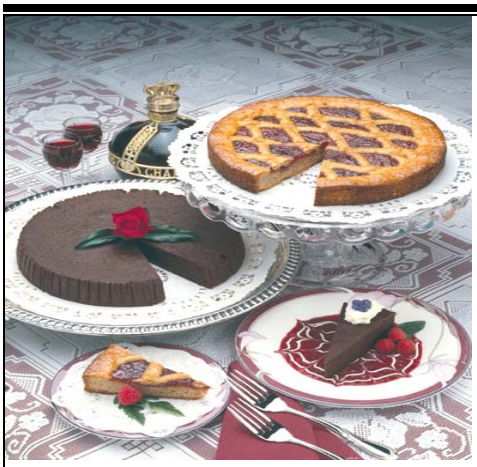

## YOU CAN'T TRUST LAWYERS

Did you catch the Appellate Term's decision in *701 Empire Blvd., LLC v. Sweet*?

You're certain to like it, particularly if you despise attorneys.

In that case, the tenant retained counsel to vacate a judgment of possession and warrant of eviction that had issued against her on default. Although the tenant had a warranty of habitability defense (as a result of certain violations) and alleged that she had not been served with either the rent demand or any of the pleadings in the case, the tenant's attorney settled the dispute by stipulating that the tenant would pay some $10,148.60 in about 40 days, together with such future rent that would become due and payable.

When the tenant later learned what had happened, she retained another attorney and alleged that her prior counsel had entered into the agreement "without her knowledge and consent." She also objected to a $4,000 error in the amount of rent claimed to be due and to the lack of any repair obligations on the landlord's behalf.

After the Kings County Civil Court refused to set aside that agreement, the Appellate Term, 2nd and 11th Judicial Districts, intervened and reversed. The appellate court noted that while an attorney may usually make "procedural or tactical decisions" on a client's behalf, counsel is not permitted to "compromise or settle a claim" without the client's approval. Absent that authority, any agreement reached may not be binding.

When entering into a settlement, how does a third-party know that the adversary's attorney may rightfully take such action? Without the litigant's active participation in the process, you really don't. And, according to the AT's decision, it just isn't prudent to blindly accept an adversary's representation that s/he is acting with authority. In fact, you do so at your own peril.

In this instance, the AT was of the opinion that the tenant was denied an opportunity to consult with her attorney before the settlement was reached, that she only learned of the disposition of her case after the agreement had been signed in her absence, and, that she never ratified the agreement by "words or conduct." As a result, the settlement was annulled and the case remanded for a decision on the tenant's motion to vacate her default.

A bittersweet outcome for the landlord, that's for sure.

## NEW YORK CITY DEFEATS INDIA

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Big Apple. Relying on precedent, the definition of a lien, and a lien's impact on the transfer of real property, the nation's highest court concluded that a tax lien is indeed a "right in immovable property," making the suit an exception to India's sovereign immunity, and thus affording U.S. courts jurisdiction to declare the lien valid.

Notwithstanding this victory, are there going to be some Karmic consequences here?

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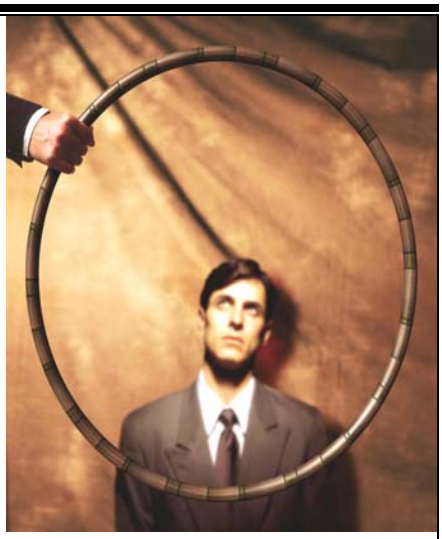
*This case also included a dispute with Mongolia over a $2.1 million tax bill. Since the legal issues were identical, and for the sake of simplicity, only the facts related to India's dispute have been recited herein.

If you have any questions or comments about the above articles, please contact partner Jonathan H. Newman at 212-619-5400 x 205 or email him at JNewman@fnfllp.com. To join the debate, visit us at www.nyreblog.com.

## DECLOAKING CO-OP BOARDS



If you live in New York City, chances are that you have been subjected to a co-op board's interminable and often arbitrary scrutiny (or know of someone that has undergone that grueling process).

Potential purchasers of a cooperative apartment are usually subject to the approval of the entity's board of directors before the seller may transfer his/her shares. Remarkably, there are currently very few regulations governing the process by which co-ops make these determinations.

Discrimination laws prohibit decisions based upon "prohibited categories" including, but not limited to, race, creed, color, national origin, gender, age, disability, family composition, military status, citizenship status, sexual orientation, and, marital status. However, since co-op boards are under no legal compunction to disclose the reasoning behind a rejection, these "secret societies" are rarely required to justify their actions.

Critics claim that this silence discourages New Yorkers from seeking homes in cooperative apartment buildings, interferes with the housing market, and reinforces economic, racial, and other forms of segregation. Moreover, a rejected applicant must usually bring a costly and time consuming lawsuit in order to find out why they were denied approval and, unless some form of "bad faith" can be independently established, the chances of securing the pertinent information can be quite remote. There are additional pitfalls associated with this cloak of secrecy: sellers are unable to hold purchasers in default when the latter fail to cooperate with board requirements. By way of example, in *Rosenthal v. Oakes*, Oakes refused to return Rosenthal's down payment on an apartment after the co-op board declined to consent to the apartment's transfer.

Since the board's rejection was not attributable to any "bad faith conduct" on Rosenthal's part, the New York County Supreme Court and the Appellate Division, First Department, both concluded that Rosenthal was "entitled to cancel the contract for the sale of the apartment and to the return of the escrowed down payment." Arguably, disclosure of the co-op board's reasoning might have triggered the seller's ability to find the purchaser in breach and may have entitled the seller to retain the contract down payment.

In response to these and other concerns, New York City Council Member Hiram Monserrate has sponsored a bill (the "Fair and Prompt Coop Disclosure Law," Intro 119) which would require co-op boards to disclose to prospective purchasers the reasons for a rejection. The bill proposes that whenever a co-op withholds consent to a sale, the purchaser must be given a written statement detailing the reason(s) for the denial. That statement must also include the number of applications received, as well as the number rejected, for the three year period preceding the decision.

Under that law, the statement must be given within five business days of the co-op's decision. Following a twenty day grace period, a non-compliant entity may be subject to fines, penalties, and legal fees. In theory, the statement should convey sufficient information to enable the purchaser to remedy the deficiencies in an application or for the seller to avoid a future rejection of a subsequent applicant.

Although the bill is supported by two-thirds of the Council, it has met with considerable resistance from co-op boards and various council members, including Council Speaker Christine Quinn. Opponents claim that it would discourage people from serving on co-op boards, and will invite lawsuits and incite ill will. We agree.

While some form of explanation is better than none, we can't help but think that imposing such a requirement will cripple boards' decision-making processes and open the floodgates to seemingly endless litigation.

Fasten your seatbelts!

If you have any questions or comments about the above articles, please contact partner Lucas A. Ferrara at 212-619-5400 x 211 or email him at LFerrara@fnfllp.com. To join the debate, visit us at www.nyreblog.com

## NO RENEWAL? BEGONE!

If your lease is about to expire and you live in a free market (unregulated) apartment, or if you're a tenant of a commercial space, it is always best to assume you will have to leave on the agreement's end date, particularly if you don't have a written option or lease renewal in-hand.

Without an extension signed by your landlord, you can be sued for "holding over," that is, your landlord can start a special landlord-tenant proceeding asking a judge to order your eviction, direct that you pay the fair market value of the space during the period you remained in occupancy (after the expiration of your lease), and grant an award of the legal fees and costs that were incurred removing you from the premises.

In *4446-50 Realty Inc. v. Rojas*, the tenants, Rafel Rojas, "Jane" Oryden, d/b/a/La Mesquita Restaurant a/k/a El Cactus Restaurant, claimed to have a lease renewal which allowed them to remain in possession beyond their original May 31, 2001 expiration date. In an eviction proceeding started against them in the New York County Civil Court, the tenants were unable to produce an original copy of the renewal document and were otherwise unable to prove the existence of an extension (since the tenants' sole witness inexplicably refused to submit to cross-examination).

Because the renewal document was found to be nothing more than a "draft agreement," which had never been countersigned by the landlord, both the Civil Court and the Appellate Term, First Department, concluded that the El Cactus Restaurant's eviction was appropriate.

What is left unanswered is why it took this landlord some six years to get to that point.

Are we missing some prickly details?

If you have any questions or comments about this article, please contact partner Robert Finkelstein at 212-619-5400 x 227 or email him at RFinkelstein@fnfllp.com. To join the debate, visit us at www.nyreblog.com.

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