LJN LAW JOURNAL NEWSLETTERS

NEW YORK REAL ESTATE LAW REPORTER®

ALM.

Volume 39, Number 12 • August 2023

INDEX

Guaranty Law Invalidated

By Deborah E. Riegel

In March 2020, as New York City became the epicenter of the COVID-19 pandemic, Governor Andrew Cuomo issued a number of executive orders, some of which required non-essential businesses to close their doors. As a consequence, many commercial businesses began defaulting on rent payments or attempting to terminate their leases altogether, to potentially catastrophic effect for landlords, who rely on rent payments to cover expenses (*e.g.*, taxes and debt service).

In May 2020, the New York City Council enacted several local laws to combat the economic impact of the pandemic on struggling small businesses. Among the laws passed in this legislative relief package were amendments to the Commercial Harassment Law (Local Law No. 53 of 2020) and to the Residential Harassment Law (Local Law No. 56 of 2020), and the "Guaranty Law" (Local Law No. 55 of 2020). While facially implemented to protect struggling commercial tenants and small businesses, the practical effect of these laws was to shift the economic burden of the pandemic almost exclusively to landlords, who were now precluded from enforcing certain negotiated personal guaranties contained in their lease agreements. Compounding that restriction, the amendments to the Harassment Laws stoked apprehension with respect to the consequences of demanding rent payments directly from tenants.

By far, the most egregious action was the enactment of the Guaranty Law, which limited the ability of commercial landlords to enforce their bargained-for personal guaranties for the period from March 7, 2020, through June 30, 2021 to the extent the guarantor was an individual. New York City, N.Y., Code §22-1005

In November 2020, three commercial landlords challenged these local laws in *Melendez v. City of New York, 503 F. Supp. 3d 13 (S.D.N.Y. 2020), aff'd in part, vacated in part, rev'd in part,* 16 F.4th 992 (2d Cir. 2021). The plaintiffs alleged that the Guaranty Law unconstitutionally restricted their contractual rights under personal guaranties and urged the court to find a violation of the Con-

continued on page 2

In This Issue

Guaranty Law

continued from page 1

tract Clause which provides that "no State shall … pass any … Law impairing the Obligations of Contracts." U.S. Const. art. I, §10, cl. 1. A Contract Clause challenge in the Second Circuit requires the Court to find that: 1) the contractual impairment is substantial and, if so; 2) whether the law serves a legitimate public purpose such as remedying a general social or economic problem and, if such purpose is demonstrated; and 3) whether the means chosen to accomplish this purpose are reasonable and necessary.

The District Court found that while the Guaranty Law imposed a substantial impairment on the Plaintiff's contract, it held the law to be constitutional because it advanced a significant and legitimate public purpose through reasonable and appropriate means. 503 F.Supp.3d at 36.

In short, the District Court found that the goal of the Guaranty Law — ostensibly to prevent the City's small business owners from being pushed to the brink of either business and/or personal bankruptcy, with the broader goal of allowing such businesses to recover after the pandemic — advanced a legitimate public purpose.

While the presence of a pandemic and economic crisis gave way to a finding of necessity, the District Court acknowledged the need to find that the impairment of contracts was appropriate and reasonable. *Id*. at 34. Ultimately, the Court determined that the law withstood constitutional scrutiny because: 1) it was limited to personal guaranties made by natural persons who are not the tenant; 2) it was temporally limited to a particular timeframe (*i.e.*, debts that arose between March 7, 2020 - June 31, 2021); and 3) that commercial landlords still had other means through which they could recoup lost rental income (albeit more difficult). *Id*. at 35-36.

In October 2021, on appeal to the Second Circuit Court of Appeals, the Second Circuit reversed the lower court, outlining five major concerns with the Guaranty Law. *Melendez v. City of New York*, 16 F.4th 992 (2d Cir. 2021).

Consistent with the lower court, the Second Circuit found that the Guaranty Law substantially impairs the contract rights of landlords and interferes with their reasonable expectations. The Court pointed to the fact that the law renders any personal guaranties of rent obligations arising from March 7, 2022 through June 30, 2021 permanently unenforceable. Therefore, although on its face, the Guaranty Law was temporally limited to a 16-month period, its effect was permanent — "the landlord can never seek to recover those amounts from the guarantor. Not during the pandemic period. Not after the emergency declaration is withdrawn. Not ever. This substantially undermines the landlord's contractual bargain, interferes with his reasonable expectations, and prevents him from safeguarding or ever reinstating rights to which he was entitled during a sixteen-month period."

Similarly, the Court found that based on the record before it, the question of whether the law served a legitimate public purpose and protects a basic societal interest rather than a "favored group" could not be determined as a matter of law. It further concluded that dismissal was not warranted where reasonableness or appropriateness of the means used could not be determined in favor of the City of New York as a matter of law. The Second Circuit reviewed five factors, which in their totality precluded dismissal. First, the Guaranty Law was neither temporary nor limited, in that it extinguished rather than deferred debts. Second, the Court

continued on page 3

Deborah E. Riegel is a partner at Rosenberg & Estis and filed a brief for Amici in the *Melendez* case. **Michael Fortugno**, a summer law clerk at Rosenberg & Estis, assisted in preparation of this article.

NEW YORK
REAL ESTATE LAW REPORTER®

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

Guaranty Law

continued from page 2

examined the purported purpose of the law — to protect guarantors of small businesses which closed during the pandemic and to allow them to reopen — and compared it to the actual law, which failed to condition the relief on the reopening of those businesses. Third, the Court took issue with allocation of the burden of the Guaranty law on private landlords, rather than the City (or the public that benefits from functioning businesses in their neighborhoods). Fourth, the Court pointed to the failure to condition the relief afforded by the Guaranty Law on need, particularly where some guarantors have the benefit of "good guy" guaranties, and contrasted the failure to examine need in this context with the many government assistance programs implemented during the pandemic, such as the CARES ACT or the American Rescue Plan's Restaurant Revitalization Fund. Finally, the Second Circuit found that the reasonableness of the law was called into question by any compensation of the landlords or their principals for damages.

On remand to the District Court in March 2023 for a decision consistent with the Second Circuit's opinion, Judge Abrams this time found that the Guaranty Law lacked the requisite reasonability to overcome a Contract Clause challenge, (*Melendez v. City of New York*, No. 20-CV-5301 (RA), 2023 WL 2746183 (S.D.N.Y. Mar. 31, 2023) and concluded that the Guaranty Law violated the Contracts Clause. She therefore granted the Plaintiffs' summary judgment motion, relieving landlords from the burden of shouldering consequences of the pandemic and the related government restrictions.

—❖—

DEVELOPMENT

Specific Performance Available for Breach Of Contract to Convey Air Rights

301 East 60th Street LLC v. Competitive Solutions LLC
2023 WL 3698582
AppDiv, First Dept.
(Opinion by Gonzalez, J.)

In an action for specific performance of an agreement to convey air rights, both parties appealed from Supreme Court's denial of both parties' summary judgment motions. The Appellate Division modified to grant summary judgment to purchaser, enforcing the parties' agreement that specific performance would be available as a remedy for seller breach.

Purchaser is a developer of five adjacent lots on Second Avenue in Manhattan. As of Dec. 12, 2020, seller had 35,706 square feet of inclusionary air rights (IARs) awarded as an incentive to build or rehabilitate affordable housing. IARs may be sold through private sale by obtaining a certificate of eligibility for zoning bonus from the Department of Housing Preservation and Development (HPD). In March 2021, seller contracted to sell 21,000 square feet of IARs to purchaser for $155 per square foot. During the negotiations, purchaser's broker had represented that other sellers were willing to sell IARs at $165 to $175 per square foot. Seller made no effort to corroborate those numbers beyond discussing the issue with his lawyer and two brokers who were unaware of any sales during the pandemic. Purchaser obtained the required certificate from HPD. Seller then notified purchaser that it would not transfer the IARs at the previously negotiated price, contending that purchaser had made fraudulent representations about other alleged IRA sellers. Seller offered to return the deposit or to adjust the price to $200 per square foot. Purchaser then brought this action for specific performance. Supreme Court denied both parties' motions for summary judgment.

In modifying to grant summary judgment to purchaser, the Appellate Division started with the language of the agreement, which indicated that purchaser would have the right "in its sole discretion and as its sole and exclusive remedy" to seek specific performance or to terminate the agreement. The court conceded that a party seeking specific performance must demonstrate that there was no adequate remedy at law. The court then noted that specific performance is traditionally available for breach of contracts to convey real property, and further noted that New York courts have considered air rights as interests in property. The court then noted that it is difficult to ascertain the value of IARs due to the lack of documentation, making specific performance particularly appropriate. Finally, the court concluded that seller's fraud defense lacked merit because seller made no significant effort to evaluate the representations by purchaser's broker. The court concluded that reliance on those representations was not reasonable.

Challenge to Site Plan Approval Dismissed For Failure to Join a Necessary Party

Wood v. Village of Painted Post
2023 WL 3265403
AppDiv, Fourth Dept.
(memorandum opinion)

In neighbors' article 78 proceeding challenging grant of site plan approval, neighbors appealed from Supreme Court's dismissal of the proceeding. The Appellate Division affirmed, holding that neighbors had failed to timely join a necessary party.

Neighbors brought the article 78 proceeding to challenge grant of site plan approval for construction of a warehouse and trucking distribution facility. They filed against the village, the planning board, and

continued on page 4

Development

continued from page 3

the applicant. The applicant, however was a contract vendee, and neighbors did not file against the title holder of the land on which the facility was to be built. Neighbors subsequently amended the petition to add the title holder, upon which the various respondents moved to dismiss for failure to timely join a necessary party. Supreme Court granted the motion. Neighbors appealed.

In affirming, the Appellate Division first held that the title holder was a necessary party. The court then rejected the argument that adding the title holder after the expiration of the statute of limitations was permissible under the relation back doctrine. The court held that the relation back doctrine is inapplicable when failure to serve a necessary party is based on a mistake of law. In this case the neighbors made a mistake of law: they failed to appreciate that the title holder was a necessary party.

NYU's Challenge to Zoning Amendment Dismissed for Lack of Standing

New York University v. City of New York
NYLJ 5/19/23
Supreme Ct., N.Y. Cty
(Lebovits, J.)

In NYU's action for a declaratory judgment that an amendment to the city's zoning resolution was ultra vires, the city moved to dismiss the complaint both on the merits and for lack of standing. The court granted the motion, holding that NYU had not identified any injury as a result of the amendment, and therefore lacked standing to challenge the amendment.

In 2015, the Department of City Planning began studying an update of SoHo and NoHo zooming rules. In 2021, the City Planning Commission approved a rezoning creating mixed use districts in which residential uses, including college and university uses, would be permitted as of right. When the City Council approved the rezoning, it did so after imposing new restrictions, including a bar on college and university uses and student residence halls. NYU then brought this action challenging the amendment and seeking an injunction against applying the bar on college and university uses. The city moved to dismiss.

In granting the city's motion, the court emphasized that under the zoning resolution as it existed before the amendment, college and university uses were not permitted without a variance. The court held, therefore, that the amendment did not make NYU worse off. As a result, NYU had no standing to challenge the amendment because it was not aggrieved by the amendment.

Town's Construction of Its Ordinance Was Irrational

Lemmon v. Town of Scipio
2023 WL 3265287
AppDiv, Fourth Dept.
(memorandum opinion).

In landowner's article 78 proceeding challenging the ZBA's decision to uphold an "order to remedy violation" issued by the town's code enforcement officer, landowner appealed from Supreme Court's denial of the petition and dismissal of the proceeding. The Appellate Division reversed and granted the petition, holding that the town's construction of its ordinance was irrational.

The town's zoning code provides that "camp structures" must be set back at least 250 feet from the property lines of a "camp." The code defines "camp" as "any temporary or portable shelter, such as a tent, recreational vehicle or trailer." Landowner maintained a camper trailer within 250 feet of the side and rear property lines of his property. The town issued an order to remedy violation, and the ZBA denied landowners' appeal. Supreme Court upheld the ZBA order, and landowner appealed.

In reversing, the Appellate Division rejected the town's argument that landowner's property should be understood as a "camp." The court focused on the code's definition of camp, and concluded that landowner could not have violated the ordinance by maintaining a trailer within a temporary or portable shelter, such as a tent, recreational vehicle or trailer.

Condition on Special Permit Renewal Invalidated As Unreasonable

Matter of Pepe Porsche of Larchmont v. Planning Board Of the Town of Mamaroneck
2023 WL 3729813
AppDiv, Second Dept.
(memorandum opinion)

In landowner's article 78 proceeding challenging a condition on renewal of its special use permit, the town planning board appealed from Supreme Court's grant of the petition. The Appellate Division affirmed, holding that that the condition imposed was unreasonable.

Landowners has been operating an auto dealership on the property for 20 years pursuant to a special use permit that has been renewed every two years. In 2019, the planning board imposed a condition on renewal requiring landowner to provide documentation that it had a right to use an adjacent area owned by a third party. Landowner provided a letter of permission from its landlord, who claimed the adjacent area by adverse possession. The planning board concluded that this documentation was inadequate, provoking this article 78 proceeding. Supreme Court granted the petition.

In affirming, the Appellate Division held that there was no rational basis for the planning board to require landowner to resolve the legal uncertainty resolving the landlord's ownership of the subject area.

—❖—

Tenant Violated the Lease By Changing Nature of The Restaurant

BKNY1, Inc. v. 132 Capulet Holdings, LLC
2023 WL 3486353
AppDiv, Second Dept.
(memorandum opinion)

In commercial tenant's action for a judgment declaring the rights and obligations of the parties to a lease, landlord appealed from Supreme Court's denial of its motion for summary judgment. The Appellate Division modified to grant landlord's motion with respect to some provisions of the lease, holding that tenant had violated the lease by changing the nature of its restaurant.

The lease obligated the tenant to use the premises for a tapas restaurant with light cooking only, and to make no alterations or changes to signs without the landlord's approval. Landlord served notices to cure on tenant, alleging that tenant had violate the lease by converting the restaurant into a steakhouse, but changing the signage, and by making interior alterations. Tenant than brought this action for a declaration that it was not in violation of the lease. Landlord moved for summary judgment. Supreme Court denied the motion and extended tenant's time to cure any alleged defaults. Landlord appealed.

In modifying, the Appellate Division first held that Supreme Court had properly denied summary judgment with respect to alterations, because landlord's introduction of uncertified business records from the Department of Buildings was insufficient to establish a violation by tenant. But the court then held that the deposition testimony by tenant's principal, who admitted that tenant had changed the concept of the restaurant and had installed signs without permission, was sufficient to establish landlord's entitlement to summary judgment on those issues. Because the lease entitled landlord to terminate the lease based on nonmonetary defaults, the court held that tenant was not entitled to an extension of time to cure its alleged defaults.

Lease's Guaranty Clause Did Not Bind Tenant's Principal

Y.V. Associates v. Rubin
2023 WL 3328969
AppDiv, Second Dept.
(memorandum opinion)

In landlord's action on a personal guaranty, landlord appealed from Supreme Court's grant of summary judgment to tenant's principal. The Appellate Division affirmed, holding that the lease's guaranty clause did not bind tenant's principal.

Landlord leased the premises to Mount Vernon Social Adult Day Care Center, an LLC. Paragraph 68 of the lease provided that in the event of tenant's default, the "undersigned covenants and agrees" to perform tenant's obligations until the date on which tenant surrenders possession of the premises. Tenant's principal signed the lease as Managing Member of the LLC, but there was no separate signature by the principal as guarantor. After landlord obtained a judgment against tenant for nonpayment of rent, landlord brought this action against the principal as guarantor. Supreme Court granted summary judgment to the principal, and landlord appealed.

In affirming, the Appellate Division emphasized that nowhere in the lease was the principal, or anyone else, identified as the "undersigned." Although the principal executed the lease on behalf of the tenant LLC, there was no separate signature purporting to bind the principal as guarantor. As a result, the principal was not liable as guarantor.

Yellowtone Injunction Denied Because Tenant Failed to Show It Was Willing and Able to Cure Defaults

Middletown Flea Market, LLC v. Middletown Plaza Holdings, LLC
2023 WL 3606952
AppDiv, Second Dept.
(memorandum opinion)

In commercial tenant's action for declaratory relief, tenant appealed from Supreme Court's denial of a Yellowstone injunction. The Appellate Division affirmed, holding that tenant failed to demonstrate that it was willing and able to cure its defaults.

The lease agreement for commercial space required tenant to obtain "special form" property insurance, general liability insurance, and worker's compensation insurance naming the landlord as an additional insured, and provided that no contractor would work on the premises without proof of appropriate insurance. Sixteen months into the lease, landlord served tenant with a notice of intention to terminate the lease, alleging that tenant had failed to procure the required insurance and had failed to provide proof of insurance for its contractors. Tenant then moved for a Yellowstone injunction, which landlord opposed. Supreme Court denied tenant's motion on the ground that tenant had failed to demonstrate that it carried insurance for its contractors. Tenant appealed.

In affirming, the Appellate Division acknowledged that tenant had submitted evidence that it obtained a general liability policy that became effective in November 2019, but the court also noted landlord had submitted photographic evidence that tenant had performed work on the premises from August to October 2019. The court held that could not retrospectively cure the default arising from failure to have continually maintained insurance in landlord's favor.

Loft Occupant Remains Protected By Loft Law

Matter of 16 Cypress Ave Realty, LLC v. New York City Loft Board
2023 WL 2796265
AppDiv, First Dept.
(memorandum opinion)

continued on page 6

Landlord & Tenant

continued from page 5

In landlord's action to annul a Loft Board determination that the current occupant was protected under the Loft Law, landlord appealed from Supreme Court's denial of the petition. The court concluded that the petition should have been transferred to the Appellate Division in the first instance, and, treating the matter as if it had been transferred to the court for de novo review, denied the petition and dismissed the proceeding.

When the prior tenant vacated the unit, he signed a one-page agreement releasing each party from liability tied to return of the security deposit. The agreement did not expressly indicate that he was a protected occupant or that he was selling Loft Law rights. On that record, the court concluded that landlord had failed to demonstrate that the former tenant knew he was a protected occupant of that he knowingly sold his Loft law rights. As a result, the court upheld the Loft Board's determination that the current occupant was protected.

—❖—

REAL PROPERTY LAW

Buyer Entitled to Return Of Deposit Because Estoppel Certificates Were Inadequate

Angelo Gordon Real Estate, Inc. v. Benlab Realty, LLC
2023 WL 3236008
AppDiv, First Dept.
(memorandum opinion)

In an action by purchaser for a judgment declaring that it is entitled to return of a $12 million deposit, seller appealed from Supreme Court's grant of summary judgment to purchaser. The Appellate Division affirmed, holding that the estoppel certificates provided by seller were not in compliance with the sale contract.

The parties entered into 11 purchase and sale agreements for properties on Manhattan's west side. The agreements provided that the mutual obligation to close was conditioned on simultaneous closing of all agreements. Several of the agreement required, as a condition for purchaser's obligation to close, that seller provide estoppel certificates from commercial tenants certifying that neither tenant nor landlord were in default under the lease. The agreements also allowed seller to provide seller's estoppel certificates as a substitute for certain of the tenants. Seller provided estoppel certificates indicating that the owner-landlord was not in default, but those certificates did not indicate whether tenants were in default. As a result, Supreme Court held that purchaser was entitled to return of its deposit.

In affirming, the Appellate Division held that no provisions of the agreements relieved landlord from fulfilling its obligation to provide estoppel certificates. Because seller failed to tender conforming estoppel certificates seller was not ready willing and able to close. As a result, purchaser was entitled to return of the deposit.

City Had Authority to Extinguish Interest of Delinquent Taxpayers After Four Month Redemption Period Expires

In re Tax Foreclosure Action No. 53
2023 WL 3486647
AppDiv, Second Dept.
(Opinion by Wooten, J.)

In an action to foreclose tax liens, the city appealed from Supreme Court's order vacating the foreclosure judgment and the deeds transferring the properties to a third party. The Appellate Division reversed and denied the motions to set aside the deeds, holding that under current law the city had authority to extinguish the interest of the prior owners after expiration of the four month redemption period.

The city commenced the action to foreclose tax liens on delinquent parcels. The owners, who received notice of the foreclosure, failed to serve timely answers, leading to entry of a judgment of foreclosure. Some of the owners took no action to redeem during the four-month redemption period; the others entered into installment agreements with the city, but then defaulted on the agreements. The city then transferred the properties to a third party under the city's Third Party Transfer Program. The prior owners then moved to vacate the judgments of foreclosure. Supreme Court granted the motions, and the city appealed.

In reversing, the Appellate Division conceded that under the current Administrative Code provisions, the city had discretion to transfer title to the property to a third party without giving any value to the prior owner, noting that the city process could extinguish $2,000,000 in equity over a water bill of a few thousand dollars. Nevertheless, the court held that under current law, it could not review the prior owners' claims that their property had been taken without just compensation.

Questions of Fact About Whether Sellers Were Ready to Perform

Sweeney v. Stark
2023WL3729826
AppDiv, Second Dept.
(memorandum opinion)

In contract vendee's action for return of a deposit and money damages, sellers appealed from Supreme Court's denial of its summary judgment motion and grant of contract vendee's summary judgment motion. The Appellate Division modified to deny contract vendee's motion, holding that questions of fact remained about whether sellers were ready, willing, and able to perform.

The parties contracted for a sale of the property for $6,250,000, and contract vendee paid $625,000 into escrow. A rider to the contract provided that if there were valid

continued on page 7

continued from page 6

objections to title, sellers would have 30 days to remove those defects, and if the objections could not be removed, sellers would return the deposit. The rider also provided that a right of way to Hempstead Harbor would be entirely unobstructed. The basic contract also provided that each party would have a right to cancel the contract if seller were unable to remove title defects within an adjournment of the closing date, not to exceed 60 days.

Before the scheduled closing date, the parties discovered that deeds related to a land swap between seller and a neighbor had not been properly recorded. The sellers then set out to cure the title defect and set a closing date of Dec. 21, 2017, and declared time of the essence. Contract vendee objected based don obstructions on the right of way and unresolved defects related to the land swap. On May 23, 2018, with those issues still unresolved, contract vendee sent a notice of cancellation and a demand for return of the deposit. Sellers rejected the cancellation notice and set a time of the essence closing for July 2, 2018. Contract vendee then commenced this action for return of the deposit and for damages. Supreme Court granted contract vendee's summary judgment motion and denied sellers' summary judgment motion. Seller appealed.

In modifying, the Appellate Division first held that contract vendee's cancellation notice was ineffective because a cancellation under the terms of the contract, contract vendee was only entitled to cancel when a closing date had been set, giving seller a specified time to cure the defect. At the time of the cancellation notice, no closing had been scheduled, because the December 21 closing date had passed without any adjourned date. According to the court, in order to cancel, the contract vendee had to fix a time by which the sellers had to perform, and contract vendee did not do that. But the court held that Supreme Court had properly denied sellers' summary judgment motion because questions of fact remained about seller's ability to clear title, and about the obstructions on the right of way. Sellers, therefore, had not established that they were ready, willing, and able to perform.

Survival Clause Includes No Expiration Date

New York Commercial Realty Group, LLC v. Beau Pere Real Estate, LLC
2023 WL 3328810
AppDiv, Second Dept.
(memorandum opinion)

In an action to recover a brokerage commission, both the broker and seller appealed from Supreme Court's order granting summary judgment to seller buy denying attorneys' fees to seller. The Appellate Division modified to deny both parties' summary judgment motions because questions of fact remained about whether broker was the procuring cause of the transaction.

Seller and broker entered into an exclusive brokerage agreement which was to last for six months. The agreement also included a "survival clause" which provided that "[a]ny customer which originated during the terms of the exclusive will survive its expiration." During the agreement's six month term, broker introduced LM to the property, and LM made an offer for $8.75 million, which seller rejected as too low. At the expiration of the six month period, seller notified broker that it was terminating the exclusive brokerage agreement. Four months later, seller and LM executed a nonbinding offer to purchase the property for $9 million. That agreement recognized the broker as the sole procuring broker. Subsequently, seller rejected that offer when it received a higher offer from another purchaser. That deal ultimately fell through. Then, more than a year after expiration of the brokerage agreement, seller contracted to well to LM for $9.1 million. The price was subsequently reduced to $9 million, and closing took place 15 months after expiration of the brokerage agreement. Broker then brought this action for a commission. Supreme Court granted summary judgment to seller, holding that the survival clause was too vague to be enforceable. The court, however, denied the seller's request for attorneys' fees pursuant to a clause in the brokerage agreement entitling the prevailing party in litigation under the contract to attorneys' fees. Both parties appealed.

In modifying, the Appellate Division first concluded that the survival clause's meaning was clear and applicable in this case. The court then rejected seller's argument that when an extension clause like the survival in this agreement includes no time limit, a court should enforce the clause for only a reasonable time, which seller argued was one year. The court held that the parties to the agreement were sophisticated and if they did not impose a time limit on the survival clause, a court should not read one into the agreement. But the court then held that once the brokerage agreement expired, broker would only be entitled to a commission if broker were the procuring cause of the transaction. In this case, questions of fact remained about whether the broker was the procuring cause of the ultimate sale. As a result, neither party was entitled to summary judgment.

Comment

When a brokerage agreement contains a definite term, and the seller paid a commission to a broker engaged after expiration of the term, the original broker is not entitled to a commission unless the agreement included an extension clause. In *United Real Estate & Prop. Mgt., Inc. v. Unknown*, 28 Misc.3d 804, the court denied a brokerage firm a commission, although its agent procured a buyer who was ready, willing, and able to purchase the apartment during the term of its listing agreement, because the owner contracted to sell the apartment to the buyer through another broker after expiration of the initial listing agreement. The court held that seller, who had paid a commission to the

continued on page 8

Real Property Law

continued from page 7

second broker, was not obligated to pay a commission to the first broker because the agreement did not contain an extension clause. By contrast, in *Picotte Real Estate, Inc. v. Gaughan*, 107 A.D.2d 996, the court awarded a broker his commission when the owner sold the property during the period of the extension clause to a person that the broker procured during the effective period of the brokerage agreement.

When a brokerage agreement contains no definite term, *dictum* in *Hampton Realty v. Conklin*, 220 A.D.2d 385, suggests that a broker is only entitled to a commission if the sale occurs within a "reasonable duration" after execution of the agreement. In *Hampton Realty*, the court denied a commission to a broker primarily because the broker was not the procuring cause of the sale, but also indicated that it would not be reasonable to extend the duration of the brokerage agreement for more than one year where the agreement contained no definite term and the seller sold the property more than two years after the broker entered the agreement with the seller.

By contrast, when a brokerage agreement includes an extension clause, but the clause has no definite term, one court had held, the agreement enforceable because the clause was freely negotiated. In *J.E. Horan Duffy Realty v. Brighton*, 216 A.D.2d 358, the court awarded the broker a commission after termination of the brokerage agreement in reliance on an extension clause that entitled the broker to a commission if the ultimate purchaser of the premises had negotiations with the seller or broker during the term of the agreement, regardless of when the actual purchase took place and regardless of whether the broker was the procuring cause of the sale.

Easement Not Invalid For Fraud

West 125th Street Realty LLC v. Chosen Realty Corp.
2023WL 3468475
AppDiv, First Dept.
(memorandum opinion)

In an action by purchaser to invalidate an easement and for fraud, seller appealed from Supreme Court's denial of its motion to dismiss the complaint as against it. The Appellate Division reversed and granted the motion, holding that purchaser's failure to consent to the easement did not invalidate the easement or support a claim for fraud.

Seller contracted to sell the property to Onyx. At the time of the sale, the rooftop of the building had been leased to telecommunications tenants. A day before the scheduled closing, Onyx asked seller to executed an easement to Onyx giving Onyx dominion over the rooftop, including the leases for telecommunications. The following day, Onyx notified seller that it had assigned its rights under the contract to purchaser and a cotenant, who were assuming all of Onyx's obligations under the contract. On the day of closing, seller executed the easement to Onyx and executed a deed to purchaser and its cotenant. The closings were conducted remotely. Upon discovering the easement, purchaser brought this action against Onyx and seller, contending that the easement was invalid and that purchaser was entitled to recover for fraud. Seller moved to dismiss the complaint against it, but Supreme Court denied the motion.

In reversing, the Appellate Division noted that the complaint did not allege that seller had aced fraudulently by failing to disclose that the property would be encumbered but instead alleged that the easement was invalid and fraudulently granted because the execution of the easement did not become effective until after the sale of the property had been completed and because purchaser had not consented to it. Those allegations, the court held, were insufficient to state a claim against seller. The court rejected the proposition that a property owner cannot agree to grant an easement that becomes effective after a sale of the property.

—❖—

CO-OPS AND CONDOMINIUMS

Appointment of Receiver to Collect Rent Owed to Defaulting Commercial Unit Owner Upheld

Board of Managers of Printing House Condominium v. Mountbatten Equities, L.P.
2023 WL 3742898
AppDiv, First Dept.
(memorandum opinion)

In condominium's action against commercial units to foreclose on liens for unpaid common charges, unit owners appealed from Supreme Court's appointment of a receiver to collect reasonable rent for the subject units and apply the rent to common charges. The Appellate Division affirmed, holding that Supreme Court hard providently exercised its discretion.

In upholding Supreme Court's exercise of discretion, the court held that the existence of first mortgages that enjoyed priority over the lien for common charges did not preclude appointment of a temporary receiver of application of rent to common charges. The court noted that the owners had submitted no support for their position that the amount of unpaid charges was at issue.

—❖—