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Panels Clash on Pre- and Post-Eviction Remedies

By Jeffrey Turkel

The scenario is common enough: A landlord brings a proceeding against a long-term rent-regulated tenant, sometimes elderly or infirm, who has fallen behind in rent. The tenant struggles to obtain the money, often from slow-moving governmental or charitable sources. "Time of the essence" payment stipulations are entered into, and then violated. A judgment of possession is issued, and multiple stays are obtained. Finally, the tenant offers payment, sometimes pre-eviction, and sometimes post-eviction. What is a court to do?

As two recent cases prove, there is no clear answer. In *Lafayette Boynton Hsg. Corp. v Pickett*, 135 AD3d 518 (1st Dept 2016), a post-eviction case, the majority affirmed Appellate Term's order restoring the tenant to possession, with Justice David B. Saxe issuing a lengthy concurring opinion that called the current state of the law into question. In contrast, in the pre-eviction case of *191 St. Assoc. LLC v Cruz*, 50 Misc3d 137(A) (App Term 1st Dept 2016), Appellate Term majority authorized a tenant's eviction, over a lengthy dissent by Justice Doris Ling-Cohan.

LAFAYETTE BOYNTON

Lafayette Boynton concerned a disabled and infirm rent-stabilized tenant who had been in occupancy for 46 years. The tenant was evicted, but Civil Court (Vargas, J.) granted his motion to be restored on the condition that the tenant pay, within two weeks, all remaining rent arrears, eviction costs, and landlord's attorneys' fees. Appellate Term, 44 Misc3d 140(A), affirmed, holding that "the particular facts and circumstances of record" did not "warrant the forfeiture of this tenancy," and that Civil Court had not abused its discretion.

Citing *Brusco v Braun*, 84 NY2d 674 (1994), the Appellate Division majority held that a court, "'in appropriate circumstances,'" can "vacate a warrant of eviction and restore the tenant to possession even after the warrant has been executed." The majority observed that the tenant "made appreciable payments toward his rent arrears and 'engaged in good-faith efforts to secure emergency rental assistance to cover the arrears.'"

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Justice Saxe concurred, writing that existing case law justified the majority's affirmance. But he called such authority into question, and expressed his concern that the law often "forces landlords to serve as *de facto* no-interest lenders to low-income tenants."

Justice Saxe noted that prior to eviction, RPAPL 749(3) authorizes the vacatur of a warrant of eviction for "good cause shown." Post-eviction, the court can restore the tenant to possession under "appropriate circumstances," although, ironically, that remedy was established in *Brusco*, a pre-eviction case. Justice Saxe further observed that in some post-eviction cases, courts had erroneously employed the pre-eviction standards of "good cause shown" and abuse of discretion.

The concurring Justice urged courts to "reconsider the standard of proof necessary to vacate an already-executed warrant of eviction," stating:

> When the posture of the litigation is that a warrant of eviction was issued based on conceded rent arrears, but was stayed to give the tenant time to obtain the overdue funds from any available sources, the 'good cause' standard of RPAPL 749(3) makes perfect sense.
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> But since a completed eviction ordinarily terminates the tenant's interest in the property and entitles the landlord to treat the previously rented premises as its own, a court should not undo that eviction unless the tenant makes a showing of something more than the type of 'good cause' that justifies vacating an unexecuted warrant.

Justice Saxe concluded that where the warrant has already executed, the tenant should have to establish that "incorrect assumptions or findings were made in issuing the warrant of eviction that undermines the basis for its issuance in the first place." Acknowledging that there were public policy considerations to ensure that long-term elderly or infirm tenants do not lose their rent-regulated apartments, Justice Saxe noted that under the present case law, courts "are relying on the private property owners who happen to rent apartments to such tenants, requiring them to cover the shortfall for months, or even years, rather than, as a society, making sure that elderly and disabled low-income tenants have access to the necessary funds *in a timely manner* so they can stay current on their rent" (italics in original).

191 St. Assoc.

191 St. Assoc. concerns the more common scenario of a long-term rent-regulated tenant who has fallen behind in rent and hopes to avoid eviction. The tenant in *191 St. Assoc*. failed to appear, and a warrant of eviction was issued. The tenant moved to vacate her default, but failed to appear on that date as well. Over the next 15 months, the tenant sought and obtained court-ordered stays, and signed a "time of the essence" stipulation, which she breached. Notwithstanding, Civil Court granted the tenant a tenth stay of execution.

Appellate Term reversed, holding that Civil Court had abused its discretion, and that public policy encourages the enforcement of stipulations. The majority stated that the landlord had previously commenced 28 nonpayment proceedings against this tenant, and, as to the tenant's status as disabled and infirm, such status "is one of the particular facts and circumstances to be considered by the court," and "does not constitute an automatic exemption to be robotically applied with a blind indifference to other considerations."

Justice Ling-Cohan dissented, holding that in this type of case, the court should conduct "a

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fact-sensitive inquiry" including "the extent of tenant's delay in tendering payments, the length and nature of the tenancy, the tenant's advanced age or infirmities, the amount of the default, the particular tenant's history, tenant's ability to pay future rent, tenant's payment of arrears during the course of the proceeding, and a balance of the equities."

Analysis

Lafayette Boynton and *191 St. Assoc*. evidence what happens when a court attempts to enforce contracts, while at the same time seeking to implement a social policy designed and to keep tenants in occupancy from being evicted.

A lease is a contract, like any other. *See Farrell Lines, Inc. v. City of New York*, 30 NY2d 76 (1972). Thus, when a tenant has failed to timely pay rent, he or she is in breach of the contract, and contractual remedies should be enforced. A stipulation is also a contract. *See Banos v. Rhea*, 25 NY3d 266 (2015). As such, where a tenant executes a stipulation to pay rent by a date certain, that stipulation should also be enforced, especially where the stipulation is "time of the essence" and provides that no default shall be deemed *de minimis*.

The problem in landlord-tenant cases is that strict enforcement of a contract can lead to eviction. Given New York City's housing situation, and the general lack of affordable housing in the City, evictions can lead to homelessness. As long as courts seek to avoid evictions, landlords can expect that contracts and stipulations will not be strictly enforced, and that, as Justice Saxe wrote, landlords who happen to rent apartments to the elderly or infirm will bear the brunt of this social policy.

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COOPERATIVES & CONDOMINIUMS

Tenant-In-Common Not Entitled to Stay of Sale

Robak v. Liu

NYLJ 2/9/16, p. 17, col. 1

Supreme Ct., N.Y. Cty. (Moulton, J.)

Tenant-in-common in the shares associated with a co-op apartment moved to stay a sale of the apartment's shares pursuant to an agreement settling a prior partition action between the parties. The court denied the motion, holding that the moving tenant had defaulted under the terms of the agreement even if she was not to blame for the default.

Liu and Robak owned the apartment as tenants-in-common. When they broke up as a couple, Robak brought a partition action. The parties entered into a settlement agreement that would have resulted in transfer of the shares to Liu if the co-op corporation consented to the transfer. The settlement also included a confession of judgment given by Liu to Robak. The co-op refused to consent to the transfer without offering a reason for the refusal, and Liu has, in a separate action, alleged that the decision was the product of discrimination. Robak then arranged for the clerk of the court to enter a judgment directing sale, based on the confession of judgment Liu had executed. Liu moved to vacate the judgment and confession, and to stay the sale.

In denying Liu's motion, the court noted that the agreement provided that if Liu failed to obtain a new stock and lease solely in her own name, she would be deemed to be in default of the agreement. The court held that even if Liu's failure to obtain the transfer was not her own fault, it was also not Robak's fault. In light of the language of the settlement agreement, which contemplated Liu's potential failure to obtain the transfer, Robak was entitled to enforce the agreement's terms, and to compel sale of the apartment.

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DEVELOPMENT

Neighbor Has Standing to Challenge Landowner's Violation of Zoning Ordinance

Gershon v. Cunningham

NYLJ 1/22/16, p. 31, col. 3

AppDiv, Second Dept.

(memorandum opinion)

In an action by neighbor to enjoin landowner's alleged violation of the New York City zoning ordinance, landowner appealed from Supreme Court's orders granting a motion by neighbor's counsel to be relieved, and denying landowner's motion to dismiss the complaint for lack of standing and lack of personal jurisdiction. The Appellate Division dismissed the appeal with respect to neighbor's counsel, and affirmed denial of the motion to dismiss, holding that neighbor had established standing and landowner had failed to demonstrate that he was not properly served with the complaint.

In dismissing landowner's appeal from the order relieving neighbor's counsel, the Appellate Division held that landowner was not aggrieved by that order. In affirming denial of landowner's motion to dismiss the complaint, the court emphasized that neighbor's property was in close proximity to landowner's, and neighbor's interests were within the zone of interests protected by the zoning ordinance. As a result, neighbor had standing to bring the action. The court also rejected landowner's claim that Supreme Court

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lacked personal jurisdiction, noting that landowner failed to submit a sworn denial of receipt of process to rebut the presumption of proper service.

COMMENT

Even if a statute appears to vest exclusive power to enforce an ordinance with the city or its officials, the Court of Appeals has held that a close neighbor may maintain an action to enjoin the continuance of a zoning violation. In Little Joseph Realty v. Town of Babylon, *41 N.Y.2d 738, the court held that a landowner had standing to maintain an action to enjoin the construction of an asphalt plant on a neighboring parcel of land in violation of zoning restrictions despite the language of section 268 of the Town Law, which grants the power to enjoin zoning violations to town authorities, and only extends this power to a group of three taxpayers, acting in concert, when the town fails or refuses to take action within 10 days of receiving written notice of a request to enforce. The court indicated that these provisions could not diminish the right of one who suffers special damages to take legal action. The court suggested that section 268's requirements were directed at resident taxpayers merely suffering from general inconvenience experienced by the public at large.*

In order to successfully establish special damages, a neighbor must show that landowner's forbidden activity depreciated in the value of neighbor's premises in some way other than diversion of the neighbor's business. In Cord Meyer Development Company v. Bell Bay Drugs, *20 N.Y.2d 211 , the court held that the owner of a pharmacy lacked standing to enjoin the defendant from operating a nearby pharmacy in violation of town zoning restrictions. The court indicated that property owners have no vested rights in monopolies created by zoning laws and therefore a private action could not be maintained where the sole damage the pharmacy owner would suffer was diversion of business.*

Additionally, a neighbor must prove diminution in the value of his or her property by offering specific, detailed evidence. In Marlowe v. Elmwood, *12 A.D.3d 742, the court held that a real estate appraiser's opinion that noise associated with children's activities would detract from the value of nearby properties was insufficient to establish special damages. Without any quantification of specific property values or the diminution attributable to the landowner's operation of a summer camp, the neighbors failed to produce the detailed evidence necessary to establish standing. Similarly, in* Camarda v. Vanderbilt, *147 A.D.2d 607, the court held that evidence of special damages was insufficient when it was merely based on round figures, with no attempt at itemization. Thus, the neighbors, who made a general claim that the value of neighboring properties had diminished by approximately $5,000 because of the landowner's actions, lacked standing to enjoin landowner from maintaining flea markets on its property in alleged violation of zoning regulations.*

Constitutional Claims Ripe, Despite Absence of Final Decision

East End Resources, LLC v. Town of Southold Planning Board

NYLJ 1/29/16, p. 27, col. 6
AppDiv, Second Dept.
(memorandum opinion)

In landowner's hybrid action against the town for violation of landowner's constitutional rights, and article 78 proceeding to compel the planning board to conduct a hearing on its site-plan application, the town appealed from Supreme Court's denial of its motion for summary judgment dismissing several of landowner's claims. The Appellate Division modified to dismiss the due-process claims on the ground that landowner had no cognizable property interest, to dismiss the state constitutional equal protection claim for failure to serve a notice of claim, and to dismiss the article 78 proceeding as academic because the planning board had conducted a public hearing on the application.

In 2002, landowner contracted to purchase 6.75 acres in the town. The town then imposed a moratorium on all residential site-plan approvals. When the moratorium expired, landowner submitted an application for construction of a 24-unit senior housing development on the parcel. Then, in 2008, landowner submitted an amended site-plan application. Landowner later brought this proceeding alleging that the town planning board and the town board deliberately and systematically delayed review of its site-plan application. Landowner sought to compel the planning board to hear the application, and also sought damages for violation of its due process and equal protection claims. The town defendants sought summary judgment dismissing the claims, but Supreme Court denied the motion. The town defendants appealed.

In modifying, the Appellate Division first concluded that Supreme Court had properly rejected the town defendants' claim that the constitutional claims were not ripe for judicial review. Although the court acknowledged that a claim against a land use board is not generally ripe until a government entity has made a final decision, the court noted that in this case, landowner had raised a triable issue of fact about whether the town defendants would use repetitive and unfair procedures to avoid making a final decision. Because ripeness was the only ground the town defendants had raised for dismissal of the federal equal protection claim, the court concluded that Supreme Court had properly denied summary judgment on that claim.

With respect to the due process claims, however, the court concluded that although the claims were ripe, Supreme Court should have dismissed because the planning board had significant discretion

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in reviewing the site plan application. As a result, landowner had no cognizable property interest in approval of the application, so the due process claims should have been dismissed. As to the state constitution equal protection claim, the court held that landowner had not satisfied a condition precedent: service of a notice of claim on the town defendants. Finally, with respect to the article 78 proceeding, the court held that the planning board had, in fact, held a public hearing on landowner's application, rendering the article 78 proceeding academic.

COMMENT

C.P.L.R. § 7801 precludes a party from challenging a non-final determination. When a landowner applies for site plan approval from a land use board, the landowner may not generally bring an Article 78 proceeding to challenge the board's action until the board has definitively approved or denied the application; a letter from municipal officials indicating that certain conditions may be placed on review of landowner's application does not constitute a final decision. For instance, in Sterling Idea Ventures v. Planning Bd. of Town of Southold, *173 A.D.2d 475, the Second Department dismissed an article 78 proceeding on finality grounds when landowner instituted an Article 78 proceeding after the town planning board notified the landowner by letter that its pending application for site plan approval would now be retroactively reviewed under a zoning code passed after the submission of its application. The court found the letter did not amount to final administrative action, because the letter expressly stated that the application was still under review pending receipt of revised site plans. As a result, the board had taken no definitive position that had a direct, immediate effect on the applicant.*

A landowner's federal constitutional challenge to a land use board's determination is not generally ripe unless the landowner establishes finality by applying for, and being denied, variance allowing development. In S&R Development Estates, LLC v. Bass, *588 F.Supp.2d 452, the Southern District granted the zoning board's motion to dismiss, holding that developer's due process and equal protection challenges to a board's determination that landowner's parcel was located in a single-family zoning district were unripe because landowner had never sought a variance to permit a nonconforming use.*

Although courts have articulated a futility exception to the finality requirement, they have generally applied the exception only to dismiss landowner's claims on the merits. For instance, in Honess 52 Corp. v. Town of Fishkill, *1 F.Supp.2d 294, the Southern District, while dismissing landowner's substantive due process claims on the merits, found that landowner's allegations of obstruction and delay made its claim ripe for adjudication despite the absence of a final decision on the site plan. In* Honess, *after originally granting site plan approval, the board endlessly applied conditions and indicated concern over proposed development's density, pressuring landowner into continuously modifying the size of the development. After the board still refused to either approve or deny the application, landowner brought a § 1983 claim, alleging a due process violation The court rejected the town's ripeness defense, concluding that the board's delay demonstrated that any attempt to continue applying would be futile.*

Landowner Failed to Establish That Retail Use Was Continuation of Pre-Existing Non-Conforming Use

Matter of East End Holdings, LLC v. Zoning Board of Appeals
NYLJ 1/22/16, p. 30, col. 5
AppDiv, Second Dept.
(memorandum opinion)

In landowner's article 78 proceeding challenging a determination by the zoning board of appeals (ZBA) that landowner's use of a unit as retail space was not a continuation of a pre-existing nonconforming use, landowner appealed from Supreme Court's denial of the petition and dismissal of the proceeding. The Appellate Division affirmed, holding that the ZBA's determination was not arbitrary or capricious.

Landowner's commercial buildings were constructed in 1976, and contain retail shops. In 1982, the Village of Southampton amended its zoning code to prohibit retail shops smaller than 800 square feet. In 2008, when the village building inspector learned that one of landowner's tenants was operating a 100-square-foot shop, the building inspector notified landowner of the violation of the zoning code. Landowner appealed to the ZBA, contending that the shop was a pre-existing nonconforming use.

Landowner relied on a 1999 appraisal report listing a 100-square-foot shop as occupied and a certificate of occupancy showing that landowner had a right to operate seven shops on the property. In rejecting landowner's appeal, the ZBA relied on the surveys submitted by the building inspector, dating from 1981 and 1999, showing the floor plan and layout of the seven shops. The floor plans did not include the 100-square-foot shop at issue. Landowner then brought this article 78 proceeding, and Supreme Court denied the petition.

In affirming, the Appellate Division noted that the record was devoid of evidence that the 100-square-foot unit was being used as a retail space at the time the zoning code was amended in 1982. As a result, it was not arbitrary or capricious for the ZBA to conclude that landowner's use was not the continuation of a legal nonconforming use.

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LANDLORD & TENANT

Civil Court Abused Its Discretion By Staying Execution of Warrant of Eviction

191 Street Associates, LLC v. Cruz
NYLJ 2/9/16, p. 22, col. 1
AppTerm, First Dept.
(2-1 decision; *per curiam* opinion; dissenting opinion by Ling-Cohan, J.)

In landlord's nonpayment proceeding, landlord appealed from Civil Court's grant of tenant's motion to stay execution of a warrant of eviction. The Appellate Division reversed, holding that Civil Court had abused its discretion.

Landlord brought the nonpayment proceeding against rent-stabilized tenant in August 2012, seeking eight months of rent arrears. A default judgment was entered against tenant in September 2012, and a warrant of eviction was issued in November 2012. Tenant's motion to vacate the default was denied in December 2012 due to her failure to appear. Over the ensuing 15 months, tenant obtained a number of court-ordered stays of the warrant of eviction. Ultimately, in January 2014, the parties, both advised by counsel, entered into a stipulation staying execution of the warrant of eviction upon tenant's compliance with a strict payment timetable. The stipulation provided that all payments were deemed time of the essence, and no default would be deemed *de minimus*. Tenant failed to make a scheduled payment of $2060.30 on Feb. 20, 2014, instead making a payment of $688. Civil Court nevertheless granted tenant a further stay of execution of the warrant. Landlord appealed.

In reversing, the Appellate Term majority held that Civil Court should not have granted the stay, but should have strictly enforced the parties' stipulation. The court emphasized the tenant's lengthy history of rent defaults, including 28 prior nonpayment proceedings commenced against her. In light of that history, and the fact that tenant was represented by counsel when she signed the stipulation, Civil Court abused its discretion by staying execution of the warrant.

Justice Ling-Cohan, dissenting, focused on the 34-year duration of the tenancy and the modest amount of rent due, and emphasized that the trial court has broad discretion to determine whether good cause exists even when the issues is vacating an already-executed warrant of eviction. She emphasized that the First Department has held that courts should hold a fact-sensitive inquiry, and should balance the equities.

COMMENT

When landlord obtains a warrant of eviction pursuant to a stipulation of settlement, Civil Court does not abuse its discretion to stay execution of the warrant when a tenant has demonstrated good cause by making significant efforts to cure arrears. In Harvey 1390 LLC v. Bodenheim, *96 A.D.3d 664, the First Department reversed the Appellate Term and reinstated the trial court's finding that a 15-day stay of the execution of a warrant of eviction was appropriate, despite tenant default on payments under a stipulation, when tenant demonstrated that he approached charities and agencies to obtain assistance, tendered almost all of the payment due, and showed that he would soon receive enough charitable assistance to satisfy the arrears. When tenant's failure to comply with a settlement stipulation is caused by a third party's delays, Civil Court does not abuse its discretion by staying execution. In* 2246 Holding Corp. v. Nolasco, *52 AD3d 377, the First Department held that the civil court did not abuse its discretion to stay the eviction of a 30-year tenant when the tenant's defaults were largely the result of the Human Resources Administration delay in issuing benefits.*

Civil Court abuses its discretion if it stays execution merely because tenant asserts difficulty in obtaining funds, a lengthy occupancy, or because tenant has medical issues. In Chelsea 19 Associates v. James, *67 A.D.3d 601, the First Department affirmed the Appellate Term's reversal of Civil Court's stay of execution, holding that the stay was inappropriate when the parties had entered into a stipulation of settlement to cure extensive, unexplained rent defaults, and the tenant defaulted. The court noted that claiming difficulty in obtaining funds was not a meritorious defense. Similarly, in* 2460 Davidson Realty, LLP v. Lopez, *43 Misc. 3d 130(A), the First Department Appellate Term reversed the civil court's decision to stay execution of a warrant of eviction when the parties entered into a rent delinquency stipulation. The court found a stay inappropriate given tenant's extended history of rent defaults, which continued with regularity for a 20-month period during the probationary term agreed upon by the parties. The court noted that neither the length of the tenancy nor tenant's belated and bare-bones assertion that she has an unspecified psychiatric problem constituted "good cause."*

The First Department has held that Civil Court has authority to vacate the warrant of eviction even after the warrant has been executed, so long as tenant makes the same good cause showing necessary to vacate a warrant before execution. In Lafayette Boynton Hsg. Corp. v. Pickett, *135 A.D.3d 518, the First Department held that the trial court did not abuse its discretion in vacating an executed warrant of eviction for a long-term, disabled tenant who "did not sit idly by" but rather made appreciable payments towards his rental arrears that were in part caused by third parties.*

The court held that the trial court providently exercised its discretion in finding good cause when the record reflected tenant's attempts to secure emergency rental assistance to cover the arrears. The record also showed that the tenant had ultimately paid the rental arrears for the unit and the landlord's costs for the underlying proceeding. The concurring opinion called for the court to reconsider the standard of proof necessary to vacate an already-executed warrant of eviction — noting that importing the same good cause standard for already executed warrants may be inconsistent with the statutory language.

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ABATEMENT OF INTEREST AND FEES APPROPRIATE

Lasalle Bank, N.A. v. Dono

NYLJ 1/22/16, p. 31, col. 5
AppDiv, Second Dept.
(memorandum opinion)

In a mortgage foreclosure action, mortgagee bank appealed from Supreme Court's imposition of sanctions for failure to negotiate a loan modification in good faith. The Appellate Division modified, holding that Supreme Court was entitled to impose sanctions, but that Supreme Court had improvidently exercised its discretion by permanently barring any collection of interest or attorneys' fees without further court order.

The bank brought this foreclosure action after homeowner defaulted on his mortgage. When the homeowner submitted an application for a loan modification, the bank made numerous requests for additional documentation, including that which homeowner had already submitted. These requests spanned a period of 40 months, during which 24 separate court appearances were held, and during which the bank failed to comply with court directives requiring it to turn over documentation to the homeowner.

When the bank finally did transmit a modification offer to homeowner, the latter did not accept on the ground that the offer was unconscionable. The bank refused to consider homeowner's counteroffer, responding that it would not negotiate the terms of the loan modification. Homeowner then sought sanctions for failure to negotiate in good faith as required by CPLR 3408(f).

Supreme Court awarded sanctions, abating all interest, costs, and attorneys' fees that had accrued between Oct. 1, 2010 and April 12, 2014 (the date of Supreme Court's order). The court also barred the bank from collecting any interest, costs, or attorneys' fees in the future absent a further court order. The bank appealed.

In modifying, the Appellate Division started by noting that the homeowner's submissions demonstrated that the bank had engaged in dilatory tactics and had failed to negotiate in good faith. The court then noted that CPLR 3804(f) provides no specific remedy for a mortgagee's failure to negotiate in good faith, but held that Supreme Court had providently exercised its discretion in abating all interest, costs, and fees accruing up until the date of the court's order. The court held, however, that Supreme Court had improvidently exercised its discretion in abating future interest, costs and fees absent a court order.

COMMENT

In light of CPLR 3408(f)'s silence about the remedies that may be employed for violation of the statute's good-faith negotiation requirement, at least one court has required a mortgagee to continue settlement negotiations in an effort to coerce mortgagee into offering mortgagor a reasonable loan modification. In Bank of America, N.A. v. Rauscher, *43 Misc.3d 488, after finding that the mortgagee had failed to negotiate a loan modification in good faith, the court cancelled the interest and accrued fees back to the date of the first conference, scheduled a new settlement conference, and directed mortgagee to indicate whether it would provide a loan modification at the next conference. Further, the court held that if mortgagee denied mortgagor a loan modification, mortgagee must provide an explanation of the reason for denial.*

A court may also impose a fine on a mortgagee for failing to negotiate in good faith. In One West Bank, FSB v. Greenhut, *36 Misc.3d 1205(A), the court ordered mortgagee to pay $1,000 to the New York Interest on Lawyers Account Fund when mortgagee violated its duty under CPLR 3408(c) to produce a representative with authority to dispose of the case during settlement negotiations. The court emphasized that mortgagee should have known after the first conference before the court that mortgagee must produce a representative with authority to settle*

While courts may obligate mortgagee to continue settlement negotiations after finding mortgagee failed to proceed in good faith, a court may not require a mortgagee to accept a particular loan modification agreement. In Wells Fargo Bank, N.A. v. Meyers, *108 A.D.3d 9, the Second Department rejected the remedy employed by the Supreme Court, which compelled mortgagee bank to modify the loan agreement by adopting the terms of a trial modification offer mortgagee had earlier proposed.*

After mortgagor contacted mortgagee seeking a loan modification, the latter offered mortgagor a trial modification where mortgagee promised that it would not foreclose during the trial period. Although mortgagee violated the terms of the trial period and commenced a foreclosure action against mortgagor, the Second Department held that Supreme Court had acted improperly in permanently binding the parties to what was supposed to be only a trial modification. According to the Second Department, Supreme Court's solution rewrote the parties' agreement in violation of CPLR 3408(f).

Courts may also impose sanctions on mortgagee's counsel in an effort to enforce the obligation to negotiate in good faith. In Deutsche Bank Trust Co. of Am. v. Davis, *32 Misc.3d 1210(A) (2011), when Supreme Court found mortgagee's inability to locate three of the five applications for a loan modification showed a lack of good faith, the court stayed the foreclosure action until mortgagee moved to resume negotiations in good faith, and sanctioned mortgagee's attorney 50% of interest from the date of the first negotiation, which was originally due to mortgagee by mortgagor.*

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Real Property Law

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COURT APPROVAL NOT REQUIRED FOR SALE BY RELIGIOUS CORPORATION

Vista Developers Corp. v. Board of Managers of the Diocesan Missionary and Church Extensions Society of the Protestant Episcopal Church

NYLJ 1/21/16, p. 23, col. 6
AppDiv, First Dept.
(memorandum opinion)

In purchaser's action for return of a down payment, purchaser appealed from Supreme Court's award of summary judgment to seller. The Appellate Division affirmed, holding that court approval of the sale was not required, and failure to obtain court approval did not justify purchaser's failure to close.

Seller, a not-for-profit corporation created by a special act of the state legislature in 1912, contracted to sell a multifamily property to purchaser. Purchaser refused to close without prior court approval of the sale, and sought return of its down payment. Supreme Court awarded summary judgment to seller, and purchaser appealed.

In affirming, the Appellate Division noted that the special act creating seller limited seller's ability to purchaser real property, but imposed no limit on seller's ability to sell or otherwise dispose of real property. The court acknowledged that section 12 of the Religious Corporations Law generally required court approval of the sale of real property owned by religious corporations, but held that section 12 must yield to the provisions of a special act creating a particular religious corporation.

The court subsequently held that, assuming but not deciding that seller is a religious corporation, the act creating seller took the seller outside the mandates of section 12. The court then held that section 510 of the Not-for-Profit Corporations Law did not require court approval because the sale was not for all or substantially all of seller's assets. Finally, the court held that the sale contract did not require court approval. The contract provided that the sale was "contingent upon [seller] obtaining [court] approval, pursuant to the Religious Corporations Law and the Not-for-Profit Corporation Law … if required." Because neither statute required approval of the sale, the contract provision was inapplicable. As a result, the purchaser had no excuse for failure to close, and the seller was entitled to return the down payment as liquidated damages.

COMMENT

Generally, Religious Corporations Law § 12 requires a religious organization to obtain court approval prior to any sale of real property. The statute applies where the religious corporation is created by a special act that does not expressly address the procedure by which the organization may dispose of its property. In Matter of Religious Corps.& Ass'n. Divestment of Prop., *2 Misc. 3d 1003(A), the court declined to approve a religious organization's intended sale of property, as the organization had not followed the proper procedure for obtaining court approval.* Id. *at *8. The special act that created the organization granted it the authority to dispose of property "for the use of the corporation" without making any mention of any procedural requirements. (L. 1926, ch. 680). The court held, therefore, that the corporation had to comply with Religious Corporations Law § 12 would apply.*

In contrast, if the language of the special act expressly allows the organization to sell property at its will, Religious Corporations Law § 12 does not apply. In Bush v. Bush, *91 Misc. 2d 389, the court held that the special act creating the church, the same church involved in* Vista Developers, *authorized the church to sell property without obtaining prior court approval. The special act expressly permitted the church "to sell, mortgage, lease or otherwise dispose of the [property] at their will and pleasure."* Id. *This was in contrast to the statute's grant of power to acquire property "subject to such other restrictions as from time to time shall be prescribed by law with regard to charitable corporations."* Id. *The court held that, under principles of statutory interpretation, the general provisions of Religious Corporations Law must give way to the specific provisions of the special act which allowed the church to sell property at its "will and pleasure," i.e., without any procedural restrictions.* Id.

If the language of the special act places on the organization procedural requirements different from those in Religious Corporations Law § 12, the special act governs and § 12 does not apply. In Diocese of Buffalo, N.Y. v. McCarthy, *91 A.D.2d 1210, the court held that the pastor of a church under the Diocese of Buffalo could not lease property without first obtaining the Bishop's approval.* Id. *at 767. The special act reincorporating the Diocese of Buffalo in 1951 required the approval of the Bishop before any lease of Diocesan land.* Id. *at 766. The court held that the act dispensed with § 12's requirement of court approval and replaced it with a requirement of obtaining the Bishop's approval.* Id. *at 767. Because the pastor of the church had not obtained the Bishop's approval prior to leasing Diocesan land, the court held the lease to be* void ab initio. Id.

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