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Regina Metropolitan: What Practitioners Need to Know

By Jeffrey Turkel

On April 2, 2020, the Court of Appeals, by a 4-3 margin, issued a lengthy and groundbreaking decision in *Regina Metro Co. v New York State Div. of Hous. & Community Renewal*. The decision collectively decided four rent overcharge cases arising from *Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 (2009), wherein the Court of Appeals had ruled that luxury deregulation was unavailable in buildings receiving J-51 benefits. The landlords in Regina had deregulated various apartments based on advice from DHCR that luxury deregulation was not prohibited in such buildings. The question in *Regina* was how to compute base rents and rent overcharges in such cases.

The issue was further complicated by the enactment of Part F of the Housing Stabilization and Tenant Protection Act (HSTPA) on June 14, 2019. The Part F amendments dramatically altered how overcharges were to be computed.

The majority opinion in *Regina* is 57 pages long, and the dissenting opinion consists of 52 pages. Accordingly, this article will focus on what the Court did and did not decide in *Regina*, and how its holding affects pending overcharge cases.

The Court's primary holding in *Regina* is that retroactive application of the Part F amendments would violate the Due Process clause of the U.S. Constitution. Contrary to what at least one commentator has written, the retroactive application issue has nothing to do with the date on which an overcharge claim is filed. Instead, the majority held that overcharges collected pre-HSTPA will be governed by what is essentially the 1997 version of the RSL (RSL-97). Overcharges collected after the HSTPA's June 14, 2019 effective date will be calculated under the new statute. The Court did not clarify how all of this will work in practice in those cases where overcharges were collected before and after the HSTPA.

Although the Court of Appeals in *Regina* decided four *Roberts* cases, it made clear that its ruling governed any and all overcharge claims. First, the majority observed that the Part F amendments "apply to all overcharge claims — not merely those

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flowing from an improper deregulation, much less a *Roberts* deregulation" (majority op. at 2). Second, because applying the Part F amendments to pre-HSTPA overcharges was deemed unconstitutional *per se*, *Regina* necessarily establishes the rule for any claim involving overcharges collected before June 14, 2019.

Having held that the pre-HSTPA version of the statute applied to overcharges collected before the new statute, the majority then explained how overcharges are to be determined under the RSL-97, an issue as to which the First Department had been sharply divided. The Court of Appeals held that the "categorical" rule under the RSL-97 was as follows:

> "For overcharge calculation purposes, the base date rent was the rent actually charged on the base date (four years prior to the initiation of the claim) and overcharges were to be calculated by adding the rent increases legally available to the owner under the RSL during the four-year recovery period. Tenants were therefore entitled to damages reflecting only the increases collected during that period that exceeded legal limits" (majority op. at 12).

Under this rule, the rental history of the apartment more than four years prior to the complaint could not be examined for any purpose. In addition, the Court made clear that this rule applied even if: 1) the rent charged and paid four years prior to the overcharge complaint was an illegal "deregulated" market rent (majority op. at 14); and 2) "no registration statement had been filed reflecting that rent" (*id*. at 10).

This was the methodology the First Department had employed in *Reich v Belnord Partners, LLC*, 168 AD3d 482 (1st Dept 2019) and *Raden v W 7879, LLC*, 164 AD3d 440, 441 (1st Dept 2018), which the *Regina* Court affirmed, and in *Stulz v 305 Riverside Corp.*, 150 AD3d 558 (1st Dept 2017), *lv. denied* 30 NY3d 909 (2018), and *Todres v W7879, LLC*, 137 AD3d 597 (1st Dept 2016), *lv. denied* 28 NY3d 910 (2016), which the *Regina* Court cited approvingly (majority op. at 14).

The Court of Appeals next examined the sole exception to the categorical rule, first announced in *Thornton v Baron*, 5 NY3d 175 (2005), wherein the Court held that the rental history of an apartment can be examined beyond the four-year lookback period where the tenant raises a colorable claim of a landlord's fraudulent scheme to deregulate an apartment. The *Regina* Court clarified that examining the rental history more than four years prior to the complaint in such circumstances was "solely to ascertain whether the fraud occurred — not to furnish evidence for calculation of the base rent or permit recovery for years of overcharges barred by the statute of limitations" (majority op. at 12).

The *Regina* majority, not surprisingly, held that there was no fraudulent scheme to deregulate in the four *Roberts* cases before it. As to the issue of computing rents and overcharges after the base date, the majority also ruled that treble damages were not appropriate in a *Roberts* case:

> "In these *Roberts* cases, the owners removed apartments from stabilization consistent with agency guidance. Deregulation of the apartments during the receipt of J-51 benefits was not based on a fraudulent misstatement of fact but on a misinterpretation of the law — significantly, one that DHCR itself adopted and included in its regulations. As we observed in *Borden v 400 E. 55th St. Assoc., L.P.*, a finding of willfulness 'is generally not applicable to cases arising from the aftermath of *Roberts*' (24 NY3d 382, 389 [2014]). Because conduct cannot be fraudulent without being willful, it follows

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that the fraud exception to the lookback rule is generally inapplicable to *Roberts* overcharge claims" (majority op. at 13).

The *Regina* majority next discussed whether these landlords — who did not initially register their apartments after they deregulated them based on DHCR's guidance — should be penalized by a rent freeze pursuant to RSL §26-517(e). In both *Park v New York State Div. of Hous. & Community Renewal*, 150 AD3d 105, 113 (1st Dept 2017), *lv. dismissed* 30 NY3d 966 (2017) and *Taylor v 72A Realty Assoc. L.P.*, 151 AD3d 95, 106 (1st Dept 2017), which was affirmed as modified in Regina, the Court held that freezing rents based on an owner's reliance on DHCR's mistaken guidance would unfairly penalize landlords for actions taken in good faith, without furthering any legitimate purpose of the RSL. In *Regina*, the Court endorsed *Park* and *Taylor* in this respect, holding that "rent freezing is inapplicable in *Roberts* cases where the failure to timely register resulted directly from DHCR's endorsement of a misunderstanding of the law" (majority op. at fn. 9).

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REAL PROPERTY LAW

Statutory Damages Awarded Against Building Owner Who Whitewashed Artwork

Castillo v. G&M Realty, L.P.
2020 WL 826392,
U.S. Ct. App. Second Circuit
(Opinion by Parker, C.J.)

In an action by artists against building owner for a violation of the Visual Artists Rights Act (VARA), building owner appealed from the District Court's award of statutory damages in the amount of $6.75 million. The Second Circuit affirmed, holding that the artists' temporary works had achieved recognized stature and were protected against destruction by the building's owner.

In 2002, building owner undertook to install artwork in dilapidated warehouse buildings in Long Island City. The owner enlisted a curator to turn the walls of the warehouses into exhibition space for aerosol art. Some of the works were to have short lifespans and be painted over, while the vest of the works would be displayed on "longstanding walls" which were more permanent. Over time, more than 10,000 works of art were displayed at the 5Pointz site. In 2013, building owner sought approvals to demolish 5Pointz and to build luxury apartments on the site. The curator applied unsuccessfully to have the Landmarks Commission designate the site as one of cultural significance. The curator and various artists then brought this action under VARA to prevent destruction of the site. The District Court denied the request for a preliminary injunction, holding that money damages would be sufficient to remedy any injuries proved at trial. The building owner immediately whitewashed the artwork and prohibited the artists from returning to the site to recover any work that might be removed. The District Court subsequently concluded that the building owner had violated VARA. After determining that 45 of the works had achieved recognized stature, the court awarded statutory damages of $150,000 per infringement. Building owner appealed.

In affirming, the Second Circuit first held that temporary works could constitute works of recognized stature, and then concluded that the artists had established that the works in question qualified as works of recognized stature. The court then upheld the district court's statutory damage award, holding that the destruction of the works was willful. The court then concluded that especially in light of the building owner's conduct in whitewashing the walls before adjudication was complete and before necessary for construction of the apartments, the statutory damage award would serve as an appropriate deterrent.

Comment

VARA entitles an artist of a work of "recognized stature" to injunctive relief (to prevent destruction of their works) or money damages (if the work has already been destroyed). 17 U.S.C. §106A(a)(3)(B); 504(b) and (c). If the work is incorporated into a building, and cannot be removed without destruction of the work, the artist's rights may only be waived if the building owner obtains a written instrument — signed by both the owner and the artist — specifying that the work's installation may subject it to destruction or mutilation. If the artist consented to the installation prior to the effective date of VARA, the work is not protected under the statute. 17 U.S.C. 113(d)(1)(B).

17 U.S.C. 113(b)(2) provides that if a work of recognized stature can be removed from a building without being destroyed , the owner is liable for destruction of the work (absent waiver) unless the owner made a good faith attempt to notify the artist — in writing — of the work's destruction, and the artist fails to remove, or pay for the work's removal, within 90 days of receipt of the notice. 17 U.S.C. 113(d)(2). An owner can create a presumption of a diligent, good-faith attempt of notice by sending notice by registered mail to the most recent address of the artist registered at the Register of Copyrights. 17 U.S.C. 113(3).

VARA only protects works on a building that were initially sanctioned by the building owner. In English v. BFC&R East 11th Street LLC, *the Southern District granted summary judgment dismissing a claim for injunctive relief and damages by artists who had trespassed onto owner's property to paint murals on a building without the owner's consent. 97 CIV. 7446 (HB), 1997 WL 746444 (S.D.N.Y. Dec. 3, 1997),* aff'd sub nom. English v. BFC Partners, *198 F.3d 233 (2d Cir. 1999). In holding that VARA is inapplicable to works illegally*

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placed on others' property, the court reasoned that a contrary result would allow artists to effectively halt development of vacant lots simply by placing art there without permission.

Sale Contract Bars Action for Fraudulent Misrepresentation

116 Waverly Place LLC v. Spruce 116 Waverly LLC
NYLJ 1/21/20, p. 27, col. 5
AppDiv, First Dept.
(memorandum opinion)

In buyer's action for fraudulent misrepresentation, fraudulent concealment, and fraudulent inducement, buyer appealed from Supreme Court's grant of seller's summary judgment motion. The Appellate Division affirmed, holding that the parties' agreement barred such claims.

Disclaimers in the relevant sales agreement provided that seller made no representations or warranties concerning the building's condition, that buyer would purchase the building as is, and that buyer had the right to inspect the premises before closing and was "entering into this contract based solely upon such inspection and investigation." After closing buyer brought this action, contending that seller had fraudulently concealed information about the building's condition that was peculiarly within the seller's knowledge. Supreme Court granted seller's summary judgment motion.

In affirming, the Appellate Division held that the contract language rendered untenable purchaser's claim that information about the building's condition was peculiarly within the seller's knowledge. The court concluded that when a buyer has the means to discover the quality of the subject of a representation, the buyer cannot complain that he was induced to enter into the transaction by a misrepresentation.

Comment

Real estate contracts that specifically disclaim representations as to all physical conditions are sufficient to bar fraudulent action for misrepresentation and active concealment of those physical conditions. For example, in Comora v. Franklin, *171 A.D.3d 851, the disclaimers, which provided that the buyers were fully aware of the physical conditions based on their own inspection and would not rely on any representation given by the seller, were sufficient to bar buyer's action for active concealment of mold-causing conditions. Similarly, in* Couch v. Schmidt, *204 A.D.2d 951, the court held that disclaimers, which provided that the seller made no representations as to physical conditions except those itemized, and that the buyer had inspected and was acquainted with the building conditions, foreclosed the buyer's claim that the seller fraudulently misrepresented a flooding problem.*

However, courts have not treated the existence of underground industrial waste as a physical condition, so that even a specific disclaimer of physical conditions will not shield a seller from fraud actions, For example, in Tahini Invest. Ltd. v. Bobrowsky, *99 A.D.2d 489, the buyer of a farm alleged that the seller misrepresented its use as a horse farm and concealed the underground drums containing industrial waste. The court allowed the action to proceed, even though the contract specifically disclaimed the buyer's reliance on representations of physical conditions. Relying on* Tahini Invest. Ltd., *the court in* Hi Tor Industrial Park Inc. v. Chemical Bank, *114 A.D.2d 838, also held that a specific disclaimer of "physical nature of the premises," was insufficient to bar allegations with respect to underground tanks containing possibly toxic chemicals, concluding that the disclaimer could not fairly be said to refer to the tanks.*

In contrast to a specific disclaimer, a general disclaimer or merger clause will not shield a seller from fraud allegations. For instance, in Schooley v. Mannion, *241 A.D.2d 677, the court held that the disclaimer which only stated the buyer will take the property "as is," was insufficient to bar the buyer's action for fraudulent misrepresentation with respect to an insulation system, because the disclaimer did not state that the buyer had inspected the property; nor did it disclaim the buyer's reliance on representations as to the physical condition.*

Ambiguity In Restrictive Covenant Limits Enforcement

Matter of Fiore v. Fabozzi
NYLJ 2/7/20, p. 24, col. 6
AppDiv, Second Dept.
(memorandum opinion)

In an action to enforce a restrictive covenant, both parties appealed from Supreme Court's order enjoining burdened party from building a chimney but denying an injunction against construction of a gazebo. The Appellate Division affirmed, holding that ambiguity in the covenant precluded enforcement against the gazebo.

In 2003, burdened party bought a house from a corporation owned by benefited party, who lived next door. At the time of the sale, the parties agreed to a restrictive covenant precluding burdened party from making any additions or alterations to his house which rose "above one story or 17 feet to the top of the roof of any structure as measured from the existing basement floor elevation." The covenant was designed to preserve the benefited party's view of the ocean from his house. In 2016, burdened party converted a gas fireplace to a wood-burning fireplace and added a chimney. Burdened party also began to build a gazebo in the back yard. Benefited party then brought this action to enforce the covenant by enjoining continued construction and by requiring removal of what burdened party had already constructed. Supreme Court concluded that the chimney, but not the gazebo, violated the covenant, and directed that the chimney be removed. Both parties appealed.

In affirming, the Appellate Division held that the provision prohibiting construction "above one story or 17 feet to the top of the roof" was ambiguous. Because a party seeking to enforce the covenant bears the burden of establishing the covenant's scope,

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the benefited party was not entitled to enforce the covenant with respect to the gazebo. On the other hand, the court concluded that Supreme Court had properly concluded that the covenant would unambiguously prohibit construction of the chimney.

Constructive Trust Imposed Based On Alleged Oral Agreement

Reingold v. Bowins
NYLJ 2/7/20, p. 27, col. 1
AppDiv, Second Dept.
(memorandum opinion)

In an action by brother to impose a constructive trust and recover damages for unjust enrichment from his sister, sister appealed from Supreme Court's judgment for $107,662.15 in favor of brother, and imposition of a constructive trust in brother's favor. The Appellate Division affirmed, holding that brother had established all of the elements necessary for imposition of a constructive trust.

In 1985, brother purchased property in Greenlawn and allowed his sister to live in the home on the property. In 1990, sister purchased property in Ronkonkoma and allowed brother to live in the home on the property. In 1994, sister brought an action against brother to establish a constructive trust against the Greenlawn property. Brother failed to appear and, after an inquest, the court awarded judgment to sister awarding her title to the Greenlawn property. In 2002, brother brought the instant action against sister seeking imposition of a constructive trust on the Ronkonkoma property. Brother alleged an agreement whereby he would transfer title to the Greenlawn property and his sister would transfer title to the Ronkonkoma property, but sister had already acquired title to the Greenlawn property through her judgment in the prior proceeding, leaving her with title to both properties. During the pendency of the proceeding, the Ronkonkoma property was sold and a portion of the proceeds were put into escrow. After a nonjury trial, Supreme Court found in favor of brother in the sum of $107,662.15 and imposed a constructive trust on the proceeds held in escrow. Sister appealed.

In affirming, the Appellate Division noted that the evidence at trial established that brother had expended money towards the purchase of the Ronkonkoma property and had paid money towards it carrying charges and improvements in reliance on the agreement that sister would eventually transfer title to him. The evidence also established that sister breached the promise. On these facts, the court held that brother had established all of the necessary elements to support a constructive trust.

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DEVELOPMENT

Buffer Zone Included In Rezoned Area

Dodson v. Town Board
2020 WL 825555
AppDiv, Third Dept.
(Opinion by Garry, P.J.)

In neighbors' action for an injunction and a declaration that a proposed zoning change was invalid, neighbors appealed from Supreme Court's dismissal of the complaint. The Appellate Division reversed and declared the challenged local law invalid for failure to comply with the supermajority requirements of Town Law section 265.

Landowner sought to develop a senior residential community in a district zoned for agricultural use. Landowner initially sought rezoning of its entire parcel, but withdrew that application and submitted a revised application reducing the scope of the project and providing a 100 foot buffer around the property for which it sought rezoning. Landowner made no request to rezone the buffer area, although landowner planned to use the buffer area to provide emergency access and utilities. Neighbors objected to the rezoning, and submitted a petition signed by 90 landowners. Town Law section 265 provides that if the town board receives a written protest signed by owners of 20% or more of land within 100 feet of the land for which a zoning amendment is proposed, the amendment requires approval by at least three-fourths of the members of the board. In this case, neighbors did not meet the 20% requirement if the buffer were not counted as part of the rezoning, but did meet the requirement if the buffer were treated as part of the rezoning. The Town Board approved the proposed rezoning, but not by a three-fourths majority. Neighbors then brought this action contending first that the rezoning constituted impermissible spot zoning and second that the rezoning was invalid because it was not approved by the requisite supermajority. Supreme Court dismissed the complaint and neighbors appealed.

In reversing, the Appellate Division first rejected neighbors' spot zoning challenge, holding that the proposed senior living district was a residential district and therefore not inconsistent with the town's comprehensive plan, which had recommended preservation of the residential character of the area in which the SLD was to be located. The court further noted that the comprehensive plan had recognized the need for senior housing. But the court then held that the 100-foot buffer should be treated as part of the rezoned area for purposes of Town Law section 265. The court emphasized that the utilities in the buffer area were necessary for the rezoned project. As a result, the court held that the rezoning was invalid for failure to obtain the necessary supermajority.

Comment

Generally, in order to avoid the supermajority requirement of Town Law §265, a rezoning applicant may limit his rezoning application to a smaller portion of his property,

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thereby creating a buffer zone of at least 100 feet between the rezoned area and the neighboring landowners. In Eadie v. Town Bd. of Town of N. Greenbush, *7 N.Y.3d 306, the Court of Appeals upheld a rezoning by simple majority where the rezoned area was over 200 feet from the edge of the property, holding that a buffer zone prevents neighboring landowners from invoking Town Law §265, even if the rezoning applicant intended to circumvent the supermajority requirement when creating the buffer zone. The Court found that "fairness and predictability" support the conclusion that Town Law §265 only applies to those neighbors who are within 100 feet of the portion of the property that will actually be affected by the rezoning.*

Even if the buffer zone contains improvements that will benefit the rezoned area, those improvements will not change the status of the buffer zone if the improvements benefit areas other than the rezoned area. In Ferraro v. Town Bd. of Town of Amherst, *79 A.D.3d 1691, the Fourth Department held that neighboring landowners could not invoke the supermajority requirement of Town Law §265, even though the buffer zone contained driveways providing access to the rezoned area. The court rejected the neighbors' argument that since the buffer zone contained improvements for the rezoned area the buffer zone itself needed to be rezoned, which would then allow the neighbors to invoke the supermajority requirement. In holding that the buffer zone did not need to be rezoned, the Court pointed to the Commissioner of Buildings' finding that the driveways would serve a "dual purpose."*

In Dodson, *the neighbors made a similar argument as the Ferraro plaintiffs about improvements in the buffer zone, but the court contrasted the facts in Ferraro and declared the intended buffer zone a part of the rezoned area. The court interpreted the "dual purpose" language in Ferraro to require that if the improvement in the buffer zone will solely benefit the rezoned area, the municipality must treat the buffer zone as part of the rezoned area. Since the emergency access way, which was to be built in the buffer zone and was necessary to the SLD, did not provide any public benefit or other purpose aside from serving the rezoned area, the court deemed the buffer area a part of the rezoned area. The neighboring landowners were therefore able to invoke the supermajority requirement.*

Short-Term Rentals Do Not Qualify As Single-Family Use

Matter of Cradit v. Southhold Town Zoning Board
NYLJ 1/31/20, p. 31, col. 2
AppDiv, 2nd Dept.
(memorandum opinion)

In landowner's hybrid article 78 proceeding/declaratory judgment action challenging the zoning board's (ZBA's) determination that her use of the property was not a legal non-conforming use, landowner appealed from Supreme Court's denial of the petition and dismissal of the proceeding/action. The Appellate Division modified to also declare that landowner's use was not a legal nonconforming use, concluding that landowner's use of the property for short-term rentals was not legal even before enactment of an ordinance explicitly prohibiting those rentals.

In 2006, landowner purchased a home in a low-density (R-40) residential zoning district. In 2014, she began using the home for short-term rentals. The following year, the town amended its zoning code to prohibit "transient rental properties" in all districts. The town then issued landowner a violation, prompting landowner to appeal to the ZBA contending that her use for short-term rentals was a pre-existing non-conforming use. At a hearing, landowner testified that ninety-nine percent of the rentals had been for seven nights or fewer. The ZBA concluded that her use had been similar to a hotel/motel use, which had never been permitted on the property. Landowner then brought this hybrid proceeding, and Supreme Court denied the petition an dismissed the proceeding.

In upholding the ZBA's determination, the Appellate Division held that use of the property for short-term rentals did not constitute use as a one-family dwelling. The court noted that even before enactment of the current ordinance, the town code had explicitly provided that "any use not permitted by this chapter shall be deemed prohibited." As a result, because landowner's use was not use as a one-family dwelling, landowner was not entitled to protection as a pre-existing non-conforming use. The court modified to declare that the use was not a legal non-conforming use.

Comment

I*n the absence of an express prohibition in the zoning ordinance, the use of a residence for short-term rentals will not violate the ordinance's single-family use restriction. In* Matter of Atkinson v. Wilt, *94 A.D.3d 1218, the Third Department affirmed the trial court's judgment, annulling a zoning board of appeals determination that petitioner owners' property constituted a "tourist accommodation" in violation of the town's ordinance. Petitioner owners had rented their six-bedroom, single-family residence on a weekly basis as a vacation rental to various parties. Because the owners screened potential renters, the court held that they were not operating the home in violation of the ordinance's prohibition on "tourist accommodations," which the ordinance defined to include a "transient facility used to house the general public."* See also, Matter of Fruchter v. Zoning Bd. of Appeals of The Town of Hurley, *133 A.D.3d 1174 (reversing a zoning board's dismissal of a property owner's petition to review a determination because the owner's short-term rental of his entire single-family residence did not explicitly fall under the definition of a "bed or breakfast" in violation of the Town Code.)*

Courts have indicated that express prohibitions on the use of single-family residences for short-term rentals are enforceable. In Spilka v. Town of Inlet, *8 A.D.3d 812 (N.Y. App. Div.*

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2004), the Third Department upheld the validity of the town's amended zoning ordinance which required landowners to obtain a special use permit for the rental of non-owner occupied properties for periods of less than four months. Plaintiff-landowner rented his entire, one-family dwelling on a short-term basis for a period of three months. The court's strong language upholding the validity of the ordinance may have been dicta because the court remanded the case to determine whether the landowner was entitled to continue short-term rentals as a nonconforming use that existed before the town enacted the prohibition. See also, Weisenberg v. Town Bd. of Shelter Island, *404 F. Supp. 3d 720 (2019), (upholding the validity of the Town Code's amendment, which imposed "licensing and advertising requirements for certain vacation rentals and the prohibition of regulated vacation rentals from being rented more than once in any fourteen-day period.")*

Although in single-family district cases, courts have rejected the analogy between short-term rentals and hotels, some courts have accepted the analogy to prohibit short-term rentals in multiple dwellings. Multiple Dwelling Law §4(8)(a), has been construed to prohibit the rental of a Class A multiple dwelling for periods of less than thirty days when the host is not present. For instance, in City of N.Y. v. Tominovic, *NYLJ LEXIS 272 (2020), the court granted a preliminary injunction to plaintiff New York City, enjoining individual and corporate defendants from illegally renting out units in numerous multiple dwelling buildings. The defendants created 28 separate Airbnb host accounts and accepted at least twenty thousand, short-term rental reservations. The court focused on the absence of safety standards applicable to hotels, noting that each building used by the defendants lacked safety features such as automatic sprinklers and fire alarms.* See also, Brookford, LLC v Penraat, *47 Misc. 3d 723, (granting a landlord's order to show cause for a preliminary injunction enjoining a tenant from advertising and renting an apartment to tourists for periods of less than thirty days because of insufficient fire protections.)*

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LANDLORD & TENANT LAW

Insurance Failure Precludes Exercise Of Purchase Option

455 Dumont Associates LLC v. Rule Realty Corp.
NYLJ 2/18/20, p. 37, col. 1
AppDiv, Second Dept.
(memorandum opinion)

In commercial tenant's action for declaratory and injunctive relief, tenant appealed from Supreme Court's declaration that tenant had no legal interest in the real property. The Appellate Division affirmed, holding that tenant's failure to procure insurance entitled landlord to terminate the lease and prevent tenant from exercising its option to purchase the property.

The parties entered into a lease for a period beginning Oct. 1, 2004 and ending on Sept. 30, 2015. The lease required tenant to purchase $2,000,000 in insurance coverage, and to provide proof of coverage to landlord. The lease also gave tenant an option to purchase the property. In three letters dated in early 2014, landlord notified tenant that it was in default for failure to procure the requisite insurance coverage. Those letters were followed by a letter dated April 30, 2014 informing tenant that the lease would be terminated as of May 8, 2014. On July 25, 2014, tenant commenced this action for a declaration that the lease had not been validly terminated and that tenant was entitled to exercise its option to purchase. Supreme Court granted summary judgment to landlord and declared that tenant had no interest in the property. Tenant appealed.

In affirming, the Appellate Division started by holding that failure to provide the required insurance was a material breach of the lease, and was an obligation separate and apart from tenant's obligation to indemnify landlord. The court then rejected tenant's argument that landlord had waived compliance with the insurance obligation by accepting rent for years without objecting. The court relied on a lease provision specifying that failure to enforce a condition in the lease did not constitute a waiver, and the court went on to hold that mere negligence or oversight by landlord would not operate as a waiver. Because landlord properly exercised its right to terminate the lease before tenant exercised its purchase option, tenant could no longer exercise the option, leaving tenant with no interest in the subject property.

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EMINENT DOMAIN

Additional Allowance to Condemnee Disallowed

Matter of Village Of Haverstraw
NYLJ 2/18/20, p. 29, col. 2
AppDiv, Second Dept.
(memorandum opinion)

In a condemnation proceeding, condemnor appealed from Supreme Court's award of additional allowances to landlord and tenant of the condemned property. The Appellate Division reversed the award of an additional allowance to landlord and modified downward the award to tenant.

The village condemned property owned by landlord and leased to tenant. The village made advance payments of $575,000 to landlord and $61,044 to tenant. Both parties

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challenged the sufficiency of the compensation. At trial, the village offered an appraisal of the fee at $316,500, while landlord's appraiser valued it at $800,000. Supreme Court concluded that the value was $721,671. Tenant sought $973,000 in compensation for its fixtures, and Supreme Court concluded that most of the fixtures were not compensable, awarding a total of $159,596 to tenant. In addition to the compensation for value of the premises, Supreme Court, pursuant to section 701 of the Eminent Domain Procedure Law (EDPL), awarded landlord an additional allowance of $106,480.73 and awarded tenant an additional allowance of $127,064.82. The court also awarded post-judgment interest on those amounts at a rate of 9%. The village appealed the additional allowances.

In reversing the award of an additional allowance to landlord, the Appellate Division concluded that Supreme Court's award of $721,671 at trial did not substantially exceed the village's advance payment of $575,000 within the meaning of section 701 of the EDPL. As a result, landlord was not entitled to the additional allowance. With respect to the tenant, the village conceded that the amount of the award was substantially in excess of the advance payment, but emphasized that tenant was unsuccessful as to the bulk of its $973,000 claim. The court concluded that Supreme Court had properly awarded an additional allowance for tenant's attorneys' fees, who were to be compensated on a contingency fee basis. But the court held that tenant was not entitled to an award for the appraiser's full fee, because the appraiser's work did not substantially contribute to the additional compensation the tenant received. Because tenant was awarded only 16.4% of the appraiser's appraisal, the court held that tenant was entitled to only 16.4% of the appraiser's fee. As a result, the court reduced the tenant's additional allowance from $127,064.82 to $70,831.40.

COMMENT

In order for a condemnee to receive an additional award to cover costs of litigation, the court's principal award must be substantially in excess of the condemnor's offer. In a number of cases, courts have held that an increment of about 20% is not substantially in excess of the condemnor's first offer. See, e.g., CMRC, Ltd. v. State, *16 A.D.3d 204 (20%)*; Matter of County of Tompkins, *298 A.D.3d 825 (22%)*; Matter of Village of Johnson City (Waldo's Inc.), *277 A.D.2d 773 (19%). By contrast, when the increment reaches 35%, courts are more likely to hold that the award is substantially in excess of the condemnor's offer.* See, e.g., Gelsomino v. City of New Rochelle, *25 A.D.3d 554 (35.5%)*; Matter of Metropolitan Transp. Authority v. Ausnit, *306 A.D.2d 190 (35.3%);* Matter of Village of Haverstraw, *where the village offered landowner $575,000 for the condemned property while the court determined the value of the property to be $721,671 falls between these two categories, with an increment of 25.5%, and the court held that landlord-condemnee was not entitled to an additional award.*

The trial court's discretion to determine the sum of additional awards is limited to compensating for the costs that were necessary and reasonable for landowner to incur to establish condemnor's offer was inadequate. In Matter of Village of Port Chester, *137 A.D.3d 802, the Second Department upheld the trial court's determination that the landowner was entitled to the less than half of the additional sum requested because the remaining fees were incurred to develop a failed theory to support a claim substantially in excess of the court's ultimate award. Although the village had offered property owner $975,000 and the trial court determined the property was worth $3,062,000, the court awarded only $406,827.44 in litigation costs out of the $832,244 landowner had requested. Additionally, a court's determination of an additional award must be supported by evidence or be within the range of expert testimony provided at trial. In* Matter of City of Long Branch v. Sun NLF L.P., *146 A.D.3d 775, the Second Department reversed the trial court's additional award for engineering fees because the property owner did not provide the engineer's report and the engineer did not testify at trial, so the owner could not establish that engineering fees were necessary to achieve just compensation.*

When an owner agreed to compensate its lawyer on a contingency fee basis, the owner is generally entitled to reimbursement for the contingency fee if it was necessary and reasonable to prove inadequacy of condemnor's offer. Thus, in Matter of City of Long Branch, supra, *where landowner agreed to pay the lawyer 25% of any excess above the city's offer, the Second Department upheld the trial court's award of 25% of the $5,500,000 excess the landowner obtained at trial.*

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