LJN LAW JOURNAL NEWSLETTERS

NEW YORK REAL ESTATE LAW REPORTER®

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Volume 38, Number 9 • May 2022

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Making Sense of the 421-A Rent Concession Appeals

By Jeffrey Turkel

Landlords initially renting up new RPTL 421-a buildings routinely give incoming rent-stabilized tenants rent concessions to account for the fact that construction may be ongoing, and that there may still be punch list items in the apartments. This seemingly innocuous practice, however, has led to class-action litigation wherein tenants allege that rent concessions are part of a fraudulent scheme that results in massive building-wide overcharges under the Rent Stabilization Law.

We begin with Rent Stabilization Code §2521.1(g), which sets the initial stabilized rents for apartments in 421-a buildings:

> "The initial legal regulated rent for a housing accommodation constructed pursuant to section 421-a of the Real Property Tax Law shall be the initial adjusted monthly rent charged and paid...."

A rent concession, however, can blur the issue of what rent was actually charged and paid by the first tenant. For example, if a tenant signs a 12-month lease at $3,000 per month with a one month rent abatement, one might argue that the monthly rent charged and paid is what it appears to be: $3,000. But given that the tenant pays a total of $33,000 over 12 months (11 payments of $3,000, with the 12th month free), one might also argue that the "real" monthly rent is $2,750 ($33,000 / 12 = $2,750).

This issue becomes important because under the rent stabilization system, the first stabilized rent becomes the basis for all future rent increases. Thus, in the example set forth above, the question arises as to whether the renewal will be at a guideline increase above $3,000, or above $2,750. That $250 differential, when multiplied by dozens or even hundreds of apartments in a new 421-a building, over a period of months or years, is a sum worth fighting over.

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Rent Concession

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On Dec. 28, 2021, the Appellate Division, First Department issued decisions in two so-called rent concession cases: *Flynn v Red Apple 670 Pac. St., LLC*, 200 AD3d 607 (1st Dept 2021), and *Chernett v Spruce 1209, LLC*, 200 AD3d 596 (1st Dept 2021). In *Flynn*, the First Department affirmed Supreme Court's dismissal of the tenants' complaint. In *Chernett*, the First Department affirmed Supreme Court's denial of landlord's motion to dismiss.

Flynn

The facts in *Flynn* are straightforward. The building in *Flynn* received a Temporary Certificate of Occupancy (TCO) on Aug. 8, 2016. Flynn, the first tenant of the apartment, signed his lease on Aug. 18, 2016, six months before a permanent CO (CO) was issued on Feb. 10, 2017. The lease recited a monthly rent of $3,350, and contained a rent concession rider providing for a one-month rent concession in the last month of the 13-month lease term. The rider stated in relevant part:

> "The foregoing One-Time Concession is granted solely in consideration for Tenant entering into the Lease for the apartment located in a new building which was completing construction and commencing operations at the time of the execution of the Lease. The One-Time Concession is granted to compensate Tenant for any and all inconvenience associated with the same including, but not limited to, noise, dirt, debris, use of the Building and or common areas by Owner's construction contractors and/or employees, and temporary cessation of services, including utilities and elevator service."

Jeffrey Turkel, a member of this Newsletter's Board of Editors, is a member of the Manhattan real estate law firm of Rosenberg & Estis, P.C. He represented *amici curiae* in *Flynn* and *Chernett*.

The tenants in *Flynn* asserted that: 1) Flynn's initial stabilized rent was in fact the "net effective rent" of $3,092.31 ($3,350 x 12 ÷ 13 = $3,092.31); and 2) the landlord's assertion that the initial stabilized rent was $3,350 was part of a scheme to defraud Flynn and similarly situated tenants.

The landlord moved to dismiss. The landlord first cited DHCR's Fact Sheet 40, which expressly distinguished between: 1) a one-time rent concession; and 2) a "preferential" rent, where the rent concession is pro-rated throughout the lease and is not tied to a specific month. In the former case, the first stabilized rent is the contract rent. In the latter case, the lower "preferential" or net effective rent is deemed the first stabilized rent.

The landlord also relied on *Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483 (1983). The Court of Appeals interpreted the rent concession rider therein as evidencing a true, one-time rent concession that did not survive the lease of which it was a part ("[t]he concession rider under consideration, fixed as it was to the granting of possession and assumption of occupancy in the uncertainty of building completion, cannot be construed to carry forward to renewal leases").

The First Department in *Flynn* affirmed Supreme Court's dismissal of the complaint, succinctly stating:

> "Pursuant to the concession rider, the parties plainly agreed that the one-month rent concession was a one-time event that had no impact on the remainder of plaintiff's rent payments. There is also no dispute that, at the time plaintiff received a one-month rent concession, the building had not yet received a permanent certificate of occupancy. Under these circumstances, plaintiff failed to assert allegations sufficient to withstand a motion to dismiss his claim that defendants attempted to defraud him by ma-

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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

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nipulating the legal regulated rent."

Chernett

In *Chernett*, the timing of the issuance of the CO worked against the landlord. There, the initial occupant of apartment 311 signed a 13-month lease commencing in June 2014, which contained a rent concession rider granting a one-month rent concession. The initial tenant of apartment 410 signed a lease commencing January 2015, which contained a rider granting a three-month rent concession. Both initial leases were signed *after* the building's CO was issued on Oct. 23, 2013.

The First Department affirmed Supreme Court's denial of landlord's motion to dismiss, stating:

"The motion court correctly denied defendant's motion, finding that the complaint stated a cause of action for overcharges based on an alleged fraudulent scheme to evade the requirements of the 421-a program so as to charge higher rents by providing 'construction concessions' *well after construction was complete*.

* * *

We agree with the motion court that the allegations in the complaint warrant discovery to determine whether the concessions were functionally equivalent to a preferential rent; '[s]imply calling it a concession does not transform it into a permissible activity under the applicable statutory scheme." Although defendant contends that DHCR's fact sheet 40 distinguishes between a permissible one-time concession for a specific month and a preferential rent and that it properly deferred to DHCR, discovery is needed to determine whether that is so" (internal citation omitted; italics supplied).

Flynn and Chernett make clear that in the First Department, rent concession cases will be judged on their specific facts.

Aftermath

Flynn and *Chernett* make clear that in the First Department, rent concession cases will be judged on their specific facts. The primary factors will be: 1) the execution date of the initial stabilized lease relative to the date a CO was issued; and 2) the intent of the parties as evidenced by the language of the rent concession rider.

A problem arises, however, for rent concession cases in the Second Department, where a good many 421-a buildings were constructed. The first perfected rent concession case in the Second Department, *Marantz v MD CBD 180 Franklin St.*, Sup Ct, Kings County Index No. 521055/20, will not be decided by the Second Department until 2023 or 2024, given the Court's extensive backlog. In the meantime, however, lower courts in the Second Department will be bound by *Flynn* and *Chernett*. *See, Maple Med., LLP v Scott*, 191 AD3d 81, 90 (2d Dept 2020) ("While the Supreme Court is bound to apply the law as promulgated by the Appellate Division of its own Department, where the issue has not been addressed within that Department, the Supreme Court is obligated to follow the precedent set by the Appellate Division of another Department until its home Department or the Court of Appeals pronounces a contrary rule").

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REAL PROPERTY LAW

Purchaser of Mixed-Use Building, Not Master Lessee Of Residential Units, Liable for Rent Overcharges

Walsam 316, LLC v. 316 Bowery Realty Corp.

NYLJ 1/24/22, p. 19, col. 4
AppDiv, First Dept.
(memorandum opinion)

In an action by purchaser of a mixed-use building seeking indemnification and contribution from its seller and from lessee of the residential units, purchaser and lessee cross-appealed from Supreme Court's order limiting purchaser's remedy against seller to amounts specified in the contract, and granting purchaser summary judgment on its counterclaim against lessee. The Appellate Division modified to deny purchaser summary judgment on the counterclaim against lessee, holding that purchaser took subject to lease provisions that imposed liability for rent overcharges on the seller-lessor, not the lessee of residential units.

Seller initially contracted to convert the building to a condominium, and to sell the residential units in the building to lessee, but when the conversion was not completed, seller executed a 99-year master lease of the residential units to lessee. The lease represented that the rents did not exceed those permitted by law, and also provided that in the event of a sale of the leased premises, it would be deemed that the purchaser would assume all covenants and obligations of the master lease. After residential tenants began rent overcharge litigation, seller entered into a purchase and sale agreement with purchaser covering all of seller's interest in the premises, subject to the terms of the master lease. The purchase and sale agreement contained a carveout providing that seller would continue to pay counsel fees in the rent overcharge litigation up to $100,000, and would indemnify

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purchaser for any liability arising from that litigation up to a total of $250,000. In this action purchaser sought indemnification and contribution from both seller and lessee for any liability for rent overcharges. Lessee counterclaimed for breach of contract. Supreme Court awarded purchaser summary judgment against seller, but only up to the contractually limited amount, awarded lessee summary judgment on its breach of contract counterclaim against purchaser, and awarded purchaser summary judgment on its claim for indemnification and contribution claims against lessee. Purchaser and lessee appealed.

In modifying, the Appellate Division held that purchaser was not entitled to summary judgment on its indemnification claims against lessee because it had notice of the terms of the master lease and took subject to those terms. As a result, purchaser affirmatively assumed the contractual liability of the original landlord. The court held that seller's representation as to the legality of the rents was a warranty equivalent to a promise to indemnify if the representation proved untrue. Because the master lease agreement provided that the representation survived the closing of title, the representation was a continuing obligation that became binding on purchaser. The court then held that Supreme Court had properly granted summary judgment to purchaser for indemnification against seller up to the liability limitation provisions in the sale contract. The court noted that the parties' allocation of risk of economic loss was enforceable.

COMMENT

Although the court equated a misrepresentation with a breach of warranty, the remedies available for the two are not always equivalent. Rescission of the contract is the ordinary remedy for a party who relies on a representation that is materially false. For example, In *Sedgefield Holding Co. v. 440 W. End Ave. Corp.*, 228 AD 138, the First Department reversed the trial court's dismissal of purchaser's complaint and held that buyer's allegation that seller misrepresented the amount of rental money coming in from the subjected property was sufficient to state a claim for rescission of the contract. The complaint alleged that upon entering a purchase agreement, the seller represented that the rental property brought in $30,000 annually, while the rentals did not actually bring in more than $10,000. By contrast, in *Menzel v. List*, 24 N.Y.2d 91, the Court of Appeals made it clear that expectation damages are available in a suit for breach of warranty. The court held, in an action for breach of warranty of title, that a buyer who bought a painting not owned by the seller was entitled to recover the fair market value of the painting at the time of trial. Seller had purchased a Chagall painting from a Paris gallery, and then resold the painting to buyer for $4,000. When facts revealed that a third party held title to the painting, which German authorities had removed from their apartment during World War II, the former owner recovered the paining from the buyer, who then cross-claimed against the seller for breach of an implied warranty of title, seeking the then-current value of the painting, which had reached $22,500. In holding that buyer was entitled to recover that amount, the court emphasized that if the buyer were only entitled to recover the $4,000 purchase price and interest, then the buyer would be put in same place as if the sale had not happened, thus depriving buyer of the benefit of his bargain. Of course, the buyer can instead elect a restitutionary remedy. In *Fischer v. Bright Bay Lincoln Mercury, Inc.*, 234 AD2d 586, the Second Department held that the buyer was entitled to restitution when the seller breached an express warranty of title by selling a stolen automobile to the buyer. The buyer was awarded the purchase price of the automobile.

A seller's generalized expression that does not make any promises or affirmation of the fact as to the condition of the item, does constitute a warranty. For example, in *Nigro v. Lee*, 63 AD3d 1490, the Third Department dismissed the buyer's claim against the seller for breach of warranty, holding that the seller description of the car as "gorgeous" did not constitute a warranty to the buyer. Furthermore, courts look at the surrounding circumstances to determine whether a seller's statement constitutes a warranty or mere puffery. For example, in *Sparks v. Stich*, 135 AD2d 989, the Third Department held that a merchant's statement to the buyer that the farm equipment was "in good working order" did not express a warranty against all imperfections in the equipment because the court looked at the surrounding evidence, including the low cost of each item and the clear understanding that the equipment was in used condition

QUESTIONS OF FACT ABOUT LIABILITY FOR BROKER COMMISSION AFTER EXPIRATION OF BROKERAGE AGREEMENT

Douglas Elliman of LI, LLC v. Roselle Building Co, Inc.
NYLJ 2/14/22, p. 25, col. 2
AppDiv, Second Dept.
(memorandum opinion)

In an action to recover a brokerage commission, broker appealed from Supreme Court's denial of its summary judgment motion. The Appellate Division affirmed, holding that questions of fact remained about seller's liability for a commission after expiration of the brokerage agreement.

Seller entered into a brokerage agreement providing for a 5% commission if seller entered into a contract of sale or sold the property within 60 days after termination of

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the agreement if the buyer had been shown the property during the term of the agreement. The agreement expired in August 2016, but the parties extended it until January 2017. The parties dispute whether they subsequently entered into an oral agreement for an open listing. In December 2017, the seller contracted to sell the property to the long-time tenant, with whom a prior sale attempt had fallen through. The contract identified the broker by name, and provided that seller would pay any commission earned pursuant to a separate agreement between broker and seller. When seller failed to pay a commission, the broker brought this action and moved for summary judgment. Supreme Court denied the motion and broker appealed.

In affirming, the Appellate Division held that questions of fact about the seller's obligation to pay a commission precluded summary judgment. The court concluded that the contract of sale did not clearly admit that the broker had performed services with respect to the sale contract and did not clearly establish seller's obligation to pay a commission on that sale.

COMMENT

A broker is not entitled to a commission on a sale made after the expiration of the brokerage agreement, unless the agreement has an extension clause or the broker can establish fraud or bad faith on the part of the seller. For example, in *United Real Estate & Prop. Mgt., Inc. v. Unknown*, 28 Misc. 3d 804, the court held that the real estate broker was not entitled to a commission when the seller entered into a contract with a buyer initially procured by plaintiff broker four days after the broker's listing agreement expired. The agent who found the buyer initially worked for the plaintiff broker, but affiliated with another brokerage three days after expiration of plaintiff broker's listing agreement, and the buyer contracted to purchase, at a reduced price, the following day. In holding that the initial broker was not entitled to a commission, the court noted that the seller had paid a commission to the subsequent broker and emphasized that the initial broker's agreement included no extension clause.

When a broker has clearly performed services in connection with a sale of real property, courts treat the broker as a third party beneficiary of a sales contract's express promise by the seller to pay the broker's commission, even where the broker cannot rely on a separate brokerage agreement. For instance, in *Helmsley-Spear, Inc. v. New York Blood Ctr.*, 257 A.D.2d 64, the court granted the broker's summary judgment motion when the contract provided that"[s]eller shall pay any brokerage commission in accordance with Seller's agreement with the Broker" Although the seller contended that the ultimate buyer was not the same corporate entity the broker had introduced to the seller, the court noted that the principals of the two entities were the same, and concluded that the contract provision constituted an admission of liability to pay the broker. *See also*, *William B. May Co., Inc. v. Monaco Assocs.*, 80 A.D.2d 798, 799, where the court relied on similar language to hold seller liable to broker despite the absence of any separate brokerage agreement.

By contrast, when the broker's performance of services is in dispute, courts treat similar language in a sales contract or lease as a mere agreement by one party to indemnify the other, creating no obligation to the broker. For example, in *Siegel Consultants, Ltd. v. Nokia, Inc.*, 85 A.D.3d 654, the court awarded summary judgment to lessor on broker's claim for a commission despite a lease provision stating that lessor would pay "any and all commissions due [two named brokers] pursuant to separate agreement or otherwise." Lessor contended that it never had any interaction with broker and that the lease provision was included only to allocate any liability between the parties to the lease in light of the broker's repeated demands for a commission.

Although an indemnification clause is not sufficient to entitle broker to a commission under a theory of third-party beneficiary, the clause may provide evidence that the owner accepted and benefitted from the broker's services, entitling broker to commission under the theory of implied employment. For example in *Joseph P. Day Realty Corp. v. Chera*, 308 A.D.2d 148, the court denied summary judgment to seller on broker's claim for a commission, holding that the broker was not a third-party beneficiary of the sale contract, but that the contract's indemnity clause raised questions of fact about whether the seller had assumed an responsibility for paying the broker's commission. The indemnity clause provided "Tenant agrees to hold Landlord harmless against any claims for brokerage commission … except [claims from the plaintiff-broker]."

STATUTE OF LIMITATIONS DOES NOT BAR STRICT FORECLOSURE ACTION

517-525 W 45, LLC v. Avrahami

NYLJ 2/28/22, p. 18, col. 2
AppDiv, First Dept.
(memorandum opinion)

In a strict foreclosure action, junior mortgagee appealed from Supreme Court's grant of summary judgment to foreclosure sale purchaser. The Appellate Division affirmed, holding that the statute of limitations did not bar the strict foreclosure action.

Senior mortgagee brought a foreclosure action in October 2009. Purchaser purchased at the foreclosure sale on July 9, 2014, and subsequently learned that junior mortgagee had not been made a party to the foreclosure action. On Nov. 16, 2015, purchaser brought a strict foreclosure action to foreclosure junior mortgagee's right of redemption. Junior mortgagee maintained

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that the six-year statute of limitations barred the action. Supreme Court awarded summary judgment to purchaser and junior mortgagee appealed.

In affirming, the Appellate Division held that an action in strict foreclosure cures a defect in the original judgment or sale, the action arises only after the property is conveyed at the foreclosure sale. As a result, the cause of action in this case accrued in July 2014, and purchaser timely brought the action the following year.

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EMINENT DOMAIN LAW

Evidence Supports Award Of Severance Damages

Wesley Hills Center v. State of New York

NYLJ 2/14/22, p. 33, col. 1
AppDiv, Second Dept.
(memorandum opinion)

In an action to recover damages for a taking of property, the state appealed from the Court of Claims' award of $432,000 in severance damages. The Appellate Division affirmed, holding that the court's award was supported by the evidence.

The state exercised its eminent domain power to take 6,025 square feet from claimant's shopping center. The land taken was along the frontage of a highway and resulted in nonconformities in parking spaced in the shopping center and the loss of a landscape buffer. The claimant sought severance damages for the impairment of the value of the land not taken, and the Court of Claims awarded severance damages. The state appealed.

In affirming, the Appellate Division noted that the severance damages were based on the opinions of experienced experts, and that the Court of Claims' measure of damages was within the range of expert testimony.

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LANDLORD & TENANT LAW

Prior Landlord's Purchase Of Loft Tenant's Improvements Exempted Unit from Rent Regulation

Aurora Associates v. Locatelli

NYLJ 2/16/22, p. 19, col. 2
Court of Appeals
(4-2 decision; majority opinion by Garcia, J; dissenting opinion by Wilson, J.).

In loft landlord's summary holdover proceeding against tenant, landlord appealed from the Appellate Division's affirmance of a grant of summary judgment to tenant. The Court of Appeals reversed and granted summary judgment to landlord, holding that prior landlord's purchase of prior tenant's improvements exempted the unit from rent regulation.

The subject building was registered as an interim multiple dwelling in 1983. In 1998, prior owner purchased the improvement and rights related to the disputed apartment. Prior owner then sold the building to current owner, who leased the unit for $4,250 (up from the $440 the unit had previously generated). In 2009, current tenant leased the unit for $4,000 for a five-year term, and in 2014, the parties extended the lease for an additional year at a rent of $4,200. Tenant continued to pay that rent on a month-to-month basis until 2016, when landlord sent tenant a notice of termination. When tenant refused to vacate, landlord brought this summary holdover proceeding. Housing Court granted summary judgment to tenant, concluding that the apartment had become subject to rent stabilization under the Emergency Tenant Protection Act (ETPA). The Appellate Term and the Appellate Division affirmed, and landlord appealed.

In reversing, the Court of Appeals majority held that a loft unit exempted from the Loft Law's rent stabilization provisions by operation of a prior tenant's sale of rights and improvements is not subject to the ETPA's rent stabilization provisions. The court held that illegal conversions do not independently fall within the ambit of the ETPA, whether or not the unit ultimately becomes legal under the Loft Law. As a result, landlord was entitled to charge a market rent and to regain possession of the unit in a holdover proceeding.

Judge Wilson, dissenting for himself and Judge Rivera, argued that the issue was not whether the unit was covered by the ETPA, but whether the Loft Law itself precluded landlord from recovering rent and possession. He argued that because the landlord had never obtained a certificate of occupancy for the apartment within the Loft Law's time frame, it became unlawful for the landlord to collect rent from the tenant or to recover possession.

Notice of Termination Did Not Meet Federal Standards

Matter of Metro Plaza Apartments, Inc. v. Buchanan

2022 WL 479466
AppDiv, Third Dept. 2/17/22
(Opinion by Lynch, J.)

In landlord's holdover proceeding, tenant appealed from County

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Court's affirmance of City Court's grant of landlord's petition. The Appellate Division reversed and dismissed the proceeding, holding that landlord's notice of termination was not specific enough to meet federal standards.

Landlord rented a unit to tenant that was subsidized by the federal Department of Housing and Urban Development. HUD regulations required that any lease termination notice "state the reasons for the landlord's action with enough specificity so as to enable the tenant to prepare a defense." On Dec. 28, 2018, landlord sent tenant a termination notice asserting that tenant had violate the building's" bullying policy" and had "disrupted the livability of the project, adversely affecting the right of other tenants to the quiet enjoyment of the premises." In March 2019, landlord brought this holdover proceeding to evict tenant. Following a termination hearing, City Court granted landlord's petition, and County Court affirmed that determination. Tenant appealed.

In reversing, the Appellate Division first held that tenant had properly preserved her objection to the termination notice. The court then held that the notice was deficient because it did not set forth the faculty predicates underlying the alleged lease violations. The notice described no specific incident, nor any specific facts. The court held that the federal regulation required more detail as to the nature of the tenant's alleged misconduct. Absent that detail, the notice was inadequate.

Comment

A landlord who seeks to terminate a federally subsidized tenancy provides the "specific grounds for termination" required by 24 C.F.R. 966.4(l)(3) when landlord's notice affords tenant sufficient information to mount an initial defense, For instance, when landlord seeks to terminate because tenant has permitted unauthorized persons to live in an apartment, a notice naming the unauthorized persons satisfies the federal regulation. Thus in *New Greenwich Gardens Assocs., LLC v. Saunders*, 23 Misc. 3d 521, 525, the court denied tenant's motion to dismiss a holdover proceeding, holding that that the Notice to Cure, which was attached to the Notice of Termination, sufficed to enable tenant to prepare a defense because it named the individuals alleged to have occupied the premises in violation of the lease terms.

By contrast, more general allegations that tenant had failed to pay rent, or had caused complaints from other tenants, would not, without some specifics, enable tenant to prepare a defense. Thus, in *Fairview Co. v. Idowu*, 148 Misc. 2d 17, 22–23, the court dismissed landlord's holdover proceeding when landlord's notice of termination alleged a failure to pay rent, while omitting the amount and months for which rent was owed. In concluding that the notice was insufficiently specific to permit tenant to conduct a defense, the court observed that the notice's other grounds for termination were also unaccompanied by dates, except for the reference to a single wrongful act that on its own was not a basis for termination. Similarly, in *Harris v. Paris Hous. Auth.*, 632 S.W.3d 167, 170 (Tex. App. 2021), the court, in reversing a judgment of eviction, held the termination notice to be insufficiently specific when it alleged that multiple complaints were received regarding tenant's cursing and screaming at neighbors, but omitted the dates of the incidents or the people involved. The court also found the allegation that tenant was belligerent and aggressive on a particular day to maintenance employees to be vague and conclusory when the notice failed to state the underlying facts.

Tenant Entitled to Preliminary Injunction Against Use of Video Cameras In Interior of Premises

Suchdev v. Grunbaum

NYLJ 2/25/22, p. 33, col. 4
AppDiv, Second Dept.
(memorandum opinion)

In tenants' action for private nuisance and tenant harassment, tenant appealed from Supreme Court's order granting only a limited preliminary injunction preventing landlord from operating video cameras which captured persons entering or exiting from any bathroom in the premises. The Appellate Division reversed and held that tenants were entitled to a preliminary injunction against all use of video cameras in the interior of the premises.

Tenants live in a brownstone operated as a single-room-occupancy residence. They collectively share access to the kitchen, bathrooms, living area, and backyard. When current landlord bought the building in 2015, she commenced holdover proceedings to recover possession for her personal use. Tenants moved to dismiss, invoking the subsequently enacted Housing Stability and Tenant Protection Act of 2019, which precludes a landlord from recovering multiple rent stabilized units for personal use. Landlord then moved to discontinue her proceedings. In 2020, tenants brought this action, contending that landlord had committed a private nuisance and engaged in harassment by installing video cameras in the hallways of the brownstone. They sought a preliminary injunction, and Supreme Court enjoined landlord from operating cameras which would capture entry to and exit from bathrooms. Tenants appealed.

In reversing, the Appellate Division held that Supreme Court had properly determined that tenants had established a likelihood of success on the ultimate merits and had established a danger of irreparable injury. In light of those findings, however, the Appellate Division held that Supreme Court had improvidently exercised its discretion by limiting the injunction to bathroom-related cameras. The court held that the court should have enjoined landlord from operating video cameras anywhere in the interior of the building.

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Neighbors Have Standing To Challenge Use Variance for Operation of Concrete Manufacturing Plant

Matter of Veteri v. Zoning Board of Appeals (ZBA) Of the Town of Kent

NYLJ 2/18/22, p. 29, col. 2
AppDiv, Second Dept.
(memorandum opinion)

In neighbors' article 78 proceeding to review the ZBA's determination that a use variance permitted landowner to operate a concrete manufacturing plant, neighbors appealed from Supreme Court's dismissal of the proceeding for lack of standing. The Appellate Division reversed and reinstated the complaint.

Landowner owns a parcel that has been used as a concrete batch plant since at least 1949. Although the zoning ordinance prohibits manufacturing on the site unless fewer than five people are engaged in the manufacturing, landowner obtained a variance in 1948 permitting operation with more than five people. In 2016, current owner bought the parcel and leased the property to Titan to refurbish and operate the plant. The town revoked the building permit after an accident during the renovation work. In 2017, the town building inspector revoked the building permit, concluding that the cement plant use was a pre-existing nonconforming use, and that because of an extended discontinuance, landowner could no longer resume that use. When landowner produced the 1948 variance, the building inspector adhered to his initial determination, concluding that the variance was not a use variance that ran with the land to the benefit of the current owner. Upon landowner's appeal to the ZBA, that board disagreed with the building inspector and concluded that the building inspector was empowered to reissue a building permit. Two sets of adjacent property owners then brought this article 78 proceeding. Supreme Court dismissed for lack of standing and the adjacent owners appealed.

In reversing, the Appellate Division started by noting that when a neighbor in close proximity to a property challenges a zoning determination with respect to that property, an inference of damage or injury arises, but then cautioned that the nearby owner must still establish that the harm to the neighbor must be different from that suffered by the public generally. Here, because one of the petitioning neighbors owned property directly on a lake adjacent to the subject property, and alleged interference with recreational activities on the lake, Supreme Court should not have dismissed for lack of standing.

Comment

Although an immediate neighbor is presumed to have standing to challenge zoning board decisions without proof of actual injury, the neighbor must nevertheless assert a specific injury that is different from that suffered by the general public. For example, in *Matter of Wittenberg Sportsmen's Club, Inc. v. Town of Woodstock Planning Bd.*, 16 A.D.3d 991, the Third Department held that the petitioner had standing to challenge the adjoining landlord's special use permit to develop a vacation rental because the project's rifle range would cause a greater threat to the immediate neighbor than to the general public. By contrast, in *Matter of CPD NY Energy Corp. v. Town of Poughkeepsie Planning Bd.*, 139 A.D.3d 942, the Second Department held that petitioner lacked standing to challenge the adjacent owner's special use permit to develop four new buildings because petitioner's general allegations of traffic impacts, issues of compliance with land use laws, and changes in community character failed to establish any harm distinct from the community at large.

Additionally, speculative or conclusory allegations, even of an injury distinct from the general public, are not sufficient to confer standing. For instance, in *Matter of Panevan Corp. v. Town of Greenburgh*, 144 A.D.3d 806, the Second Department held that a restaurant owner lacked standing to challenge adjacent landlord's special use permits and variances because its alleged injury of parking congestion failed to allege impact on on-street parking and its traffic concerns were entirely conclusionary and speculative. Cf. *Matter of Center Square Assoc. v. City of Albany Bd. of Zoning Appeals*, 9 A.D.3d 651 (finding petitioners had standing to challenge the issuance of use and parking variances because the alleged injury of traffic congestion was not speculative as petitioner offered proof that the area was already congested and residents would have to compete for limited on-the-street parking spaces).

Yet, even if an injury is non-speculative and sufficiently distinct from that suffered by the general public, the petitioner may still not have standing if its injury falls outside the zone of interests of zoning laws, which generally protects the health, safety, and welfare of the community. *See*, *Sun-Brite Car Wash, Inc. v. Board of Zoning & Appeal*, 69 N.Y.2d 406 (finding that the threat of increased business competition was not within the zone of interests protected by zoning regulations); *Brighton Residents Against Violence to Children, Inc. v. MW Props., LLC*, 304 A.D.2d 53 (finding that freedom from protests was not within the zone of interests protected by zoning regulations).

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