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Altman: Six Takeaways

By Jeffrey Turkel

On April 26, 2018, a unanimous Court of Appeals held that apartments vacated between 1997 and 2011 will be considered luxury deregulated where the legal regulated rent was $2,000 or more at the time the incoming tenant moved in. *Altman v. 285 W. Fourth LLC*, 31 N.Y.3d 178 (http://bit.ly/2LqjxWM). The court reversed the First Department, which had held that such apartments would not be deregulated unless the rent was $2,000 or more at the time the outgoing tenant vacated. As has been widely reported, this was a major victory for the real estate industry.

This article will discuss the various impacts of the *Altman* decision.

1. A GOOD DAY FOR STATUTORY INTERPRETATION

Rent regulatory disputes often turn political; a court will frequently ignore or expand statutory language to achieve a desired outcome based on its views of tenant protection, affordable housing, or property rights. The Court of Appeals' ruling in *Altman*, however, was apolitical.

The court analyzed the case as one of pure statutory construction. The tenant in *Altman* had argued that the first and second clauses in RSL §26-504.2(a) were identical, and that both barred luxury deregulation unless the rent was $2,000 or more at the time the outgoing tenant vacated. The Court of Appeals held that the second clause, added in 1997 and preceded by the word "or," had to mean something different than the first, ruling that the second clause permitted deregulation where the rent reached $2,000 or more "*after* the tenants' vacancy" (italics in original). The court further observed that the legislative history, which "could not be clearer," supported its interpretation.

In so ruling, the court ignored arguments based on gentrification, affordable housing, and the need to limit luxury deregulation.

2. THE COURT OF APPEALS DECLINED TO TAKE THE EASY WAY OUT

In *Altman*, Richard Altman was a subtenant occupying the apartment in question when, pursuant to a three-way stipulation, the tenant of record vacated and the landlord gave Altman a lease in his own name.

Throughout the appeal, Altman argued that the irrespective of any statutory interpretation, there could be no vacancy deregulation because there had been no vacancy. According to Altman, a vacancy only occurs where an apartment is devoid of tenants; here, Altman continuously occupied the apartment, first as a subtenant and then as the tenant of record.

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Had the court agreed with the tenant, it could have avoided the entire issue of when the rent had to reach $2,000 in order to effectuate deregulation. Instead, the court rejected this argument as "without merit" and proceeded to interpret the statute.

3. The Administrative and Judicial Backlogs Will End

Following the First Department's 2015 decision in *Altman*, many tenants raised *Altman*-type arguments before DHCR, Civil Court, and Supreme Court. Once the Court of Appeals granted leave in *Altman* in March 2017, tribunals began to hold these cases in abeyance.

Those cases will now be decided (*see*, *e.g.*, *233 E. 5th St., LLC v Smith*, 75 NYS3d 908 [1st Dept. 2018]), settled, or withdrawn. Prevailing owners may seek attorneys' fees, and tenants who erroneously claimed stabilization status may find that their leases will not be renewed. Tenants who paid a lower rent, or no rent at all, may now owe their landlords tens of thousands of dollars, as does the tenant in *Altman*.

4. Tenants in Apartments That Became Vacant Between 2011 and 2015 Will Likely Lose their *Altman* Claims

Altman involved the interpretation of the second clause in RSL §26-504.2(a), which applies to apartments that were vacant on or after June 19, 1997 and on or before June 24, 2011. That clause provided for deregulation where the apartment became vacant "with" a legal rent of $2,000 or more. In its decision, the Court of Appeals explicitly declined to address language added to the statute pursuant to the Rent Act of 2015, which governs apartments that became vacant on or after June 30, 2015.

But what about apartments vacated on or after June 25, 2011 and on or before June 30, 2015? Those apartments are governed by another clause in RSL §26-504.2(a), added to the statute pursuant to the Rent Act of 2011. That clause deregulates apartments vacant between those two dates "with a legal regulated rent of $2,500 or more per month at any time on or after the effective date of the Rent Act of 2011." Because that language is similar to the language in the second clause, and quite different from the language in the first clause, the *Altman* rule will likely be extended to apartments vacated between 2011 and 2015.

5. *Altman II* is No Longer Good Law

After the First Department ruled in the tenant's favor in 2015, *Altman* was sent to Supreme Court to determine damages. In *Altman II* (145 AD3d 415 [1st Dept. 2016]), the First Department affirmed Supreme Court's imposition of treble damages and a rent freeze. Many believed that this was a draconian result given that the landlord's 2005 deregulation of the apartment was consistent with pre-*Altman* authority.

Once the Court of Appeals ruled that the apartment was properly deregulated and that there had been no overcharge, it had no occasion to revisit *Altman II*. Notwithstanding, both *Altman I* and *Altman II* were reversed.

6. Due Diligence Just Became Easier

Between 2015, when the First Department decided *Altman*, and 2018, when the Court of Appeals reversed, buyers and sellers of rent regulated buildings frequently clashed as to what these buildings were worth. If *Altman* were affirmed, the existing rent roll could decrease and there was a potential for damages and treble damages.

That problem has now been solved, as at least with respect to buildings with apartments that were vacated before 2011. While many other factors affect the value of a building, uncertainty as to the outcome in *Altman* is no longer one of them.

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Unique Circumstances Require Rent Recomputation

Matter of Migliaccio v. New York State Division of Housing and Community Renewal (DHCR)

NYLJ 5/4/18, p. 33., col. 2
AppDiv, First Dept.
(3-2 decision;
majority memorandum;
dissenting memorandum
by Duffy, J.)

In landlord's Article 78 proceeding challenging DHCR's determination that the maximum collectible rent for a rent-controlled two-bedroom apartment was $125, tenant appealed from Supreme Court's determination annulling DHCR's determination. The Appellate Division affirmed, concluding that the presence of unique circumstances required remittal to DHCR for recomputation of the maximum collectible rent.

Landlord purchased the four-unit residential building in 2000. The prior owner had owned the building since 1941, and had occupied one of the units. The other units were all occupied by family members, some of whom paid rent. The subject apartment was occupied by the prior owner's niece and her husband from 1961 until their deaths in 2008. Throughout their tenancy, they paid $125 per month in rent, first to the prior owner, and then to the current landlord, who viewed them as friends. When the niece and her husband died in 2008, their son, who had lived in the apartment since his birth in 1983, claimed succession rights to the apartment. In 2009, landlord submitted a request to DHCR for copies of rent control records. DHCR responded that there had been no registration statement on file from 1984 through the present. Landlord then requested that DHCR establish a maximum present day rent for the apartment. DHCR then discovered notations on a rent registration card indicating that the prior owner had rented the premises to the niece and nephew at monthly rents ranging from $51.60 in 1961 to $78.47 in 1970, although the records also revealed that landlord had charge4 the niece and her husband $125 per month for the entire period. Based on this record, and the fact that prior owner never applied for increases after 1970, DHCR set the maximum collectible rent at $125. Landlord then brought this Article 78 proceeding. Supreme Court granted the petition, concluding that there were "unique or peculiar circumstances" materially affecting the maximum rent. Supreme Court remanded to DHCR for a redetermination. Tenant appealed.

In affirming, the Appellate Division majority concluded that personal and family reasons led to the prior owner's failure to apply for rent increases. Those personal and family reasons constituted unique and peculiar circumstances justifying a current rent higher than $125 per month — the rent charged for the apartment in 1961. Justice Duffy, dissenting for himself and Justice Chambers, emphasized that courts should not set aside DHCR determinations unless they are arbitrary, capricious, or an abuse of discretion. In his view, DHCR's determination had a rational basis, especially because this was the rent landlord had actually been collecting from the niece and her husband at the time of their death.

City Human Rights Law Requires Landlord to Convert Window Into Wheelchair Accessible Entrance

Matter of Marine Holdings, LLC v. New York City Commission on Human Rights

NYLJ 5/9/118, p. 25., col. 3.
Court of Appeals
(4-2 decision;
majority memorandum;
dissenting memorandum
by Garcia, J.)

In landlord's Article 78 proceeding challenging a determination requiring it to convert a window into a doorway to create a wheelchair accessible entrance to tenant's apartment, the commission appealed from an Appellate Division order reversing Supreme Court's grant of the petition. The Court of Appeals reversed and reinstated Supreme Court's determination, concluding that substantial evidence supported the Commission's determination.

Tenant, who is unable to enter or leave her apartment without being carried, asked landlord to create a wheelchair accessible entrance to her unit, and, when landlord balked, she contacted the Commission on Human Rights. Commission employees visited the site, and saw a window-to-door conversion in landlord's management office in another building, and suggested a similar conversion in tenant's apartment. Landlord then hired an architect and a structural engineer, both of whom found that the conversion posed technical problems. The engineer opined that the conversion might require evacuation of the building. When the commission issued a probable cause determination on tenant's discrimination claim, the matter was referred to an administrative law judge (ALJ). After a hearing, the ALJ issued a report finding no discrimination because conversion of the window to a door would create an undue hardship. She relied on the report of landlord's structural engineer and noted that the commission did not present the testimony of a structural engineer to rebut the conclusions of landlord's engineer. Nevertheless, the Commission rejected the ALJ's report, relying on statements by landlords' experts that the conversion "could be modified." The commission therefore found that landlord had not established undue hardship, and imposed a civil penalty of $125,000 on

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landlord. Supreme Court then denied landlord's petition challenging the commission's determination, but the Appellate Division reversed, concluding that the record did not include substantial evidence rebutting landlord's experts' conclusions that the conversion would be structurally unfeasible. The commission appealed.

In reversing, the Appellate Division majority relied on the testimony that landlord had conducted a window to door conversion in its management offices, and concluded that landlord had established neither that the prior conversion imposed a hardship nor that the propose conversion would require alterations significantly different from the previous one. As a result, the majority concluded that substantial evidence supported the commission's determination, although the majority conceded that substantial evidence would also have supported the opposite determination. Because the issue before the court was whether the commission's determination was supported by substantial evidence, the majority concluded that the commission's determination should be upheld.

Judge Garcia, dissenting for himself and Judge Feinman, would have affirmed the Appellate Division's order. He argued that the commission had improperly focused on whether the conversion could be done, rather than on whether the conversion would cause undue hardship in the conduct of landlord's business.

COMMENT

State and federal law explicitly impose costs of modifications to apartments on the disabled tenant requesting the changes. The New York State Human Rights Law (NYSHRL) states that "[i]t shall be an unlawful discriminatory practice for the owner … [t]o refuse to permit, at the expense of a person with a disability, reasonable modifications of existing premises." N.Y. Exec. Law §296.18(1) (McKinney). The Fair Housing Act (FHA) embodies similar language that clearly identifies the tenant's responsibility. 42 U.S.C. §12182(b)(2)(A)(iii).

By contrast, the New York City Human Rights Law (NYCHRL) does not specify who bears the costs of modification. Rather, the statute imposes a balancing test and provides four factors to determine whether the landlord would face an "undue burden," therefore relieving him of modification expenses. N.Y. ADMIN. CODE tit. 8, ch. 1, §8-102(18). While New York courts have not analyzed the meaning of burden in great detail, the Commission on Human Rights (the Commission) has interpreted the NYCHRL to impose the responsibility primarily on housing providers.

Once the Commission establishes that the tenant's proposed modification is both reasonable and necessary, the Commission requires the landlord to make the modification at its own cost so long as the requested modification is neither financially burdensome nor architecturally infeasible. The Commission has required the landlord to make the modifications even when the landlord proposed, and the tenant rejected, reasonable alternatives. For instance, in Matter of John Rose v. Co-op City of New York d/b/a Riverbay Corporation and Vernon Cooper, *2010 WL 8625897, the court required landlord to make a front entrance of the building accessible to the disabled tenant even though the landlord had already made a side entrance accessible.* Id. *at 2. And in* Matter of Irene Politis v. Marine Terrace Holdings, LLC., *2012 WL 1657556, at 10, the Commission overturned an ALJ's determination and required landlord to convert a window into a door to accommodate a disabled tenant, despite questions about the effect the conversion would have on the building's structural integrity, and despite landlord's offer to relocate the disabled tenant to an apartment elsewhere in the complex.*

"As Is" Clause Does Not Bar Claim That Landlord Intentionally Caused Defective Conditions

New WTC Retail Owner LLC v. Pachanga, Inc.

NYLJ 4/27/18, p. 24., col. 4.
AppDiv, First Dept.
(memorandum opinion)

In landlord's action for breach of a commercial lease, landlord appealed from Supreme Court's denial of landlord's motion to dismiss tenant's counterclaims for rescission, breach of contract, fraud, and negligent misrepresentation. The Appellate Division modified to dismiss the counterclaims for fraud and negligent misrepresentation, but otherwise affirmed, holding that an "as is" clause in the lease did not preclude tenant's rescission and breach of contract claims if landlord intentionally caused defective conditions.

Landlord and tenant executed a lease that provided for no firm delivery date. The lease required tenant to take the premises in "as is" condition. Tenant contended, however, that when landlord notified tenant that the premises were ready for occupancy, the premises were not in fact ready, and tenant contended that landlord knew when the lease was executed that landlord would not be able to deliver the premises within a reasonable time of the estimated date provided in the lease. When landlord brought this action, tenant counterclaimed for rescission, breach of contract, breach of the covenant of good faith and fair dealing, fraud, and negligent misrepresentation. Landlord moved to dismiss the counterclaims, but Supreme Court denied the motion. Landlord appealed.

In upholding Supreme Court's denial of the motion to dismiss the rescission and breach of contract counterclaims, the Appellate Division held that a generally enforceable exculpatory clause, like the "as is" clause in this lease, does not afford a landlord protection against a claim that landlord intentionally

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caused the delay. In this case, tenant alleged that landlord knew that the premises would be ready, and it would have been error to dismiss tenant's counterclaims before tenant had an opportunity to conduct discovery. The court held, however, that the fraud claim should have been dismissed because of a lease provision indicating that landlord had made no representations to tenant, and the negligent misrepresentation claim should have been dismissed because there was no privity-like relationship between the parties that imposed a duty on the landlord to impart correct information to tenant.

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DEVELOPMENT

LPC's Denial of Hardship Application Upheld

Stahl York Avenue v. City of New York

NYLJ 5/23/18, p. 22., col. 1
AppDiv, First Dept.
(Opinion by Kahn, J.)

In a hybrid action/Article 78 proceeding, landowner appealed from Supreme Court's order and judgment granting the city summary judgment dismissing landowner's challenge to the Landmarks Preservation Commission's denial of its hardship application and rejecting landowner's takings claim. The Appellate Division affirmed, concluding that in evaluating both the hardship application and the takings claim, the entire city block constituted the relevant basis for comparison.

In 1990, the Landmarks Preservation Commission (LPC) designated an entire city block known as the First Avenue Estates (FAE) as an historic landmark. The Board of Estimate voted to approve the designation of most of the block but excluded the two buildings now at issue. In 2004, the local community board voted to extend the designation to the two buildings. Two years later, the LPC also voted in favor of extending the designation, and in 2007, the City Council approved the LPC's decision. Landowner's challenge to the designation was unsuccessful. Landowner then sought a certificate of appropriateness approving demolition of the two buildings on the ground that the building's expenses would exceed their income, depriving landowner of the 6% return provided for in the Landmarks Law. The LPC denied the application. Landowner then brought this action/proceeding. Supreme Court awarded summary judgment to the city.

In affirming, the Appellate Division first addressed rejection of the hardship application. The court first held that although the Landmarks Law is ambiguous about how to define the relevant "improvement parcel" for evaluating the landowner's return, the LPC had rationally concluded that the entire FAE site, rather than the two buildings at issue, constituted the improvement parcel, even though landowner had no plan to demolish the remainder of the FAE site. The court also upheld the LPC's conclusion that even if the two buildings were the relevant improvement parcel, landowner could still obtain a reasonable return. The court held that the LPC had reasonably excluded from landowner's expenses the cost of renovating apartment landowner had warehoused after the landmark designation, and that the LPC had reasonably used the "income" approach rather than the "cost" approach for projecting the property's post-renovation value.

Turning to landowner's takings claim, the court relied on the Supreme Court's decision in *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017), to hold that the entire FAE site constituted the denominator for evaluating the claim. Measured against the FAE site as a whole, the landmark regulation did not work a complete deprivation of landowner's economically beneficial use of the property.

Developer's Failure to Obtain Final Decision Deprives Federal Court of Subject Matter Jurisdiction

Community Services for the Developmentally Disabled of Buffalo v. Town of Boston

NYLJ 4/28/18, p. 17., col. 3
U.S. Dist. Ct., WDNY
(Vilardo, J.).

In non-profit developer's action for injunctive relief and damages for violation of the Fair Housing Act, the town moved to dismiss for lack of subject matter jurisdiction. The court granted the motion, holding that developer's failure to obtain a final decision from the town deprived the court of subject matter jurisdiction.

Developer seeks to build a group home for the developmentally disabled. Develop did not apply for a permit. Instead, developer brought this action for a Fair Housing Act violation, relying on a letter written from the Town Attorney to the state Office of People with Developmental Disabilities indicating that the town had denied similar permits over a 50-year period and opining that the developer in this case "will not be the first to get a permit." The town moved to dismiss.

In granting the town's motion, the court emphasized that a challenge to a land use determination does not become ripe until the applicant has received a final decision on an application for a permit, or until landlord demonstrates that application for a permit would be futile. The court held that in this case, where developer had not even applied for a permit, developer could not establish that the municipality had made a final decision. The court then held that the futility exception is available only when the town has already denied one application from the landowner and the landowner establishes that a subsequent application would meet with the same fate. In this case, developer had never made any application at all, precluding reliance on the futility exception.

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Development

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Spot Zoning and SEQRA Challenges Rejected

Heights of Lansing, LLC v. Village of Lansing
160 A.D.3d 1165
AppDiv, Third Dept.
(Opinion by Lynch, J.)

In neighbors' combined Article 78 proceeding/declaratory judgment action challenging a zoning amendment, neighbors appealed from Supreme Court's grant of summary judgment to the village. The Appellate Division affirmed, rejecting neighbors' spot zoning and SEQRA challenges.

Neighbors own or manage property in a subdivision adjacent to a 19.5-acre parcel that had, for more than 25 years, been classified as a business and technology district. In November 2016, the village board rezoned the property as high-density residential. Neighbors brought this action/proceeding challenging the rezoning as a violation of SEQRA, as spot zoning, and as inconsistent with the village's comprehensive plan. Supreme Court granted summary judgment to the village and dismissed the action/proceeding.

In affirming, the Appellate Division rejected neighbors' argument that the environmental review did not consider the effects of the anticipated but not yet proposed residential development of the parcel. The court noted that the board had determined that maximum residential development would still have a positive impact on traffic patterns, and indicated that the board had taken a hard look at other areas of environmental concern. The court then rejected the other challenges, noting the board's conclusion that the rezoning would create a better transition between residential and commercial areas and would advance the plan's goal of developing a broad range of housing options. As a result, the amendment was consistent with the comprehensive plan and did not constitute spot zoning.

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COOPERATIVES & CONDOMINIUMS

Purchaser Adequately Alleged Concealment Of Defects

Razdolskaya v. Lyubarsky
NYLJ 4/27/18, p. 32., col. 4
AppDiv, Second Dept.
(memorandum opinion)

In an action by condominium unit purchaser against her sellers for fraud and against her lawyer for legal malpractice, sellers appealed from Supreme Court's denial of their motion to dismiss their fraud claim, and from Supreme Court's denial of their motion to dismiss lawyer's crossclaim for contribution and indemnification. The Appellate Division modified to dismiss the lawyer's claim for indemnification, but otherwise affirmed, holding that purchaser had adequately alleged facts amounting to concealment of defects.

After purchaser completed her purchase, she discovered that the building required remediation for mold and water damage. She alleged that sellers actively concealed damage in the unit's balcony, in the assigned storage unit and parking space, and throughout the building's common areas. She also alleged that her lawyer committed malpractice in connection with the transaction. The lawyer crossclaimed against sellers, and sellers moved to dismiss the complaint and all crossclaims. Supreme Court denied their motion in its entirety, and sellers appealed.

In modifying, the court first upheld Supreme Court's denial of the motion to dismiss purchaser's complaint. Although purchaser's allegations were that seller had claimed to lose the key to the storage area and had removed and replaced the sheetrock from the parking garage and cellar area, the court rejected seller's argument that the complaint should have been dismissed with respect to the common areas for failure to allege active concealment with respect to those areas. The court held that if purchaser's allegations were true, seller's conduct might have thwarted purchaser's efforts to discover defects with respect to the common areas. The court also upheld Supreme Court's denial of seller's motion to dismiss the lawyer's crossclaim for contribution, emphasizing that when two parties contributed to the same injury contribution is available even if their liability arises under different theories. But the court held that Supreme Court should have dismissed the lawyer's indemnification claim because the sellers owed no duty to the lawyer, an essential element of an indemnification claim.

Space Allocation Cannot Be Changed Without Unanimous Vote; Unjust Enrichment Claim Survives

P360 Spaces LLC v. Orlando
NYLJ 4/25/18, p. 22., col. 2
AppDiv, First Dept.
(memorandum opinion)

In a dispute between condominium unit owners over basement space, plaintiff, the owner of the front unit, appealed from Supreme Court's denial of its summary judgment motion. The Appellate Division modified to grant summary judgment to the front unit owner on its claims for trespass, a warrant of eviction, and a permanent injunction, but held that questions of fact precluded summary judgment on front unit owner's unjust enrichment claim.

The condominium's declaration and offering plan state that the disputed basement space is a limited common element of the front unit. The deeds to both the front unit owner and the rear unit owner were silent about the basement space, but both deeds indicated that they were subject to the declaration. When front unit owner

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purchased its unit, it signed a contract of sale in which it agreed that the basement space was not part of the conveyance. The rear unit owner occupied the basement space, and the condominium board approved the rear unit owner's renovation plans that incorporated the basement space into the rear unit. The front unit owner subsequently brought this action for trespass, eviction, and a permanent injunction, and the rear unit owner counterclaimed for a declaration that it was the owner of the basement space. Supreme Court denied front unit owner's summary judgment motion and declined to dismiss rear unit owner's counterclaim. Front unit owner appealed.

In modifying, the Appellate Division focused on language in the condominium declaration providing that the use of the basement space was deemed conveyed with the front unit even if the interest in that space was not expressly described in the conveyance. The court then noted that by its terms, the declaration could only be amended by a vote of 80% of the unit owners, and that any amendment which would alter rights to the common elements had to be approved by 100% of affected owners. In this case, the unit owners had never held a vote. As a result, front unit owner remained the owner of the basement space. The court held, however, that issues of fact remained about whether rear unit owner should be entitled, in equity and good conscience, to retain the monies and benefits obtained from use of the basement space. The court noted that the rear unit owner had acted in the mistaken belief that the space was her own, and that the front unit owner had agreed that it was not acquiring rights to the basement space.

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REAL PROPERTY LAW

No Easement Created

New York Land Development Corp. v. Bennett
160 AD3d 1366
AppDiv, Fourth Dept.
(memorandum opinion)

In an action by neighbor for a declaration that landowner's property is subject to a permanent easement appurtenant, landowner appealed from Supreme Court's judgment, after a nonjury trial, declaring that an easement burdened landowner's parcel. The Appellate Division reversed and declared that no easement had been created.

Before landowner purchased his parcel, a document was filed in the count clerk's office providing that landowner's predecessor had granted neighbor's predecessor a right of access over landowner's parcel. The document also provided that neighbor was responsible for maintaining the access road. A witness to the document recited that it was her impression that the access would be permanent. Landowner then erected a gate that blocked the access road. Neighbor brought he adjacent parcel with knowledge of the gate. Neighbor then brought this declaratory judgment action, and Supreme Court declared that neighbor enjoyed an easement over landowner's parcel.

In reversing, the Appellate Division emphasized that the document signed by the parties' predecessors contained no words of permancy nor any indication that the document was intended to bind successors in interest. The court concluded that the conclusory and unsubstantiated testimony of the witness was insufficient to establish an entitlement to an easement. As a result, landowner was entitled to use of the land unencumbered by an easement.

Grant Created Valid and Alienable Possibility Of Reverter

NJCB Spec-1, LLC v. Budnik
NYLJ 5/11/18, p. 28., col. 3
AppDiv, Second Dept.
(memorandum opinion)

In an action for a judgment declaring use restrictions unenforceable, fee owner appealed from Supreme Court's judgment declaring the restrictions valid and enforceable. The Appellate Division affirmed, holding that the original grantor had created valid and alienable possibilities of reverter.

In 2013, fee owner acquired title to the subject property by deed in lieu of foreclosure. Two earlier deeds, one dated in 1941 and the second dated in 1953, transferred different parts of the subject property "for so long as" each parcel was used "for golf club purposes, and for no other purposes." The deeds provided that if either lot ceased being used for golf club purposes, "the estate granted … shall thereupon become void, and title to said land shall revert back" to the grantors or their successors in interest. In 1964, the grantor of the 1953 deed conveyed her future interest to the Kearneys, whose children later succeeded to their interest. After the fee owner acquired its deed in lieu of foreclosure, fee owner brought this action for a declaration that the use restrictions were invalid, arguing that the future interest created in the 1941 deed did not allow for inheritance and that the future interest in the 1953 deed terminated when the grantor terminated it in 1964. Supreme Court rejected those arguments and declared that the future interests were valid and enforceable. Fee owner appealed.

In affirming, the Appellate Division held that even though no statute in effect in 1964 explicitly provided the grantor with a right to alienate a possibility of reverter, that right was alienable under the common law.

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Real Property Law

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The court distinguished possibilities of reverter from rights of reacquisition, which were rendered void if the holder of the right attempted to alienate it. As a result, the court held that the successors in interest to the original possibilities of reverter continued to hold valid and enforceable rights.

COMMENT

A right of reacquisition — but not a possibility of reverter — was rendered void under the common law upon any attempt to assign it, until the legislature enacted EPTL §6-5.1 in 1966, classifying all future interests as descendible, devisable and alienable. In Company's Cathedral of Incarnation in Diocese of Long Island, Inc. v. Garden City Co., *265 A.D.2d 286, the court held that the grantor's right to reacquisition became void upon its conveyance to a third party in 1893, which concurrently extinguished the restrictions on the grantee's property. By comparison, in* Nichols v. Haehn, *8 A.D.2d 405, the Fourth Department held that the grantors' interest in a possibility of reverter in a strip of land was fully alienable. The court cited modern texts on real property law and decisions from other states.*

In general, the use of durational language in a conveyance signals that the transferor has retained a possibility of reverter which automatically terminates the transferee's interest upon the occurrence of the specified limitation. In Gorton v. Wager, *149 N.Y.S.2d 887, the court held that the grantor retained a possibility of reverter in his land, as the deed stated that the property interest will be held by the grantee "so long as it shall be necessary for school purposes." In holding that grantor retained a possibility of reverter, the court emphasized that the language limited the duration during which the grantee would retain the estate and designated the time the estate would revert to the grantor. Similarly, in* Thypin v. Magner, *28 N.Y.S.2d 262, the Second Department held that the grantors held a possibility of reverter in a deed containing the language "so long as the Railroad Company shall continue to use the said land for its said railroad," as the words "so long as" created an appropriate durational term to construe a possibility of reverter. Furthermore, the deed did not contain any condition or express provision for re-entry.*

By contrast, when a grant contains language of condition, courts have held that the grantor has retained a right of reacquisition, which entitles the grantor to enter and terminate the grantee's estate upon failure to perform the condition. In Fausett v. Guisewhite, *16 A.D.2d 82, the court held that despite the deed containing the durational word "whenever," the deed's dominant conditional language showed the grantor's intent to create a condition subsequent, and thus to retain a right of reacquisition. The court stated that the deed contained the "effective formulae" to create a condition subsequent, as it required the land to be "subject to the following conditions and reservations" of being used for school and meeting purposes.*

QUESTIONS OF FACT ABOUT SCOPE OF MORTGAGE

JPMorgan Chase Bank, N.A. v. Cao

NYLJ 4/20/18, p. 30., col. 4
AppDiv, Second Dept.
(memorandum opinion)

In Chase's action to foreclose a mortgage on two adjacent lots, Chase appealed from Supreme Court's denial of its summary judgment motion dismissing affirmative defenses asserted by E.R. Holdings, which also held a mortgage on the lots. The Appellate Division modified to grant the summary judgment motion with respect to some claims, but held that questions of fact remained about the scope of Chase's mortgage.

In 2005, the fee owner executed a note and mortgage to WAMU, one of Chase's predecessors. The note and mortgage referred to Lot 48, and was recorded against Lot 48, but the metes and bounds description of the property included both Lot 48 and the adjacent Lot 49. In 2008, fee owner executed a note and mortgage to E.R. Holdings. That mortgage was recorded as a second lien on Lot 48 and a first lien on Lot 49. Chase subsequently sought to foreclose its mortgage against both properties, alleging that the parties to the 2005 mortgage had intended that it cover both lots. E.R. holdings asserted affirmative defenses and a counterclaim asserting that its mortgage on lot 49 is superior to Chase's mortgage. Chase moved to dismiss the affirmative defenses and counterclaims, and Supreme Court denied the motion. Chase appealed.

Although the Appellate Division modified to dismiss some counterclaims, the court upheld Supreme Court's determination that questions of fact remained about the scope of Chase's mortgage. The court held that when there is a conflict between a metes and bounds description and the street address or tax lot numbers, the deed is ambiguous and parol evidence is admissible to resolve the ambiguity. In this case, Chase did not submit documentary evidence resolving the ambiguity one way or the other, leaving questions to be resolved at trial.

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