LJN LAW JOURNAL NEWSLETTERS

# NEW YORK REAL ESTATE LAW REPORTER®

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## INDEX



## Covenants That Run With the Land Can Be Waived

**By Jeffrey Turkel**

Real estate practitioners tend to think of covenants that run with the land as absolute: after all, they are signed and recorded documents, binding on successors, and, at least figuratively, run with the land.

Another way to look at such covenants is that there are contractual in nature, and that contractual provisions can be waived or abandoned, at least by the party that benefits from them. That is what the First Department recently held in *New York City Transit Auth. v 4761 Broadway Assocs., LLC*, 169 AD3d 568 (1st Dept. 2019).

To constitute a covenant that runs with the land, three elements must be present. It must appear that: 1) the grantor and grantee intended that the covenant should run with the land; 2) the covenant touches or concerns land to a substantial degree; and 3) there is privity of the estate between the party claiming the benefit of the covenant and the party who has the burden thereunder. *See*, *Nicholson v 300 Broadway Realty Corp.*, 7 NY2d 240 (1959).

The New York City Transit Authority's predecessor (the Board of Transportation) and 4761 B'Way's predecessor (Landlord) entered into an Indenture in 1926. The Landlord was constructing an apartment house on the corner of Broadway and Dyckman Street, and wanted to include within the ground floor of that building the latest in urban amenities: entrances and stairways leading to the burgeoning New York City subway system, specifically, the planned Dyckman Street station. The Indenture required Landlord to maintain the entrances (the Repair Covenant), and further required the Landlord to indemnify the Board of Transportation against damage claims in connection with the entrances (the Indemnification Covenant).

In 2014, NYCTA commenced an action asserting that 4761 B'Way had breached the Repair Covenant, and demanded, pursuant to the Indemnification Covenant, damages to recover costs allegedly incurred by NYCTA with respect to the subway

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entrances. 4761 B'Way argued that NYCTA had waived or abandoned the Covenants; NYCTA argued that covenants that run with the land are not subject to the defenses of waiver or abandonment.

### Prior Case Law

There was remarkably little case law on the subject. In *Water's Edge on Saratoga Lake Homeowners' Assn. Inc. v Weissman*, 205 AD2d 1014 (3d Dept. 1994), the homeowners claimed that the developer (Kohn) had waived a covenant running with the land regarding the homeowners' right to replace their front door. The Third Department found for the defendant Homeowners' Association, stating without fanfare or analysis that "[t]here is no proof in the record that Kohn and was empowered to waive plaintiff's rights under the Declaration, which, having been incorporated into the deed as covenants running with the land, may only be waived or released by those they are intended to benefit."

The issue next arose in *Condor Funding, LLC v 176 Broadway Owners Corp.*, 147 AD3d 409 (1st Dept. 2017). There, the respective predecessors-in-interest to the parties entered into a Heating Agreement whereby defendant would supply heat to plaintiff's adjacent building. The First Department, affirming Supreme Court's finding that the Heating Agreement was "a covenant running with the land," nevertheless reversed Supreme Court's ruling that plaintiff was entitled to summary judgment on its breach of contract claim:

"Contrary to plaintiff's urging, defendant's argument as to plaintiff's waiver of any objection to the termination of the Heating Agreement is preserved for appellate review. As to that argument, a covenant running with the land may only be waived or released by those the covenant is intended to benefit (*see*, *Water's Edge on Saratoga Lake Homeowners' Assn. Inc. v Weissman*, 205 AD2d 1014 [3d Dept. 1994] lv dismissed 84 NY2d [1994]. Here, plaintiff, as the owner of a building to which heat was to be provided by defendant in accordance with the covenant, was clearly intended to benefit from that covenant, and was, therefore, legally eligible to waive it."

### NYCTA v. 4761 B'Way

NYCTA argued in the *4761 B'Way* appeal that abandonment and waiver, "which can be a defense to a personal contract claim, does not apply to covenants attached to real property." Acknowledging *Water's Edge*, *supra*, NYCTA asserted that even if a covenant that ran with the land could be abandoned, such abandonment must be evidenced by recorded writing. In *Condor Funding*, however, the First Department held that there was a question of fact as to the waiver of the Heating Agreement, even though there was "no express statement of plaintiffs' consent to the [Heating Agreement's] termination."

In addition to citing *Condor Funding*, 4761 B'Way argued that although a covenant that runs with the land is a special form of contract that binds successors-in-interest, it is still a contract, and is thus subject to subject to the defenses of waiver and abandonment.

With the issue squarely before it, the First Department held that covenants that run with the land can indeed be waived or abandoned:

"The court correctly denied the Transit Authority's motion. The record does not permit resolution, as a matter of law, of the issues of whether the Transit Authority waived the covenant requiring defendant landowner, 4761 Broadway Associates, LLC, to provide maintenance for the entrances, passages and stairwells leading to the subject

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## *Covenants*

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subway stop. *Condor Funding, LLC v 176 Broadway Owners Corp.*, 147 AD3 409, 410-411 [1st Dept. 2017] *see*, *Fundamental Portfolio Advisors v Toqueville Asset Mgt.*, L.P., 7 NY3d 104 [2016]."

The Court's citation to *Fundamental Portfolio Advisors*, *supra*, is significant. That case was a *contracts* case, and stands for general proposition that "[c]ontractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned." Thus, the First Department in 4761 B'Way viewed a covenant that runs with the land as a contract — albeit a contract binding on successors — pursuant to which benefits can be waived or abandoned."

The importance of *4761 B'way*, in addition to clarifying the state of the law, is that the NYCTA undoubtedly has many similar covenants throughout the City. Passengers slip and fall in subway entrances all the time, and sue the NYCTA for damages. Where there are similar covenants, the NYCTA will implead the landowner for damages and, possibly, the cost of repairs. But if the landowner can establish that NYCTA has waived or abandoned those covenants, impleading the landowner may well be a dead-end.

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# EMINENT DOMAIN LAW

### No Consequential Damages When State Takes Neighbor's Land

***RA Three RDS, LLC v. State of New York***

NYLJ 2/8/19, p. 32, col. 3
AppDiv, Second Dept.
(memorandum opinion)

In an action to recover damages for a partial taking, claimant appealed from a Court of Claims order granting summary judgment to the state dismissing a consequential damages claim. The Appellate Division affirmed, holding that landowner could not obtain consequential damages for diminution in value resulting from the state's use of a neighbor's land.

The state appropriated two parcels owned by landowner, and exercised a temporary easement for a work area over two other parcels. The state also appropriated the land of a neighbor, on which the state built a drainage recharge basin. Landowner filed a claim for the taking of its property, and also sought damages for the decrease in aesthetic appearance of its property resulting from construction of the recharge basin on the neighbor's property. The state moved for summary judgment on the claim for consequential damages resulting from construction of the recharge basin. Supreme Court granted the motion. Landowner appealed.

In affirming, the Appellate Division acknowledged that consequential damages are available when the state's taking of a part of a landowner's land diminishes the value of the remainder. But the court held that consequential damages are not available when the taking of a neighbor's land diminishes the value of a landowner's land. In this case, claimant had no ownership interest in the neighbor's land, and was therefore not entitled to consequential damages.

**Comment**

*At least in cases where a government taking does not constitute a nuisance, denying consequential damages to neighbors puts the government on an equal footing with private landowners whose uses devalue neighboring land. In* Campbell v. United States, *266 U.S. 368, 371, the Supreme Court denied a neighbor consequential damages arising from a government taking of nearby land for use as a nitrate plant, but granted the nearby landowner consequential damages resulting from the partial taking of his own land for use in the same project. The Court explained that had landowner decided to build a nitrate plant, the neighbor would not have been entitled to damages or an injunction, and concluded that the liability of United States should not be greater than that of a private landowner. While* Campbell *involves the actions of United States government and federal takings law, New York's parallel takings law suggests the same principles may be at play. Accordingly, in* Lucas v. State, *44 A.D.2d 633, where the state condemned land from adjacent owners for construction of a highway, the court limited landowner's consequential damages to the noise and vibrations emanating from the portion of the highway constructed on the land that was formerly his, but denied recovery for those same harms emanating from the portion of the highway constructed on adjacent land.*

*Administrative concerns about the efficiency of litigation may also underlie the rule granting landowner consequential damages while denying them to neighbors. Under New York law, damages from a partial taking are calculated as the difference between the market value of the land before and after the appropriation. (*See, Town of Brookhaven v. Gold, *89 A.D.2d 963, where the court calculated damages from a government road bifurcating landowner's property by comparing the market value of the property before the taking and the value of the remainder after the taking). Although courts often conflate the terms (*See, In re City of N.Y., *N.Y.S.2d 313, 339), two distinct harms can arise from a partial taking: severance damages, which arise from the remaining tract being less usable as a result of its smaller size; and consequential damages, which arise by virtue of the way the condemnor uses the appropriated property. "Condemnation Law and Procedures in New York," Santemma, Jon, ed., New*

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*York State Bar Association (2005) at 196. The simple damage calculation (market-value before minus market-value after) would not be usable if landowner were entitled only to severance damages but not consequential damages. By contrast, no judicial economy is achieved by awarding consequential damages to neighbors, who are not entitled to severance damages at the outset.*

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# DEVELOPMENT

### Nonconforming Use Not Discontinued

***Matter of HV Donuts, LLC v. Town of Lagrange Zoning Board***
NYLJ 2/8/19, p. 25, col. 2
AppDiv, Second Dept.
(memorandum opinion)

In neighbor's article 78 proceeding challenging the ZBA's determination that landowner was entitled to re-establish a nonconforming use, neighbor appealed from Supreme Court's denial of the petition and dismissal of the proceeding. The Appellate Division affirmed, holding that the ZBA's conclusion that landowner had not discontinued the nonconforming use was entitled to deference.

Landowner operated a non-conforming gasoline filling station and convenience store across the street from neighbor's Dunkin Donuts franchise. On June 4, 2013, a tanker truck spilled 3,000 gallons of fuel on landowner's property. Landowner closed both the filling station and convenience store for remediation, which was completed in October 2014. When landowner inspected the system in preparation for re-opening, landowner discovered a leak between the underground storage tanks and the pumps, requiring more remediation. Landowner then applied to the town building inspector for permission to reopen the filling station. The building inspector granted the application. Neighbor challenged the grant before the ZBA, contending that landowner had discontinued the nonconforming use. The ZBA upheld the building inspector's determination that landowner was entitled to invoke a provision of the local zoning law dealing with re-establishment of nonconforming uses after casualties. The ZBA gave landowner one year to re-establish the nonconforming use. Neighbor then brought this article 78 proceeding, but Supreme Court denied the petition, prompting appeal.

In affirming, the Appellate Division started by citing the town zoning law provision indicating that if a landowner discontinues a nonconforming use for a period of a year or more, the landowner may not thereafter resume the use. The court then turned to the ZBA's determination, which indicated that remediation of the filling station amounted to a continuation of the existing nonconforming use rather than discontinuance of the use. The court concluded that the ZBA's determination was rational, and was entitled to deference.

### Developer's RICO, Estoppel, And Equal Protection Claims Dismissed

***NRP Holdings LLC v. City of Buffalo***
NYLJ 2/27/19, p. 21, col. 1
Second Circuit Court of Appeals
(Opinion by Carney, J.)

In developer's action against the city, its mayor, and its urban renewal agency for violations of RICO and the constitution's equal protection clause, developer appealed from federal district court's grant of summary judgment to the municipal defendants. The Second Circuit affirmed, holding that legislative immunity barred the RICO claim, that the absence of comparators barred the "class of one" equal protection claim, and that the developer had not demonstrated the manifest injustice required to sustain an estoppel claim against the city government.

Developer made arrangements to build affordable housing in the City of Buffalo. The developer obtained a commitment letter from the city's urban renewal agency, and the agency adopted a resolution authorizing release of $1.6 million to support the project. The developer then secured $3 million in tax credits and low interest loans, submitted applications, conducted appraises, prepared architectural designs, and took other steps to implement the project. The project, however, required final approval by the city's common council, which required a proposal by the mayor to the council. The mayor never sent the proposal to the council which, by the mayor's admission, was highly unusual. Developer contends that the mayor's action was the direct result of the developer's failure to create a paid contractor role for a not-for-profit coalition led by one of the mayor's political allies. When the mayor pushed for creation of such a role, developer insisted on preparing a request for proposals (RFP) rather than selecting the mayor's preferred firm, and after receiving responses to the RFP, selected another firm. When the mayor and council failed to approve the project, developer brought this action. Federal District court granted defendants' summary judgment motion, and developer appealed.

In affirming, the Second Circuit first addressed developer's RICO claim, and concluded that the mayor's action was part of the city's legislative process and therefore covered by legislative immunity. The court then turned to the class of one equal protection claim and concluded that developer could point to no similarly-situated developer whose proposal was approved by the city. Finally, in turning to the estoppel claim, grounded in state law, the court indicated that only claims of manifest injustice would support a claim of estoppel against the government, and the court found no manifest injustice in this case.

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## *Development*

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### Denial of Area Variance Overturned

***Matter of Mengiopolous v. Board of Zoning Appeals***
NYLJ 1/25/18
AppDiv, Second Dept.
(memorandum opinion)

In landowner's article 78 proceeding to annul denial of an area variance, the Board of Zoning Appeals (BZA) appealed from Supreme Court's grant of the petition. The Appellate Division affirmed, holding that the board had not meaningfully considered the requisite statutory factors.

Landowner owns a house built before 1920, when the city enacted its zoning ordinance. Landowner's house, like most others in the neighborhood, sits on a lot that is now substandard. The house is in a neighborhood zoned for one and two-family homes, but landowner needed five area variances to convert her single-family house into a two-family house. The BZA denied her application, citing the substantiality of the proposed variances and the fact that the difficulty was self-created. Landowner brought an article 78 proceeding. Supreme Court granted the petition and the BZA appealed.

In affirming, the Appellate Division relied on the BZA's failure to cite particular evidence with respect to several of the statutory factors. The board did not indicate how the variance would have an undesirable effect on the neighborhood, how it would adversely impact physical or environmental conditions, or how it would be detrimental to the health, safety, or welfare of the neighborhood. As a result, the court agreed with Supreme Court that remand to the board was necessary.

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# REAL PROPERTY LAW

### Affirmative Covenant Enforceable Against Successor Developer

***Bay Street Landing Homeowners Association, Inc. v. Meadow Partners, LLC***
NYLJ 3/1/19, p. 29, col. 5
AppDiv, Second Dept.
(memorandum opinion)

In an action for a declaration that an affirmative covenant ran with the land, the homeowners association, as beneficiary of the covenant, appealed from Supreme Court's grant of summary judgment declaring that the covenant did not run with the land. The Appellate Division reversed and declared the covenant enforceable against a successor owner.

Homeowners association manages a residential community. In 2000, it contracted to sell neighboring land to BSSG for the purpose of developing the neighboring parcel into luxury condominium apartments. The sale contract required the purchaser to construct amenities, including gardens and picnic areas, and to build a pedestrian walkway linking the condominium parcel with the rest of the residential community. BSSG never built the walkway or the condominium complex. In 2012, Partners acquired the condominium parcel at a foreclosure sale. Homeowners association then brought this action for a declaration that the walkway covenant remained in full force and effect against Partners. Supreme Court awarded summary judgment to Partners, concluding that any claim for breach of the covenant was time-barred and that, in any event, the covenant did not run with the land. Homeowners association appealed.

In reversing, the Appellate Division first held that Supreme Court had erred in holding that the association's claim was time-barred because BSSG had breached the covenant by failing to construct the walkway within 60 days of the contract date. The court concluded that the contract did not require construction within 60 days, but required only delivery of plans and specifications within that period. Although BSSG did not deliver those plans, the court held that given the broad scope of the project, failure to deliver the plans was not sufficiently substantial to trigger the running of the statute of limitations on a claim for breach of the walkway covenant. The court then noted that in 2002, upon the closing of the contract with BSSG, the homeowners association recorded an amendment to the declaration of covenants providing that the covenants in the agreement with BSSG, whether affirmative or negative in nature, shall constitute covenants running with the land. The court held that the walkway covenant satisfied all of the requirements for covenants running with the land – intent, touch and concern, and privity. As a result, homeowners association was entitled to summary judgment declaring that the covenant runs with the land.

#### Comment

*Since the Court of Appeals, in* Neponsit Prop. Owner's Assn' v. Emigrant Indus. Sav. Bank, *278 N.Y. 248, abandoned the pre-existing blanket rule that affirmative covenants do not run with the land, New York courts have held that affirmative covenants will in fact bind successor owners when they "touch and concern" the land.*

*Where an affirmative covenant requires performance of a single, one time act of restoration or installation, and the previous owner fails to perform the act prior to transferring the land to a subsequent purchaser, courts routinely enforce the covenant against the subsequent owner, finding that the covenant touches and concerns the land. For example, in* City of New York v. Delafield 246 Corp., *236 A.D.2d 11, 25 the First Department held that covenants to preserve and replace trees, restore terrain surrounding an unbuilt garage, restore a mansion located on the property, and install a fire alarm system were binding on the successor owner. The court held that the*

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*subsequent purchaser, performing the same construction project as its predecessor, was not entitled to benefit from the previous owner's failure to complete the acts that specifically concerned the status of the land, especially since once these one-time acts were completed, the duty of the covenantor was fulfilled.* Id. *at 27.*

*In cases where the covenant imposes a continuing obligation on the covenanter, courts are more likely to bind subsequent owners if the performance of the obligation is something that any pair of landowners would want to continue without renegotiating each time the land is transferred, but not when the covenant's benefit depends on the preferences of particular landowners. For example, in* Harrison v. Westview Partners, *LLC, 79 A.D. 3d 1198, 1202, the Third Department found that a covenant to provide and maintain a water line was binding on the subsequent owner since the covenantee plaintiffs could not receive water on their properties any other way and since the use of their lots was fully dependent on the maintenance of that water line. Similarly, in* Nicholson v. 300 Broadway Realty Corp., *7 N.Y 2d at 246, the Court of Appeals found that a covenant to furnish steam heat and maintain all necessary steam pipes was binding on subsequent purchasers as long as the covenatee's building required heat and the coventantor's heat producing facilities operated on the land. By contrast, in* Eagle Enters v. Gross, *39 N.Y.2d 505, the Court of Appeals held that a covenant to provide a seasonal water supply was not binding on the subsequent owner, because unlike the supply of water in* Harrison *or the supply of steam heat in* Nicholson, *there was no evidence that the covenantees would be deprived of water without the additional supply, or that they needed the additional supply for those six months.*

*When a covenant, either restrictive or affirmative, runs with the land, a foreclosure sale generally will have no effect on the status of the covenant and will therefore not act to extinguish it. Courts have explicitly stated that restrictive covenants will not be cut off by a foreclosure sale because such covenants are easements.* See, Malley v. Hanna, *101 A.D. 2d 1019 (1984)*; see also, Halpin v. Poushter, *59 N.Y.S.2d 338 (Sup. Ct. 1945) While there is no similarly explicit rule regarding the survival of affirmative covenants in foreclosure sales, courts have held that when an affirmative covenant runs with the land, the covenant will not be extinguished by a foreclosure sale, as long as the purchaser had notice of the covenant.* See, Neponsit Prop. Owner's Assn', *278 N.Y. 248 (affirmative covenant to pay fee for maintenance ran with the land and was not extinguished when defendant purchased land at judicial sale).*

## Post-Sandy FEMA Height Requirements Might Make Restrictive Covenant Unenforceable

***Quinto v. Diamond***

NYLJ 2/20/19, p. 21, col. 2
Supreme Ct., Nassau Cty
(Diamond, J.)

In an action to enforce a restrictive covenant, beneficiary of the covenant sought a preliminary injunction against violation of the covenant. The court denied the preliminary injunction, holding that the beneficiary had not shown that the covenant would ultimately be held enforceable, or that a preliminary injunction was necessary to prevent irreparable harm.

Beneficiary's parents owned two adjacent parcels. In 2005, when they sold one of the parcels, they imposed a restrictive covenant on that parcel limiting the height of any housing structure on the parcel. Nevertheless, purchasers proceeded to build a second floor on the house with a full dormer, in violation of the restrictive covenant. Beneficiary brought suit, and in April 2012, Supreme Court held that the second floor violated the covenant and needed to be taken down. Six months later, however, Superstorm Sandy destroyed the entire building. The owners of the burdened party then sold the property to New York State pursuant to a deed that did not mention the restrictive covenant. The burdened property was then sold to current owners, also pursuant to a deed that did not mention the restrictive covenant. Beneficiary of the covenant alleges, however, that current owners were made aware of the covenant at the time of transfer. In light of Sandy, however, FEMA (the Federal Emergency Management Agency) required elevation of housing to new levels as a condition of federal funding. The new requirements would make it difficult for the owners of the burdened parcel to qualify for funding without violating the restrictive covenant.

The Beneficiary then brought this action against both the burdened owner and the village seeking to prevent the owner from building in violation of the covenant and to prevent the village from approving construction in violation of the covenant. Beneficiary sought a preliminary injunction. The court dismissed the claim against the village in its entirety, holding that issuance of a permit for a use allowed by a zoning ordinance may not be denied because the use would violate a restrictive covenant. The court then denied the preliminary injunction, indicating that, despite the 2012 judgment against the prior owner, subsequent events might make the covenant unenforceable as violative of public policy because enforcement of the covenant might prevent all future buyers from building a home on the property. Moreover, the court concluded that the beneficiary had not demonstrated that failure to issue the preliminary injunction would cause irreparable harm, noting that if the covenant were ultimately enforced, the cost of removal would be borne by the burdened owners, not by the covenant's beneficiary.

### Comment

*As a general matter, landowners need to comply with both "public" laws, such as zoning, as well as private covenants. A use permitted by zoning regulations may still be*

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## *Real Property Law*

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*enjoined if it violates a restrictive covenant.* Friends of Shawangunks, Inc. v. Knowlton, *64 N.Y.2d 387.*

*When there is a clash between a private restrictive covenant and a public law, the covenant will remain enforceable so long as enforcement would not pose a direct conflict with public policy. In* Chambers v. Old Stone Hill Rd. Assocs., *1 N.Y.3d 424, the Court of Appeals upheld an injunction against maintenance of a cell phone tower that would violate a restrictive covenant limiting construction on the lot at issue to single family homes. The court rejected the argument that the covenant conflicted with the public policy embodied in the Telecommunications Act of 1996 (TCA), which makes it unlawful for state and local governments engage in regulation that would effectively prohibit the provision of wireless services, 47 U.S.C §332 [c] [7] [B] [i] [II]. The court concluded that the covenant did not violate public policy because even though the town had found that the lot was the best location for a cell tower, (and the tower had already been built), other sites were available for cell phone facilities that would provide cell phone service within the town.*

*By contrast, when a law evidences intent to specifically preempt otherwise valid restrictions, courts will not enforce the covenants. In* Crane Neck Ass'n v. N.Y.C./Long Island Cty. Servs. Grp., *61 N.Y.2d 154, the Court of Appeals affirmed the Second Department's reversal of an injunction against operation of a residence for mentally disabled persons, holding that enforcing a restrictive covenant limiting buildings to single family dwellings would contravene a "long-standing public policy." N.Y. Mental Hyg. Law §41.34 (f) stated "a community residence established pursuant to this section and family care homes shall be deemed a family unit, for purposes of local laws and ordinances." The court held that enforcement of the restrictive covenant would frustrate the purpose of the law — to place developmentally disabled persons in supervised residences within residential neighborhoods.*

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# LANDLORD & TENANT

### Claim Based On Retaliation for Assertion Of Fair Housing Rights Dismissed

***Byrd v. KTB Capital LLC***

NYLJ 2/22/19, p. 22, col. 3

U.S. Dist. Ct., WDNY (Telesca, J.)

In tenant's action alleging violations of the Fair Housing Act, landlord and the managing agent moved for summary judgment. The court granted the motion, holding that landlord and the managing agent had rebutted tenant's prima facie case of discrimination, and that tenant had demonstrated no causal connection between her assertion of statutory rights and landlord's decision to evict her.

Tenant initially leased her apartment in 2012 and renewed her lease the following year. In 2014, landlord proposed a lease renewal with a $20 monthly increase in rent. Tenant did not agree to the increase and did not vacate, leading landlord to send reminder letters and then to commence an eviction proceeding. Ultimately, after a City Court hearing, tenant agreed to pay the increase, and her lease was extended until Oct. 31, 2015. In September of that year, landlord notified tenant that it was not renewing her lease. Tenant did not vacate, prompting landlord to commence an eviction proceeding, which resulted in tenant's eviction.

Tenant then brought this federal action alleging Fair Housing Act violations. The court dismissed several of the claims on the pleadings, and landlord moved for summary judgment on the claims that survived dismissal. With respect to tenant's claim of discrimination based on her race and disability, the court acknowledged that tenant had made out a prima facie case by demonstrating that she was African American, she was qualified to pay the rent, and she was denied the apartment. But the court then noted that landlord had adequately rebutted the prima facie case with evidence that tenant had failed to co-operate during each lease renewal process, and refused to pay modest rent increases, and had demonstrated bellicose and abusive behavior towards staff. Moreover, landlord had demonstrated that a downstairs tenant had agreed to renew his lease only if landlord agreed to evict plaintiff tenant because of noise in her apartment. Plaintiff tenant offered only conclusory and unsupported assertions in response.

With respect to tenant's claim of retaliatory eviction, the court noted that to succeed, a tenant must establish that tenant engaged in protected activity, that landlord took adverse action against the tenant, and that a causal connection exists between the protected activity and the adverse action. In this case, the court held that tenant could establish no causal connection because tenant did not assert a Fair Housing Act claim until after landlord evicted tenant. Tenant had not asserted any discrimination claim in the state court proceedings. Instead, the eviction preceded any protected action by tenant, making it impossible for landlord to establish that causal connection.

**Comment**

*When a plaintiff presents some evidence of retaliation for assertion of a right under the Fair Housing Act (FHA), a one-year gap between the protected activity and an adverse action is not sufficient to entitle a defendant to a summary judgment. Thus, in* Regional Economic Community Action Program, Inc. (RECAP) v. City of Middletown, *294 F.3d 35, 41–44, 53–55, the Second Circuit vacated a grant of summary judgment for defendant city in an*

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## *Landlord & Tenant*

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*FHA retaliation action where, in December 1994, a non-profit threatened suit and filed a HUD complaint against the city for denying the non-profit a critical building permit, and in early 1996, the city reneged on a pre-existing funding commitment to the nonprofit. The court concluded that the time gap was not sufficient o entitle the city to summary judgment in light of the city's attorney's comments, made after the non-profit's legal threat, that "had [the non-profit] not pursued legal action against the Mayor, he would be much more cooperative" and that the non-profit "has to learn not to bite the hand that feeds it."* RECAP, *294 F.3d at 43–44, 54.*

*Even without concrete evidence of retaliatory animus, a two-month gap between a protected activity and an adverse action, on the other hand, is sufficiently close in time to defeat a motion to dismiss a federal retaliation claim. For example, in* Ponce v. 480 East 21st Street, LLC, *2013 WL 4543622, the Eastern District denied a landlord's motion to dismiss a tenant's FHA retaliatory eviction claim where the tenant filed a sexual harassment complaint with police against her building's superintendent in November and her landlord, aware of the complaint, refused to renew her lease the following January. The court found that, even without alleging additional evidence of retaliatory animus, the tenant stated a causal connection between her complaint and the landlord's refusal to renew her lease.*

*Beyond the FHA, section 223-b(5) of New York's Landlord Tenant Law) creates a rebuttable presumption of retaliation for evictions commenced within six months of a tenant's protected activity. The presumption may not arise, however, when tenant raises retaliation in an affirmative claim rather than as a defense to eviction.* See, 601 W. 160 Realty Corp. v. Henry, *189 Misc.2d 352, 353-54 (dictum in affirmed a damages judgment on tenant's §223-b(3) retaliatory eviction counterclaim).*

### Failure of Consideration a Defense In Action Against Tenant's Guarantor

***Moon 170 Mercer, Inc. v. Vella***
NYLJ 2/21/19, p. 23, col. 6
AppDiv, First Dept.
(memorandum opinion)

In landlord's action against tenant's guarantor, guarantor appealed from Supreme Court's grant of landlord's summary judgment motion. The Appellate Division reversed, holding that guarantor had raised questions of fact about a defense based on failure of consideration.

In a related action, the Appellate Division had reinstated tenant's claim against landlord for wrongful eviction. In the current case, the Appellate Division observed that failure of consideration remains a defense available to the guarantor of a tenant's lease obligations, even if the guaranty purports to be unconditional. In remanding, the Appellate Division held that the guarantor should be afforded an opportunity to establish whether the facts and circumstances surrounding the alleged wrongful eviction prevented him from exercising his rights under the guaranty, and the extent to which those facts and circumstances bear on the amount of post-eviction rent due under the guaranty.

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# COOPERATIVES & CONDOMINIUMS

### Sponsors Not Entitled to Indemnification for Faulty Construction

***Board of Managers of Olive Park Condominium v. Maspeth Properties LLC***
NYLJ 3/8/18, p. 31, col. 5
AppDiv, Second Dept.
(memorandum opinion)

In an action by the condominium board against the sponsor and general contractor for breaching obligations under the offering plan and purchase agreements, the sponsor and general contractor appealed from Supreme Court's dismissal of their third party actions against an engineering firm and a security firm. The Appellate Division affirmed, holding that because the sponsor and contractor retained contractual responsibilities, they were not entitled to indemnification.

The condominium board and unit owners brought this action contending that the sponsor and general contractor had breached their contractual obligations by failing to correct defects that were their fault or the fault of their subcontractors. The sponsor and the general contractor then brought a third-party claim for indemnification against subcontractors who designed or installed various allegedly defective systems. Supreme Court dismissed the third party claim, and the sponsor and general contractor appealed.

In affirming, the Appellate Division held that indemnification is available only when the party seeking indemnification has delegated exclusive responsibility for the duties giving rise to the loss, and has not committed any actual wrongdoing itself. In this case, where the sponsor and general contractor retained contractual responsibilities, they did not delegate exclusive responsibility.

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