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Three Takeaways from *Casey v. Whitehouse Estates* Rent Regulation Decision

By Jeffrey Turkel

On March 16, 2023, the Court of Appeals decided *Casey v Whitehouse Estates, Inc.*, the first Court of Appeals ruling to address rent regulation since its landmark decision in *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332 (2020). In *Casey*, the Court of Appeals unanimously reversed the First Department's finding that the landlord's purported fraud mandated use of DHCR's so-called default rent formula.

(***Note***: *In the interest of full disclosure, the author herein represented the prevailing landlord in Casey.*)

Casey concerned a building wherein the landlord, relying on DHCR's advice, purported to luxury deregulate multiple apartments despite the building's receipt of J-51 benefits. Years later, the Court of Appeals ruled in *Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 (2009), that DHCR had misinterpreted applicable law, and that such deregulations were unlawful. Various tenants in the building in *Casey* thereafter commenced a class action for rent overcharge, seeking, *inter alia*, recalculation of their rents and a refund of any overcharges collected.

The issue in *Casey* was the method by which the tenants' rents would be recalculated. The standard, categorical rule in pre-HSTPA overcharge cases (such as *Casey*) was to begin with "the rent charged on the date four years prior to filing of the overcharge complaint (the 'lookback period') as the base date rent,'" and thereafter adding all lawful stabilized increases. *Regina*, 35 NY3d 348.

The Court of Appeals, however, had previously created a common-law exception to the four-year lookback rule. In *Matter of Grimm v New York State Div. of Hous. & Community Renewal*, 15 NY3d 358 (2010), the Court held that DHCR's punitive default rent formula, rather than the four-year lookback rule, would be used where the tenant established that the landlord had engaged in a fraudulent scheme to

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deregulate. The default rent formula resulted in extremely low rents, and, correspondingly, high overcharge awards. Not surprisingly, tenants in rent overcharge actions began claiming that almost any error or omission committed by the landlord somehow constituted fraud.

Reviewing *Grimm* and other Court of Appeals authority, the Court in *Casey* reiterated the narrow type of "fraud" that would trigger the common-law exception to the four-year lookback rule:

> "[In *Regina*], this Court made clear that, under the pre-Housing Stability and Tenant Protection Act of 2019 law applicable here, 'review of rental history outside the four-year lookback period [i]s permitted only in the limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate.
>
> * * *
>
> In fraud cases, because the reliability of the base date rent has been tainted, 'this Court sanctioned use of the default formula to set the base rent'" (internal citations omitted).

Thus, the fraud necessary to warrant the default rent formula had to: 1) be part of a fraudulent scheme to deregulate the apartment in question; and 2) taint the base date rent, thus rendering it unreliable.

In *Casey*, the landlord had sought to comply with *Roberts* in late 2011 and early 2012, when it became clear, by virtue of *Gersten v 56 7th Ave. LLC*, 88 AD3d 189 (1st Dept. 2011), *appeal withdrawn* 18 NY3d 954 (2012), that *Regina* would be applied retroactively. The landlord first recalculated the rents using the "reconstruction method" — the prevailing methodology before it was deemed unlawful in *Regina* — whereby the last stabilized rent before the improper deregulation becomes the base date, to which all permissible stabilization increases are then added. *See*, *e.g.*, *72 Realty Assoc. v Lucas*, 101 AD3d 401 (1st Dept 2012). The landlord then registered those rents and began to offer stabilized leases in accordance therewith.

The tenants in *Casey* commenced their action in October 2011, and thereafter alleged that the default rent formula should be used because the landlord's post-*Roberts* efforts to comply with *Roberts* constituted fraud. The tenants argued that the recalculated rents were deliberate overcharges, and that the new registrations fraudulently reflected those inflated rents.

Supreme Court, 2017 WL1161744 (Lebovits, J.) agreed, and directed that all rents be established by the default rent formula. The First Department, 197 AD3d 401 (1st Dept 2021), by a 3-1 margin, affirmed:

> "Although defendants may have been following the law in deregulating the apartments during the period before *Roberts* was decided … their 2012 retroactive registration of the improperly deregulated apartments was an attempt to avoid the court's adjudication of the issues and to impose their own rent calculations rather than face a determination of the legal regulated rent within the lookback period."

197 AD3d at 404.

The First Department also found that the default rent formula was justified because the landlord had allegedly "failed to produce leases for the class reflecting the actual rent charged on the base date, October 14, 2007." *Id.* at 405. *See*, RSC §2522.6(b)(2)(i) (default rent formula applies where "the rent charged on base date cannot be determined").

The landlord argued in the Court of Appeals, *inter alia*, that the alleged fraud failed to satisfy the two prerequisites set forth in *Grimm* and *Regina*. First, the landlord's 2011-2012 rent recalculations and registrations took place years after the Oct. 14, 2007 base date, and

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Takeaways

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thus could not possibly have tainted the base date rent or rendered it unreliable. The Court of Appeals unanimously agreed, holding that neither the landlord's pre-*Roberts* erroneous deregulation of the apartments, nor the landlord's recalculation and registration efforts, constituted the type of "fraud" necessary to trigger the default rent formula:

"Plaintiffs failed to meet their burden on summary judgment. Defendants' deregulation of the apartments was based on this same 'misinterpretation of the law' involved in *Regina* and therefore that conduct did not constitute fraud. Defendants' subsequent re-registering of the apartments occurred after the four-year lookback period, and plaintiffs have failed to offer evidence that it somehow affected the reliability of the actual rent plaintiffs paid on the base date."

The landlord also argued that its efforts to recalculate *stabilized* rents, register apartments as *stabilized*, and offer *stabilized* leases, could not qualify as a fraudulent scheme to *deregulate* the units. The Court of Appeals did not address this argument head-on, but pointedly observed that in *Regina*, "this Court made clear that, under the pre-Housing Stability and Tenant Protection Act of 2019 law applicable here, 'review of rental history outside the four-year lookback period [i]s permitted *only* in the *limited category* of cases where the tenant produced evidence of *a fraudulent scheme to deregulate*'" (emphasis supplied). The Court's observation effectively overrules post-*Regina* authority holding that the fraud necessary to trigger the default rent formula need not be a fraudulent scheme to deregulate, and that a mere "fraudulent rent overcharge scheme" would suffice. The First Department, citing *Casey*, appears to have acknowledged this in *Burrows v 75-25 153rd St., LLC,* issued on April 13, 2023.

Lastly, the Court of Appeals reversed the First Department's holding that the landlord had failed to submit even a single base date lease, remitting the case to Supreme Court for an assessment in this regard as to each individual apartment.

There are three takeaways from *Casey*.

First, the default rent formula cannot be used where the alleged fraud took place after the base date, in that such conduct could not logically taint the base date rent; put another way, if the base date rent is known and is untainted, it must be used as the basis for subsequent rent calculations.

Second, the fraudulent scheme must be one to deregulate the apartment, and a mere "fraudulent rent overcharge scheme" will not justify using the default rent formula.

Third, landlords are cautioned to produce during discovery all leases from the base date forward, because the failure to do so warrants use of the default rent formula even if there is no fraud.

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DEVELOPMENT

Sand Mine Enjoys Nonconforming Use Protection

Town of Southampton v. New York State Department of Environmental Conservation

2023 WL 1824432

Court of Appeals

(Opinion by Cannataro, A.C.J.)

In an article 78 proceeding brought by the town, various organizations and neighbors to annul an agreement between mine operator and the Department of Environmental Conservation (DEC), the mine operator appealed from the Appellate Division's grant of the petition. The Court of Appeals modified, holding that whether DEC has authority to issue a renewal and modification permit depends on the scope of the mine operator's prior non-conforming use.

A sand and gravel mine has been operated on the subject 50-acre Suffolk County parcel since the 1960s, when local zoning permitted mining. In 1972, the town rezoned the area to prohibit mining. Nevertheless DEC issued or renewed permits at regular intervals, and the operator obtained certificates of occupancy from the town stating that use as a sand mine was a prior nonconforming use. In 2014, the operator applied to the DEC to modify its permit to increase the depth of mining by 40 feet and to mine on additional 4.9 acres that had not been covered by previous DEC permits. Although DEC initially denied the permit application, DEC and the mine operator ultimately reached a settlement authorizing the greater depth and greater area in return for the operator's agreement to cease using the facility for receipt and processing of vegetative organic waste. The town and the neighbors brought an article 78 proceeding to annul the permit. Supreme Court denied the petition and dismissed the proceeding. A divided Appellate Division modified, holding that Environmental Conservation Law 23-2703(3) barred issuing the permit in violation of the town's prohibition on mining. The mine operator appealed.

In modifying, the Court of Appeals first held that ECL 23-2703(3), which bars state agencies from considering mining permit applications within Suffolk and Nassau counties if local zoning laws prohibit mining, apples to renewal and modification applications as well as applications for new mining permits. But the court then held that if a mining use was a prior nonconforming use, zoning did not prohibit issuance of permits to continue the mining operation. The court suggested that its reading of the statute was designed in part to avoid interference with the constitutionally protected rights of mine owners. But the court then indicated that the remaining

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question – not resolved by the proceedings below – was the scope of the mine owner's nonconforming use. The question on remand would be whether the mine operator had manifested an intention to mine the additional acreage and the expanded depth before the zoning ordinance prohibited mining in the area.

Contract Vendee Entitled to Use Variance Despite Knowledge of Ordinance's Provisions

Source Renewables, LLC v. Town of Cortlandville Zoning Board of Appeals (ZBA)
2023 WL 2168411
AppDiv, Third Dept.
(memorandum opinion)

In contract vendee's combined article 78 proceeding and plenary action challenging denial of a use variance, contract vendee appealed from Supreme Court's partial grant of the town's motion to dismiss the petition and complaint. The Appellate Division reversed, annulled the ZBA's determination and remanded to the ZBA, holding that contract vendee had met the criteria for a use variance.

Contract vendee contracted to purchase two abutting parcels, totaling about 63 acres, contingent on municipal approval of a solar energy system. One parcel was located in the City of Cortland and the other in the Town of Cortlandville. The undeveloped parcels are elevated, with precipitous slopes, and are located in a residential zoning district. Contract vendee then applied for use variances, conditional permits and special permits to construct the system on 21 acres. The county industrial development agency determined that the project would have no significant environmental impact. The City of Cortland ZBA approved a use variance for the parcel within its borders, but the Town of Cortlandville ZBA concluded that contract vendee had established that the parcel could not generate a reasonable return under the current zoning ordinance, but that contract vendee had not met the other criteria for a use variance. Contract vendee then brought this proceeding, contending that the denial was arbitrary and constituted a regulatory taking. Supreme Court concluded that contract vendee had standing, but that any hardship was self-created and that the regulatory taking claim was inadequately pleaded. Contract vendee appealed.

In reversing, the Appellate Division held that the record provided no basis for the ZBA's conclusion that the hardship did not result from conditions unique to the parcel. Although the ZBA found that there were other lots on the hill with houses, the record demonstrated that lots within the parcel sell for $20 to $25,000 while the development cost for the subject parcel would be more than $100,000 per lot. The court emphasized that the record provided no evidence that other parcels shared that limitation. The court also found no evidence in the record to establish that the variance would alter the essential character of the neighborhood, noting that once the city had approved the variance on its parcel, the solar arrays would already be visible to anyone who would be able to see the arrays on the town parcel. Finally, the court rejected the contention that any hardship was self-created. First, the court noted that when a contract vendee seeks a variance, it is the rights of the vendor that are at stake; the fact that the contract vendee knew of the restrictions does not bar a use variance. Second, while conceding that a hardship is considered self-created when the property is acquired subject to the restrictions allegedly creating the hardship, the court noted that the vendor bought the parcel before the town enacted its zoning ordinance, so the vendor could not be said to have willingly assumed the hardship.

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REAL PROPERTY LAW

Strict Liability for Excavation Damage

Georgitsi Realty, LLC v. Armory Plaza, Inc.
2023 WL 1425584
AppDiv, Second Dept.
(memorandum opinion)

In an action by neighboring landowners against developers and their various contractors for damages to property caused by excavation, owners and contractors appealed from Supreme Court's grant of summary judgment to neighbors on claims for violation of the New York City Administrative Code and for negligence. The Appellate Division modified to deny summary judgment on some of the Administrative Code claims and on the negligence claims, but affirmed with respect to other Administrative Code claims.

Developers built a multistory apartment building with two levels of underground parking. In the course of construction, developers excavated more than 40 feet beneath the surface of the land, allegedly causing damage to a number of neighboring properties. Several neighboring owners sued, alleging violation of former Administrative Code section 27-1031(b)(1), which requires an excavator to preserve and protect neighboring properties from injury caused by excavations of more than 10 feet, provided that the excavator is afforded a license to enter and inspect the adjoining properties. Neighboring owners also alleged negligence. Supreme Court awarded summary judgment to the neighboring owners on the issue of liability with respect to the Administrative Code claims and the negligence claims.

In modifying, the Appellate Division first upheld the grant of summary judgment on the Administrative Code claims to those neighbors

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who established that they had never been asked for a license to inspect their buildings. The court held that in the absence of a request for a license, they were not required to prove that they granted the license. As a result, because the statute provides for strict liability, those neighboring owners were entitled to summary judgment on the issue of liability. With respect to another neighboring owner, however, the court reversed the grant of summary judgment on the Administrative Code claim because the owner had not established that it had granted a license to inspect and protect the property. The court also reversed the grant of summary judgment on the negligence claims because the negligence claims were not the subject of a summary judgment motion.

COMMENT

In New York City, Chapter 33 Section 3309 of the City Building Code requires excavators to protect adjoining property against damage to soil or foundation of adjourning properties so long as the adjoining owner granted the excavator a license to perform the work necessary to protect the adjoining property. In *211-N. Blvd. Corp. v. LIC Contr., Inc.*, 186 A.D.3d 69, the Second Department construed the ordinance to impose strict liability on the excavator, even without proof that the adjoining owner provided a license, if the adjoining owner establishes that the excavator never requested a license.

Before enactment of the current building code, courts had held that former section 27-1031(b)(1), which imposed an obligation to protect adjoining property when excavating to a depth greater than ten feet, subjected excavators to strict liability. In *Yenem Corp v. 382 Broadway Holdings*, 18 N.Y.3d 481, the court granted summary judgment for the adjoining owners against excavators who had excavated to a depth of 18 feet, holding that because section 27-1031(b)(1) was originally derived from a state statute, violation of its provisions constituted negligence per se, and resulted in absolute liability.

By contrast outside of New York City, excavator liability is based on negligence, not absolute liability. In *Level 3 Communications, LLC v. Petrillo Contr., Inc.*, 73 A.D.3d 865, the Second Department granted summary judgment for the neighbors on their negligence claim when, in violation of General Business Law §364, excavators failed to place a call to the One Call Notification Center and then damaged the plaintiff's property The court found §764 creates a duty on excavators to place the call to the Notification Center and failing to do so was evidence of negligence on behalf of the excavators, and that the excavator's actions were the proximate cause of the damage done to the neighbor's land. Statutory remedies for violations of are separate from the damages plaintiff can recover under a common law negligence claim arising out of §764.

EASEMENT WAS NON-EXCLUSIVE

Berg v. Cahill

2023 WL 1807845
AppDiv, Second Dept.
(memorandum opinion)

In easement holders' action for a judgment that they enjoy an exclusive easement, easement holders appealed from Supreme Court's grant of servient owners' summary judgment motion. The Appellate Division affirmed, holding that the easement was non-exclusive.

Owner of a 19.393 acre tract sold parcels to a number of easement holders, each with a right of way over a private road running along owner's retained land, which owner then sold to a trust. When the common owner sold off the various parcels, common owner included a restrictive covenant in the deeds prohibiting the use of any portion of the tract "for the purpose of business or trade." In 2016, the trust contracted to sell the servient parcel to current servient owners for the purpose of developing a golf course and multiple residential units. Easement holders then brought this action seeking to establish that their easement was exclusive, that the proposed subdivision of the servient parcel would violate the restrictive covenant, and that widening of the private road to accommodate the subdivision would unreasonably interfere with their easement. Servient owners moved for summary judgment, and Supreme Court granted the motion. Easement holders appealed.

In affirming, the Appellate division first indicated that truly exclusive easement rights are disfavored, and that the fee owner generally has the right to use the servient land so long as the servient owner does not unreasonably interfere with the easement. In this case, the grant of the right of way did not contain unequivocal language manifesting an intent to make the easement exclusive. The court then held that the servient owner had the right to widen or modify the private road so long as the widening does not affect the easement holders' use of the roadway. In this case, the court concluded that the threat of hypothetical interference was premature. The court also concluded that the claim of violation of a restrictive covenant was without merit.

PURCHASER'S CLAIMS BARRED BY MERGER DOCTRINE, CAVEAT EMPTOR

R. Vig Properties, LLC v. Rahimzada

2023 WL 2000836
AppDiv, Second Dept.
(memorandum opinion)

In purchaser's action to recover damages for fraud, misrepresentation, and breach of contract, purchaser appealed from Supreme Court's grant of summary judgment to seller. The Appellate Division affirmed, holding that the doctrine of caveat emptor barred the fraud and misrepresentation claims, and the merger doctrine barred the breach of contract claim.

In 2006, purchaser contracted to buy three improved commercial properties for $20,400,000. The sale closed on Dec. 20, 2006. Six years later, purchaser brought this

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action for damages, alleging that sellers had represented that one of the properties was primarily occupied by a master tenant pursuant to a self-sustaining triple-net master lease, and had failed to disclose that the master tenant had informed sellers of their financial difficulties. Purchasers also alleged that sellers had failed to disclose that a bankruptcy court had relieved all prior assignees of liability even though the master lease provided that they were liable. Supreme Court granted summary judgment to sellers, and purchaser appealed.

In affirming, the Appellate Division emphasized that for purchaser to prevail on the fraud and misrepresentation claims, purchaser would have to show that the facts alleged to have been misrepresented or concealed were peculiarly within the sellers' knowledge and could not have been discovered by the exercise of ordinary diligence. In this case, because of purchaser's lack of justified reliance, sellers were entitled to summary judgment on those claims. The court then held that sellers were also entitled to summary judgment on the breach of contract claim because the sale closed before purchaser brought suit. Since the parties did not evidence any intention that a provision of the contract would survive delivery of the deed, the merger doctrine precluded recovery for breach of contract.

Comment

Once a deed is delivered to a purchaser, the merger doctrine generally bars purchaser from bringing claims arising out of the sale contract. For instance, in *Summit Lake Assoc. v. Johnson*, 158 A.D.2d 764 (1990), the court held that once the purchaser accepted the deed at closing, the merger doctrine barred the purchaser's claim that the deed did not conform to the sale contract's description of the property to be conveyed. Although the sale contract included a portion of a landlocked parcel that was not included in the deed delivered to purchaser at closing, the court reasoned that upon accepting title at closing, all prior agreements merged into the deed and therefore any inconsistencies between the sale contract and the deed were to be governed solely by the deed as the final agreement amongst the parties. Because there was no express evidence of the parties' intention that the provision survive closing, and because the deed made it explicit that the landlocked parcel was not included in the conveyance, the purchaser should have been aware that it was not accepting title to all of the property described in the contract.

If a purchaser can show that the parties explicitly intended that a particular provision of the sale contract was to survive the delivery of the deed, the merger doctrine will not bar a post-closing claim based on that provision. In *TIAA Global Inves., LLC v. One Astoria Sq. LLC*, 127 A.D.3d 75 (2015), the court, while ultimately barring the claim on Statute of Limitations grounds, found that the merger doctrine did not bar purchaser's breach of contract where the purchaser alleged that seller failed to abide by specific provisions of the contract relating to representations of the property's condition, and the contract included an express anti-merger clause. The contract was for the purchase of an apartment building and contained a variety of representations by the seller relating to the property's condition. The contract further provided that "the express representations and warranties made in this Article by the [purchaser] or seller will not merge into any instrument of conveyance delivered at the Closing." Upon closing, the purchaser learned that the issues with the building were far worse than represented by the seller, and subsequently brought a breach of contract claim for misrepresentations. In rejecting the seller's argument that the merger doctrine barred the claims, the court reasoned that the express terms of the contract intended for the allegedly breached representations to survive the transfer of title.

Some trial courts have held that the merger doctrine does not apply where the purchaser's breach of contract claim is based on latent defects which were discoverable only after the purchaser occupied the premises. In *Fehling v. Wicks*, 179 Misc.2d 1041 (1999), the court held that the merger doctrine did not apply where the purchaser learned, upon taking possession of the premises, that the faucets in the bathroom were not working as they were when she initially performed an inspection prior to closing. In holding that the merger doctrine did not apply to bar the purchaser's claim, the court reasoned that the doctrine is inapplicable when the defect discovered is one that could not have been found until after the purchaser took possession post-closing. Similarly, in *Pache v. Kingdom Plus Holdings LLC*, 2020 NYLJ LEXIS 1553, the court applied the exception when purchaser discovered after closing that there was no system on the property to remove wastewater and sewage, therefore causing frequent flooding in the basement. The court found that the merged doctrine was not applicable base on the fact the sewer was a nonvisible component of the property that was not easily verifiable without destructive testing. As the court noted in *TIAA Global*, however, the latency exception to the doctrine has not yet been adopted by any of the Appellate Divisions or by the Court of Appeals. *TIAA Global Inves., LLC v. One Astoria Sq. LLC*, 127 A.D.3d 75.

Purchaser's Claim Based On Inoperative Elevator Dismissed In the Absence Of Active Concealment

228 West 72 LLC v. 228A Est 72 LLC

2023 WL 2248041

AppDiv, First Dept.

(memorandum opinion)

In property purchaser's action against seller and title insurer for damages resulting from an inoperative elevator on the premises,

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Real Property Law

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purchaser appealed from Supreme Court's dismissal of the complaint and award of attorneys' fees to seller. The Appellate Division affirmed, holding that there was no active concealment of any defect and there were not title defects covered by the title policy.

The sale contract provided that the subject premises were sold "as is" and that purchaser was acquiring the premises subject to all violations of state and municipal laws. After the sale, purchaser brought breach of contract and negligence actions against both the seller and the title insurer. Supreme Court dismissed all claims and awarded attorneys fees to seller.

In affirming, the Appellate Division emphasized that purchaser inspected the premises before closing and was notified of open DOB violations relating to the elevator. As a result, purchaser could not claim active concealment. The court then noted that any alleged title defects were not covered by the title policy and the negligence claim against the title insurer was properly dismissed because a cause of action for negligence in searching title does not lie in an action on the policy and the purchaser had no claim against the title insurer independent of the insurance contract. Moreover, the title insurer notified purchaser of the DOB violations in a municipal search it provided as a courtesy.

Deed Forgery Claim Survives Motion to Dismiss

Alleyne v. Rutland
Development Group, Inc.
2023 WL 2147198
AppDiv, Second Dept.
(memorandum opinion)

In an action to set aside a deed and cancel a mortgage, transferor appealed from Supreme Court's grant of mortgagee's motion to dismiss. The Appellate Division reversed and reinstated the complaint. Holding that mortgagee had not utterly refuted transferor's allegations that the documents were forged.

To support its motion to dismiss the complaint, mortgagee submitted a notary's certificate of acknowledgment attesting that transferor had appeared before him and executed the deed or acknowledged her execution of the deed. Mortgagee also submitted a resolution by transferee authorizing transferor to borrow money from mortgagee on transferee's behalf. Based on these submissions, Supreme Court granted mortgagee's motion to dismiss transferor's claim that the documents were forged and that she had never negotiated with transferee or mortgagee. Transferor appealed.

In reversing, the Appellate Division indicated that the evidentiary submissions did not conclusively establish a defense as a matter of law. The court did concede, however, that on a motion for summary judgment, transferor would have to proffer evidence so clear and convincing as to amount to a moral certainty in order to overcome the presumption of due execution created by the notary's certificate of acknowledgement.

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LANDLORD & TENANT LAW

Wrongful Eviction Claim Raises Questions of Fact

Rahman v. Alim
2023 WL 2000734
AppDiv, Second Dept.
(memorandum opinion)

In an action by tenant against purported assignee for wrongful eviction, tenant appealed from Supreme Court's denial of his motion for summary judgment on the issue of liability. The Appellate Division affirmed, holding that questions of fact remained about the validity of the assignment.

Tenant and another individual leased the subject property for the purpose of operating a catering hall through Core Foods, and LLC. Another individual, purporting to act as attorney-in-fact for tenant, executed a lease assignment to assignee. Assignee then changed the locks and began operating their own catering hall on the premises. Tenant brought this wrongful eviction action against assignee. When Supreme Court denied tenant's summary judgment motion, tenant appealed.

In affirming, the Appellate Division first noted that tenant had not signed any document assigning the lease to the assignee, and that the individual who did sign the document had a power of attorney to act on behalf of Core Foods, not the individual tenant. The court also noted that landlord stated in an affidavit that landlord did not sign the lease assignment, suggesting that landlord's signature was forged. Because the lease required landlord's written consent to an assignment, the absence of landlord's signature was significant. The court nevertheless held that issues of fact precluded summary judgment because assignee contended that he relied on the apparent authority of the individual with power of attorney, and had paid overdue bills, including rent and utilities.

Comment

RPAPL §853 allows for the collection of treble damages from any "wrong-doer," not only a landlord, that forcefully or unlawfully removes a rightful occupant from possession. *Markun v. Weckstein,* 166 N.Y.S. 736, which long predates RPAPL 853, illustrates this general principle. In *Markun*, a co-lessee forcefully removed the other tenant from possession of their leased premises, and the Appellate Term held that the ousted co-lessee could bring a cause of action against the excluding co-lessee even though a landlord-tenant relationship did not exist between the parties. While the remedy sought in *Markun* was possession, *Rahman v. Alim* makes clear that a party unlawfully evicted may also seek damages against the wrongful evictor.

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Although both the Second and Third Departments have determined that under RPAPL §853 the award of treble damages is discretionary, both courts have held treble damages available unless the evictor has made a good faith effort to comply with the law. Thus, in *Lyke v. Anderson*, 147 A.D.2d 18, the Second Department, after indicating that treble damages are discretionary, affirmed an award of treble damages after the son of a trailer park owner unlawfully removed a mobile home and dumped it in a swamp. Similarly, the Second Department in *Clinkscale v. Sampson*, 48 A.D.3d 730, reversed a denial of treble damages against a landlord who had shut off tenant's utilities in February and ultimately subdivided tenant's former apartment. And, in *Bianchi v. Hood*, 128 A.D.2d 1007, the Third Department, after indicating that treble damages were discretionary, affirmed a treble damages award against a landlord who unlawfully removed the tenant's possessions from her leased room. By contrast, in *Sills v. Dellavalle*, 9 A.D.3d 561, the Third Department affirmed a denial of treble damages when it determined that, although the tenant had been wrongfully evicted, the landlord had not done so with malice and had a reasonable basis for eviction. The law required that the landlord give the month-to-month tenant thirty days' notice of eviction, but the landlord had been off by a day.

YELLOWSTONE INJUNCTION
CURE PERIOD

Prestige Eli & Grill Corp. v. PLG Bedford Holdings, LLC
2023 WL 3147242
AppDiv, Second Dept.
(memorandum opinion)

In commercial tenant's action for declaratory and injunctive relief, landlord appealed from Supreme Court's grant of a Yellowstone injunction. The Appellate Division reversed and denied the motion, holding that tenant's motion was untimely.

In May 2020, landlord served a notice to cure on tenant, alleging that tenant had breached the lease by failing to install grease traps and by failing to pay several months' rent. The cure period expired on June 1, 2020, and landlord then served a notice of termination. On June 15, tenant brought an action for declaratory and injunctive relief and moved for a Yellowstone injunction, which Supreme Court granted. Landlord appealed.

In reversing, the Appellate Division held that tenant does not qualify for a Yellowstone injunction unless tenant requested the relief before both the termination of the lease and the expiration of the cure period. In this case, the cure period expired on June 1, and tenant did not seek a Yellowstone injunction until June 15. Moreover, the court held that the governor's executive order issued during the pandemic did not toll the cure period because the cure period was set by contract.

COMMENT

The Second Department has held that when the lease's cure period has expired a court has no power to grant a Yellowstone injunction. In *Korova Milk Bar of White Plains, Inc. v. PRE Props., LLC*, 70 A.D.3d 646, 647, the court deemed a filing of a Yellowstone application untimely when a commercial tenant was served with a notice to cure for allegedly engaging in illegal conduct on the premises, but did not file for an injunction until after the cure period had expired. In holding that the court no longer had power to issue the injunction the court then cited and rejected its earlier holding in *Long Island Gynecological Servs., P.C. v. 1103 Stewart Ave. Assocs. Ltd.*, 224 A.D.2d 591, stating, "to the extent that any of our prior decisions may be construed as fixing a different or longer period of time in which an application for Yellowstone relief must be made, we expressly reject any such construction." In *Long Island Gynecological Servs., P.C.*, the court had held that a tenant who provided abortion services was entitled to a Yellowstone injunction after the lease's 30 day cure period had expired because the lease provided for an unspecified cure period if cure were not possible within 30 days and tenant had made diligent and good faith efforts within the cure period. Tenant had made efforts to install additional security in response to protests that interfered with building use by other occupants, but landlord protocols had made it impossible to install the security within the cure period.

Conversely, the First Department has expressly adopted the exception articulated in *Long Is. Gynecological Servs.* — a tenant may be entitled to a Yellowstone injunction after a cure period has lapsed when the defaults identified in a landlord's notice to cure cannot be remedied within the cure period, and the lease provides for an alternative unspecified cure period for such defaults. In *Vill. Ctr. for Care v. Sligo Realty & Serv. Corp.*, 95 A.D.3d 219, 221, the court granted a Yellowstone injunction that was filed after the "10 day" cure period ended; the cure period was subject to a lease provision which limited sending a notice of cancellation if tenant commenced with "reasonable diligence and […] good faith [efforts to] proceed to remedy or cure such default." Because tenant could not cure its alleged default without obtaining a building-wide hydrostatic test which landlord had not produced, the court held that tenant was entitled to a Yellowstone injunction even though tenant's application was filed after the cure period.

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