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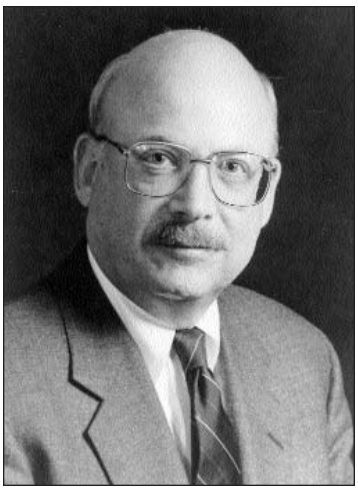
of the New York State Bar Association

In Memoriam—Sandy Liebschutz



Sandy Liebschutz

As a young attorney in the 1970s I recall participating in a relatively sophisticated transaction involving a property exchange, purchase of a business, and creative financing of a substantial industrial development project. My piece of the transaction was to handle the "real estate" aspects of the deal. Members of our Section will not be surprised to discover that my real responsibility was to observe and learn how a true professional conducts himself in handling and concluding a real world transaction. I was extremely fortunate to be observing Sandy Liebschutz. Even at 3:00 a.m., as the many contentious negotiations which were part of the closing that had started 18 hours earlier were finally resolved, Sandy took the time to review and explain to me what really had occurred.

Sandy, a past Chair of the Real Property Law Section, was universally acknowledged as one of the brightest and most creative real estate lawyers, not only in New York State, but nationwide. His dedication to advancing and improving the state of the law was unquestioned. He was an active participant in committees studying uniform laws. His tireless dedication to the adoption of New York's LLC statutes was exemplary. His presence at our Section Executive Committee meetings always meant that Sandy would make points or raise issues that would challenge and teach all his peers.

One often hears the complaint that there is not sufficient mentoring in the legal profession. When Sandy left us in December, our Section lost a man who exemplified the highest standard of mentoring both young attorneys and his colleagues.

As an active practicing attorney, Real Property Law Section Executive Committee member and a Fellow of the American College of Real Estate Lawyers, it would be easy to conclude that real estate law was Sandy's primary life focus. Nothing could be further from the truth. Sandy was a man who had enormous energy, a generous wit, and an insatiable appetite for all aspects of life. A devoted family man, Sandy was fiercely proud of his children, Jane, a physician, and

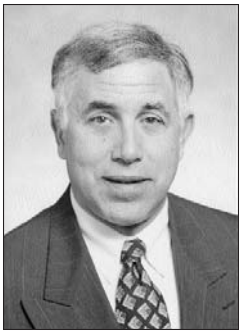
(continued on page 2)

Inside

In Memoriam—Sandy Liebschutz

(continued from page 1)

David, an attorney, as well as his granddaughters, Jennifer and Rebecca. He easily made friends. He and his wife Sarah loved to travel and learn about history and cultures. He was a local community leader in Rochester who devoted enormous time and effort to eleemosynary groups such as the United Way, the Jewish Community Center and the Rochester Area Community Foundation, which he chaired until his death.

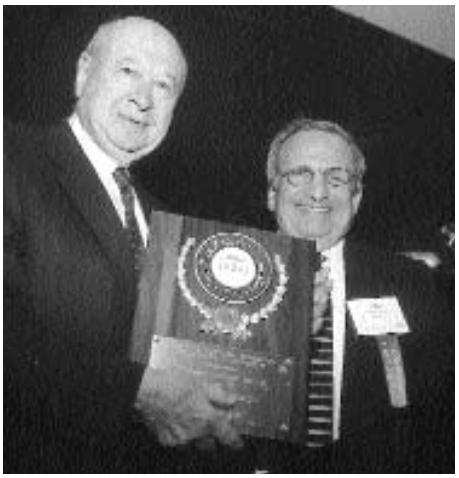


James Grossman

Not just a mentor to real estate lawyers, but a bigger than life model to emulate—Sandy Liebschutz will be missed.

James Grossman
Section Chair

State Bar Meeting Highlighted by Pedowitz Award Presentation



Calling him the "finest real estate lawyer of the 20th century in New York," Mel Mitzner, 1st Vice-Chair, presented his mentor James Pedowitz with the Section's first annual Professionalism Award during a luncheon capping off the January 25th Annual Meeting at the New York Marriott Marquis.

Mel continued by listing some of the numerous accomplishments of Jim Pedowitz, a practitioner of law for over 60 years. A prolific author, Jim served as Chief Counsel, among other positions, with Title Guaranty Company of New York and its successor, Pioneer Title, for over 40 years; is a Charter Member of the Board of Governors of the American College of Real Estate Lawyers, and a former Chair of this Section, as well as the Association of the Bar of the City of New York and the Nassau County Bar Association. Jim also was an Adjunct Professor of Law at New York University and Visiting Professor of Law at St. John's University.

In addition to the award, the State Bar Association will dedicate Jim Pedowitz's *Real Estate Titles* to Jim in perpetuity. Mel Mitzner closed by heralding Jim Pedowitz's reputation and devotion as "an example of how to practice the law with dignity, charity, responsibility and integrity."

While the luncheon served as the highlight of the day for many, a standing-room-only crowd of Section members was also treated to a wonderful morning program featuring outstanding presentations by Section members and guest speakers.

Joshua Stein outlined considerations to be taken into account when using letters of credit as security deposits on leases. Daniel McMahon, the State Bar's CLE Publications Director, led a guided tour through "HotDocs," an online automated document-assembly system co-sponsored by this Section and available at www.capsoft.com. John Hall gave a presentation roadmapping possible pitfalls associated with federal preemption of the real estate lending activities of Office of Thrift Supervision-regulated lenders.

Section member, and former Chair, John Blyth hosted a discussion with attorneys R. David Whitaker from Virginia, an expert on the new E-contracting federal legislation, and Norwood Gay III from Florida, a participant in the first fully electronic closing. Karl Holtzschue discussed the recent veto by Governor Pataki of the Property Condition Disclosure Act and presented modifications to the model residential contract for sale promulgated by this Section. Service of process in landlord-tenant cases was the topic of Honorable Peter M. Wendt, who gave practical advice on how to ensure successful notice. Michael Rikon and Lawrence Zimmerman finished the program with their hot tips on condemnation and tax certiorari.

The Annual Meeting was once again a great success. Thank you to all of those who participated and contributed their time and talents.

James Grossman
Section Chairman

New York City's Other Appellate Term Disagrees With *Paikoff* as to Who Is a "Non-Purchasing Tenant"

By Joel E. Miller

In the much-discussed *Paikoff v. Harris* case, the Appellate Term, Second Department, for the Second and Eleventh Judicial Districts adopted a rule that—for the time being, at least—gave Martin Act protection to a class of persons who had theretofore been thought not entitled thereto, namely persons who had rented so-called "unsold" cooperative or condominium apartments from offering-plan sponsors long after the consummation of the conversion of the building from rental status to unit ownership.[1] In an article in a previous issue of this *Journal*, this writer discussed the *Paikoff* case at some length, including an extensive review of the evolution of the statutory provisions at issue, and concluded that, because "its ruling on the status of the Harrises as 'non-purchasing tenants' would seem to be more legislative than judicial, . . . one must be cognizant of the possibility that other courts may not reach the same result."[2]

That has come to pass. The Appellate Term, First Department has now gone the other way.[3] The following paragraphs discuss the issue on which the two appellate courts adopted divergent views, beginning with a look at the relevant portions of the controlling statute.

The Martin Act

The General Business Law contains an article 23-A—which consists of §§ 352 through 359-h and is commonly known as "the Martin Act"—that regulates the sale of "stocks, bonds and other securities." GBL § 352-eeee governs cooperative and condominium conversions in New York City.[4] It provides one form of protection for one broad class of people—i.e., "purchasers under the plan"—and that and certain other forms of protection for another broad class of people—i.e., "non-purchasing tenants."[5] Both of those terms—"purchaser under the plan" and "non-purchasing tenant"—are defined in the statute.

The Definition of "Purchaser under the Plan"

Notwithstanding that the focus of this article is on who qualifies as a "non-purchasing tenant" as that term is used in the statute, it is appropriate to look first at the statute's rather simple definition of "purchaser under the plan," which is as follows: "A person who owns the shares allocated to a dwelling unit or who owns such dwelling unit itself."[6]

In shorter words, *every unit-owner* is a "purchaser under the plan." That definition, albeit uncluttered, is of course highly artificial; there are lots of unit-owners who did not *purchase* at all, and many purchasers of units did not do so *under the plan*. But, however much we may wish that the Legislature had used better words, there can be no genuine doubt about what it meant.[7] For purposes of this article, it will be assumed that it has been established that "unit-owner" may be substituted for "purchaser under the plan" wherever that phrase appears in the statute.

The Definition of "Non-Purchasing Tenant"

The statute's definition of "non-purchasing tenant," which is considerably more complex than its "purchaser under the plan" definition, contains two sentences—one inclusionary in nature (hereinafter referred to as "the Including Sentence") and the other exclusionary in nature (hereinafter referred to as "the Excluding Sentence")—and how those two sentences were intended to interact with one another has become a matter of dispute. We shall look first at the Excluding Sentence and then at the Including Sentence.

The Excluding Sentence

To state the obvious, the Excluding Sentence obviously was intended to prevent some people from being "non-purchasing tenants" (notwithstanding that, as discussed below, there may be issues as to whether or not an excluded person would otherwise have qualified as such).

The Excluding Sentence reads as follows: "A person who sublets a dwelling unit from a purchaser under the plan shall not be deemed a non-purchasing tenant."

We may begin our consideration of this sentence by noting that it contains an obvious slip. Although the statute uses the single word "sublets," it must mean "sublets (in the case of a cooperative) or lets (in the case of a condominium)," inasmuch as it is impossible to believe that the exclusion was not intended to be equally applicable in condominium situations. Moreover, the slip is one that is made more often than not by practitioners in the field, who tend to think in terms of cooperatives, with a more-or-less accurate tack-on of condominium terminology when they are reminded (which also explains why they are not uncomfortable about thinking, inaccurately, about a condominium converter as *acquiring* units rather than simply retaining them when the condominium declaration is recorded). Another reason that the word "sublets" can-

not be taken literally is that, when a proprietary lessee installs his own tenant, that person does not *sub*let from him (as opposed to *letting* from him); rather, the proprietary lessee's tenant is a subtenant of the cooperative corporation. The Legislature could hardly have been intending to exclude only actual subtenants of unit-owners (i.e., sub-subtenants of the cooperative corporation). All things considered, it seems clear enough that the Legislature used the word "sublets," not in a technical sense but merely in order to make it clear that it had in mind persons who obtained their possessory rights from the owners of *units* rather than from the owners of *buildings*.[8] For purposes of this article, we shall assume that it has been established that "sublets" in the Excluding Sentence means "rents."[9]

If, in accordance with the foregoing discussion, we now substitute the word "rents" for "sublets" and we substitute the word "unit-owner" for "purchaser under the plan," we have an Excluding Sentence that reads as follows: "A person who rents a dwelling unit from a unit-owner shall not be deemed a non-purchasing tenant." That, in and of itself, would answer many of the questions that arise, whatever the content of the Including Sentence, to which we now turn.

The Including Sentence

The Including Sentence reads as follows: "'Non-purchasing tenant' [means] [a] person who has not purchased under the plan and who is a tenant entitled to possession at the time the plan is declared effective or a person to whom a dwelling unit is rented subsequent to the effective date."

It cannot be doubted that two classes of person are referred to, and, for reasons that have been discussed elsewhere,[10] the only sensible construction is that those classes are the following (emphasis and bracketed letters added):

> 1. A person [A] who has not purchased under the plan *and* [B] who is a tenant entitled to possession at the time the plan is declared effective.
>
> 2. A person [A] who has not purchased under the plan *and* [B] who is . . . a person to whom a dwelling unit is rented subsequent to the effective date.

If the above is correct, no person can be within either class unless he is someone "who has not purchased under the plan." It seems clear that the Legislature had something in mind when it included that requirement, notwithstanding that there may be differences of opinion as to just what that was. That is one of the issues discussed below.

Five Hypothetical Cases

The following discussion is in the form of consideration of five hypothetical cases, in each of which the essential background facts are these:

> Two people, one as landlord and the other as tenant, signed a two-year market-rate lease of an apartment in New York City. The tenant was, and is, protected by neither rent control nor rent stabilization. The lease expired and the tenant, stating his willingness to agree to pay a rent that was at the then-current market, refused to surrender possession to the landlord. The landlord has brought an eviction proceeding based on the expiration of the lease, and the tenant is resisting on the ground stated below.

In all but the first case, the tenant shows some additional facts that he claims entitle him to retain possession of the apartment. Each case is presented in the form of an imaginary dialogue between the landlord and the tenant, followed by a prediction of what would likely be the outcome in the trial court.

Hypo 1

Here there are no additional facts.

> Tenant One: No tenant who is willing to pay a full market rent may be removed without cause.
>
> Landlord One: That is not the law. Absent a special rule, a landlord is entitled to recover possession of his property at the end of the period during which he agreed that someone else could use it. That is one of the attributes of the private ownership of property.

Landlord One would win.

Hypo 2

The additional facts are these: (i) the apartment is a cooperative apartment, (ii) it is located in a building that was converted from rental status to cooperative ownership under a so-called "non-eviction" offering plan, (iii) the tenant of the apartment at the time of the conversion purchased the shares allocated thereto and entered into a proprietary lease thereof with the cooperative corporation, and (iv) that tenant-shareholder then sold the shares and associated leasehold to another person, who thereafter gave them to Landlord Two.

> Tenant Two: I am protected by GBL § 352-eeee(2)(a)(ii), which says that, in the case of a "non-eviction" plan, "No eviction proceedings [may] be commenced at any time against non-purchasing tenants for failure to purchase or any other reason applicable to expiration of

tenancy."[11] I am a tenant and I did not purchase the apartment.

Landlord Two: I agree that you would be protected if you were a "non-purchasing tenant" as that term is used in GBL § 352-eeee. But you are not. You never had anything to do with the offering plan.

Tenant Two: But the term "non-purchasing tenant" is defined in the statute, and two classes of tenants are covered. I admit that I am not in the first class—because I was not entitled to possession of the apartment on the day the offering plan was declared effective—but I am within the second class. All that is required is that I be "a person to whom a dwelling unit is rented subsequent to the effective date," and I am such a person.

Landlord Two: You are omitting part of the language defining the second class. The beginning portion of the sentence applies to both classes, so that you must also be "A person who has not purchased under the plan." And the Legislature used those words—which were used in contradistinction to "purchaser under the plan," so that every then tenant of the building was in one class or the other—to refer to a person who was present before the plan was consummated but, for one reason or another, did not purchase the unit. There is extensive legislative history, and all of it shows that the Legislature was concerned with people who were present at the time that the conversion process was going on, not with people who arrived on the scene after the conversion was over.

Tenant Two: But your construction would read the second class out of the statute, inasmuch as every person present before an offering plan is consummated would be covered by the words "a tenant entitled to possession at the time the plan is declared effective."

Landlord Two: That is incorrect; there can be a significant period of time between the date that an offering plan is declared effective and the date when the conversion is actually consummated (i.e., the date on which a cooperative corporation receives a deed and issues shares and enters into proprietary leases), and it is only people who became tenants during that period that the Legislature meant the final portion of the Including Sentence to protect. But, even if considering the Including Sentence in isolation were to leave some doubt, it would be dispelled by the Excluding Sentence, which says that "A person who sublets a dwelling unit from a purchaser under the plan shall not be deemed a non-purchasing tenant."

Tenant Two: But you did not purchase the apartment at all, much less purchase it under the plan. You got it as a gift from someone else, and, even though that person might have purchased the apartment, he did not do so under the plan.

Landlord Two: Even though the statute does not say so in so many words, the only sensible interpretation in this context would be that the term includes any person who derived his ownership from a "purchaser under the plan" as you would construe it. Otherwise, a person who sublet from a remote owner would have greater rights than if he had sublet from the first owner. The Legislature could not have intended that. In any event, the Legislature did address the issue; GBL § 352-eeee(1)(d) defines "purchaser under the plan" as including "A person who owns the shares allocated to a dwelling unit." However I got them, there is no doubt that I own the shares allocated to the apartment.

Landlord Two would win. Whether or not Tenant Two is included in the Including Sentence, the Excluding Sentence, taking into account the definition of "purchaser under the plan," keeps him from being a "non-purchasing tenant."

Hypo 3

The facts are the same as in Hypo 2 except that the apartment is a condominium unit.

Tenant Three: For the same reasons as advanced by Tenant Two, I am within the Including Sentence. In addition, I am not within the Excluding Sentence, which applies only to "A person who *sublets* a dwelling unit." I am a direct tenant of the unit-owner. I am not a *sub*-tenant of anyone.

Landlord Three: While you may be literally correct in the abstract, it is impossible to believe that the Legislature intended the result that you are urging. People in the coop/condo field frequently—albeit inaccurately—refer to tenants of condominium units as subtenants,

and it is obvious that that is what the Legislature was doing. Any other rule would result in a major—and obviously unintended—disparity between the rights of tenants of unit-owners according to the technical form of ownership of the building.

Landlord Three would win.

Hypo 4

The facts are the same as in Hypo 2 except that Landlord Four was the sponsor of the cooperative conversion plan and pursuant thereto received from the cooperative corporation the shares allocated to the apartment in exchange for cash transferred to the cooperative corporation.

Tenant Four: For the same reasons as advanced by Tenant Two, I am within the Including Sentence. In addition, I am not within the Excluding Sentence, which applies only to "A person who sublets a dwelling unit from a purchaser under the plan." My renting was from you, and you are not a "purchaser under the plan."

Landlord Four: Why not?

Tenant Four: For one reason, you were the sponsor, and a sponsor never gives consideration for the shares that he gets under the plan,[12] so you are not a purchaser at all. I know that at the closing you paid cash to the cooperative corporation for the shares, but that payment was meaningless, inasmuch as that cash came right back to you at the same closing as part of the purchase price that the cooperative corporation paid to you for the building.[13]

Landlord Four: But, if you look at it that way, then I gave part of my building for the shares, so that, either way, I gave consideration.

Tenant Four: Even if it be assumed that you gave consideration for the shares, you still did not "purchase" them within the meaning of the statute. Everyone knows that the shares that a sponsor owns are "unsold" shares, so that, inasmuch as they were never *sold*, you could not have *purchased* them.

Landlord Four: But I did. The term "unsold shares"—which does not appear in the statute—is only a misleading shorthand label. It really means, not that the shares were never sold by the cooperative corporation to *anyone*, but only that they were never sold to a person who is permitted to re-sell them without reference to the offering plan.

Tenant Four: But that would mean that no person who ever sublet an existing cooperative apartment from anyone would ever be a "non-purchasing tenant."

Landlord Four: That is correct. That is exactly what the statute says, and that is exactly what the Legislature intended. Whether or not one believes that the Legislature should have gone further, it is plain that the Legislature chose not to extend the "non-purchasing tenant" protections to people who had not appeared on the scene until after the conversion process was over (which is, of course, the only time that a person could sublet from a tenant-shareholder). The only people that the Legislature intended to cover were those to whom an apartment was "rented"—not "sublet"—by the building owner qua building owner (as opposed to a subletting qua proprietary lessee by the person who used to own the building but who ceased to own it upon the consummation of the conversion).

Whether Landlord Four would win might depend on which borough the building is located in. If the building is in Brooklyn, Queens or Richmond, Tenant Four might win. That is because of the opinion issued by the Appellate Term, Second Department, for the Second and Eleventh Judicial Districts in *Paikoff v, Harris*,[14] in which the court included a clear declaration (unnecessary to the decision, it may be noted) that a person in the position of Tenant Four *is* a "non-purchasing tenant" under GBL § 352-eeee.

How the *Paikoff* Appellate Term arrived at that conclusion is worthy of note. The court began, unobjectionably enough, by pointing out that, where a statute is susceptible of more than one non-absurd interpretation, "a proper construction . . . must be based upon an understanding of the protection that the Legislature intended to provide."[15] It then proceeded to explain as follows the economic tension underlying what it perceived to be "the mischief sought to be remedied":[16]

It is apparent that the protections afforded nonpurchasing tenants were necessitated by the change in the owner's economic incentives as a result of the conversion. In the case of a rental building, it is to the owner's economic benefit to retain a non-objectionable tenant who is paying a market rent. In

> that situation, the owner's interest coincides with the tenant's interest in not being dislocated and with the public interest in stable and undisrupted tenancies. However, after a conversion, the apartment may be more valuable to the owner empty than occupied by a tenant, even one paying a market rent. In that case, it is in the owner's economic interest to evict the tenant, and the interest of the owner diverges from those of the tenant and the public. It is, in our view, against this financial incentive to displace the non-purchasing tenant that the Legislature sought to protect.[17]

The quoted language, it should be noted, would apply to *any* owner of a rented-out unit in a converted building. The question then becomes whether the Legislature intended to protect the entire class of *all* non-owner tenants of such apartments or only some subclass. An examination of the operative provisions' wording and the history of their development, as well as what the Legislature itself had to say on the subject, would seem to leave no doubt; all make it clear that (rightly or wrongly as a policy matter) the Legislature was trying to protect only those tenants who became such before the conversion occurred.[18] And that is not unreasonable; it cannot be doubted that it makes at least some sense to differentiate between, on the one hand, a person who becomes a tenant of a person who owns an entire building and, on the other hand, a person who becomes a tenant of a person who owns an individual apartment (which, for this purpose, may be regarded as the equivalent of a one-family house).

But the *Paikoff* Appellate Term did not see it that way. Rather than giving effect to what the Legislature *actually* intended, it chose instead to give effect to what it believed the Legislature *should have* intended. The court explained as follows its decision to broaden the protected class as set forth in the statute:

> [T]here can be no valid distinction between tenants in possession at the time of the conversion and those who rent from sponsors[19] after the conversion. . . . If it was the Legislature's intention to protect tenants from dislocations caused by this shift in the economic interest [i.e., the change that occurs whenever a unit-owner who rented out his unit for a period of time decides that it would be to his financial advantage to sell the unit at the end of that period rather than continuing to rent it out], it could only address the problem thoroughly by protecting tenants that rent from sponsors[20] after the conversion as well as those in possession at the time of the conversion.[21]

Having arrived at its decision of what the statute *ought to* do, the *Paikoff* Appellate Term then had to deal with the statute's words. It began by reading the second class covered by the Including Sentence as including every person to whom an apartment was rented after the date the offering plan was declared effective, without regard to whether or not that person was "[a] person who ha[d] not purchased under the plan." As stated above, that reading seems incorrect.[22] Even so, the *Paikoff* Appellate Term still had to deal with the Excluding Sentence. At first, it seemed that the court was going to do that by holding that that sentence did not apply to sponsors,[23] but the court did not do that.[24] Rather, instead of trying to reconcile the conflict that it had caused by reading in isolation only a certain portion of the Including Sentence, it simply discarded the Excluding Sentence, based on its view of what the statute should accomplish.[25]

But that created another issue. With neither (i) the "person who had not purchased under the plan" language of the Including Sentence nor (ii) the Excluding Sentence, the statute would literally give "non-purchasing tenant" protections to every person who ever rented a unit in a converted building, regardless of from whom he rented it. But, as it had repeatedly made clear, the *Paikoff* Appellate Term wanted, for whatever reason, to protect only persons who rented from sponsors (or, possibly, sponsor-like persons). Accordingly, it simply—again without explanation—replaced with its own rule the portions of the statute that it had discarded, its rule being that "non-purchasing tenant" status did not extend to "persons who rent from bona fide purchasers for occupancy."[26]

Accordingly, if the Hypo 4 building is located in Kings County, Queens County or Richmond County, Tenant Four will probably win.

On the other hand, if the building is located in Manhattan or the Bronx, Landlord Four will win. In the recently decided *Park West* case, the Appellate Term, First Department, which covers New York County and Bronx County, issued a ruling that holds exactly the opposite of the *Paikoff* ruling on the "non-purchasing tenant" point.[27] Here again, the reasoning is interesting. The *Park West* Appellate Term, like the *Paikoff* Appellate Term, gave no effect to the Excluding Sentence. In fact, the *Park West* Appellate Term, after quoting the entire two-sentence definition of "purchaser under the plan," never again mentioned the Excluding Sentence. Rather, it rested its decision on the Including Sentence alone,[28] which it construed in the light of

what it understood to be "the harm sought to be avoided by the Legislature, [namely] the imminent eviction of tenants in possession during the conversion process." Based on its belief that "the overarching purpose of General Business Law § 352-eeee [is] to protect tenancies extant during the cooperative or condominium conversion process," it ruled as follows:

> [T]he statutory language conferring nonpurchasing tenant status on persons "to whom a dwelling unit is rented subsequent to the effective date" reasonably can be read to include only persons who lease a covered unit between the effective date of the offering plan and the closing date of the ownership conversion.[29]

Hypo 5

The facts are the same as in Hypo 4 except that the apartment is a condominium unit.

> Tenant Five: In addition to all the arguments made by Tenant Four, I have an additional argument. When Landlord Five recorded the condominium declaration, he did not buy anything. He already owned the building, and the condominium conversion merely changed his form of ownership. He therefore could not be a "purchaser under the plan."
>
> Landlord Five: Even though the popular concept is (and the Legislature's probably was) that a condominium converter exchanges his building for a number of condominium units,[30] so that he would be thought of as acquiring each unit for consideration (and would therefore be a purchaser under the plan), you would be correct as a technical matter, but for the fact that the statute defines "purchaser under the plan," and the definition covers every "person . . . who owns such dwelling unit itself" (the "itself" being included to point up the distinction from a cooperative apartment, where the owner owns, not the unit itself, but the shares allocated thereto).

It is a virtual certainty that the result would be the same as in Hypo 4. Aside from the weakness of the did-not-purchase point itself, the unit involved in the *Park West* case happens to have been a condominium unit.

Conclusion

At the moment, we have two diametrically opposed interpretations of the same statute—one binding on the New York City Civil Court judges sitting in three of the City's five counties and one binding on the New York City Civil Court judges sitting in the City's other two counties. That situation, while undoubtedly survivable, can hardly be regarded as desirable. It is to be hoped that it will be rectified soon, and preferably in accordance with the expressed will of the Legislature.

Endnotes

1. 713 N.Y.S.2d 109 (App. T. 2d Dep't 1999).
2. *See* Miller, *Did the Appellate Term in* Paikoff *Come to the Right Conclusion as to Who Is a "Non-Purchasing Tenant"?*, 28 N.Y. Real Prop. L.J. 44, 54 (2000). The article also briefly describes the cooperative conversion process. *Id*. at 45.
3. *Park West Village Assoc. v. Nishoika*, 721 N.Y.S.2d 459 (App. T. 1st Dep't 2000), *leave for appeal granted*.
4. GBL § 352-eee provides similar rules for electing communities in Nassau, Westchester and Rockland Counties. Although "triple-e" and "quad-e" are different in important respects, they do contain identical definitions of "purchaser under the plan" (subsection 1(d) in each) and "non-purchasing tenant" (subsection 1(e) in each). Hence, the within discussion—which is limited to quad-e—will have relevance if similar issues should arise under triple-e.
5. Under GBL § 352-eeee(2)(c)(vi), a non-eviction offering plan must provide (emphasis added) that "The rights granted under the plan to *purchasers under the plan* and to *non-purchasing tenants* may not be abrogated or reduced notwithstanding any expiration of, or amendment to, this section." For an example of a form of protection afforded only to "non-purchasing tenants," see GBL § 352-eeee(2)(c)(iii), which requires such a plan to provide that, if their apartments were subject to rent regulation before the conversion of the building to cooperative or condominium ownership, they shall continue to be subject thereto.
6. GBL § 352-eeee(1)(d). Significantly, an older version of a parallel provision referred to the person who owned "the shares allocated to *only one* dwelling unit" instead of to a person who owned "the shares allocated to *a* dwelling unit" (former § 352-ee(1)(d), as added by Chapter 544 of the Laws of 1978), but the restrictive words were not included when the present § 352-eeee(1)(d) was enacted. No explanation was given for the change, but it was obviously meant to bring multi-unit owners within the definition, and, inasmuch as the Legislature was thinking about the point and made no exception, that would seem clearly to include the usual class of multi-unit owners, namely sponsors.
7. It seems likely that the Legislature, having first set forth a rule that was in fact appropriate only for people who actually had bought with reference to the offering plan, later added a second rule that also used the same term—"purchaser under the plan"—and then, when it realized that the additional rule should be more widely applied, infelicitously chose to insert the present broad (and counterintuitive) definition rather than rewriting the new rule in more appropriate language.
8. See the final portion of the language quoted in note 29 *infra*.
9. For the sake of completeness, it may be pointed out that in this context it is impossible to understand either "sublets from" or "rents from" as being used in the sense of "is a tenant of." Rather, what must be being referred to is the entry into a landlord-tenant relationship. Adopting an is-a-tenant-of interpretation would deprive of protection the very persons that the Legislature was seeking to protect, namely every tenant of the sponsor as building-owner who by virtue of the conversion became a tenant of the sponsor as unit-owner.
10. *See* Miller, *Did the Appellate Term in* Paikoff *Come to the Right Conclusion as to Who Is a "Non-Purchasing Tenant"?* note 2 *supra*, at 49.

11. Technically, the statute does not quite say that. Rather, the statute says that the Department of Law should not accept a "non-eviction" plan unless it so provides. The courts have not, however, made the distinction.

12. There is some support for this contention. In *Pembroke Square Assoc. v. Coppola*, N.Y.L.J. May 5, 1999, p. 32, col. 6 (Civ. Ct., Queens County, Apr. 19, 1999), Judge Ellis S. Franke wrote a fine opinion that contained an excellent analysis and reached the right conclusion. However, in an incidental remark, she did state (emphasis added) that, were it not for the fact that the statute defines the term "purchaser under the plan," she "would wholeheartedly concur with Judge Finkelstein's holding that a Sponsor, i.e., the 'holder of unsold shares', *who paid no money or other good and valuable consideration to acquire the shares*, would not meet the definition of 'purchaser' as the term is commonly used." However, Judge Franke's assumption is factually wrong; to whomever they are issued (whether to the sponsor or to someone else), shares are always issued by the cooperative corporation in exchange for money or other good and valuable consideration (often an undivided interest in the realty being conveyed to the cooperative corporation).

13. In many instances, the sponsor does not pay in (and receive back) cash; rather, he pays for his shares with an undivided interest in the building. So far as this writer is aware, no one contends that it makes a difference for this purpose which procedure was followed.

14. *See* note 1 *supra*.

15. 713 N.Y.S.2d at 112.

16. *Id.*

17. 713 N.Y.S.2d at 113.

18. *See* Miller, *Did the Appellate Term in* Paikoff *Come to the Right Conclusion as to Who Is a "Non-Purchasing Tenant"?* note 2 *supra*, at 45-53.

19. Notwithstanding that the court's prior discussion would apply to every unit-owner who decided that it was in his economic interest to sell the apartment rather than to continue to rent it out, the court did not attempt to explain why it saw an evil only if the renting-out person was a sponsor as opposed to any other unit-owner.

20. 713 N.Y.S.2d at 13.

21. 713 N.Y.S.2d at 112-13.

22. See page 7 *supra*.

23. The court had stated—without any explanation—that the statute's definition of "purchaser under the plan" (which, the reader will recall, included every "person who owns the shares allocated to a dwelling unit") was only "arguably broad enough to include a sponsor."

24. That is what the lower court had done. In his decision, Judge Marc Finkelstein had disregarded the statute's definition of "purchaser under the plan" and then construed the phrase in accordance with what he understood to be the "commonly understood definition" of those words, relying on an assertion by an Assistant Attorney General (who also failed to considered the statutory definition) that "a sponsor would not be a 'purchaser under the plan'" because "shares still held by a sponsor are, by definition, 'unsold' shares." *Paikoff v. Harris*, 178 Misc. 2d 366, 374-75, 679 N.Y.S.2d 251, 256-57 (Civ. Ct., Kings Co. 1998), *modified*, 713 N.Y.S.2d 109 (App. T. 2d Dep't 1999).

25. It is submitted that, even accepting *arguendo* the asserted literal conflict, it would then be apparent that the Excluding Sentence should be understood as though it had been joined to the Including Sentence by the words "except that." Consider a lease that (i) says that only "household pets" are permissible, (ii) contains a sentence defining "household pet" as "a dog or a cat," and (iii) also says in a separate sentence that any animal weighing more than 100 pounds shall not be deemed a household pet. Despite the period after the "household pet" definition, would anyone believe that the drafter intended a 150-pound dog to be permissible?

26. 713 N.Y.S.2d at 112. In a case that involved several tenants and a landlord that had purchased multiple apartments from the sponsor and undoubtedly held "unsold" units, Judge Anthony J. Fiorella, Jr., held that the tenants were not "non-purchasing tenants," distinguishing the *Paikoff* Appellate Term ruling on the ground that that court had "clearly indicated that the requirement to offer renewal leases [which was the "non-purchasing tenant" protection there at issue] applies to persons who 'rent from sponsors.'" *Parkchester Preservation Co. v. Hanks*, 714 N.Y.S.2d 399, 402 (Civ. Ct., Bronx Co. 2000).

27. *Park West Village Assoc. v. Nishoika*, 721 N.Y.S.2d 459, 461 (App. T. 1st Dep't 2000), *leave for appeal granted.*

28. In the lower court, Judge Bruce M. Kramer had referred to the statute's definition of "purchaser under the plan" and then concluded: "The respondent [tenant], having sublet the unit from a purchaser under the plan is therefore not a 'nonpurchasing tenant' entitled to protection pursuant to GBL section 352-eeee(1)(e)."*Park West Village Assoc. v. Nishoika*, 721 N.Y.S.2d 459 (App. T. 1st Dep't 2000), *leave for appeal granted.*

29. Compare the following language in Judge Franke's opinion in the *Pembroke Square* case, *supra*:

> Given the Martin Act's definition of a "purchaser under the plan" as owner of the shares to the dwelling unit, the only way to construe the phrase "subsequent to the effective date" found in sec. 352.eeee 1(e) is to limit the scope of that language solely to those tenants who rented their apartments after the effective date but before the actual conversion. Such interpretation renders the language of 1.(e) consistent and harmonious with 1.(d). Moreover, this reading is, in this Court's opinion[,] a more logical interpretation of the statutory intent since a person renting prior to conversion is not subletting from an owner of the shares to the apartment but is renting as a prime tenant from the owner of the building.

30. See discussion at page 3 *supra*.

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The Right of Self-Help in the Residential Landlord-Tenant Context

By Mary H. Curtis

Introduction

A tenant's right of self-help is the right of a tenant to remedy, or to take steps to remedy, a landlord's breach and then seek reimbursement from the landlord.[1] A landlord's right of self-help is similar to that of a tenant's; however, the landlord's right of self-help may also include the right to eject the tenant from the premises, to lock out the tenant, or to cut off the tenant's utilities.[2]

This article will attempt to analyze the tenant's and the landlord's right to self-help in a residential lease. It appears that the current trend in landlord-tenant relations is to be more permissive in the case of the tenant's self-help and less permissive, to the point of a near prohibition, of a landlord's right to self-help.

I. A Tenant's Right to Self-Help in the Context of a Residential Lease

In a residential lease there is an implied covenant of habitability from which a tenant's right of self-help arises.[3] The result of this right is that, if a landlord fails to repair and replace essential facilities, the tenant may make the repairs and deduct the cost of such repairs from future rents[4] or use such amounts paid as a counterclaim against the landlord in a suit to collect rent.[5] An example of self-help used as a counterclaim is when a landlord sues under forcible entry and detainer statutes and the tenant asserts an affirmative defense of rent abatement because of permissible tenant self-help actions.[6] Another example of when a tenant may use the right of self-help as a counterclaim is when a landlord brings a summary proceeding against a tenant for failure to pay rent.

A. Why Elect to Exercise Self-Help?

Richard M. Frome, *Tenant Remedies: An Oxymoron*, analyzes the benefits and downsides of the various tenants' remedies. Self-help may be a better remedy than a damage suit because of the costs and delays that formal court proceedings present. Self-help is also oftentimes superior to a constructive eviction or to a lease termination because a landlord's breach may not be substantial enough either to warrant or to make a complete abandonment of the property desirable. Further, constructive eviction or lease termination requires that the tenant find another premises and possibly execute a new lease. If subsequently a court finds that the tenant was not justified in abandoning the premises, then the tenant may be left with two leases. However, a tenant should be careful before resorting to self-help and should make sure that he or she has the financial resources to remedy a landlord's default. If the landlord does not contest the tenant offsetting the amounts spent on self-help, then self-help is an easy and quick remedy. If, however, the landlord does contest the offsets, then the tenant must prove the costs, demonstrate the necessity of the repairs, and bear the costs until after the matter has been settled.[7]

B. When May a Tenant Exercise the Right of Self-Help?

For a tenant to exercise the right of self-help, first, there must be a failure by the landlord to repair or replace something that substantially affects the habitability of the premises.[8] Second, the tenant must provide the landlord with reasonable notification and allow the landlord a reasonable amount of time to repair the problem. Finally, if the problem persists, the tenant may make the necessary repairs and deduct the costs from his or her rent obligation.

1. Conditions that Fall Within the Scope of Habitability

For a tenant to exercise the right of self-help there must be a failure of the landlord to repair or replace something that materially affects the habitability of the premises.[9] A landlord is expected to provide things such as adequate heat, plumbing and other services that "constitute the essence of the modern dwelling unit."[10] A violation of a housing code or sanitary regulation is not an exclusive determinant of whether there has been a breach of habitability.[11] "If, in the eyes of a reasonable person, defects in the dwelling deprive the tenant of those essential functions which a residence is expected to provide, a breach of the implied warrant of habitability has occurred."[12]

Examples of when a tenant was justified in exercising the right of self-help include:

- 18 hours of an inoperable door lock.[13]
- A toilet that leaked water onto the bathroom floor.[14]
- Strong cat-urine odor.[15]
- Existence of roaches and rats where a portion of bathroom wall was wet, causing conditions which were breeding ground for roaches and vermin.[16]

Examples of when a tenant was not justified in exercising the right of self-help include:

- Noise and dust resulting from the demolition of a nearby

building, while an annoyance and inconvenience, it was not a breach of habitability.[17]

- Exposed wiring in the hallways during periods of wallpapering and repairs, garbage in the basement, and worn hallway carpets did not breach the warranty of habitability, even though the building contained luxury apartments and the rents were high.[18]
- The warranty of habitability does not include a duty to maintain fire detection equipment such as smoke alarms.[19]

2. Reasonable Notice and Reasonable Time to Repair

Reasonable notice and reasonable time to repair are required in order for a tenant to recover self-help costs.[20] What constitutes reasonable time and reasonable notice depends on the circumstances.[21]

- Defective door locks created an emergency situation and therefore 18 hours without was reasonable time.[22]
- One month was reasonable time in a case where the screens and storm windows were either broken or missing, a number of windows were boarded up, several radiators were missing, there were holes in the floors and walls, plaster was chipping, the sewers were clogged in the basement, and the place was infested with roaches and rodents.[23]
- For a leaky toilet reasonable time was considered to be three days after written notice.[24]

3. Receipt of Notice by Landlord

Receipt of notice by the landlord will begin the tolling of the notice period. If the landlord does not receive notice, then the tenant is not justified in resorting to self-help. While actual notice will satisfy the reasonable notice requirement,[25] circumstances will determine what reasonable notice entails when the notification is short of actual notice. "If the tenant is unable to give such notice after a reasonable attempt, he may nonetheless proceed to repair or replace."[26] What constitutes reasonable notice is a question for the trier of fact, and the burden of proof is on the party establishing that reasonable notice was given.[27]

With all of these ambiguities, one thing is clear: even if the landlord breaches the implied warranty of habitability, if the tenant fails to notify the landlord and to give the landlord time to correct the defect, it will be improper for the tenant to resort to self-help and the tenant will be unable to recover any costs expended.[28]

4. What May a Tenant Charge the Landlord?

Self-help does not mean that a tenant must to perform the work himself;[29] a tenant may hire someone to perform the work for him.[30] The damages that a tenant may recover are only the reasonable and actual costs incurred by a tenant.[31] The tenant may either deduct the charges from his rent obligations or may present the charges by way of a counterclaim in an action for rent.[32] Further, the tenant may perform the repairs. In this case the tenant is able to deduct the reasonable cost of materials and then may multiply the minimum wage of unskilled labor at the time the repairs were made by the reasonable amount of time for the performance of the repairs.[33]

5. Practical Limitations

Self-help may not be a practical remedy for a tenant in several situations. Central air conditioning or heating units in a multi-dweller building would render a tenant's self-help improper.[34] For example, if the heating of a large apartment complex breaks, it would be impractical for a single tenant to repair or replace the entire unit. "Issues of access, insurance and contractor errors should make almost any repairs outside the demised premises off limits for self-help."[35]

II. A Landlord's Right to Self-Help

A landlord's right to self-help usually arises in the context of a landlord's attempting to force the tenant out of the premises. A landlord's use of self-help may take the form of ejecting a tenant from the premises, locking the tenant out of the residence, or to cutting off the utilities servicing the particular premises. However, the landlord's right of self-help has been eroded to the point of near prohibition.

A. The Erosion of a Landlord's Right of Self-Help

A majority of jurisdictions have abolished a landlord's use of self-help to evict a tenant.[36] In these jurisdictions a landlord may only evict a tenant by pursuing judicial remedies such as summary proceedings.[37] Furthermore, in many jurisdictions, a landlord will be liable for damages if he resorts to self-help.[38] For example, in *Shaw v. Casser*, a landlord used self-help against tenants in violation of Michigan's Anti-lockout law,[39] so the court awarded punitive damages and actual damages for emotional stress, embarrassment and humiliation.[40]

A landlord's right of self-help in many jurisdictions has been diminished and, therefore, many states have statutorily created judicial summary proceedings to expedite landlords' claims.[41] This affords landlords quick and lawful means to resolve disputes with tenants. It is evident that the growing trend in judicial and legislative decisions is to make such legal proceedings a landlord's exclusive remedy.[42]

B. Constitutional Issues

States that authorize a landlord's right of self-help risk having tenants who were inflicted with such actions

bring a constitutional claim against the state on the bases of a violation of due process and state action.[43] While such an action against the state may be impractical for a sole tenant, it becomes more feasible for tenants who join a class action. In *Anderson v. Denn*, the court warned that a landlord's exercise of self-help may result in a violation of a tenant's due process rights.[44] In *Lugar v. Edmondson Oil Co. Inc.*,[45] the Supreme Court held that "[w]hile private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action." Some courts have held that a statute authorizing a landlord's right of self-help encourages self-help and delegates authority to landlords that is a traditional sovereign function of the state and, therefore, any statutorily authorized exercise of self-help constitutes state action.[46]

However, while any statute allowing a landlord the right of self-help may be constitutionally invalid,[47] a landlord utilizing self-help without resort to any state official, such as a county clerk or sheriff, may not be enough to constitute state action.[48] For example, *Jenner v. Shepherd*[49] concluded that a statute that merely allowed landlords to exercise self-help remedies but does not compel the procedures does not constitute state action. Thus, whether or not there is a state action that would enable a tenant to bring a constitutional claim against the state will depend on the particular statute and procedural methods the landlord used when resorting to self-help.

C. Statutory Remedies in Lieu of a Landlord's Right of Self-Help

A landlord's right to self-help has been diminished primarily to protect tenants from an unfair and unjust use of such a right. With the erosion of the landlord's right, judicial summary proceeding should be available to landlords so that they may expedite their claims, thereby granting landlords a meaningful remedy in the case of tenant breaches. For example, in New York, NY Real Property Action and Proceedings Law § 732[50] outlines the summary proceedings that a landlord may bring in the case of non-payment of rent. Such proceedings expedite landlords' claims and reduce the need for landlords to resort to self help.

Conclusion

Both tenants and landlords should be cautious before proceeding under a claim of the right of self-help. For tenants, a tenant may have a remedy but he or she should proceed carefully because of the strict procedural guidelines and the limitations upon when the right may be properly exercised. Landlords should refrain from exercising self-help. As illustrated above, most states have abolished a landlord's right of self-help and it appears that this trend will spread. Further, even landlords who have lease clauses that explicitly authorize the landlord to exercise self-help should be wary of the exercise of such a right because courts will often declare these clauses to be invalid.[51] Consequently, landlords should seek judicial proceedings to resolve disputes with tenants.

Endnotes

1. *See Tailoring Landlord Default Clauses to Meet Specific Tenant Concerns,* 11 No. 11COMLLST 1 (1999); *Marini v. Ireland*, 265 A.2d 526, 534 (N.J. Sup. Ct. 1970); *Jangla Realty Co. v. Gravagna*, 447 N.Y.S.2d 338 (N.Y. Civ. Ct. 1981); *Kekllas v. Saddy*, 389 N.Y.S.2d 756 (3d Dist., Nassau County 1976).
2. *See* 49 Am. Jur. 2d *Landlord & Tenant* § 353 (1995) (explaining that a landlord's use of self-help has been particularly controversial and rejected by many jurisdictions).
3. *See Marini*, 265 A.2d at 535.
4. *See id*. at 534.
5. *See L&M Investment Co. v. Morrission*, 594 P.2d 1238 (Or. 1979).
6. *See id.*
7. Richard M. Frome, et al., *Tenant Remedies: An Oxymoron,* 12 J. Prob. & Prop. 39, 39-41 (1998).
8. *See Park West Management Corp. v. Mitchell*, 391 N.E.2d 1288, 1292 (N.Y. 1979).
9. *See id.*

   > Inasmuch as the landlord is vested with the ultimate control and responsibility for the building, it is he who has a corresponding nondelegable and nonwaivable duty to maintain it. The obligation of the tenant to pay rent is dependent upon the landlord's satisfactory maintenance of the premises in habitable condition.

   Id. at 1294.
10. *See id*. at 1288.
11. *See id.*
12. *Id.*
13. *See Jangla*, 447 N.Y.S.2d 338.
14. *See Marini*, 265 A.2d 526.
15. *See Kekllas*, 389 N.Y.S.2d 756.
16. *See Town of Islip Community Development Agency v. Mulligan*, 496 N.Y.S.2d 195 (5th Dist., Suffolk County 1985).
17. *See Mantica R Corp. NV v. Malone et al.*, 436 N.Y.S.2d 797, 798 (N.Y. Civ. Ct. 1981).
18. *See Solow v. Wellner*, 595 N.Y.S.2d 619, 621 (App. Div. 1992).
19. *See McIntosh v. Moscrip*, 138 A.D.2d 781 (App. Div. 1988).
20. *See Jangla*, 447 NY.S.2d at 341.
21. *See Marini*, 265 A.2d at 535 (providing some guidance by declaring that "[i]f a landlord fails to make the repairs and replacements of vital facilities necessary to maintain the premises in a livable condition for a period of time adequate to accomplish such repair and replacements, the tenant may cause the same to be done and deduct the cost thereof from future rents.").
22. *See Jangla*, 442 N.Y.S.2d at 338.
23. *See Berzito v. Gambino*, 308 A.2d 17 (N.J. Sup. Ct. 1973).
24. *See Marini*, 265 A.2d at 530.
25. *See id.*
26. *Id.* at 535. *See also A.P. Development Corp. v. Band*, 550 A.2d 1120, 1231 (N.J. Sup. Ct. 1988) (an example of where a landlord was deemed to have sufficiently satisfied the reasonable notice requirement was when the landlord sent and the tenant received a written letter notic-

ing the tenant of the landlord's future actions).

27. *See Jordan v. Talaga*, 532 N.E.2d 1174, 1186-87 (Ind. Ct. App. 1989).

28. *See Kekllas*, 389 N.Y.S.2d at 759.

29. The tenant may either make the repairs himself or cause the repairs to be made by hiring another person. *See e.g., Marini*, 265 A.2d at 535.

30. *See Penner v. United States Postal Service*, 879 F. Supp. 553, 562 (M.D.N.C. 1995).

31. *See Glimcher v. Washington Distributors, Inc. (In re Cook United. Inc.)*, 53 B.R. 342, 346 (Bankr. N.D. Ohio 1985).

32. *See 17 East 101st Street Associates v. Huguenin*, 161 Misc. 2d 815, 820 (N.Y. Civ. Ct. 1994) (for a breach of the warrantee of habitability, the most frequent solutions for tenants is to set-off rent payments, but the courts are able to authorize other remedies available in contract law such as damages, specific performance and recession); *German v. Federal Home Loan Mortgage Corp.*, 885 F. Supp 537 (S.D.N.Y. 1995).

33. *See Garcia v. Freeland Realty. Inc.*, 314 N.Y.S.2d 215 (N.Y. Civ. Ct. 1970).

34. *See* Richard M. Frome, *supra* note 7 at 40.

35. *Id.*

36. *See generally* Randy G. Gerchick, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help,* 41 UCLA L. Rev. 759, 764 (1994). States that have abolished a landlord's right to self help include New York, Ohio, Montana, North Carolina, Nebraska, Washington D.C., New Hampshire, Pennsylvania, Oklahoma, Florida, Oregon, Alabama, New Jersey and Rhode Island. *See, e.g., Friends of Yelverston, Inc. v. 163rd Street Imp. Council, Inc.*, 514 N.Y.S.2d 841 (N.Y. Civ. Ct. 1986) (stating that self-help should not be used in situations not involving penal law violations directly involving the premises); N.Y. Real Prop. Acts. Law § 711 (McKinney 1999); *Rand v. Washington*, WL 2448 (Ohio App. 2 Dist. 1983); *Whalen v. Taylor*, 925 P.2d 462 (Mont. 1996); *Baker v. Rushing*, 409 S.E.2d 108 (N.C. Ct. App. 1991); *Mason v. Schumacher*, 439 N.W.2d 61 (Neb. 1989); *Simpson v. Lee*, 499 A.2d 889 (D.C. App. 1985); *Hill v. Dobrowolski*, 484 A.2d 1123 (N.H. 1984); *Smith v. Coyne*, 722 A.2d 1022 (Pa. 1999); *Ramirez v. Baran*, 730 P.2d 515 (Okla. 1986); *Herrell v. Syfarth*, 491 So. 2d. 1173 (Fla. Dist. Ct. App. 1986); *Smith v. Topits*, 669 P.2d 1167 (Or. App. 1983); *Moriarty v. Pziak*, 435 So. 2d 35 (Ala. 1983); *Callen v. Sherman's Inc.*, 455 A.2d 1102 (N.J. 1983) (in this case self-help was allowed because there were extraordinary circumstances but the court indicated that self-help in other less egregious circumstances is impermissible); *Turks Head Realty Trust v. Shearson Lehman Hutton. Inc.*, 736 F. Supp. 422 (D.R.I. 1990).

37. *See* Randy G. Gerchick, *supra* note 36 at 764.

38. *See Kinney v. Vaccari*, 612 P.2d 877 (Cal. 1980).

39. Mich. Comp. Laws Ann. § 600.29 18 (West 1961).

40. 558 F. Supp. 303 (D. Mich. 1983).

41. *Lang v. Pataki*, 674 N.Y.S.2d 903, 912 (N.Y. Sup. Ct. 1998).

42. *See id.*; *Barstow Road Owners. Inc. v. Billion*, 687 N.Y.S.2d 845 (1st Dist., Nassau County 1998) (indicating that the summary proceedings available to the landlord in the case of a tenant default are enacted to afford the landlord a quick, easy remedy other than self-help); R. Schoshinski, *American Law of Landlord and Tenant* § 6:9 at 408 (1980).

43. *See Allegheny Clarklift Inc v. Woodline Industries of Pennsylvania Inc.*, 514 A.2d 606 (Pa. Super. Ct. 1983); *Callen*, 455 A.2d 1102 (1983).

44. 365 F. Supp. 1254, 1260 (W.D. Va. 1973).

45. 457 U.S. 922, 941 (1982).

46. *See Adams v. Department of Motor Vehicles*, 520 P.2d 961 (1974); *Allegheny*, 514 A.2d 606 (Pa. Super. Ct. 1983).

47. *Lugar*, 457 U.S. at 955.

48. *National Broadcasting Co., Inc. v. Communications Workers of America*, 860 F.2d 1022, 1027 (11th Cir. 1988) ("To charge a private party with state action under this standard, the governmental body and private party must be intertwined in a 'symbiotic relationship.'").

49. 665 F. Supp 714, 720 (S.D. Ind. 1987).

50. N.Y. Real Prop. Acts. Law § 732 (McKinney 1999).

51. *Rand v. Washington*, 1983 WL 2448 (Ohio App. 2 Dist.); *McCroy v. Johnson*, 755 S.W.2d 566 (Ark. 1988).

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The Tale of Camp Rural Retreat, or Why Real Estate Brokers Should Not Be Involved in the Preparation [or Execution] of Contracts of Sale for Real Estate Transactions

By Dennis A. Konner

Much has been written and discussed about the propriety of allowing real estate brokers to prepare contracts of sale for real estate conveyance transactions. In certain areas of New York real estate brokers are preparing contracts for execution by parties to a transaction. Although most real estate contracts proceed to closing uneventfully, it is this writer's opinion that real estate transactions necessarily require attorneys to represent all parties from the inception to the closing of the transaction in order to protect their respective clients' interests.

The purpose of this article is to show what can happen when a party is not represented by counsel. I recently was involved in a situation in which a "Purchase Offer Agreement" for non-residential property was prepared by a real estate broker and executed by a party clearly not authorized to bind the ultimate purchaser named in the offer. The executing party paid the broker a deposit upon execution of the Purchase Offer Agreement. Although the provisions of the Purchase Offer Agreement state that it had to be executed by the actual "purchaser" in order to become a binding contract, the broker ended up wrongfully refusing to return the deposit.

Background

A church, which shall be referred to as the "*Ultimate Purchaser Church*,"[1] has two members, *Mr. and Mrs. Duped Parties*, who were to locate a campsite for the church to operate a camp and conference center. If purchased, the *Duped Parties* would reside on the camp grounds and become its directors.

After much time and effort, the *Duped Parties* were able to locate what they felt was a suitable location for the camp on 172 acres located in Delaware County, New York. After discussion with the real estate agent who helped locate the campsite for the *Duped Parties* (the real estate agent is hereinafter referred to as the "*Unlicensed Attorney*"), a document with the heading "Purchase Offer Agreement" was prepared by the *Unlicensed Attorney* and signed by the *Duped Parties* on August 15, 1999. The document was signed without the *Duped Parties* first consulting an attorney. The Purchase Offer Agreement contains all of the elements necessary to constitute a contract of sale under New York State law. The Purchase Offer Agreement states in part, "This contract is subject to the approval of the respective attorneys of the parties to the agreement. Failure of either attorney to object within (3) business days of seller's acceptance as noted below, will serve as notification of approval and acceptance. Parties to the transaction agree that it is their individual responsibility to present this agreement for review to their respective attorneys and further agree to do so without delay." The Purchase Offer Agreement provides for a deposit in the sum of $6,500 (representing one percent of the purchase price) which was paid by the personal check of the *Duped Parties* to the *Unlicensed Attorney*. A provision in the Purchase Offer Agreement relating to the deposit provides that the *Unlicensed Attorney* will hold the deposit "until this offer is accepted, at which time it shall become a part of the purchase price or returned to the buyer if not accepted." The Purchase Offer Agreement further states, "This is a real and binding contract of sale. It is advisable that you consult with an attorney *before* signing. Please do not sign unless you fully understand and agree to the terms and conditions herein." (Emphasis added). As will be shown below, the *Duped Parties* were unaware that they were executing a "binding contract." Furthermore, both before and after executing the Purchase Offer Agreement, the *Duped Parties* did not consult with an attorney.

The Purchase Offer Agreement's critical provisions, which were relied upon by the *Duped Parties*, are contained on an Addendum which provides, in part, as follows: "Per the seller's representation the buyer expects: 1. Working well water and septic systems for a minimum of 150 people." The Addendum further provides, "for the purposes of this purchase offer, the *Duped Parties* are acting as representatives of the *Ultimate Purchaser Church*. Once the investigation process is complete and this property is approved **the contract will be executed by the officers of the *Ultimate Purchaser Church.***" (Emphasis added).

The Addendum to the Purchase Offer Agreement contains other representations by the seller concerning zoning, violations and survey matters relating to the camp. Investigations of these matters were to be conducted and positive results of such investigations were conditions to the

execution of a formal contract of sale by the *Ultimate Purchaser Church*.

Shortly after execution of the Purchase Offer Agreement, the *Duped Parties* discovered that the well water was polluted and contained bacteria. The *Duped Parties* notified the *Unlicensed Attorney* to withdraw the Purchase Offer and return the deposit to them.

Thereafter, on September 15, 1999, after learning of the Purchase Offer Agreement, the *Ultimate Purchaser Church* wrote to the *Unlicensed Attorney* advising her that the *Duped Parties* were "Camp Directors for the prospective *Camp Rural Retreat* and Conference Center to be sponsored by the *Ultimate Purchaser Church* in an effort to find a suitable camp location." The letter went on to say, "Should the property be of use to the *Ultimate Purchaser Church* and prove to be free of significant zoning restrictions and hazardous materials, the Board of Directors, of which *Pastor Do Right* is President, will meet to vote on whether or not we wish to purchase said property."

On September 20, 1999, without the knowledge or consent of the *Ultimate Purchaser Church*, and despite the September 15, 1999, letter from *Ultimate Purchaser Church* to the *Unlicensed Attorney*, the *Unlicensed Attorney* prepared a new Purchase Offer Agreement and the *Duped Parties* re-executed this Agreement containing *identical terms* of the Purchase Offer Agreement dated August 15, 1999. On September 27, 1999, the seller's attorney faxed a copy of the Purchase Offer Agreement to me. The Purchase Offer Agreement contained the signature of the seller accepted on September 27, 1999.

On September 28, 1999, I wrote to the seller's attorney as follows: "We represent the *Ultimate Purchaser Church*, a New York religious corporation. Reference is made to a proposed Contract of Sale for the referenced camp forwarded to us by you on September 27, 1999 at 5:09 p.m. This will confirm our conversation along with *Diane Do Good*, the Facilities Administrator of the *Ultimate Purchaser Church*, wherein you acknowledged that the *Duped Parties* were not authorized to bind the *Ultimate Purchaser Church* in any manner. Further, you acknowledged that the purpose of the September 15, 1999 letter from *Diane Do Good* to *Unauthorized Attorney* merely authorized the *Duped Parties* to locate a suitable campsite for the church. At such time as the *Ultimate Purchaser Church* is ready to contract for the purchase of the campsite, we will contact you." The *Ultimate Purchaser Church* decided not to proceed with the purchase of the campsite.

Although the *Duped Parties* have made numerous written and oral demands for more than a year, the *Duped Parties* have been unable to convince the *Unlicensed Attorney* to return their deposit. Moreover, an attorney for the seller has written to the *Duped Parties* advising them that Camp Retreat has been sold to a third party for $165,000 less than the amount set forth in the Purchase Offer Agreement. The attorney advised the *Duped Parties* that "the contract you signed was a binding contract" and that you must agree to have the "Binder Deposit turned over to my clients as liquidated damages" or his clients would sue the *Duped Parties* for return of the Binder Deposit "plus the consequential damages of your breach, namely $165,000."

Conclusion

Had the *Duped Parties* consulted an attorney prior to execution of the Purchase Offer Agreement, the attorney would most likely have required (i) that the offer be made by submission of a contract on behalf of the *Ultimate Purchaser Church* and not the *Duped Parties*; (ii) that the contract contain a due diligence period during which the *Ultimate Purchaser Church* would have the right to perform investigations of the property and the option to cancel the contract if the investigations revealed unsatisfactory conditions; and (iii) that the deposit be held in escrow by the seller's attorney rather than the *Unlicensed Attorney.* As more brokers prepare contracts for uneducated, unsophisticated or unsuspecting purchasers, it is likely that we will be hearing about parties with similar legal problems resulting from their failure to seek proper legal representation.

Endnote

1. In this article, including quoted material, the names of the parties to the transactions have been replaced with fictitious names which appear in italics.

Continuous Use or Operating Covenants: Express and Implied

By John E. Blyth

1. Overview

A continuous use clause or an operating covenant is a provision used in a commercial shopping center lease to prevent a tenant from "going dark." A tenant may attempt to vacate its store space, while continuing to pay rent, because the location has become unprofitable or because the tenant prefers another location. Landlords abhor dark spaces because they give the impression that the landlord's complex is not fully leased and is therefore not a desirable place in which to do business.

The clause or covenant is a matter of contract in the lease between the landlord and tenant. It is not regulated by statute but rather is interpreted in the case law. While there are many cases on the subject, there are only a few in New York State. The cases use the phrases "continuous use clause" and "operating covenant" interchangeably. There are not many treatments of the subject "in the learning," as the esteemed Bernard H. Goldstein, Esq., a practitioner in New York City for more than 50 years, would say.

The classifications given in this piece to the components of the clauses and covenants are artificial and are, therefore, somewhat misleading. The analysis of the components is not as simple as the classifications used here but the classifications do help to sort things out. The bottom line is that, given the number of cases on the subject, it is possible to find a case which will support almost any point of view.

2. The Problem

Tenant, a food supermarket, entered into a fifteen (15) year lease agreement with three (3) five (5) year renewals. Tenant occupies about twenty percent (20%) of Landlord's gross leaseable area. Tenant agreed to pay base rent in the amount of $30,000 per year plus percentage rent in the amount of one percent (1%) of all gross sales in excess of $3,000,000 per year. Tenant's percentage rent now greatly exceeds its base rent. The reasons for the increase in percentage rent are inflation, Tenant's increased market share, and lack of competition in the area.

The Lease provides that Tenant shall "continuously, actively, and diligently . . . during usual and customary business hours and days, occupy and use substantially the whole of the demised premises for a food supermarket."

The Lease does not contain a radius restriction applicable to Tenant but the Landlord did agree not to permit any other food supermarket, meat market, supermarket, bakery, specialty food store, or delicatessen within its premises nor the sale of fresh meats (other than cold cuts) in any other premises.

Tenant wants to move to a new location. If it does so, then it will want either to scale down its present operation or abandon the site entirely. Is the tenant under an express or implied covenant to continue operating at its present location? If so, what will be the consequences of its scaling down its operation or of abandoning its present location?

3. Express and Implied Covenants

As indicated above, the terms continuous use or operating covenants are used interchangeably. They come in two (2) flavors: express and implied. Express provisions seem easier to manage but implied provisions are more interesting. Both kinds of covenants are fraught with difficulties, both are difficult to characterize, and both lead to sometimes unintended results.

4. Express Covenants

A modern shopping center lease normally encompasses several factors with respect to a continuous use or operating covenant:[1]

a. The tenant is required to conduct business continuously for a stated number of days and for a stated number of hours per day;

b. The tenant is required to keep the store continuously or fully stocked with seasonal or top quality merchandise;

c. The tenant is required to keep the store fully staffed with employees;

d. The tenant is required to operate the store as a typical operation of its kind in the vicinity of the shopping center, or else the tenant's store is the only operation of its kind in the shopping center;

e. The tenant is required to use best efforts to achieve maximum sales volumes in its store in the shopping center;

f. The tenant is required to conduct business under the tenant's business name;

g. The tenant is obligated to use a designated percentage of floor space for its retail sale activity.

In this case, all of the above elements are *absent* from Tenant's lease with the exception of (a), if "usual and customary business hours and days" in the quoted clause equates to David Fishman's "conduct business continuously for a stated number of days and for a stated number of hours per day."[2] Nevertheless, a court may well decide that the parties intended an express covenant because Tenant was mandated ("shall") to continuously, actively, and diligently, during usual and customary business hours and days, occupy and use substantially the whole of the demised premises for a food supermarket.

Express covenants of continuous operation are not always as clear as they may seem. Consider this: (i) where an anchor tenant was under a covenant, during the entire term of the lease hereby created, to conduct and carry on in the demised premises the type of business for which the demised premises were leased, and (ii) where the lease gave the tenant the right to operate any lawful retail selling business at the shopping center as well as the right to use the building for any other lawful retail selling business not directly in conflict or competition with another major tenant in the shopping center, the court said that a triable issue of fact was raised concerning a breach of that covenant when the tenant moved its grocery store operation to another site and used the original site as a warehouse discount box store. The landlord argued that the move was a sham operation designed to improperly freeze the space at the original location and to force the tenant's customers to its new location so that the old location would not compete with the tenant's grocery store at the new location. In enforcing the express covenant, the jury found that the tenant breached the covenant of good faith and fair dealing by changing the use of the premises from a supermarket to a warehouse discount box store.[3]

5. Implied Covenants

If the lease does not contain an express covenant to operate, various components of the lease, when viewed as a whole, may constitute an implied covenant to operate. The West Virginia Supreme Court of Appeals has stated that, in determining whether an implied covenant of continuous operation exists in a lease, the following factors should be taken into consideration: (i) whether the lease contains an inconsistent express term or a provision for a substantial fixed base rent; (ii) whether the lease contains a provision giving the tenant free assignability of the lease; (iii) whether the lease was actively negotiated by all parties involved; and (iv) whether the lease contains a noncompetitive (exclusive) provision.[4] As will be seen, these are by no means all of the factors which courts take into consideration.

Implied covenants of continuous operation are disfavored by the courts.[5] Courts reason that when parties have entered into written agreements which embody the obligations of each, they have expressed all of the conditions by which they intend to be bound and courts should be reluctant to enlarge, by implication, on those conditions which affect important matters.[6] Additionally, the imposition of a continuous operation clause in the absence of express language may require the lessee to continue operating a business for a long period of time even if that business is incurring substantial losses.[7]

Even though implied covenants are viewed with disfavor by the courts, courts employ great latitude in their observation of the rule. Favor or disfavor of the rule will permit a court to arrive at its perception of the right result.

6. Components of Implied Covenants

The listing of the components here, as indicated above, is artificial. While this piece treats each component separately, each component is usually found in concert with one or more other components so that it is sometimes difficult to determine the precise emphasis which a court gave a particular component. When one component is found together with that of a tenant as an anchor tenant, for instance, then the results may vary widely.

a. Exclusives (Noncompetition Clauses)

The mere existence of a noncompetition clause—i.e., an exclusive given a tenant by a landlord—in and of itself, does not require a court to find an implied covenant of continuous operation in a lease. Whether the lease contains a noncompetition provision is just one factor that a court should consider.[8]

b. Merger Clause

This instrument embodies all the agreements between the parties hereto in respect to the premises hereby leased, and no oral agreements or written correspondence shall be held to affect the provisions hereof. All subsequent changes and modifications to be valid shall be by written instrument executed by landlord and tenant.

Such a clause is said to be inconsistent with implying a covenant of continuous operation.[9]

c. Tenant's Right to Remove FFE

If a lease expressly grants the tenant the right to remove fixtures, furniture, or equipment (FFE), courts have held that no implied covenant to operate was intended.[10]

d. Use and Occupy

(i) Covenant to Use

The mere existence of a use clause in a lease is generally not sufficient for a court to imply a continuous covenant.[11] Although some courts have held that a use clause is indicative of a covenant to operate continuously, most courts view use

clauses as only restricting the use of the property and not as mandating that the property be, in fact, used.[12]

A covenant restricting the use of the premises to the operation of a supermarket and drug store and any and all other lawful purposes does not create an implied covenant to operate. The clause merely permits any other lawful use separate from and in lieu of a supermarket use, specifically use as a retail store for unclaimed salvage and freight.[13] Similarly, a use clause permitting the tenant to operate a restaurant (Taco Bell "may use" the premises for operating a restaurant) does not require the tenant to operate a restaurant on the site. Since there is no "must use" language in the lease, there is no covenant to operate and the tenant, while continuing to pay fixed rent without any percentage rent, could change the operation from a restaurant to a storage facility.[14]

Where a tenant paid the rent but never occupied the premises, a covenant to use the premises solely as a "Pearle Vision Center" or such other name as is used by the tenant's other businesses within the State of Pennsylvania . . . and for no other purpose means only that the use specified in the lease is permitted. It does not mean that the tenant is under an obligation to occupy the premises. But when that same language is coupled with all of the other affirmative obligations on the tenant contained in the lease (tenant's obligation to open for business not later than ninety (90) days after landlord's approval of tenant's plans and specification, tenant's obligation to conduct its business in the entire premises, tenant's obligation not to allow the premises to be vacant for more than sixty (60) days, tenant's obligation to maintain the premises consistent with the general character of a shopping center), a court may well imply a covenant to occupy and use.[15]

(ii) Covenant to Occupy

A covenant to occupy the premises without more does not created an implied covenant to operate. "Unoccupied" must be construed in accordance with the accepted meaning in the law of its antonym "occupied," that is, in actual possession and use, irrespective whether in retail business or not.[16] A similar clause requiring that the premises be occupied and used only for the following purpose or purposes (a retail warehouse store selling articles found in family centers and supermarkets) did not require continuous operating. The tenant could either use the premises as a retail warehouse store or refrain from using the premises, so long as it continued to pay the rent.[17]

(iii) New Jersey's View

In New Jersey, where the tenant is an anchor and where the lease prohibited the landlord from leasing to other stores with similar uses, a covenant to use and occupy for a specific purpose only was held to create an implied covenant to operate.[18] The use and occupancy clause was found to be both restrictive (as to use) and mandatory (as to operation). The court observed that it does not matter that the lease is not a percentage lease where there are other circumstances sufficiently evidencing the intention of the parties that the lessee will be under a mandate to operate reasonably within the terms of the lease. Similarly, a clause that the premises were to "be used and occupied only and for no other purpose than as a gasoline service station" was construed to create a clear and unambiguous duty on the tenant to operate a gasoline service station.[19]

(iv) New York's View

New York has distinguished the New Jersey position. A covenant to use the premises as a drug store, to be conducted similarly to the Key Drug Stores operated by tenant, and not to use or permit the premises to be used for any other purpose, is a restrictive covenant limiting the use to which the premises may be put. The covenant does not, however, create a continuous use clause.[20]

e. Percentage Rent

A court may find an implied covenant where the lease contains, among other things, a percentage rent requirement. The thinking is that failure to find such a covenant would deprive the landlord of the benefit of its bargain. In a percentage lease, the landlord and tenant are sometimes regarded as "quasi-partners," i.e., they share mutually in the success or the failure of the tenant's business.[21] However, the mere existence of a percentage rent obligation does not, without more (e.g., an express undertaking by the tenant to remain in business), create an implied covenant to operate.[22]

The first factor which the courts consider is the relationship in the lease of fixed rent to percentage rent. An implied covenant may be found when the lease provides for a fixed minimum rental with a substantial percentage rent.[23] By way of contrast, a court often will decline to find an implied covenant where the fixed minimum rent is substantial when compared with the amount of the percentage rent.[24] The existence of a fixed rental clause prevented the implication of a covenant of continuous operation because the lease had been extensively negotiated and the fixed rent served as a reasonable protection for the lessor in case the lessee failed to conduct a certain level of business.[25]

When the fixed minimum rental is nominal, a court will take the view that the landlord's intent was to seek its consideration or return directly from the fruits of and as a result of the tenant's diligent, continuous labor. If the tenant ceases operations, the landlord is effectively deprived of the benefit of its bargain. Con-

versely, where the minimum rent is substantial, such rent is payable regardless of the tenant's success in the business. Percentage rent is merely a bonus or windfall to the landlord. The failure to pay a substantial percentage rent does not deprive the landlord of the benefit of its bargain.[26]

Even if a covenant of continuous use is found in a lease because the lease contained obligations to pay a small fixed rent and a large percentage rent, the landlord may shoot itself in the foot and may be denied the benefit of that covenant. Such an occurrence happens if the landlord violates its obligation of good faith to the tenant, implicit in every contract, by competing with the tenant: leasing other premises owned by the landlord to the tenant's competitor, thereby causing tenant's sales to decline to the point where it was operating at a loss.[27]

If the tenant specifically makes no representation or warranty as to the sales it expects to make in the leased premises, such a provision tends to conflict with implying a covenant of continuous operation.[28]

New York courts have refused to imply covenants of continuous use in percentage rent leases.[29] The Fourth Department reasoned that where the lease contained no continuous use provision, the court would not imply one. The court observed that implied in fact covenants are not favored in the law, and the court will not remake the parties' contract.[30]

f. Assignment and Sublet Restrictions

If the lease contains an express right to assign or sublet, courts will not normally imply a covenant of continuous operation.[31] There is an inherent inconsistency in a lease which permits the tenant to assign or sublease with an implied obligation that the tenant should remain on the premises and conduct business there.[32] This is true even though the tenant is required to obtain the consent of the landlord before assigning or subletting.[33]

The Arizona Court of Appeals, however, saw no such incongruity between a provision which allowed a tenant to sublet and assign the lease and an implied covenant of continuous operation. The presence of a right to assign or sublet is not necessarily inconsistent with an implied covenant of continuous operation. The two covenants can be harmonized to permit subletting or assignment to a business of the same character.[34]

Where a tenant was permitted to sublet but not to assign, the court nevertheless found the tenant's right to be inconsistent with a continuous operations covenant.[35] Such an express right to assign or sublet did not, however, prevent a court from finding an implied covenant to operate where the tenant was an anchor tenant.[36]

The purchase of a leasehold by assignment, even assuming a predominant purpose, was to reduce competition by eliminating a competitor, was not *per se* actionable and fell short of a *prima facie* cause of action for malicious, unreasonable or unjustifiable interference with the prospective benefits of a leasehold interest.[37]

g. Anchor Tenant Status

Where the tenant is regarded as an anchor[38] or nucleus[39] which will attract business for other so-called leech tenants, a court has an easier time finding an implied covenant to operate. Such a requirement of continuous operation is one of good faith. If the anchor tenant were permitted to leave the premises vacant, the landlord's purpose for signing the lease would be defeated, i.e., to bring customers to the smaller shops in the shopping center.[40]

The holdings of two New Jersey cases (both decided the same day and both authored by the same judge) which find an implied covenant of continuous operation solely because the business is a part of an "integrated" shopping center[41] were soundly criticized by the Arizona Court of Appeals. In the Arizona view, the New Jersey proposition overlooks the well-established rule that a statement as to the use of the leased premises does not imply a covenant that the lessee may not cease to use the premises for any purpose.[42]

Four years later, however, the Arizona Court of Appeals upheld a trial court's finding that an implied covenant of continuous operation did exist where (i) the tenant occupied at least one-half of the total number of square feet available for lease in the center; (ii) the landlord was required to build to suit the tenant's grocery store; (iii) the lease provided for a low fixed rent and the percentage rent was *not* substantial, and the tenant made no representation or warranty as to the sales it expected to make on the premises; (iv) the landlord granted an exclusive use to the tenant, (v) the tenant was permitted to erect or remove any signs or fixtures on the premises so long as they complied with applicable laws; and (vi) the tenant was free to assign or sublet so long as it remained liable on the lease.[43]

7. Downscaling Operations

If either an express or implied covenant of continuous use or operation is found, does the tenant violate that covenant by downscaling its business operations at the premises? Under the sample clause, even if the tenant downscales, it is nevertheless "continuously" and "actively" using and occupying the property. It is questionable, however, whether or not the tenant is "diligently" using and occupying "substantially the whole" of the premises. The landlord will consequently realize less percentage rent, something for which the landlord may well have bargained.[44]

Where a tenant continued to operate under a lease but opened another store near the leased premises, resulting in reduced sales volume and reduced percentage rent at the leased premises, a court held that the continuous use covenant was not violated.[45] The case dealt only with the effect of a tenant opening another store near the leased premises and did not directly address the issue of whether a default occurs by reason of the effects of downscaling at the first location. If a tenant opens a store at another location and does not engage in downscaling, then presumably no violation of the covenant to operate would occur.

8. Landlord's Remedies

Assuming that a continuous operation covenant exists and that a breach of it has occurred, the landlord may attempt to have the lease specifically performed, in whole or in part; it may seek damages; or it may seek a termination of the lease.

a. Specific Performance

Normally a court will not order a tenant specifically to perform a continuous lease covenant—i.e., to operate—where the tenant vacates and thereafter continues to pay its monthly fixed rental. Such a decision denying injunctive relief reflects the modern trend and is the majority rule (particularly where an adequate remedy at law exists).[46] Cases which do grant injunctive relief are old cases and are against the weight of authority, even in the face of an express covenant to operate.[47]

To order specific performance would be to contravene the doctrine of free alienability by forbidding the tenant to vacate the premises and to continue to pay rent.[48] New York's Fourth Department, in a widely cited case, refused to order Wegman's to resume operations at the leased premises even though a continuous operation covenant existed and Wegman's, in the second year of a 15-year lease, decided to vacate the premises. The court stressed that it will not place itself in a position of having to supervise continuous operations over a long period of time. To do so, the court would be placed in a position where it lacks particularized knowledge and skill to operate a food supermarket and where constant judicial supervision would be required.

The Appellate Court of Illinois also refused specifically to enforce an express covenant to operate (tenant shall occupy, thereafter shall continuously and uninterruptedly operate, and shall not vacate or abandon). To do so would place the court in the untenable situation of a long-term supervisor which might require the court to enforce lease terms for occupancy and use, operating hours, signs, painting, displays, common areas, and other operational requirements.[49] A Maryland court, in the face of an express covenant to operate, also refused to consider the possibility of finding itself in the business of managing a retail video operation and denied injunctive relief.[50]

In a case of first impression, a Florida court also refused to grant injunctive relief.[51] In doing so, however, the court distinguished two other cases where injunctive relief was granted: (i) a tenant which agreed to remain open for business all year round except for holidays may be enjoined to remain open for business all year round as required by the lease,[52] and (ii) a landlord was granted a temporary injunction requiring the anchor tenant to remain as the occupant of one-sixth of the mall's space until there was a trial on whether a permanent injunction would issue, relief which the court recognized as unprecedented.[53]

In New Jersey,[54] the court enjoyed the tenant bakery from closing up operations at the leased premises in violation of an express continuous operation covenant. In addition to the existence of the covenant, the lease provided for a percentage rent arrangement and provided for injunctive relief in the case of a breach of the lease covenant. Furthermore, the court noted that the lease was a result of protracted negotiations in which the tenant was represented by counsel and that the store was located in a shopping center in which each store's success was dependent upon the continued operation of other stores. The equitable remedy of specific performance was justified primarily because of the interdependence of the various stores. Because of this interdependence, monetary damages were impossible to measure and, therefore, any difficulties of judicial supervision were outweighed by the inadequacy of damages.

In reaching a similar decision, a Florida court[55] ordered the tenant jewelry store to resume operations pursuant to an express continuous use covenant reasoning that, because the store helped generate traffic for additional stores in the strip shopping center, there was no adequate remedy at law and injunctive relief was in order.

b. Damages

If a court refuses specifically to enforce a continuous operation covenant, the landlord may seek to recover damages. Where the lease expressly provides for the measure of damages in the event of a default, the courts will look to this express provision as controlling the measure of damages. Where, however, the lease does not specifically provide for the measure of damages, there are two approaches which the courts have taken.[56]

(i) Base Plus Percentage Rent

Some courts have awarded the landlord base rent plus an amount equal to prior percentage rent. In such cases, the courts have determined the percentage rent due the landlord to be an amount equivalent

to that which the tenant has paid in the past or which the tenant would owe the landlord based upon its current sales at the tenant's new store, if the tenant has in fact moved to a new location.

(ii) Fair Rental Value

Using a fair rental value of the premises, a court will determine the measure of damages.

Where a sophisticated anchor tenant breaches a covenant of continuous use, a court may award consequential damages, because the diminution in value of the shopping center arose both naturally and foreseeably as a result of the termination of operations by the tenant.[57] The interdependence of major satellite tenants argument may also justify the finding of a covenant of continuing operations on the part of the major stores similar to an express covenant to operate. If that covenant is breached, such a breach may entitle a satellite tenant to terminate its lease or to seek damages.[58]

c. Termination of Lease

For violation of an implied covenant to operate, the landlord may also seek an order requiring (i) the tenant to vacate the leased premises and (ii) a termination of the lease.[59] Although this remedy is rarely sought, it may be appealing to a landlord who is able to make a better deal with a new tenant.

9. Practice Tips

While the above ranking of the components is artificial, it is possible to conclude that the most important components are (i) the covenant to use *and* operate (not one without the other), (ii) provision for a low fixed rent coupled with one for high percentage rent, (iii) restrictions on the tenant's right to assign (the more the better) and (iv) anchor tenant status. The practitioner should therefore be alert to the following:

a. Be alert to buzzwords and lease concepts used in a lease (e.g., use and operate, fixed and percentage rent, no assignment, and anchor tenant status). Recognize that, when taken together, they may be used for or against a party with sometimes unintended results;

b. Know what result you want and expressly say what you want;

c. Use Old Testament powers of prophecy. Try to foresee the future and to predict changes in a given market;

d. Consider other strategies to get out of a burdensome continuous use clause or operating covenant;

e. Maybe a five-year term with three five-year options to renew is better than a twenty-year term;

f. Consider various exit strategies, by both landlord and tenant—a kickout clause or a right to terminate if an anchor does not arrive or if it leaves, or if a certain percentage of the center is not leased up or becomes vacant, or if a certain sales level is not reached or maintained, or anything else which may come to mind;

e. Recognize that all of the above are easier said than done.

Endnotes

1. Fishman, David H., *What Counsel Must Know About Continuous Use Covenants*, 3 Prac. Real Est. Law. 35, 36 (March 1987). David is a well-known attorney in Baltimore, Maryland. Ordinarily required days and hours of operation and the required levels of stocking are included in a lease which contains a covenant of continuous operation. *Sampson Investments v. Jondex Corporation*, 176 Wis. 2d 55, 499 N.W.2d 177 (1993).
2. Fishman, note 1, *supra*.
3. *Olympus Hills Shopping Center, Ltd. v. Smith's Food & Drug Centers, Inc.*, 889 P.2d 445, 1994 Utah App. LEXIS 193 (1994).
4. *Frederick Business Properties Company, a Corporation v. Peoples Drug Stores, Inc.*, 191 W. Va. 235, 445 S.E.2d 176 (1994) (citing *Thompson Development, Inc. v. Kroger Co.*, 186 W. Va. 482, 413 S.E.2d 137 (1991)); the courts will imply a covenant if necessary to effectuate the intent of the parties but the implication must result from the language employed in the instrument or be indispensable to carrying the intention of the parties into effect. *Plaza Associates v. Unified Development, Inc.*, 524 N.W.2d 725, 1994 Minn. App. LEXIS 1240 (1994).
5. *Fay's Drug Company, Inc., v. Geneva Plaza Associates*, 98 A.D.2d 978, 470 N.Y.S.2d 240 (4th Dept.), *aff'd*, 62 N.Y.2d 886, 478 N.Y.S.2d 867, 467 N.E.2d 531 (1983); *Keystone Square Shopping Center v. Marsh Supermarkets, Inc.*, 459 N.E.2d 420 (Ind. Ct. App. 1984); *Downtown Association v. Burrows Bros.*, 34 Ohio App. 3d 296, 518 N.E.2d 564 (1986); the courts will declare an implied covenant to exist only when there is a satisfactory basis in the express contract of the parties which makes it necessary to imply certain duties and obligations in order to effect the purposes of the parties to the contract made. *Fuller Market Basket, Inc. v. Gillingham & Jones, Inc.*, 14 Wash. App. 128, 539 P.2d 868, 1975 Wash. App. LEXIS 1582 (1975).
6. *Walgreen Arizona Drug Co. v. Plaza Center Corp.*, 132 Ariz. 512, 647 P.2d 643 (Ct. App. 1982). A promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it. *Id*.
7. *Sampson Inv. v. Jondex Corp.*, 176 Wis. 2d 55, 499 N.W.2d 177 (1993).
8. *Frederick Business Properties Company, a Corporation v. Peoples Drug Stores, Inc.*, 191 W. Va. 235, 445 S.E.2d 176 (1994); courts consistently have refused to find that noncompetition clauses imply that a defendant is bound to continuously operate a business. *Carl A. Schuberg, Inc. v. Kroger Co.*, 113 Mich. App. 310, 317 N.W.2d 606 (1982).
9. *Frederick Business Properties Company, a Corporation v. Peoples Drug Stores, Inc.*, 191 W. Va. 235, 445 S.E.2d 176 (1994).
10. *Id.*, citing cases, particularly when coupled with a tenant right to sublet.
11. *Rapids Association v. Shopko Stores*, 96 Wis. 2d 516, 292 N.W.2d 668 (Ct. App. 1980).
12. *Congressional Amusement Corp. v. Weltman*, 55 A.2d 95 (D.C. Cir. 1947); *Davis v. Wickline*, 205 Va. 166, 155 S.E.2d 812 (1964).
13. *Monmouth Real Estate Investment Trust v. Manville Foodland, Inc.*, 196 N.J. Super. 262, 482 A.2d 186 (1984).
14. *Nalle v. Taco Bell Corp.*, 914 S.W.2d 685, 1996 Tex. App. LEXIS 145 (1996).

15. *Bloomsburg Shopping Center Associates v. Pearle Vision Center, Inc.*, 376 Pa. Super. 580, 546 A.2d 676 (1988).

16. *Monmouth Real Estate Investment Trust v. Manville Foodland, Inc.*, 196 N.J. Super. 262, 482 A.2d 186 (1984).

17. *Sampson Investments v. Jondex Corporation*, 176 Wis. 2d 55, 499 N.W.2d 177 (1993). This has been the rule in Wisconsin for well over 100 years: a continuous use clause is not a restrictive use clause. That rule comports with Wisconsin's statutory prohibition against implying a covenant in leases for a term of over one year. Wis. Stats. § 706.10(6).

18. *Ingannamorte v. Kings Super Markets, Inc.*, 55 N.J. 223, 260 A.2d 841 (1970). The leased store was "to be used and occupied only for a supermarket for the sale of all kinds of food, groceries, vegetables and refreshments, expressly excluding the sale of drugs, cosmetics, hardware, stationery, dishes, and on the premises bakery.

19. *Plassmeyer v. Brenta*, 24 N.J. Super. 322 (App. Div. 1953). The lease also imposed a fixed and percentage rent obligation on the tenant.

20. *Fay's Drug Company, Inc. v. Geneva Plaza Associates*, 98 A.D.2d 978, 470 N.Y.S.2d 240 (4th Dept. 1983). This case is further distinguished from the New Jersey position because it was the smallest of three stores in the shopping center, there was no evidence that it was used as a magnet, and the landlord suffered no damage as a result of the store closing.

21. Hammett, *Percentage Leases: Is There a Need to Imply a Covenant of Continuous Operation?*, 72 Marquette L. Rev. 559 (1989).

22. Tenant moved to a new location and continued to pay the base rent at the old location so that the old location would not be occupied by a competitor. *Worcester-Tatnuck Square CVS, Inc. v. Kaplan*, 33 Mass. App. Ct. 499, 601 N.E.2d 485 (1992).

23. *First American Bank & Trust Co. v. Safeway Stores*, 151 Ariz. 584, 729 P.2d 938 (Ct. App. 1986). It appears to be the law in Georgia that if the parties to a lease contemplate that the amount of rent to be generated by a percentage payment clause will be substantially greater than the minimum rental specified in the contract, it is possible to infer an implied covenant that the lessee will operate its business in the leased premises throughout the term of the lease. *Fifth Avenue Shopping Center, Inc. v. Grand Union Co.*, 491 F. Supp. 77 (N.D. Ga. 1980) (citing *Kroger Co. v. Bonny Corp.*, 134 Ga. App. 834, 216 S.E.2d 341 (1975)).

24. *Fifth Avenue Shopping Center v. Grand Union Co.*, 491 F. Supp. 77 (N.D. Ga. 1980). The existence of a substantial minimum base rent, in addition to the provision for percentage rental payments, suggests the absence of an implied covenant of continuous operation. *Piggly Wiggly Southern, Inc. v. Heard*, 261 Ga. 503, 405 S.E.2d 478 (1991). In the absence of evidence that the minimum rent is unsubstantial, courts do not infer a covenant to continue operations. *Frederick Business Properties Company, a Corporation v. Peoples Drug Stores, Inc.*, 191 W. Va. 235, 445 S.E.2d 176 (1994).

25. *Weil v. Ann Lewis Shops, Inc.*, 281 S.W.2d 651 (Tex. Civ. App. 1955), *cited with approval in Nalle v. Taco Bell Corp.*, 914 S.W.2d 685, 1996 Tex. App. LEXIS 145 (1996).

26. Hammett, *Percentage Leases: Is There a Need to Imply a Covenant of Continuous Operation?*, 72 Marquette L. Rev. 559, 566-67 (1989).

27. *Tabet v. Sprouse-Reitz Co., Inc.*, 75 N.M. 645, 409 P.2d 497 (1966).

28. *Frederick Business Properties Company, a Corporation v. Peoples Drug Stores, Inc.*, 191 W. Va. 235, 445 S.E.2d 176 (1994).

29. *Fay's Drug Company, Inc. v. Geneva Plaza Associates*, 98 A.D.2d 978, 470 N.Y.S.2d 240 (4th Dept.), *aff'd*, 62 N.Y.2d 886, 478 N.Y.S.2d 867, 467 N.E.2d 531 (1983).

30. *Id*. at 980, 470 N.Y.S.2d at 242-43.

31. *Bastian v. Albertson's, Inc.*, 102 Idaho 909, 643 P.2d 1079 (Ct. App. 1982); this is true even though the tenant was an anchor tenant. *Keystone Square Shopping Center Company v. Marsh Supermarkets, Inc.*, 459 N.E.2d 420, 1984 Ind. App. LEXIS 2294 (1984), a case of first impression in Indiana.

32. Provision for free assignability by the tenant, without the consent of the lessor, weighs strongly against a construction of the contract which would require the tenant to continue its business throughout the term of the lease. *Piggly Wiggly Southern, Inc. v. Heard*, 261 Ga. 503, 405 S.E.2d 478 (1991).

33. *Id.*; *Frederick Business Properties Company, a Corporation v. Peoples Drug Stores, Inc.*, 191 W. Va. 235, 445 S.E.2d 176 (1994).

34. Among other things, the tenant leased at least one-half of the available space in the center. *First American Bank & Trust Co. v. Safeway Store, Inc.*, 151 Ariz. 584, 729 P.2d 938 (1986). That case was cited with approval by the Supreme Court of Nevada in a case also involving an anchor tenant. *Hornwood v. Smith's Food King No. 1*, 105 Nev. 188, 772 P.2d 1284 (1989).

35. *Frederick Business Properties Company, a Corporation v. Peoples Drug Stores, Inc.*, 191 W. Va. 235, 445 S.E.2d 176 (1994); a right to sublet is inconsistent with a continuous operation clause, because the operation could be disrupted while the sublessee takes possession and prepares the premises. *Sampson Investments v. Jondex Corporation*, 176 Wis. 2d 55, 499 N.W.2d 177 (1993).

36. *Columbia East Associates v. Bi-Lo, Inc.*, 299 S.C. 515, 386 S.E.2d 259 (1989).

37. *Monmouth Real Estate Investment Trust v. Manville Foodland, Inc.*, 196 N.J. Super 262, 482 A.2d 186 (1984).

38. *Columbia East Associates v. Bi-Lo, Inc.*, 299 S.C. 515, 386 S.E.2d 259 (1989).

39. *Ingannamorte v. Kings Super Markets, Inc.*, 55 N.J. 223, 260 A.2d 841 (1970).

40. *Columbia East Associates v. Bi-Lo, Inc.*, 299 S.C. 515, 386 S.E.2d 259 (1989). The lease provided that the leased premises shall be used only for the operation of a supermarket. The court did not place any emphasis on that fact that the lease also permitted the tenant to assign or sublet any part or all of the leased premises for the purposes set forth in the lease for which the premises may be used.

41. *Ingannamorte v. Kings Super Markets, Inc.*, 55 N.J. 223, 260 A.2d 841 (1970) and *Tooley's Truck Stop, Inc. v. Chrisanthopouls*, 55 N.J. 231, 260 A.2d 845 (1970).

42. *Walgreen Arizona Drug Co. v. Plaza Center Corporation*, 132 Ariz. 512, 647 P.2d 643 (1982). The Arizona court also discussed the distinction between a sublease and an assignment. Where the sublessor retains a one-day reversionary interest (the sublease terminated one day before the end of the lease term), such a reversionary interest is not a sham based on an archaic formalism. Arizona has adopted the archaic formalism of the common law.

43. *First American Bank & Trust Co. v. Safeway Stores, Inc.*, 151 Ariz. 584, 729 P.2d 938 (1986).

44. If a court does grant specific performance of a continuous use covenant, the effect of the decision is said to provide the landlord with the benefit of its bargain, the duty of the tenant not only to pay rent but also to occupy the premises. *Bloomsburg Shopping Center Associates v. Pearle Vision Center, Inc.*, 376 Pa. Super. 580, 546 A.2d 676 (1988).

45. *Food Fair Stores, Inc. v. Blumberg*, 243 Md. 521, 200 A.2d 166 (1964).

46. *8600 Associates, Ltd. v. Wearguard Corporation*, 737 F. Supp. 44 (E.D. Mich. 1990), citing a long list of cases which have not reached unanimous results.

47. *CBL & Associates, Inc. v. McCrory Corp.*, 761 F. Supp. 807 (M.D. Ga. 1991). A Pennsylvania court, however, did order specific performance of a shopping center operating covenant, entered a preliminary injunction enjoining the closing of the stores, and mandated that the tenants continue to operate their stores in

compliance with the operating covenants contained in their respective leases. *The Equitable Life Assurance Society of the United States v. Allied Stores Corporation* and *Lincoln Plaza Associates v. Allied Stores Corporation and Sterns-Oxford Valley, Inc.*, Court of Common Pleas for Bucks County, Pennsylvania, Docket Nos. 88-08728-05-5 and 88-08729-05-5. Although appeals were filed, the matter was settled before the cases reached the appellate court. Segal, Robert M., Vol. 7, No. 3 Newsl. Am. College Real Est. Law. (July 1989).

48. *Grossman v. Wegman's*, 43 A.D.2d 813, 350 N.Y.S.2d 484 (4th Dept. 1973).
49. *New Park Forest Associates II v. Rogers Enterprises, Inc.*, 195 Ill. App. 3d 757, 552 N.E.2d 1215 (1990).
50. *M. Leo Storch Limited Partnership v. Erol's, Inc.*, 95 Md. App. 253, 620 A.2d 408 (Md. Ct. Spec. App. 1993).
51. *Mayor's Jewelers, Inc. v. State of California Public Employee's Retirement System*, 685 So. 2d 904, 1996 Fla. App. LEXIS 12837 (1996).
52. *Lincoln Tower Corp. v. Richter's Jewelry Co.*, 152 Fla. 542, 12 So. 2d 452 (1943).
53. *Massachusetts Mutual Life Insurance Co. v. Associated Dry Goods Corp.*, 786 F. Supp. 1403 (N.D. Ind. 1992).
54. *Dover Shopping Center, Inc. v. Cushman's Sons, Inc.*, 63 N.J. Super. 384, 164 A.2d 785 (1960).
55. *Lincoln Tower Corp. v. Richter's Jewelry*, 152 Fla. 452, 12 So. 2d 452 (1943).
56. *Sinclair Refining Co. v. Davis*, 47 Ga. App. 601, 771 S.E. 150 (1933).
57. *Hornwood v. Smith's Food King No. 1*, 105 Nev. 188, 772 P.2d 1284 (1989).
58. *Cordonier v. Central Shopping Plaza Associates*, 82 Cal. App. 3d 991, 147 Cal. Rptr. 558 (1978).
59. *Igannamorte v. King's Super Markets*, 55 N.J. 233, 260 A.2d 840 (1970); *Tooley's Truck Stop, Inc. v. Chrisanthopouls*, 55 N.J. 231, 260 A.D.2d 845 (1970).

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BERGMAN ON MORTGAGE FORECLOSURES

The Judgment Is Final

By Bruce J. Bergman

Obstreperous borrowers are no surprise to mortgage lenders and servicers. A multitude of defenses, sometimes outlandish, are encountered in foreclosure cases from time to time and probably more often than most foreclosing plaintiffs would ever prefer. Although meeting those defenses can sometimes be time-consuming and expensive, in most instances, the lender or servicer prevails. Adding to the annoyance of all this are defenses asserted late in the case. While eve-of-sale orders to show cause suggest to the contrary, there ought to come a time when the ability to delay a foreclosure action with claimed defenses ends—and there is—which is the message of a recent case in New York.[1] At least an existing lesson is underscored.

"A multitude of defenses, sometimes outlandish, are encountered in foreclosure cases from time to time and probably more often than most foreclosing plaintiffs would ever prefer."

Here are the facts which tell the tale and lead to the conclusion which is pleasing to lenders and servicers. A corporation borrows a substantial amount of money from a bank and secures it with a mortgage upon a commercial building, with the obligation guaranteed by three principals of the corporation. Default ensues, and a foreclosure is instituted. Wisely, the bank named the guarantors in the action as defendants for the deficiency liability. (It is necessary to include guarantors in the foreclosure to pursue the deficiency, although this is sometimes neglected.)

The corporation defaulted in the foreclosure, as did one of the guarantors, but another guarantor answered and a third appeared in the case, thus subjecting himself to the jurisdiction of the case. Summary judgment disposed of the lone answer, a judgment of foreclosure and sale was ultimately entered, and the action proceeded to a foreclosure sale.

The bank then brought an action for a deficiency (although it was defeated because there was no deficiency between the market value of the property and the amount due to the bank). In any event, while the motion for the deficiency was pending, the guarantors of the mortgage commenced a separate action against the bank alleging (among other things) that the bank breached its contractual obligations on the loan and violated its duty to act in good faith by refusing to give a reasonable extension of the mortgage and refusing to enter into a stipulation of settlement which would have limited the personal liability of those individual guarantors.

Merits aside (although it would seem that the guarantors' claim was baseless), the bank moved to dismiss the action brought against it on the theory that the issue had already been decided—*res judicata*. The court agreed. That doctrine provides that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy. . . ."[2] Critically, the court ruled that the judgment of foreclosure and sale is final as to all questions at issue between the parties, together with all matters of defense which were or might have been litigated in the foreclosure action which are thereby deemed concluded.[3] Thus, the claimed issues concern rights and obligations under the mortgage agreement and could have been raised as equitable defenses in the foreclosure action.[4] But they were not.

"None of this means, of course, that a borrower cannot make a motion after the judgment of foreclosure and sale—just that if the claimed issue is a point they could have earlier raised in the action, they won't succeed."

The guarantors (the plaintiffs in this new suit) neglected to raise these claims as defenses before the judgment of foreclosure and sale was granted in the foreclosure action. And that precluded them from endeavoring to litigate these points in any other action.[5] So there really *does* come an end to the ability to do battle with a mortgagee (successfully anyway) and that time is the judgment of foreclosure and sale.

None of this means, of course, that a borrower cannot make a motion after the judgment of foreclosure and sale—just that if the claimed issue is a point they could

have earlier raised in the action, they won't succeed. Additionally, all this presupposes that jurisdiction was obtained. Any defendant can come forward and, if they can demonstrate that they were not properly served in an action, the case can be set aside. But if a party *was* served in a case, they had to raise their defenses before the judgment and if they haven't, they cannot be heard later on for the first time.

Endnotes

1. *New Horizons Investors v. Marine Midland Bank*, 248 A.D.2d 449, 669 N.Y.S.2d 666 (2d Dept. 1998).
2. *Id.* (citing *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687, 429 N.E.2d 1158).
3. *Id.* (citing *Gray v. Bankers Trust Co.*, 82 A.D.2d 168, 170-71, 442 N.Y.S.2d 610); *GreenPoint Sav. Bank v. Clarke*, 220 A.D.2d 384, 631 N.Y.S.2d 888; *Cherico v. Bank of New York*, 211 A.D.2d 961, 621 N.Y.S.2d 235.
4. *New Horizons Investors v. Marine Midland Bank*, 248 A.D.2d 449, 669 N.Y.S.2d 666 (2d Dept. 1998) (citing *Nassau Trust Co. v. Montrose Concrete Prods. Corp.*, 56 N.Y.2d 175, 451 N.Y.S.2d 663, 436 N.E.2d 1265); *Pellicane v. Norstar Bank*, 213 A.D.2d 610, 624 N.Y.S.2d 214; *Massachusetts Mut. Life Ins. Co. v. Gramercy Twins Assocs.*, 199 A.D.2d 214, 606 N.Y.S.2d 158.
5. *New Horizons Investors v. Marine Midland Bank*, 248 A.D.2d 449, 669 N.Y.S.2d 666 (2d Dept. 1998).

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