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Message from the Section Chair

The Real Property Law Section continues to expand its commitment and welcome to recently admitted attorneys and to law students. To encourage attendance at our 2015 Summer Meeting, to be held at the Basin Harbor Club & Resort on Lake Champlain, Vermont, from July 16-18, 2015, we are offering a 75% discount of meeting registration fees and hotel accommodations to first time attendees and to attorneys admitted less than 10 years. Mindy Stern will be our Program Chair for the 2015 Summer Meeting and assures us that we have a spectacular venue and wonderful program planned for all. You can register now on our website to assure your place at the meeting.

We welcome Professor Shelby D. Green of Pace Law School as our new co-chair of the Law School Internship Committee. She is working with co-chair Ariel Weinstock to create more internship opportunities for law students who wish to participate in the work of our Section's many committees and publications. In addition, Professor Green is working with the administration and faculty of Pace Law School to encourage participation in our Student Internship Program, making it the seventh school to send its law students to intern with members of our Section.

Our Section remains focused on the practical needs of its members. The Task Force on Title Agent Licensing continues to work with the NYS Department of Financial Services to assure that its regulations do not curtail an attorney's right to act as title agent.

We reconstituted our Attorney Escrow Agent Task Force to (1) review the disclosures that an attorney acting as escrow agent for a client should provide to the client and other parties to the transaction; (2) prepare model escrow agent disclosure forms for use in such transactions; (3) review the escrow language in the form contracts of sale to determine whether any changes should be made to the forms, placed in a rider or set forth in a separate escrow agreement; (4) review the practices of upstate and downstate practitioners to determine whether the differences require different disclosures or forms; and (5) consider proposing legislation to protect attorneys acting as escrow agents and their clients, such as legislation that would require banks to send escrow account monthly statements to both the attorney and person for whose benefit the account was established. We are fortunate to have Gilbert Hoffman and Benjamin Weinstock as co-chairs of the Task Force.

I hope to see many of you at the RPLS CLE program to be held on Thursday, January 29, 2015 at the New York Hilton Midtown during the NYSBA's Annual Meeting. Leon Sawyko, our Program Chair, promises an interesting CLE session and wonderful luncheon at the 21 Club. Please check our event calendar for other CLE programs sponsored by our Section and its committees and for social events scheduled by our District Representatives.

My best wishes to all for a very happy and healthy New Year!

David L. Berkey

The 2008 Amendments to the New York Adverse Possession Law: Unresolved Ambiguity and Suggestions for Clarity

By Vincent Di Lorenzo

Introduction

In July, 2008 the New York Legislature made substantial revisions to the statutory provisions governing acquisition of title to real property by adverse possession.[1] The proposed legislation was criticized and opposed by the Real Property Law Section of the New York State Bar Association due to, among other reasons, the ambiguities it contained.[2] This article examines three significant ambiguities in the 2008 legislation: (a) the claim of right requirement; (b) the revised actual possession standard; and (c) the prospective or retroactive nature of the legislative changes. It explores how the courts have addressed these ambiguities and offers suggestions for clarification based on the statute's legislative history and earlier but related Court of Appeals decisions.

Claim of Right

Sections 2 and 4 of the 2008 legislation[3] amended New York Real Property Actions and Proceedings Law (NYRPAPL) sections 511 and 521 by eliminating the requirement that the adverse possessor occupy the property under "claim of title." The phrase "claim of title" referred to any recognized adverse claim of ownership, whether based on (a) hostile intention or (b) a good faith mistaken belief of ownership. The Legislature substituted the requirement that the adverse possessor must occupy the property under a "claim of right."[4]

This was not the only relevant change in the statute, however. The Legislature drafted a new provision that amended section 501 of the NYRPAPL and defines "adverse possessor" and "claim of right."[5] "Claim of right" is defined as "…a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be."[6] "Adverse possessor" is defined as follows: "…when the person or entity occupies real property of another person or entity with or without knowledge of the other's superior ownership rights, in a manner that would give owner a cause of action for ejectment."[7] Yet if the adverse possessor enters with knowledge of the owner's superior rights, or with a reasonable basis for the belief that the property belongs to the owner, the courts would characterize that entry as one made with hostile intention. Seemingly, therefore, hostility continued to be recognized as a form of adversity, even though one purpose of the 2008 amendments was to limit adverse possession to claims asserted in good faith.

Complicating the issue is the fact that the case law in New York has not clearly distinguished between a "claim of title" and a "claim of right." In one of the earliest cases exploring the adverse possession doctrine, *Humbert v. Trinity Church*,[8] the court repeatedly described the adversity requirement as a "claim of title for twenty years."[9] However, in the early part of the opinion the court's language suggests that claim of title and claim of right are equivalent terms.[10]

The Court of Appeals' later decision in *Ramapo Manufacturing Company v. Mapes* cites *Humbert* and seemingly adopts the same view that the two terms are equivalent.[11] Later case law did not provide clarity. Indeed, later case law may have created more confusion. This is because cases such as *Belotti v. Bickhardt* describe the adversity requirement as requiring that "possession must be hostile *and under claim of right*…."[12] The decisions in the Court of Appeals, however, made it clear that prior to the 2008 amendments the New York courts recognized both hostile intention[13] and adverse possession held under the mistaken belief of ownership[14] as a valid form of adversity. Thus, either satisfied the requirement in the N.Y. Real Property Actions and Proceedings Law that possession must be under a "claim of title."[15]

The legislative history of the 2008 amendments provides insight into the changes the Legislature was attempting to implement and, in turn, assistance in addressing the ambiguity in the new legislation. With respect to the adverse intention requirement, the Legislature sought two changes in existing law—not one. The first change was to limit claims of adverse possession to claimants asserting title in good faith—i.e., a good faith but mistaken belief of ownership, in contrast to hostile intention. The second change was to require that the claimant have a reasonable basis for that belief.[16]

The Legislative Memorandum accompanying the 2008 amendments states:

> This legislation is all about good faith. A person who attempts to possess land that they know all too well does not belong to them should not be encouraged.… Adverse possession should be used to settle good faith disputes over who owns land. It should not be a doctrine which can be used offensively to deprive a landowner of their real property.[17]

However, the same legislative memo made it clear that a second change was intended as well. It states:

> Last year the Executive vetoed a different attempt to resolve this issue. The Executive took issue with the introduction of a person's belief into the elements of adverse possession. This bill will focus the inquiry not upon the person's belief, but instead upon the evidence introduced in court which justifies a reasonable basis for that belief. It will be an inquiry into the basis and whether it was reasonable, not into a person's mind.[18]

In light of this two-part legislative change, the amendments to sections 511 and 521 of the NYRPAPL, demanding a "claim of right," could be read as the only relevant provisions employed by the Legislature to accomplish the first goal—to eliminate hostile intention as an acceptable form of adverse possession. The amended section 501 of the NYRPAPL, by contrast, could be read as being aimed solely at accomplishing the second goal—to require a reasonable basis for adverse possessors' mistaken belief that they are the owner.

If the focus of section 501 is solely to impose a reasonable basis requirement, then the statutory language in section 501(3), defining claim of right as "a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be," could be interpreted as merely enumerating alternative beliefs that might be demonstrated to have a reasonable basis. However, sections 511 and 521 as revised in 2008 would only permit the former—a reasonable basis for the belief the property belongs to the adverse possessor—to lead to acquisition of title by the adverse possessor. The same view can be taken of the definition of "adverse possessor" in amended section 501(1) of the NYRPAPL. It describes alternative potential adverse possessors—namely "[a] person… with or without knowledge of the other's superior ownership rights.…" However, amended sections 511 and 521 would only allow the latter to acquire title—an adverse possessor without knowledge of another person's superior ownership rights.

Two cases have applied the new adverse intention requirements. Neither explicitly addressed the apparent inconsistency or uncertainty contained in amended section 501. However, in *Ziegler v. Serrano*, the Third Department confirmed that, as amended in 2008, the NYRPAPL now requires a reasonable basis for the adverse possessor's belief that the property is owned by the adverse possessor.[19] In the case before it, the court found that such a reasonable basis existed for occupancy under a claim of right because the adverse possessors had received a deed to the parcel and an earlier action challenging their title had been dismissed.[20]

Similarly, in *Reyes v. Carroll*,[21] the court applied the 2008 amendments to the NYRPAPL. Without mention of the apparent ambiguity or uncertainty in section 501(3), the court stated the new statute requires a "reasonable basis for the belief that the property belongs to the adverse possessor."[22] In this case, the adverse possessors owned adjoining property but had encroached on defendants' land. The court concluded that the adverse possessors had a deed and a survey that "clearly indicated" the correct property line and therefore they did not have a reasonable basis for the belief that the disputed property belonged to them.[23]

Actual Possession

Prior to the 2008 amendments, sections 512 and 522 of the NYRPAPL required that the property was "usually cultivated or improved" by the adverse possessor or "protected by substantial inclosure [sic]."[24] In 2008 the phrase "usually cultivated or improved" was eliminated and the Legislature substituted the following standard:

> …land is deemed to have been possessed and occupied in any of the following cases:
>
> 1. Where there has been acts sufficiently open to put a reasonably diligent owner on notice.
>
> 2. Where it has been protected by substantial enclosure, except as provided in subdivision [543].[25]

The phrase "acts sufficiently open to put a reasonably diligent owner on notice" suggests the provision relates to the open and notorious requirement of the adverse possession doctrine. However, the courts had explained that NYRPAPL sections 512 and 522 in fact stipulate the actual possession requirement of the adverse possession doctrine.[26]

The Court of Appeals, applying the former statutory requirement that possession must be in the form of enclosure, cultivation or improvement, explained the two related aims of this requirement: "[t]he purpose of the statute was to make the possession real, and not constructive, so that it shall be visible, open and notorious."[27] The enumerated requirements limited the acceptable forms of actual possession recognized in New York while simultaneously implicitly affirming that the particular acts relied upon by the claimant must be visible.

The 2008 amendments supply ambiguity rather than clarity with respect to the actual possession requirement. The amended statutory provision speaks only of "*acts* sufficiently open to put a reasonably diligent owner on *notice*." This creates ambiguity concerning (a) the nature of the act that is now required, including whether an act of possession (occupancy) is still required, and (b) the nature of the notice the diligent owner must be provided, e.g., notice of a claim of title.

As discussed below, it is likely the New York Legislature intended to require "acts of ownership" in order to satisfy the amended actual possession requirement. This would align New York law with the law in many other states. However, some states that define actual possession as "acts of ownership" do not require that the adverse possessor is in actual, physical possession of the property. Prior court decisions in New York help us decide what the Legislature likely intended to be the governing standard in New York after its 2008 amendments.

The Court of Appeals has explained that "…there must be possession in fact of a type that would give the owner a cause in ejectment against the occupier throughout the prescriptive period."[28] The Court of Appeals has also noted that the true owner is deemed to be constructively in possession of land to which the owner has title. "This possession is deemed to continue until there is an actual disseizin and expulsion of the true owner…."[29] This is the fundamental character of the actual possession requirement in New York underlying the particulars of the statute's enclosure, cultivation or improvement standard. Thus, as to the nature of the act traditionally required under New York law, it is an act of actual occupation, such that could trigger a cause of action in ejectment. Recognizing the nature of the actual possession required under New York law, the courts have explained that proof of payment of real estate taxes may help to prove the adverse possessor's claim of title. However, it would not be a sufficient act of possession under the adverse possession doctrine.[30] Did the New York Legislature intend to eliminate this fundamental requirement of actual possession when it embraced an "acts of ownership" standard? There is nothing in the terms of the 2008 amendments or its legislative history that indicates this was intended.

The nature of the notice provided to the owner through such act of occupation has also been considered by the Court of Appeals. In *Barnes v. Light* the Court of Appeals embraced the earlier position of the court in *La Frombois v. Smith*[31] that "[t]he actual possession…of the premises, as owners are accustomed to possess… their estates…will…be sufficient to raise a presumption of his entry and holding as absolute owner, and will establish a claim of title. Possession, accompanied by the usual acts of ownership, is presumed to be adverse until shown to be subservient to the title of another."[32] In other words, the Court of Appeals has required actual occupation of the premises by the adverse possessor in a manner that would evidence a claim of ownership and provide notice to the owner of such a claim.

No case law has yet addressed the new statutory standard for actual possession in the 2008 amendments. However, other provisions in the statute and its legislative history help us address the ambiguity in the revised statute. The newly enacted definition of "adverse possessor" speaks of occupancy of the real property of another "in a manner that would give owner a cause of action in ejectment."[33] This definition serves to confirm that the "acts" now required continue to be acts of actual occupation, and not such acts of ownership as could be characterized as constructive possession.

There is only one reference in the legislative history of the 2008 amendments that speaks of the purpose of eliminating the cultivation or improvement requirement. It is a memorandum in support of an earlier version of the bill that contained the same change and was submitted by the New York State Bar Association. The memorandum explained:

> S. 7915 Would Prevent Stealth Takings of Property.
>
> Presently the statute permits acquisition of property by an adverse possessor if the adverse possessor "usually cultivated or improved" the property. This language especially the words "usually cultivated" is at best ambiguous and has caused a number of homeowners who lost property, including the defendants in *Walling v. Przybylo*, 7 N.Y. 3d 228 (2006), to claim that they did not know that the adverse possessor was on their property and so were unable to eject them during the statutory period.
>
> *a. Reasonably diligent owner must be on notice of adverse possessor.*
>
> S. 7915 addresses this problem by limiting "usually cultivated or improved" to situations where the adverse possessor's actions were "sufficiently open to put a reasonably diligent owner on notice." Under this language, for the first time there would be a specific statutory direction to the courts rejecting stealth takings of property.[34]

The 2008 amendments additionally eliminate the possibility that de minimis, non-structural encroachments, such as fences, hedges, shrubbery and sheds, and lawn mowing or similar maintenance can be characterized as sufficient acts of adverse possession. Rather, as a matter of law these acts are "deemed to be permissive and non-adverse."[35]

A statutory modification to a common law doctrine is narrowly construed to preserve common law requirements not expressly modified. This principle has been stated in various forms. The Court of Appeals has stated that the common law "will be held to be no further abrogated than the clear import of the language used in the statute absolutely requires.…"[36] Similarly, it has stated that the "Legislature may not

be presumed to make any innovation upon the common law further than is required by the mischief to be remedied."[37] The mischief in question targeted by the 2008 amendments was avoiding possible stealth takings of property. Thus, in light of the long-recognized common law standard governing actual possession, the 2008 amendments should be read as requiring (a) acts of possession, (b) that evidence usual acts of ownership, and (c) put a reasonably diligent owner on notice of the possessor's claim of title.

When read in this manner, the 2008 amendments now align New York law with the actual possession requirement imposed in most other states, namely a requirement of an act of ownership. This requirement was recognized and explained in cases such as *Lessee of Ewing v. Burnet*.[38] In that case the Court summarized Ohio law in the following terms:

> It is well settled, that to constitute an adverse possession, there need not be a fence, building or other improvement…; it suffices…that visible and notorious acts of ownership are exercised over the premises in controversy…. So much depends on the nature and situation of the property…that it is difficult to lay down any precise rule…But it may with safety be said, that where acts of ownership have been done upon land, which, from their nature, indicate a notorious claim of property in it…such acts are evidence of an ouster of a former owner, and an actual adverse possession against him.[39]

However, the *Ewing* case went on to explain that "[n]either *actual occupation*, cultivation nor residence, are necessary to constitute actual possession… when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership."[40] This aspect of the actual possession requirement recognized only in some other states is likely not embraced by the 2008 amendments. Rather, the Court of Appeals has, in the past, required actual occupation—expulsion of the true owner.[41] Certainly the overall legislative purpose of the 2008 amendments, to avoid stealth takings, would be best served by continuing to insist on an actual, and not constructive, possession requirement.

Retroactive or Prospective Requirements

Section 9 of the 2008 legislation provides: "[t]his act shall take effect immediately, and shall apply to claims filed on or after such effective date."[42] The terms of the statute, if literally applied, would require a court to apply the new statutory provisions to any action to quiet title, or any action in ejectment, filed after July 7, 2008 even if the adverse possessor acquired title prior to the enactment of the statute. The New York courts have repeatedly confirmed that the adverse possessor becomes the owner of the property immediately upon expiration of the statute of limitations.[43] A quiet title action only serves to confirm that outcome. Yet, if the new statutory provisions govern all actions filed after enactment of the statute, they could serve to strip the adverse possessor of a vested property interest whenever that party could not satisfy the new statutory requirements. For example, title could not be confirmed if the adverse possessor entered with hostile intention and the court was forced to reject hostile intention as a recognized form of adversity by applying the 2008 statutory amendments retroactively.

A number of decisions in the appellate courts have considered whether the 2008 amendments to the adverse possession law can be applied to all adverse possessors who were parties to actions to quiet title filed after the effective date of the new statute. In these cases the statute of limitations for recovery of real property had already expired. Curiously, only the Fourth Department has consistently refused to apply the amended statute retroactively to such claimants. Decisions in the Second and Third Departments are divided. In the First Department, there is no decision in the appellate court but the lower courts are also divided. The issue was raised before the Court of Appeals in *Estate of Becker v. Murtagh*.[44] However, in that case the Court noted the amended statute was not applicable because (a) the adverse possessor's title vested *and* (b) the action was filed before the effective date of the new statute.[45] Thus, the court did not explore the propriety of applying the amended statute retroactively.

Franza v. Olin[46] was one of the first appellate decisions addressing the constitutionality of retroactively applying the 2008 amendments to the adverse possession law to all actions filed after the effective date of the legislation. In that case the adverse possessor claimed acquisition of title as early as 1985 but did not file an action to quiet title until August 18, 2008—approximately six weeks after the effective date of the 2008 amendments. The court refused to apply the amended version of the statute because this would impair vested property rights. The court reaffirmed that at the expiration of the statutory limitations period, legal title is transferred from the owner to the adverse possessor. The court noted that newly enacted section 543 of the NYRPAPL defines as permissive and non-adverse actions that were sufficient to obtain title under prior law. The court then ruled: "It therefore follows that, where title has vested by adverse possession, it may not be disturbed retroactively by newly enacted or amended legislation."[47] Rather, application of the amendments to plaintiff, whose title to the disputed property would have vested prior to 2008, is unconstitutional.[48] The Fourth Department faced the same issue in *Perry v. Edwards*[49] and

Hammond v. Baker[50] and adhered to its decision in the *Franza* case.

Three decisions in the Third Department have addressed the retroactive application of the 2008 amendments to the adverse possession law. Two of the three decisions have applied the 2008 amendments retroactively. However, the court's last decision, in *Barra v. Norfolk Southern Railway Company,*[51] refused to do so. *Barra* involved a claim of easement by prescription, but the court explained that it is well settled that statutory changes affecting the law of adverse possession concomitantly alter the common law doctrine of prescriptive easement.[52] The court noted that plaintiffs' claim was filed in March 2009 but the prescriptive periods all commenced and concluded prior to the effective date of the 2008 amendments. The court explained that if plaintiffs succeed in proving their claims, rights to the easement in question would have vested prior to the effective date of the amendments, and concluded that such rights may not be disturbed retroactively by newly enacted or amended legislation.[53] The court cited the Fourth Department's decision in the *Franza* case and the Court of Appeals' decision in *Baker v. Oakwood*. The court did not mention the two decisions in the Third Department that had reached a contrary conclusion.

In *Sawyer v. Prisoky,*[54] decided by the Third Department before *Barra*, the action was commenced in September 2008 but involved a claim of adverse possession that commenced in 1997. The court applied the 2008 amendments. It specifically discussed and applied the newly enacted section 543 of the NYRPAPL. The court concluded that plaintiffs' maintenance of a lawn, walkway and beach, as well as plantings and "rock wall," are all acts that are permissive and non-adverse, as a matter of law, under newly enacted section 543. As a result, the court affirmed the lower court's grant of defendants' limited motion to dismiss.

Similarly, in *Ziegler v. Serrano*[55] the court applied the 2008 amendments to the adverse possession law to an action commenced in September 2008 involving a claim of adverse possession since 1985. The court noted that the 2008 amendments require possession under a claim of right and a reasonable basis for that claim. In the case before it, a deed plaintiffs had received in 1985, plus dismissal of defendants' 1992 action challenging their title, provided plaintiffs with the necessary reasonable basis to believe they owned the property.[56] Of course, the same facts would establish the requisite adversity under prior law, but the court went out of its way to apply the 2008 amendments, including the new "reasonable basis" requirement in section 501 (3) of the NYRPAPL.

The Second Department has issued many opinions addressing the retroactive nature of the 2008 amendments to the adverse possession law—the largest number of decisions in any department. These decisions are also divided. Three have applied the 2008 amendments retroactively; eight have refused to do so.[57]

In *Hogan v. Kelly*[58] the court refused to apply the 2008 amendments retroactively. The court explained: "Although this action was commenced after the effective date of the 2008 amendments, we agree with our colleagues in the Third and Fourth Department that the amendments cannot be retroactively applied to deprive a claimant of a property right which vested prior to their enactment."[59] This view was followed in later decisions in the Second Department issued in 2012 and 2013.[60] It was also followed in two decisions issued by the Second Department in 2014—decisions that explained they were required to apply the law in effect at the time title allegedly vested.[61]

However, three decisions in the Second Department have taken a contrary view, including the court's 2013 decision in *Wright v. Sokoloff*.[62] In that case the facts implicated newly enacted section 543 of the NYRPAPL if that provision governed. The court applied the new statutory provision without any discussion of the retroactive nature of that decision and without mentioning earlier decisions that had reached a contrary conclusion.

The same conclusion was reached earlier in *Hartman v. Goldman,*[63] which also involved application of newly enacted section 543 of the NYRPAPL. In that case, however, the court noted "[t]he parties do not dispute that this action is governed by article 5 of the RPAPL, as amended in 2008, applicable to all claims filed on or after July 7, 2008."[64] It is not clear from the later decision in the *Wright* case if either party raised the claim that the amended statute was inapplicable. Finally, in *Calder v. 731 Bergan LLC,*[65] the court applied, without discussion, the newly enacted requirement that a claim of right must be based on a reasonable basis for the belief by the adverse possessors that they owned the disputed property.[66] In that case the reasonable basis for such a belief was deemed to exist because the adverse possessors were advised that the disputed parcel was part of the property they purchased from HUD. These facts would satisfy the claim of right requirement under prior law as well, but the court applied the new, specific legal requirement of a reasonable basis for a claim of right.

These seemingly inconsistent decisions in the Second Department have led to inconsistent decisions among judges sitting in Supreme Court in the Second Department. Some lower court decisions have refused to apply the 2008 amendments retroactively, citing the *Hogan* and *Shilkoff* decisions.[67] Others have applied the 2008 amendments retroactively, ignoring the *Hogan* decision and citing the *Hartman* decision instead.[68]

The First Department has not issued an opinion regarding retroactive application of the 2008 amendments to the adverse possession law. The lower courts in the First Department,

however, have addressed the issue and are similarly divided. At times the Supreme Court has refused to apply the statute retroactively, citing decisions in the Third and Fourth Departments such as *Franza v. Olin*.[69] However, other decisions in Supreme Court have applied the 2008 amendments retroactively, citing decisions in the Third Department such as *Sawyer v. Prisoky*.[70]

In summary, the decisions in the Second and Third Departments remain divided, while the issue of retroactive application of the 2008 amendments has yet to be addressed in the First Department. The consequence is unpredictable outcomes at the trial court level. Only the Fourth Department has consistently refused to apply the 2008 amendments to adverse possessors that allege their property rights vested prior to the effective date of the 2008 amendments.

An analysis of decisions of the New York Court of Appeals indicates that the Fourth Department's position regarding the retroactive application of the 2008 amendments is the correct decision. In *Alliance of American Insurers v. Chu*[71] the Court summarized settled principles of judicial review of legislative enactments in these terms:

> We are mindful, of course, that the legislation carries a presumption of constitutionality.… This principle requires us to avoid interpreting a statute in a way that would render it unconstitutional if such a construction can be avoided.… In this case, however, there is no question of statutory interpretation. The effects of the legislation are obvious and acknowledged. If those effects infringe on constitutionally protected rights, we cannot avoid our obligation to say so…
>
> The State's power to alter the rights and obligations that attach to completed transactions is not as broad as its power to regulate future transactions…the Legislature is not free to impair vested or property rights.… This doctrine reflects the deeply rooted principles that persons should be able to rely on the law as it exists and plan their conduct accordingly and that the legal rights and obligations that attach to completed transactions should not be disturbed…
>
> Let there be no mistake, our decision rests on the constitutionally based protection against legislative interference with vested rights, a doctrine with a long tradition….[72]

As applied to the adverse possession doctrine, it is settled that when the statute of limitations has run, the adverse possessor has acquired a vested property interest.[73] The 2008 amendments cannot interfere with such vested rights.

The discussion above has focused on a scenario in which an adverse possessor has acquired title prior to the effective date of the 2008 amendments but files an action to quiet title after the effective date. A different scenario that the courts have yet to address is one in which the adverse possessor commenced occupancy prior to the effective date of the 2008 amendments but has not yet acquired title on the effective date. The 2008 amendments contain substantial changes in the recognized elements for a successful claim of adverse possession. These changes will cause some actions that earlier satisfied the five requirements for adverse possession to no longer be given legal recognition. For example, an adverse possessor may have begun his or her period of adverse possession in 2002 with hostile intention. Yet after July 8, 2008 hostile intention would no longer be recognized as a valid form of adversity. Similarly, the adverse possessor's acts of actual possession begun in 2002 might have been planting hedges and shrubbery and/or lawn mowing. Based on prior law such actions could be characterized as valid acts of actual possession.[74] However, the 2008 amendment provide that these actions "shall be deemed to be permissive and non-adverse."[75] The issue becomes whether an adverse possessor's potential claims can be eliminated by the 2008 legislation.

Governing principles for this issue have been provided by the New York Court of Appeals. The Court has noted that: "Although a statute is not invalid merely because it reaches back to establish the legal significance of events occurring before its enactment, a traditional principle applied in determining the constitutionality of such legislation is that the Legislature is not free to impair vested or property rights…."[76] At first glance the argument surfaces that the 2008 amendments merely establish the legal significance of the acts of planting shrubbery or lawn mowing, or even entry with knowledge that the adverse possessor is not the owner. However, the more fundamental issue is whether the adverse possessor can claim a vested interest in continuing the same actions that were previously recognized as valid forms of adverse possession and would have led to acquisition of title but for the enactment of the 2008 amendments.

The Court of Appeals, in 1969, made it clear that determining when a right becomes vested is not a mechanical decision. Rather,

> [w]hen embarking on a journey into the realm of "vested rights," it is dangerous indeed not to proceed with great caution for the concept is a fiction and hides many unmentioned considerations of fairness to the parties, reliance on pre-existing law, the extent of retroactivity and the nature of the public interest to be served by the law…. The modern

> cases reflect more candid considerations of these relevant factors as well as a less inflexible view of the right of the Legislature to pass retroactive legislation. In any event, this is an area where broad conclusions are to be studiously avoided for it is impossible to predict in advance how in each concrete case the various factors will line up.[77]

As discussed earlier, it is settled that an adverse possessor's property rights are vested at the expiration of the statute of limitations. However, whether an adverse possessor may claim a vested interest in the accepted *methods* of acquiring title by adverse possession prior to the 2008 revisions is not settled. As the Court of Appeals has noted, it will consider (a) considerations of fairness to the parties, (b) reliance on pre-existing law, (c) the extent of retroactivity, and (d) the nature of the public interest to be served by the law. The Legislature made it clear that eliminating hostile taking of property was an important goal. The Legislative Memorandum in support of the legislation explained that:

> Adverse possession should be used to settle good faith disputes over who owns land. It should not be a doctrine which can be used offensively to deprive a landowner of their real property. That only encourages mischief between neighbors and even between families. No good can come of it. This is an incentive which must be curtailed.[78]

Given the importance of this goal to the Legislature, and the fact that an adverse possessor is or should be aware that a potential claim of ownership can be lost, at any time, by interruption by the true owner, then it seems likely the courts will not recognize a vested interest in the prior methods of acquiring title. No strong reliance interest is likely to be recognized. Moreover, fairness to the parties cuts in favor of the existing owner. Indeed, the demanding five-part adverse possession doctrine itself seeks to protect the existing owner's interest whenever possible.

Conclusion

The 2008 legislative amendments to the New York adverse possession doctrine have created a fair amount of uncertainty concerning the doctrine. The New York Court of Appeals has not yet addressed any of the issues raised. It seems reasonable to conclude that the lower courts can resolve the uncertainty created in the revised standards concerning the claim of right and the actual possession requirements. This article has explored the form and justifications for possible resolution of the issues raised. However, given the divided decisions in the appellate courts it is incumbent on the Court of Appeals to clarify the retroactive nature of the amendments the Legislature enacted.

Endnotes

1. *See* Property—Adverse Possession, S-7915-C, ch. 269, 2008 N.Y. Sess. Laws (McKinney).
2. Mem.of Opp'n of Real Property Law Section, New York State Bar Association, Gov. Bill Jacket at 18 A-21 (July 2, 2008). *See also* Robert E. Parella & Robert M. Zinman, *Adverse Possession: What Hath the New York Legislature Wrought?*, 37-1 N.Y. Real Prop. L.J. 27, 30-32 (2009) (discussing the interpretive problems the legislature left for the courts to resolve).
3. Property—Adverse Possession, S-7915-C, ch. 269, 2008 N.Y. Sess. Laws § 2, § 4 (McKinney).
4. *See id*. § 1 (adding a new section 501 of the NY RPAPL).
5. *Id*.
6. N.Y. Real Prop. Acts. Law § 501(3) (McKinney 2008).
7. *Id.* § 501(1).
8. 24 Wend. 587 (N.Y. 1840).
9. *Id*. at 604.
10. The court explained:

    > In testing a defense founded on possession, courts of justice direct their attention to…the intention with which it is taken and continued. If it be a naked possession, not accompanied with any claim of right it will never constitute a bar….

    Id. at 597. (ruling that the claim of the adverse possessor need not be made in good faith).
11. The court notes that possession unaccompanied by a claim of right never constitutes a bar to the true owner but also states the bona fides of the claim of the occupant is not essential. 216 N.Y. 362, 370-371, 110. N.E. 772, 775 (1915).
12. 228 N.Y. 296, 302, 127 N.E. 239, 241 (1920) (emphasis added).
13. Walling v. Przybylo, 7 N.Y.3d 228, 232-33, 851 N.E.2d 1167, 1170 (2006) (citing Humbert v. Trinity Church, 24 Wend. 587 (1840)).
14. *See, e.g.*, Belotti v. Bickhardt, 228 N.Y. 296, 301-03, 127 N.E. 239, 241 (1920).
15. *See* Barnes v. Light, 116 N.Y. 34, 22 N.E. 441 (1889) (discussing the requirements of N.Y. Code Civ. Pro. §§ 367-373, a predecessor to the NYRPAPL which also required a "claim of title"). *See also* Van Valkenburgh v. Lutz, 304 N.Y. 95, 106 N.E.2d 28 (1952) (discussing the "claim of title" requirement contained in Civ. Prac. Act §§ 34-41-a, the immediate predecessor to the NYRPAPL).
16. *See* Introducer's Memorandum in Support, 2008 New York State Legislative Annual at 182 (this bill provides that title pursuant to adverse possession shall be defeated if the claimant has no "claim of right" or reasonable basis for the belief that the property belongs to the claimant).
17. Legislative Memorandum relating to ch. 269, 2008 McKinney's Session Laws at 1941.
18. *Id.*
19. *See* 74 A.D.3d 1610, 1611-12, 905 N.Y.S.2d 297, 299-300 (3d Dep't 2010) (citing RPAPL § 501(3)).
20. *Id*. at 1612.
21. 42 Misc.3d 1219(A), 986 N.Y.S.2d 868 (Sup. Ct. Suffolk Cnty. 2013).
22. *Id*. at 6.
23. *Id*. at 7.
24. N.Y. Real Prop. Acts. §§ 512(1)-(2), 522 (1)-(2) (1962) (amended 2008). These requirements were also part of the predecessor to the NYRPAPL.
25. Property—Adverse Possession, S-7915-C, ch. 269, 2008 N.Y. Sess. Laws (McKinney) (amending NYRPAPL § 512 and § 522).
26. *See* Monnot v. Murphy, 207 N.Y. 240, 100 N.E. 742 (1913) (relating the actual occupancy requirement in Code of Civil Procedure section 371 to the enclosure, cultivation and improvement requirement in section 372); *see also* Stickler v. Halevy, 794 F. Supp. 2d 385, 397 (E.D.N.Y. 2011).

27. Ramapo Mfg. Co. v. Mapes, 216 N.Y. 362, 110 N.E. 772 (1915).

28. Brand v. Prince, 35 N.Y.2d 634, 636, 324 N.E.2d 314 (1974). This is a view reaffirmed in Ray v. Beacon Hudson Mountain Corp., 88 N.Y.2d 154, 159, 666 N.E.2d 532 (1996).

29. Archibald v. The New York Cent. and Hudson River R.R. Co., 157 N.Y. 574, 583, 52 N.E. 567 (1899).

30. *See, e.g.,* Archibald v. The New York Cent. and Hudson River R.R.Co., 157 N.Y. 574, 583, 52 N.E. 567 (1899); Ray v. Beacon Hudson Mountain Corp., 88 N.Y.2d 154, 163 note 5 (1996).

31. 8 Cow. 589, 603 (1826).

32. Barnes v. Light, 116 N.Y. 34, 39, 22 N.E. 441 (1889).

33. N.Y. Real Prop. Acts. § 501(1).

34. New York State Bar Association's Memorandum in Support, Bill Jacket, ch. 269, 2008 S.B. 7915, *available at* http://old.nysba.org/Content/ContentFolders/Legislation/LegislativeMemoranda20072008/NYSBAMemorandum23.pdf.

35. N.Y. Real Prop. Acts. § 543(1).

36. Dean v. Metro. Elevated Ry. Co., 119 N.Y. 540, 547, 23 N.E. 1054 (1890).

37. Psota v. Long Island RR. Co., 246 N.Y. 388, 393, 159 N.E. 180, 181 (1927) (citing *Dean* at 547, 23 N.E. at 1054).

38. 36 U.S. 41 (1837).

39. *Id*. at 52-53 (citing Ellicott v. Pearl, 35 U.S. 412 (1836)).

40. *Id*. at 53 (emphasis added).

41. *See supra* notes 28-29 and accompanying text.

42. Property—Adverse Possession, S-7915-C, ch. 269, § 9, 2008 N.Y. Laws (McKinney).

43. *See* Baker v. Oakwood, 123 N.Y. 16, 25-29, 25 N.E. 312, 314-316 (1890) (citing e.g., Cahill v. Palmer, 45 N.Y. 478 (1871); Reformed Church v. Schoolcraft, 65 N.Y. 134 (1875)); Franza v. Olin, 73 A.D. 3d 44, 46-7, 897 N.Y.S.2d 804, 807 (4th Dep't 2010) (citing e.g. Gorman v. Hess, 301 A.D.2d 683, 685, Woodruff v. Paddock, 130 N.Y. 618, 624 (2003)).

44. 19 N.Y.3d 75, 968 N.E.2d 433, 945 N.Y.S.2d 196 (2012).

45. *Id*. at 84 n.4.

46. 73 A.D. 3d 44, 897 N.Y.S. 2d 804 (2010).

47. *Id*. at 47 (citing Baker v. Oakwood).

48. *Id*. at 47-48.

49. 79 A.D. 3d 1629, 913 N.Y.S. 2d 460 (2010).

50. 81 A.D. 3d 1288, 916 N.Y.S. 2d 702 (2011). In *Hammond* the action was filed on June 13, 2008. Nonetheless the court rejected defendants' contention that the court should apply the amended version of the RPAPL because, citing *Franza*, if title has vested by adverse possession it may not be disturbed retroactively. *Id*. at 1290.

51. 75 A.D. 3d 821, 826, 907 N.Y.S. 2d 70 (3d Dep't 2010).

52. *Id*. at 825 n.5.

53. *Id*. at 826.

54. 71 A.D. 3d 1325 (3d Dep't 2010).

55. 74 A.D. 3d 1610, 905 N.Y.S. 2d 297 (3d Dep't 2010).

56. *Id*. at 1612.

57. In addition, one decision did not reach the issue of retroactivity since the facts in question stated a cause of action under both the amended law and prior law. Maya's Black Creek, LLC v. Angelo Balbo Realty Corp., 82 A.D. 3d 1175, 920 N.Y.S. 2d 172 (2d Dep't 2011).

58. 86 A.D. 3d 590, 927 N.Y.S. 2d 157 (2d Dep't 2011).

59. *Id*. at 592 (citations omitted).

60. Sprotte v. Fahey, 95 A.D.3d 1103, 944 N.Y.S.2d 612 (2d Dep't 2012); Shilkoff v. Longhitano, 94 A.D.3d 974, 943 N.Y.S.2d 144 (2d Dep't 2012); Matter of Dorothy Lee, 96 A.D.3d 941, 946 N.Y.S.2d 621 (2d Dep't 2012); Pakula v. Podell, 103 A.D.3d 864, 962 N.Y.S.2d 254 (2d Dep't 2013); Galchi v. Garabedian, 105 A.D.3d 700, 961 N.Y.S.2d 588 (2d Dep't 2013).

61. Scalamander Cove, LLC v. Bachmann, 119 A.D.3d 547, 987 N.Y.S.2d 902 (2d Dep't 2014); Galli v. Galli, 117 A.D.3d 679, 985 N.Y.S.2d 273 (2d Dep't 2014). *See also* Klein v. Aronshtein, 116 A.D.3d 670, 983 N.Y.S.2d 298 (2d Dep't 2014) (applying prior law without discussion).

62. 110 A.D. 3d 989, 973 N.Y.S. 2d 743 (2d Dep't 2013).

63. 84 A.D. 3d 734, 924 N.Y.S. 2d 97 (2d Dep't 2011).

64. *Id*. at 735. In *Hartman* the action was filed in April 2009, but the adverse possession allegedly commenced in 1987 and continued for more than 20 years.

65. 83 A.D. 3d 758, 920 N.Y.S. 2d 413 (2d Dep't 2011).

66. *Id*. at 759 (as required under newly enacted section 501 (3) of the NYRPAPL).

67. *See, e.g.,* Reilly v. Achitoff, 2013 N.Y. Slip. Op. 32711 (Sup. Ct. Suffolk Co. 2013) (citing Shilkoff v. Longhitano and Hogan v. Kelly, as well as decisions in the Fourth and Third Departments); Klein v. Kessler, 2013 N.Y. Slip Op. 31276 (Sup. Ct. Suffolk Co. 2013) (citing Shilkoff v. Longhitano); Powell v. Cox, 32 Misc. 3d 1237(A), 938 N.Y.S. 2d 229 (Sup. Ct. Queens Co. 2011) (citing Hogan v. Kelly).

68. *See, e.g.,* Reyes v. Carroll, 42 Misc. 3d(A) 1219 (Sup. Ct. Suffolk Co. 2013) (applying the reasonable basis requirement and de minimis non-structural encroachment provisions in newly enacted sections 501 and 543 of the NYRPAPL, without citation or discussion of retroactivity). Giannasca v. Lind, 34 Misc. 3d 227, 934 N.Y.S. 2d 656 (Sup. Ct. Queens Co. 2011) (citing Hartman v. Goldman, as well as Sawyer v. Prisoky in the Third Department).

69. *E.g.,* LBMH Group, L.P. v. Safer, 29 Misc. 3d(A) 1236, 920 N.Y.S. 2d 242 (Sup. Ct. New York Co. 2010).

70. Neighborhood Eighth Avenue LLC. v. 454-458 W. 128th Street Co., LLC 2010 N.Y. Slip. Op. 31160 (Sup. Ct. New York Co. 2010).

71. 77 N.Y.2d 573, 571 N.E.2d 672, 569 N.Y.S. 2d 364 (1991).

72. *Id*. at 585-6 (citations omitted).

73. *See* Baker v. Oakwood, 123 N.Y. 16, 25-30, 25 N.E. 312 (1890) (title to an estate in land may be acquired by one and lost by another by means of adverse possession. This principle has become a rule of property that cannot now be disturbed without grave injury to titles).

74. *See, e.g.,* Ramapo Mfg. Co. v. Mapes, 216 N.Y. 362, 372-3, 110 N.E. 772 (1915) (discussing mowing a lawn as a form of cultivation or improvement sufficient to satisfy the actual possession requirement).

75. N.Y. Real Prop. Acts. Law § 543(1), (2).

76. Hodes v. Axelrod, 70 N.Y. 2d 364, 369-370, 520 N.Y.S. 2d 933, 515 N.E.2d 612 (1987). *See also* Alliance of American Insurers v. Chu, 77 N.Y. 2d 573, 585-6, 569 N.Y.S. 2d 364, 571 N.E.2d 672 (1991).

77. In re Chrysler Properties, Inc., 23 N.Y. 2d 515, 518-9, 297 N.Y.S. 2d 723, 245 N.E.2d 395 (1969). *See also Hodes* at 370-371; *Alliance of American Insurers* at 586.

78. Legislative Memorandum relating to ch. 269, 2008 McKinney's Session Laws 1941.

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From Slums to Stadiums: A Historical Summary of New York's Public Use Limitation

By Karen M. Richards

Introduction

Judge Plager of the United States Court of Appeals for the Federal Circuit observed that "[a] man's home may be his castle, but that does not keep the Government from taking it. As an incident to its sovereignty, the Government has the authority to take private property for a public purpose."[1] Both the United States Constitution and the New York State Constitution limit the power of eminent domain by providing that private property must be taken for public use and with just compensation.[2]

The concept of public use has changed considerably over the years. Part I of this article provides a history of its evolution in New York by summarizing key cases decided by the Court of Appeals over a span of three centuries. The Judiciary's limited role in reviewing a condemnation determination is the topic of Part II.

Part I

Evolution of Public Use

In the nineteenth century and early twentieth century, the Court of Appeals literally construed public use—property acquired by eminent domain had to, in some way, be used by the public.[3] New York State's highest court defined public use in 1892 "as the use which each individual might of right demand upon the same general terms and for the same general purposes, as any other individual,"[4] and in 1918, the Court defined it as only those uses which were "for the benefit and advantage of all the public and in which all have a right to share—a use which the public have a right to freely enter upon under terms common to all."[5]

Even though the Court's early view of public use during this time period was narrow, it nonetheless recognized that some takings could benefit both private enterprises and the public.[6] A case in point is *Matter of Mayor of City of N.Y.*, decided in 1892, where the taking of privately owned piers and wharves was upheld by the Court of Appeals.[7] The Court's holding was based upon a finding that the transportation of persons and property from and to foreign ports by steamships had grown to such dimensions in New York City that "it became practically impossible to transact the commercial business of the port unless [private steamship lines] had permanent piers at which they could load and unload their cargoes."[8] Without an exclusive right to use permanent piers, the steamships would use ports in New Jersey.[9] The Court opined, "[t]o minister to the necessities of commerce by providing fit and proper places in a seaport where ships can be loaded and unloaded with all proper facilities, is a public duty owing by the state and through it by the municipality which governs and controls the port."[10] It thus concluded that even though the City may lease some of the land taken to private steamship lines, the land was nonetheless taken for a public use.[11]

However, if a property's post-taking use would be no more public than its pre-taking use, the Court rejected the argument that taking private property and transferring it to a private corporation promoted the general prosperity of the community.[12] In *Matter of Eureka Basin Warehouse and Manufacturing Company of Long Island*, the taking was impermissible because the proposed wharves and structures "would be the private property of the corporation, and subject to its absolute control and use as such."[13] The Court did not

> regard such a project as a public purpose or use which justifies the delegation to this company of the right of eminent domain. The enterprise is, in substance, a private one, and the pretense that it is for a public purpose is merely colorable and illusory. The taking of private property for private purposes cannot be authorized even by legislative act, and the fact that the use to which the property is intended to be put, or the structure intended to be built thereon, will tend incidentally to benefit the public by affording additional accommodations for business, commerce, or manufacturing, is not sufficient to bring the case within the operation of the right of eminent domain, so long as the structures are to remain under private ownership and control, and no right to their use or to direct their management is conferred on the public.[14]

Similarly, in *Matter of Niagara Falls and Whirlpool Railway Company*, a railroad company sought to take private land to construct a road, which would take sightseers to Niagara Falls.[15] The Court acknowledged that the legislature "wisely delegate[d] to corporate bodies the right to construct and maintain railroads as public ways for the transportation of freight and passengers," but it recognized that "[t]he ground upon which private property may be taken for railroad uses, without the consent of the owner, is primarily that railroads are highways furnishing means of communication between different points, promoting traffic and commerce, facilitating exchange; in a word, they are improved ways. In every form of government the duty of providing public ways is acknowledged to be a public duty."[16]

The road proposed by the railroad company, however, did not connect at either end with a highway, and notably, the sole commerce promoted "was to enable the corporation, for a compensation to be received, to provide for the portion of the public who may visit Niagara Falls, better opportunities for seeing the natural attractions of the locality."[17] This was "not a public purpose which justifies the exercise of the high prerogative of sovereignty invoked in aid of this enterprise."[18] Although the proposed road would "be public in the sense that all who desire will be entitled to be carried upon it," this was not sufficient "in view of the other necessary limitations, to make the enterprise a public one so as to justify condemnation proceedings."[19] Accordingly, the Court found the enterprise was "essentially private and not public, and the private property cannot be taken against the will of the owners for the construction of the road."[20]

The early Court's restricted view of public use confined taking private land to traditional governmental uses, such as public buildings, highways, schools, utilities, parks, and in some instances, railroads, canals, turnpikes, and ferries, but its view of public use broadened in 1936.[21] That year, in the seminal case of *New York City Housing Authority v. Muller*, the Court of Appeals observed that public use is ever-changing:

> Over many years and in a multitude of cases the courts have vainly attempted to define comprehensively the concept of a public use and to formulate a universal test. They have found here as elsewhere that to formulate anything ultimate, even though it were possible, would, in an inevitably changing world, be unwise if not futile… The law of each age is ultimately what that age thinks should be the law.[22]

The law of this age created the "blight exception" to public use, but *Muller* limited the blight exception to taking areas marked with slums and replacing substandard and insanitary housing with public housing or limited dividend housing corporations.[23] The taxing power and the police power had been used to deal with the problems caused by slums, such as disease, crime, heavy capital loss and a diminishing return in taxes and an "[e]normous economic loss resulting directly from the necessary expenditure of public funds to maintain health and hospital services for afflicted slum dwellers and to war against crime and immorality."[24] These powers, however, were inadequate to solve the "public evils, social and economic" of the slums.[25] The Legislature thus "resorted to the last of the trinity of sovereign powers by giving to a city agency the power of eminent domain."[26] Using the power of eminent domain to eliminate slums and provide low-cost housing furthered the "fundamental purpose of government"—"to protect the health, safety and general welfare of the public," according to the *Muller* Court.[27]

The limited use of the blight exception expanded in 1943. In *Murray v. LaGuardia,* the Court significantly departed from *Muller* and ruled that condemnation of substandard areas was not limited to the purpose of providing low rent housing for persons of low income.[28] The power of eminent domain could be used to clear and rehabilitate substandard areas as "a means to protect public health and morals and to restore and preserve the financial stability of municipalities which suffer indirectly from conditions existing in those blighted districts"[29] and could be accomplished by "co-operation between municipal government and private capital."[30]

The Court of Appeals again departed from *Muller* in *Kaskel v. Impellitteri*.[31] In a 4-2 decision, the majority concluded that buildings could be condemned if they were below modern standards because of age, obsolescence, and decay; they did not need to be "as noisome or dilapidated as those described in Dickens' novels or Thomas Burke's 'Limestone' stories of the London slums of other days" to be condemned.[32] Further, not every single building in an area had to be below civilized standards for an area to be cleared and redeveloped, since statutes that "contemplate clearing and redeveloping will be of an entire area…[and] would not be very useful if limited only to areas where every single building was substandard."[33]

In *Kaskel* there was concern that the main purpose of the condemnation was "merely to lend color to the acquisition of land for a coliseum under the guise of a slum clearance project."[34] The minority, dissenting on the facts, cautioned that condemning land that is not substandard or insanitary could open the door to selected private developers:

> If the existence of a few slum buildings within a particular site area is enough to divest the courts of jurisdiction to require that the dominant purpose of the project shall be the one which the statute requires, the door is opened to possible evasion of this law upon a large scale. The statutory power fails if real property which is not slum is included in the site area for the sake of its own redevelopment, instead of being included as an adjunct to slum property that cannot be redeveloped satisfactorily without it.[35]

The minority's cautionary words went unheeded, and by 1962, blight was not restricted to tangible physical blight. In that year, a notable expansion of public use occurred in *Cannata v. City of New York*, where the Court upheld a statute which authorized

"cities to condemn for the purpose of reclamation or redevelopment predominantly vacant areas which are economically dead so that their existence and condition impairs the sound growth of the community and tends to develop slums and blighted areas."[36] The *Cannata* majority concluded that condemning an area beset with intangible blight "so that it may be turned into sites for needed industries is a public use."[37]

Judge Van Voorhis dissented and opined that the power of eminent domain should not be used to take property merely because city planners think the property could be used more advantageously than its current lawful use.[38] While he conceded that the power of eminent domain had been extended to actual slums, Judge Van Voorhis wrote:

> the question here is whether this power can be further extended to the condemnation of factories, stores, private dwellings or vacant land which are properly maintained and are neither substandard nor insanitary, so that their owners may be deprived of them against their will to be resold to a selected group of private developers whose projects are believed by the municipal administration to be more in harmony with the times. It begs the question, in my judgment, merely to assert that such properties are to be taken to prevent them from becoming actually blighted at some future date.[39]

In 1975, in *Yonkers Community Development Agency v. Morris,* the Court summarized the history of urban renewal:

> Historically, urban renewal began as an effort to remove "substandard and insanitary" conditions which threatened the health and welfare of the public, in other words "slums," whose eradication was in itself found to constitute a public purpose for which the condemnation powers of government might constitutionally be employed. Gradually, as the complexities of urban conditions became better understood, it has become clear that the areas eligible for such renewal are not limited to "slums" as that term was formerly applied, and that, among other things, economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose.[40]

Taking substandard land is, as the *Yonkers* Court recognized, "made easier by the liberal rather than literal definition of a 'blighted' area now universally indorsed by case law."[41] As a result, blight "is something more than deteriorated structures. It involves improper land use. Therefore, its causes, originating many years ago, include not only outmoded and deteriorated structures, but unwise planning and zoning, poor regulatory code provisions, and inadequate provisions for the flow of traffic."[42] Further, "[i]t can encompass areas in the process of deterioration or threatened with it as well as ones already rendered useless, prevention being an important purpose."[43]

Yonkers reaffirmed that taking substandard land is a public purpose "just as it would be if it were taken for a public park, public school or public street. The fact that the vehicle for renewed use of the land, once it is taken, may be a private agency does not in and of itself change the permissible nature of the taking of the substandard property."[44]

As a result of the evolution of public use, the 21st century Court of Appeals concluded in a number of hotly contested cases that creating jobs, providing infrastructure, stimulating the local economy and new private sector economic development, and increasing the property tax base as well as sales tax revenues are legitimate public purposes which justify the use of the power of eminent domain.[45] For example, taking private property was a public use in the 2009 case of *Goldstein v. New York State Urban Development Corp*.[46] In *Goldstein*, an area, which was designated as blighted, would be revitalized by turning it over to a private developer to construct a 22-acre redevelopment project, which included a stadium for a professional basketball team, eight acres of open, publicly accessible landscaped space, millions of square feet of office space and thousands of new residential units, with more than one-third for low and/or middle income families.[47]

In 2010, in *Kaur v. New York State Urban Dev. Corp.*, the Court found taking land by eminent domain for a proposed new campus for Columbia University would bestow numerous "significant benefits to the public."[48] Although the university is private, the concern that a private enterprise would profit through eminent domain was not present because the project was "unquestionably to promote education and academic research while providing public benefits to the local community."[49] Indeed, wrote the Court:

> the advancement of higher education is the quintessential example of a "civic purpose." It is fundamental that education and the expansion of knowledge are pivotal government interests. The indisputably public purpose of education is particularly vital for New York City and the State to maintain their respective statuses as global centers of higher education and academic research.[50]

The public would also benefit by stimulating job growth in the area by creating 14,000 jobs during the construction of the new campus, as well as 6,000 permanent jobs following completion, and it would create two acres of gateless, publicly accessible park-like space, an open-air market zone, and upgrade transit infrastructure.[51] "[T]here can be no doubt," wrote the Court, that the project "which provides for the expansion of Columbia's educational facilities and countless public benefits to the surrounding neighborhood, including cultural, recreational and job development benefits—qualifies as a 'civic project' under the [New York State Urban Development Corporation] Act."[52]

The expansion of public use resulted in underutilization being a valid justification for invoking the power of eminent domain. Underutilization has not been unanimously embraced, however. Half a century ago, it was criticized by the dissenting judges in *Kaskel*, as previously discussed. More recently, "the folly of underutilization" was criticized by the First Department in *Kaur*:

> The time has come to categorically reject eminent domain takings solely based on underutilization. This concept…transforms the purpose of blight removal from the elimination of harmful and social and economic conditions in a specific area to a policy affirmatively requiring the ultimate commercial development of all property regardless of the character of the community subject to such urban renewal.[53]

Despite such criticism, courts have held that a finding by a condemnor that the property is underutilized constitutes an adequate basis for a determination that condemnation would serve a public use.[54]

Public use in the 21st century bears little resemblance to public use in the 19th century and early 20th centuries. It has evolved from being narrowly defined to being "broadly defined to encompass any use which contributes to the health, safety, general welfare, convenience or prosperity of the community" and has evolved from condemning land for traditional governmental uses to condemning land for economic revitalization.[55]

Part II

Judicial Review

In New York, judicial review is set forth in Eminent Domain Procedure Law ("EDPL"). The statute "was enacted in 1977 to supplant a mosaic of more than 150 scattered provisions with a uniform procedure"[56] and was "the culmination of nearly seven years of effort by the members of the State Commission on Eminent Domain."[57] EDPL is "the exclusive procedure by which property shall be acquired by exercise of the power of eminent domain in New York state."[58] It provides a uniform procedure for the public acquisition of property, giving "due regard to the need to acquire property for public use as well as the legitimate interests of private property owners, local communities and the quality of the environment, and to that end to promote and facilitate recognition and careful consideration of those interests."[59]

Section 207(C) of the EDPL limits judicial review of a condemnation determination to whether:[60]

(1) the proceeding was in conformity with the federal and state constitutions,

(2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority,

(3) the condemnor's determination and findings were made in accordance with procedures set forth in this article [EDPL article 2] and with article eight of the environmental conservation law [State Environmental Quality Review Act], and

(4) a public use, benefit or purpose will be served by the proposed acquisition.[61]

The party challenging the condemnation has the burden of establishing the determination was without foundation and baseless. "If an adequate basis for a determination is shown and the objector cannot show that the determination was without foundation, the [condemnor's] determination should be confirmed."[62] In other words, the determination "must be confirmed if 'the exercise of the eminent domain power is rationally related to a conceivable public purpose.'"[63]

According to the majority in *Kaur*:

> Whether a matter should be the subject of a public undertaking—whether its pursuit will serve a public purpose or use—is ordinarily the province of the Legislature, not the Judiciary, and the actual specification of the uses identified by the Legislature as public has been largely left to quasi-legislative administrative agencies. It is only where there is *no room for reasonable difference of opinion* as to whether an area is blighted, that judges may substitute their views as to the adequacy with which the public purpose of blight removal has been made out for those of the legislatively designated agencies. Indeed, we observed that the Constitution gives the "government broad power to take and clear substandard and insanitary areas for redevelopment…it commensurately deprives the Judiciary of grounds to interfere with the exercise." These principles are

> based on a consistent body of law that goes back over 50 years. Thus, a court may only substitute its own judgment for that of the legislative body authorizing the project when such judgment is irrational or baseless.[64]

In *Goldstein*, the Court stated that it was a "long-standing doctrine that the role of the Judiciary is limited in reviewing findings of blight in eminent domain."[65] Thus, where "'those bodies have made their finding, not corruptly or irrationally or baselessly, there is nothing for the courts to do about it, unless every act and decision of other departments of government is subject to revision by the courts.'"[66]

Judge Smith, dissenting in *Goldstein*, did not agree that the Judiciary was limited in its review by a "long-standing doctrine." He wrote that "[t]he determination of whether a proposed taking is truly for public use has always been a judicial exercise…[as cases] from *Bloodgood* in 1837 through *Yonkers Community Development* in 1975, demonstrate.… While no doubt some degree of deference is due to public agencies and to legislatures, to allow them to decide the facts on which constitutional rights depend is to render the constitutional protections impotent."[67]

He thought the *Goldstein* majority was "much too deferential to the self-serving determination" of blight made by a condemning agency.[68]

> [T]he whole point of the public use limitation is to prevent takings even when a state agency deems them desirable. To let the agency itself determine when the public use requirement is satisfied is to make the agency a judge in its own cause. I think it is we who should perform the role of judges, and that we should do so by deciding that the proposed taking in this case is not a public use.[69]

Despite such criticism, the Court of Appeals has held firm that "any such limitation upon the sovereign power of eminent domain as it has come to be defined in the urban renewal context is a matter for the Legislature, not the courts."[70] This stance, according to one court, has made it "plain that there is no longer any judicial oversight of eminent domain proceedings."[71]

Over the years, various bills have been unsuccessfully introduced by members of the State Legislature to address the concern that the Judiciary abdicated its role of determining whether the taking was for a public use. For example, bills were proposed to amend Article I §7 of the State Constitution by providing that "[w]henever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."[72] If there is "a question about a taking being for a truly public use, the question shall be a judicial question, and the court, when determining the answer, shall not consider any legislative assertions that the use is for a public purpose."[73]

In the future, if similar bills should pass, the Judiciary would not have a limited role in reviewing an agency's finding of blight in an eminent domain proceeding. Until then, the role of the Judiciary is limited.

Conclusion

The evolution of public use, and in particular, the creation of the blight exception, expanded beyond traditional governmental uses. It now encompasses "any use which contributes to the health, safety, general welfare, convenience or prosperity of the community."[74] While the definition has broadened over the years, a court's role in reviewing a condemnor's determination and findings has remained limited.

Endnotes

1. Hendler v. United States, 952 F.2d 1364, 1371 (Fed.Cir.1991), *aff'd*, 175 F.3d 1374 (Fed.Cir. 1999); *see also* Tinnerholm v. State of New York, 179 N.Y.S.2d 582 (N.Y.Ct.Cl. 1958) (stating that the power of eminent domain "as a prerogative of its very existence" and "[t]hrough the exercise of this right the State may appropriate private property for public use."); People v. Adirondack Ry. Co., 160 N.Y. 225, 237 (1899), *aff'd*, 176 U.S. 335 (1900) (stating that the power of eminent domain, the power of taxation and the police power are "as enduring and indestructible as the state itself").
2. N.Y. CONST., Art. I, §7(a) ("Private property shall not be taken for public use without just compensation"); *see also* U.S. CONST. amend. V (providing in part that "No person shall…be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation"); People v. Adirondack Ry. Co., 160 N.Y. at 236 (stating that although the power of eminent domain exists independently of the Constitution, it "may be limited and regulated by the Constitution."). *See* Brian Walsh, *The Expansion of the Municipal Power to Take Property for "Public Use,"* NYSBA Municipal Lawyer, Summer 2014 at 36 (discussing the Takings Clause of the Fifth Amendment of the U.S. Constitution).
3. Kelo v. City of New London, 268 Conn. 1, 126 (2004) (Zarella, J., dissenting) (discussing the evolution of the public use requirement).
4. *In re* Mayor of N.Y., 135 N.Y. 253, 260 (1892).
5. Bradley v. Degnon Contracting Co., 224 N.Y. 60, 71 (1918) (stating "Public use necessarily implies the right of use by the public.").
6. Bloodgood v. The Mohawk & Hudson R.R.Co., 18 Wend. 9 (1837).
7. Mayor, 135 N.Y. 253.
8. *Id.* at 263.
9. *Id.*
10. *Id*.
11. *Id*. at 263-264.
12. *In re* Eureka Basin Warehouse & Mfg. Co. of Long Is., 96 N.Y. 42, 48 (1884).
13. *Id.* at 46.
14. *Id.* at 48-49.
15. *In re* Niagara Falls & W. Ry. Co., 108 N.Y. 375, 382 (1888).
16. *Id*. at 385.
17. *Id.* at 382-84.
18. *Id*. at 384.
19. *Id*. at 386.

20. *Id.* at 387.

21. Cannata v. City of New York, 11 N.Y.2d 210, 216-17 (1962); Pocantico Water-Works Co. v. Bird, 130 N.Y. 249, 259 (1891).

22. New York City Hous. Auth. v. Muller, 270 N.Y. 333, 340 (1936) (examining the Municipal Housing Law).

23. *Id*. at 337, 342.

24. *Id*. at 339.

25. *Id*.

26. *Id*.

27. *Id.* at 340 (although only a small number of citizens would benefit by living in the low rent housing project—persons of low income—"[u]se of a proposed structure, facility or service by everybody and anybody is one of the abandoned universal tests of a public use" and by eliminating slums and providing low-cost housing, the entire public, not just a particular class in the community, is protected and safeguarded).

28. *In re* Murray v. La Guardia, 291 N.Y. 320, 331 (1943) (discussing Redevelopment Companies Law).

29. *Id*.

30. *Id*. at 332. (It did not matter that private interests would benefit, according to the Court, if, upon the project's completion, "the public good is enhanced.") (In *Murray*, although Chief Justice Lehman wrote a very brief dissenting opinion, he clearly stated his opposition to conveying condemned lands to a private company. He opined that the power of eminent domain may not "be granted to a city or public corporation for the purpose of taking private property to be transferred to and held thereafter by a private corporation to which the power of eminent domain could not be granted directly").

31. Kaskel v. Impellitteri, 306 N.Y. 73 (1953) (alleging that a taking of land in Manhattan was really for the purpose of obtaining federal funds to support the erection of a new coliseum, taxpayers suing under General Municipal Law § 51 were required to make out either actual fraud or illegality in the sense of a public expenditure totally beyond the power of a condemning agency because those are the only grounds on which taxpayers had standing under section 51); *see also* Yonkers Cmty. Dev. Agency v. Morris, 37 N.Y.2d 478, 486 (1975) (Van Voorhis, J., dissenting) (stating "[i]nterestingly, the entire [*Kaskel*] court concurred in the initial premise of Judge Van Voorhis (who dissented on the facts) that, in order to utilize the public purpose attached to clearance of substandard land, such clearance must be the primary purpose of the taking, not some other public purpose, however laudable it might be…").

32. Kaskel, 306 N.Y. at 78.

33. *Id*. at 79 (stating "[i]t is not to be assumed that responsible public officers will, in some future instance, label as 'substandard and insanitary' an area in which there are not buildings at all, or fine, modern buildings only, or that they will attempt to condemn a number of such buildings by stretching the concept of 'area.' Such attempts can be dealt with if and when they are made.").

34. *Id.* at 83.

35. *Id.* at 86-87.

36. Cannata v. City of New York, 221 N.Y.2d 457 (1961) (providing that intangible blight could consist of a number of conditions or combinations thereof, such as: "subdivision of the land into lots of such form, shape or size as to be incapable of effective development; obsolete and poorly designed street patterns with inadequate access; unsuitable topographic or other physical conditions impeding the development of appropriate uses; obsolete utilities; buildings unfit for use or occupancy as a result of age, obsolescence, etc.; dangerous, unsanitary or improper uses and conditions adversely affecting public health, safety or welfare; scattered improvements.").

37. Cannata, 11 N.Y.2d at 215 (finding "nothing unconstitutional on the face of this statute or in its proposed application to these undisputed facts. Taking of substandard real estate by a municipality for redevelopment by private corporations has long been recognized as a species of public use.").

38. *Id.* at 215-223.

39. *Id.* at 217.

40. Yonkers Cmty. Dev. Agency v. Morris, 37 N.Y.2d 481 (1975) (finding that where private land was taken for Otis Elevator Company, a leading industrial employer in the city, to expand its operations, the issue was whether the taking served a dominantly public purpose).

41. *Id.* at 483.

42. *Id.* at 483-484 (noting that "[n]or is it necessary that the degree of deterioration or precise percentage of obsolescence or mathematical measurement of other factors be arrived at with precision, since the combination and effects of such things are highly variable. These matters call for the exercise of a considerable degree of practical judgment, common sense and sound discretion.").

43. *Id.* at 483.

44. *In re* Goldstein v. New York State Urban Dev. Corp., 13 N.Y.3d 511 (2009); *In re* Kaur v. New York State Urban Dev. Corp., 15 N.Y.3d 235, 257 (2010); *see also In re* Kaufmann's Carousel, Inc. v. City of Syracuse Indus. Agency ("SIDA"), 301 A.D.2d 292, 296 (2002) (finding where SIDA exercised its power of eminent domain to acquire tenants' leasehold interests without also acquiring the underlying real property interests. The leases contained provisions that might restrict or impede the development of what was touted to be one of the largest economic development projects in the history of the State of New York, Destiny USA. The court confirmed SIDA's determination that "numerous public purposes would be served, including advancing the general prosperity and economic welfare of both residents of the City and the general population of the State, promoting tourism and attracting visitors from outside the economic development region, ameliorating economic deterioration and promoting employment in the City, and increasing the property tax base as well as sales tax revenues."); *In re* Fisher v. New York State Urban Dev. Corp., 730 N.Y.S.2d 516 (2001) (finding that where a public purpose was served by taking land to clear space for construction of new facilities for the New York Stock Exchange because its departure from the New York City's financial district "would be detrimental to the City and State economy" and the project would increase tax revenues, economic development and job opportunities "as well as preservation and enhancement of New York's prestigious position as a worldwide financial center.").

45. *In re* Goldstein, 13 N.Y.3d at 524.

46. *Id*. at 527.

47. *In re* Kaur, 15 N.Y.3d at 259.

48. *Id.* at 258-59.

49. *Id*. at 259 (citing Cornell University v. Bagnardi, 68 N.Y.2d 583, 593 (1986) (recognizing that schools, both public and private, "serve the public's welfare and morals")).

50. *Id*.

51. *Id*. (stating "Since the constitutionality of the UDC Act pertaining to 'civic projects' is not challenged by petitioners, we respectfully disagree with our concurring colleague that it should be addressed here. Moreover, we do not believe that anything in our opinion could reasonably be construed to mean that 'private tennis camps or karate schools' or 'private casinos or adult video stores' would qualify as a 'civic project' within the meaning of the UDC Act"); *see* N.Y. UNCONSOL. LAWS § 6253[6][c].

52. *In re* Kaur v. New York State Urban Dev. Corp., 15 N.Y.3d 235 (2010) (citing Gallenthin Realty Dev. Inc. v. Borough of Paulsboro, 191 N.J. 344, 365 (2007) (noting that "Under that approach, any property that is in a less than optimal manner is arguably 'blighted.' If such an all-encompassing definition of 'blight' were adopted, most property in the State would be eligible for redevelopment"));

In re Condemnation by Redevelopment Auth. of Lawrence Cnty., 962 A.2d 1257, 1265 (2008) (holding use to less than full potential does not constitute "economically undesirable" land use); Sweetwater Valley Civic Assoc. v. City of National City, 18 Cal.3d 270, 133 (1976); Southwestern Illinois Dev. Auth. v. National City Envtl., 304 Ill.App.3d 542 (1999) (stating "If a government agency can decide property ownership solely upon its view of who would put that property to more productive or attractive use, the inalienable right to own and enjoy property to the exclusion of others will pass to a privileged few who constitute society's elite"). The *In re* Kaur appellate court noted that "[i]n New York, wherever underutilization has been a significant factor in a blight finding, courts have upheld the finding only in connection with other factors such as zoning defects rendering the property unusable or insufficiently sized or configured lots"). *In re* Kaur, 15 N.Y.3d 235 (citations omitted).

53. *See*, *e.g.*, Sunrise Properties, Inc. v. Jamestown Urban Renewal Agency, 614 N.Y.S.2d 841 (1994); *In re* Dudley v. Town Board of Prattsburgh, 872 N.Y.S.2d 614 (2009); West 41st Street Realty LLC v. New York State Urban Dev. Corp., 744 N.Y.S.2d 121 (2002); J.C. Penney Corp. v. Carousel Center Co., 306 F. Supp. 2d 274, 280 (N.D.N.Y.2004).

54. *In re* Byrne v. New York State Office of Parks, Recreation & Historic Pres., 476 N.Y.S.2d 42, 42 (1984).

55. *In re* Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 417 (1986).

56. First Broad. v. City of Syracuse, 453 N.Y.S. 2d 194 (1981). The public hearings provision was the most controversial feature of the legislation. *In re* East Thirteenth St. Comm. Ass'n. v. New York State Urban Dev. Corp., 84 N.Y.2d 287, 294 (1994). There had been increasing public resistance to some projects, accompanied by time-consuming litigation, and many viewed the hearing requirement as an additional step to the condemnation process which would inject further uncertainty and delay in the completion of public projects. The Commission recognized the charge that increased public participation could delay or even halt projects, but it believed that the proposed procedures of notice and hearing could forestall the increasing amount of litigation and that the narrow scope of judicial review authorized by section 207 [of the EDPL] would expedite development once the hearing was concluded. The "partnership of planning" envisaged by the statute, the Commission stated, would lessen the public's "natural" resistance to projects. *Id*. at 294-95.

57. N.Y. Em. Dom. Proc. § 101 (McKinney 1977).

58. *Id*.

59. *In re* 265 Penn Realty Corp. v. City of New York, 953 N.Y.S.2d 141, 142 (2012) (noting that "[t]he principal purpose of EDPL article 2 is to insure that an agency does not acquire property without having made a reasoned determination that the condemnation will serve a valid public purpose."); *accord In re* Peekskill Heights, Inc. v. City of Peekskill Common Council, 974 N.Y.S.2d 501, 502 (2013).

60. N.Y. Em. Dom. Proc. § 207(C) (McKinney 1977).

61. *In re* Butler v. Onondaga Cnty. Legislature, 833 N.Y.S.2d 829, 830 (2007) (citing *In re* Waldo's Inc. v. Vill. of Johnson City, 74 N.Y.2d 718, 720(1989)); *In re* Stankevich v. Town of Southold, 815 N.Y.S.2d 225, 226 (2006); *In re* Kaufmann's Carousel v. City of Syracuse Indus. Agency, 750 N.Y.S.2d 212, 215-16 (2002).

62. *In re* Bergen Swamp Pres. Soc'y v. Vill. of Bergen, 741 N.Y.S.2d 363, 364 (2002) (quoting *In re* Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 425); *accord In re* Kaufmann's Carousel, 750 N.Y.S.2d 212, 220 (2002).

63. *In re* Kaur, 15 N.Y.3d at 253 (citation omitted).

64. *In re* Goldstein, 13 N.Y.3d at 526; *see also In re* City of New York, 217 N.Y. 45, 57 (1916) (stating "[i]t is the established law by numerous decisions of this court that in the exercise of the power of eminent domain the opinion of the legislature or the tribunal upon which is conferred power to determine the questions of necessity or expediency in the acquirement of private property for public use is political, not judicial, in its nature."); *see also In re* GM Components Holdings, LLC v. Town of Lockport Indus. Dev. Agency, 977 N.Y.S.2d 836, 838 (A.D. 4th Dep't 2013) (stating "[i]t is well settled that the scope of our review of LIDA's determination is 'very limited.'") (citing *In re* City of New York [Grand LaFayette Props. LLC], 6 N.Y.3d 540, 546 (2006), *appeal dismissed*, 22 N.Y.3d 1165 (2014), *leave to appeal denied*, 23 N.Y.3d 905 (2014)).

65. *In re* Goldstein, 13 N.Y.3d at 526 (citation omitted). As far back as *Kaskel*, and re-iterated in *In re Goldstein*, the Court stated that it "might intervene to prevent an urban development condemnation on public use grounds—where 'the physical conditions of an area might be such that it would be irrational and baseless to call it substandard or insanitary.'" *In re* Goldstein, 13 N.Y.3d at 527 (quoting Kaskel, 306 N.Y. at 80).

66. *In re* Goldstein, 13 N.Y.3d at 552.

67. *Id.* at 547.

68. *Id.* at 552.

69. *Id.* at 527.

70. *In re* Uptown Holdings, LLC v. City of New York, 908 N.Y.S.2d 657, 661 (2010) (Catterson, J., concurring) Catterson stated: "the record amply demonstrates that the neighborhood in question is not blighted, that whatever blight exists is due to the actions of the City and/or is located far outside the project area, and that the justification of under-utilization is nothing but a canard to aid in the transfer of private property to a developer."

71. *Id.* at 660-61. After *In re* Goldstein and *In re* Kaur, however, he was "compelled to concur with the majority." On appeal, Judge Smith agreed that no substantial constitutional issue was presented in the case because it was controlled by *In re* Goldstein and *In re* Kaur.

72. S. 2898, 2011-2012 Reg. Sess., 234th Sess. (N.Y. 2011); S. 1045, 2013-2014 Reg. Sess., 236th Sess. (N.Y. 2013).

73. Memo on Bill S. 1045 (236th Sess.), *available at* http://open.nysenate.gov/legislation/bill/S1045-2013.

74. *In re* Byrne v. New York State Office of Parks, Recreation & Historic Pres., 476 N.Y.S.2d 42, 42 (1984) (citing N.Y.C Hous. Auth. v. Muller, 270 N.Y. 333, 340-43); *In re* Long Sault Dev. Co. v. Kennedy, 212 N.Y. 1, 8 (1914); *accord In re* 225 Front St., Ltd. v. City of Binghamton, 877 N.Y.S.2d 486, 488 (2009) (quoting *In re* Aspen Cr. Estates, Ltd. v. Town of Brookhaven, 12 N.Y.3d 735 (2009)).

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Does a New York Foreclosure Create an Opportunity for a Tenant to Walk Away from Its Lease Obligations? (Answer: No)

By Louis J. Hait

Does a tenant of space in a New York City building that is the subject of a mortgage foreclosure action continue to be bound by its lease following the foreclosure sale of the property where (i) the lease was subordinate to the foreclosed mortgage, (ii) the tenant was not named as a defendant in the foreclosure, (iii) the lease contained no attornment provision and (iv) the tenant had not entered into any agreement obligating it to attorn to a purchaser at foreclosure?

What if the lease is by its terms *superior* to the lien of the mortgage being foreclosed but an express attornment provision is similarly absent?

New York[1] statutes and case law support the conclusion that, even absent any agreement by the tenant to attorn, a tenant continues to be bound by its lease following a mortgage foreclosure sale of the real estate in which the tenant's demised premises are located, so long as either (i) the lease was subordinate to the lien of the mortgage and the mortgagee did not name the tenant as a defendant in the foreclosure action, or (ii) the lease was superior to the lien of the mortgage.

Historical Background of Attornment

Under feudal and common law, when the reversion upon an estate for years was transferred, an "attornment" by a tenant for years to the transferee was necessary in order to create a landlord-tenant relationship between the transferee and the tenant for years.[2] Absent such attornment, the tenant was not bound to the transferee of the reversion.[3]

Indeed, some century-old cases in New York applied this common law rule to hold that following the foreclosure of a prior mortgage, a tenant of the foreclosed property who had surrendered its leased premises was not liable for rent to the purchaser at foreclosure in the absence of an attornment by such tenant to the purchaser.[4]

As discussed below, however, later decisions and statutes in New York treat a mortgage foreclosure sale as an assignment by operation of law of the lease to the purchaser at foreclosure (unless the lease is subordinate to the mortgage and the tenant is named in the foreclosure action).

Later Cases and Statutes Do Not Require Attornment

The consent of a tenant to its landlord's transfer of the reversion is no longer necessary in New York due to New York Real Property Law ("RPL") § 248 and its predecessor statutes.[5] Also, under RPL § 223 the transfer of the reversion, whether with or without the consent of the tenant, is a transfer of the lease and the rights and obligations thereunder.[6]

The Court of Appeals in *Metropolitan Life Ins. Co. v. Childs Co.*,[7] citing RPL § 223, found that if the tenant under a subordinate lease is not a party to the mortgage foreclosure action, then following the foreclosure sale the tenant is obligated to pay rent to the purchaser at foreclosure, even in the absence of an attornment.[8] In the words of the Court of Appeals in *Metropolitan*:

> If, on the contrary, [the tenant] is not a party to the [foreclosure] action his rights are not affected. There is never an eviction. Until the [foreclosure] sale he must pay his landlord. Afterwards, the purchaser [at foreclosure]. As to the latter there is no necessity of attornment. It may well be that some remnants of that doctrine, having its origin in the incidents of the feudal law, still persist. Indeed that they do is recognized in section 224 of the Real Property Law. But section 223, following early English statutes, sweeps away all learning on the subject [of attornment] where the reversion of leased real property is granted. It is entirely clear that if a lease is prior to a mortgage a sale under the latter is but a sale of the reversion…we think that such a sale as was here made was a grant of the reversion within the meaning of section 223. It was a grant of what interest the mortgagor had in the property at the time the mortgage was given, less the leased estate—the grant of what was left after the leased estate was subtracted. It is precisely the same so far as the estate granted was concerned as if the lease had been prior to the mortgage.[9]

The Court of Appeals in *Metropolitan* cited with approval *Commonwealth Mortg. Co. v. De Waltoff*,[10] in which the Appellate Division, First Department, citing RPL § 223, held that:

> The purchaser at a foreclosure sale of real property acquires all the right, title and interest of the mortgagor, subject to such valid liens and incumbrances as have not been cut off by the foreclosure.… If the [tenant] had been made a party to the foreclosure action, his lease being subsequent and subordinate to the mortgage, would have been annulled and his continuance in pos-

> session would have been unlawful. In that case the relation of landlord and tenant would not have been created between him and the purchaser (unless a new agreement were made)[.]… Here, however, the [tenant] was not made a party to the foreclosure action, and his lease is unaffected thereby. **But the purchaser, succeeding to all the title and rights of the original landlord, becomes the landlord by operation of law, with all the rights and remedies of the original landlord**.[11]

The legislative history[12] for an amendment to RPL § 224, enacted in 1941, understands *Metropolitan* as rejecting both *Wacht v. Erskine* and *Sprague Nat'l Bank v. Erie R.R. Co.*,[13] and states that:

> Both Wacht v. Erskine and Sprague National Bank v. Erie R.R. Co., were rejected, however, by the Court of Appeals in Metropolitan Life Insurance Co. v. Childs Co., and it would seem to be settled that the relationship of landlord and tenant exists without attornment between a purchaser on mortgage foreclosure and a tenant of the mortgagor under a lease subsequent to the mortgage, where the tenant was not a party to the foreclosure at the time of sale.[14]

Conclusion

By dint of RPL §§ 223 and 248 as interpreted both by the legislative history to the 1941 amendment to RPL § 224 and by the New York Court of Appeals in *Metropolitan*, a tenant of New York real property that is the subject of a foreclosure action will, notwithstanding the lack of any agreement on the part of the tenant to attorn to the purchaser at foreclosure (whether in the lease instrument or otherwise), continue to be bound by its lease following the foreclosure sale of the real property where (i) the lease was superior to the lien of the foreclosed mortgage or (ii) the lease was subordinate to the foreclosed mortgage and the tenant was not named as a defendant in the foreclosure.

Endnotes

1. This article is limited to New York law and does not address the laws of any other state.
2. Continental Ins. Co. v. New York & H.R. Co., 187 N.Y. 225, 237-38 (1907).
3. O'Donnell v. McIntyre, 37 Hun 623, 625 (N.Y. Sup. Ct. Gen. Term 5th Dep't 1885) (explaining that the concept of attornment had its origin in the feudal system and bound both the landlord and the tenant such that neither could, without the consent of the other, substitute another in its place, the reason being that the relation of lord and vassal was that of protection and fealty and so the relation was in some degree personal), *aff'd*, 116 N.Y. 663, 22 N.E. 1134 (1889); *see also* New York State Law Revision Commission, Report of the Law Revision Commission, Recommendation of the Law Revision Commission to the Legislature Relating to Attornment by a Tenant of Mortgaged Property upon Foreclosure of the Mortgage, 191-94 (1941) (introducing an Act to amend New York Real Property Law § 224). The full text of Real Property Law § 224 is set forth in *Appendix C* hereto.
4. *See, e.g.*, Wacht v. Erskine, 113 N.Y.S. 130, 130-31 (Sup. Ct. App. T. 1908) (absent an attornment, no privity of estate or of contract exists between a tenant and a purchaser at the foreclosure of a superior mortgage, and as a result there is no basis upon which the purchaser can maintain an action against the tenant for unpaid rent); Simers v. Saltus, 3 Denio 214, 219 (N.Y. Sup. Ct. 1846) (*per curiam*).
5. *In re* O'Donnell, 240 N.Y. 99, 105 (1925) (stating that under RPL § 248, consent of the tenant to the transfer of the reversion is no longer necessary). The full text of RPL § 248 is set forth in *Appendix A* hereto.
6. *Id.* (stating that under RPL § 223, "[t]he transfer of the reversion, whether with the consent of the tenant or without it, is a transfer of the lease and of its rights and obligations"). *Compare id. with* O'Donnell v. McIntyre, 118 N.Y. 156, 162-163 (N.Y. 1890) (citing Becker v. Howard, 66 N.Y. 5 (1876)) (distinguishing the situation where the real property is sold in a tax sale and finding that, in such a case, the purchaser at the tax sale is not the grantee of the prior owner, but of the State, and accordingly, the purchaser is a stranger to the tenant (rather than the grantee or assignee of the prior owner) and the lease is terminated (i.e., none of the provisions of RPL §§ 223 or 248 is applicable)). The full text of RPL § 223 is set forth in *Appendix B* hereto.
7. 230 N.Y. 285.
8. *Id.* at 289-290. In its holding, the Court of Appeals cited with approval, *Commonwealth Mortg. Co. v. De Waltoff*, 119 N.Y.S. 781 (1st Dep't 1909), discussed below, and without much explanation, distinguished the older case of *Wacht*, *supra* note 4. *Id.* However, there does not appear to be any basis to distinguish the facts of *Metro.* from those in *Wacht*, and *Metro.* would appear to be a complete rejection of *Wacht*. *See infra* note 11 and accompanying text (discussing legislative history of RPL § 224).
9. *Id.* at 296-97. This cited portion of *Metro.* takes for granted that, in the case of a lease that is *superior* to the foreclosed mortgage, the relationship of landlord and tenant will exist between the tenant and the purchaser at the foreclosure without any need for attornment.
10. *Supra* note 8.
11. *Id.* (emphasis added). *See* Ballesteros v. Rosello, 703 N.Y.S.2d 686, 688 (N.Y. Civ. Ct. 1999) (citing Commonwealth Mortg. Co. v. De Waltoff, 119 N.Y.S. 781 (1st Dep't 1909)); *see also* United Welfare Fund-Sec. Div. v. LAP Realty Corp., 2002 N.Y. Slip Op. 40271(U) (Sup. Ct. 2002).
12. *See* Recommendation of the Law Revision Commission to The Legislature Relating to Attornment by a Tenant of Mortgaged Property upon Foreclosure of the Mortgage, *supra* note 3.
13. Sprague Nat. Bank v. Erie R.R. Co., 48 N.Y.S. 65 (N.Y. App. Div. 1897), *cited with approval* in Wacht v. Erskine, 61 Misc. 96, 98, 113 N.Y.S. 130 (App. Term 1908).
14. Recommendation of the Law Revision Commission to The Legislature Relating to Attornment by a Tenant of Mortgaged Property upon Foreclosure of the Mortgage, *supra* note 3, at 207.

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Appendix A

RPL § 248. Effect of conveyance where property is leased

An attornment to a grantee is not requisite to the validity of a conveyance of real property occupied by a tenant, or of the rents or profits thereof, or any other interest therein. But the payment of rent to a grantor, by his tenant, before notice of the conveyance, binds the grantee; and the tenant is not liable to such grantee, before such notice, for the breach of any condition of the lease.

Appendix B

RPL § 223. Rights where property or lease is transferred

The grantee of leased real property, or of a reversion thereof, or of any rent, the devisee or assignee of the lessor of such a lease, or the heir or personal representative of either of them, has the same remedies, by entry, action or otherwise, for the nonperformance of any agreement contained in the assigned lease for the recovery of rent, for the doing of any waste, or for other cause of forfeiture as his grantor or lessor had, or would have had, if the reversion had remained in him. A lessee of real property, his assignee or personal representative, has the same remedy against the lessor, his grantee or assignee, or the representative of either, for the breach of an agreement contained in the lease, that the lessee might have had against his immediate lessor, except a covenant against encumbrances or relating to the title or possession of the premises leased. This section applies as well to a grant or lease in fee, reserving rent, as to a lease for life or for years; but not to a deed of conveyance in fee, made before the ninth day of April, eighteen hundred and five, or after the fourteenth day of April, eighteen hundred and sixty.

§ 223-a. Remedies of lessee when possession is not delivered

In the absence of an express provision to the contrary, there shall be implied in every lease of real property a condition that the lessor will deliver possession at the beginning of the term. In the event of breach of such implied condition the lessee shall have the right to rescind the lease and to recover the consideration paid. Such right shall not be deemed inconsistent with any right of action he may have to recover damages.

§ 223-b. Retaliation by landlord against tenant

1. No landlord of premises or units to which this section is applicable shall serve a notice to quit upon any tenant or commence any action to recover real property or summary proceeding to recover possession of real property in retaliation for:

    a. A good faith complaint, by or in behalf of the tenant, to a governmental authority of the landlord's alleged violation of any health or safety law, regulation, code, or ordinance, or any law or regulation which has as its objective the regulation of premises used for dwelling purposes or which pertains to the offense of rent gouging in the third, second or first degree; or

    b. Actions taken in good faith, by or in behalf of the tenant, to secure or enforce any rights under the lease or rental agreement, under section two hundred thirty-five-b of this chapter, or under any other law of the state of New York, or of its governmental subdivisions, or of the United States which has as its objective the regulation of premises used for dwelling purposes or which pertains to the offense of rent gouging in the third, second or first degree; or

    c. The tenant's participation in the activities of a tenant's organization.

2. No landlord or premises or units to which this section is applicable shall substantially alter the terms of the tenancy in retaliation for any actions set forth in paragraphs a, b, and c of subdivision one of this section. Substantial alteration shall include, but is not limited to, the refusal to continue a tenancy of the tenant or, upon expiration of the tenant's lease, to renew the lease or offer a new lease; provided, however, that a landlord shall not be required under this section to offer a new lease or a lease renewal for a term greater than one year and after such extension of a tenancy for one year shall not be required to further extend or continue such tenancy.

3. A landlord shall be subject to a civil action for damages and other appropriate relief, including injunctive and other equitable remedies, as may be determined by a court of competent jurisdiction in any case in which the landlord has violated the provisions of this section.

4. In any action to recover real property or summary proceeding to recover possession of real property, judgment shall be entered for the tenant if the court finds that the landlord is acting in retaliation for any action set forth in para-

graphs a, b, and c of subdivision one of this section and further finds that the landlord would not otherwise have commenced such action or proceeding. Retaliation shall be asserted as an affirmative defense in such action or proceeding. The tenant shall not be relieved of the obligation to pay any rent for which he is otherwise liable.

5. In an action or proceeding instituted against a tenant of premises or a unit to which this section is applicable, a rebuttable presumption that the landlord is acting in retaliation shall be created if the tenant establishes that the landlord served a notice to quit, or instituted an action or proceeding to recover possession, or attempted to substantially alter the terms of the tenancy, within six months after:

   a. A good faith complaint was made, by or in behalf of the tenant, to a governmental authority of the landlord's violation of any health or safety law, regulation, code, or ordinance, or any law or regulation which has as its objective the regulation of premises used for dwelling purposes or which pertains to the offense of rent gouging in the third, second or first degree; or

   b. The tenant in good faith commenced an action or proceeding in a court or administrative body of competent jurisdiction to secure or enforce against the landlord or his agents any rights under the lease or rental agreement, under section two hundred thirty-five-b of this chapter, or under any other law of the state of New York, or of its governmental subdivisions, or of the United States which has as its objective the regulation of premises used for dwelling purposes or which pertains to the offense of rent gouging in the third, second or first degree.

   c. Judgment under subdivision three or four of this section was entered for the tenant in a previous action between the parties; or an inspection was made, an order was entered, or other action was taken as a result of a complaint or act described in paragraph a or b of this subdivision.

   But the presumption shall not apply in an action or proceeding based on the violation by the tenant of the terms and conditions of the lease or rental agreement, including nonpayment of the agreed-upon rent.

   The effect of the presumption shall be to require the landlord to provide a credible explanation of a non-retaliatory motive for his acts. Such an explanation shall overcome and remove the presumption unless the tenant disproves it by a preponderance of the evidence.

5-a. Any lease provision which seeks to assess a fee, penalty or dollar charge, in addition to the stated rent, against a tenant because such tenant files a bona fide complaint with a building code officer regarding the condition of such tenant's leased premises shall be null and void as being against public policy. A landlord who seeks to enforce such a fee, penalty or charge shall be liable to the tenant for triple the amount of such fee, penalty or charge.

6. This section shall apply to all rental residential premises except owner-occupied dwellings with less than four units. However, its provisions shall not be given effect in any case in which it is established that the condition from which the complaint or action arose was caused by the tenant, a member of the tenant's household, or a guest of the tenant. Nor shall it apply in a case where a tenancy was terminated pursuant to the terms of a lease as a result of a bona fide transfer of ownership.

Appendix C

RPL § 224. Attornment by Tenant

The attornment of a tenant to a stranger is absolutely void and does not in any way affect the possession of the landlord unless made either:

1. With the consent of the landlord; or,
2. Pursuant to or in consequence of a judgment, order, or decree of a court of competent jurisdiction; or
3. To a purchaser at foreclosure sale.

Apartment Building Residents Get Dogged About Acquiring Emotional Support Pets

By Virginia Trunkes

I. Introduction

Residents of multi-family housing developments seem to be litigating at an ever-increasing rate over "emotional assistance" or "support" animals. Indeed, a common pet peeve of residents in multiple dwellings is their close proximity to neighbors who live incompatible lifestyles, such as cohabitation with an animal. Perhaps still desiring to be "part of a pack," often people choose apartment buildings, whether rental, cooperative or condominium, having certain "house rules" that reflect their preferences. A leading differentiator among multi-residence buildings is the pet policy, whether it be "pet friendly," "pets upon approval," "pets weighing 40 pounds or less," "no dogs" or "no pets." Many residents rent or buy into a building relying on pet policies, and their preferences can fall on both ends of the spectrum.

A fast-growing trend, both in New York and throughout the country, is the practice of residents claiming an exception to limited or no-pet policies by asserting the need for their pet, usually a dog, because of its accompanying emotional support. Some even sneak in the dog, and then, upon being caught, assert their new realization that they need the dog because they enjoyed a more positive residential experience once they cohabited with the dog.

But upon discovery of the unauthorized dog, landlords and governing boards in limited or no-pet buildings cannot just let sleeping dogs lie. They have a responsibility to the other residents not to let their building go to the dogs. Those who forgo this obligation may be considered to have "dogged it," likely to face complaints by pet-free owners reiterating the building's limited or no-pet policy.

The legal bases supporting some residents' right to an emotional support dog are varied and complex, and landlords and boards need to appreciate and be familiar with them. Residents with recognized disabilities should likewise understand their legal rights, as well as the limits thereto.

Recently there has been a rising trend of requests for waivers of no-pet rules for the purpose of "emotional support," "companionship" or "comfort," resulting in increased lawsuits and administrative agency claims involving housing discrimination. Stepping in with a recent action on behalf of tenant-shareholders who were denied permission to reside with a dog, which provided emotional assistance, the federal government has become aggressive in advocating for the rights of disabled residents. At the same time, suspicions of exaggerated or disingenuous applications for both service dogs and emotional support animals have increased as well. Consequently, for landlords and boards, both granting and rejecting applications for emotional support animals have practical effects requiring thorough consideration. For applicants, submitting the appropriate paperwork at the outset should reduce delays and/or rejections associated with dubious requests.

II. The Fair Housing Act

Throughout the country, residents claiming an exception to no-pet policies have relied on the federal Fair Housing Act (FHA), enacted as part of the Civil Rights Act of 1968, as amended in 1988.[1] The FHA and its promulgated regulations constitute the prime source of protection against discrimination, which enables residents to enjoy and use their multiple occupancy dwellings.

The FHA makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap[2] of…(A) that person; or (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that person."[3] Discrimination prohibited by the FHA includes the refusal to make "reasonable accommodations in rules, policies, practices or services when such accommodations may be necessary to afford [a person with a "handicap"] an equal opportunity to use and enjoy a dwelling."[4] To prevail on a reasonable-accommodation claim under the FHA, a plaintiff is required to show that "(1) [he or she (or a person associated with him or her)] suffers from a handicap as defined by the FHA; (2) defendant knew or reasonably should have known of the plaintiff's handicap; (3) accommodation of the handicap 'may be necessary' to afford plaintiff an equal opportunity to use and enjoy the dwelling; and (4) defendants refused to make such accommodation."[5]

Traditionally, the FHA has been invoked in cases where people with physical disabilities require service animals. A "service animal" is not defined by the FHA or the accompanying regulations. Rather, it is defined in the Americans with Disabilities Act of 1990 (ADA), which addresses disability discrimination in multiple contexts including public housing, to include "any guide dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability.…"[6] There are many ways in which service animals, usually dogs, can assist people, e.g., Guide Dog or Seeing-Eye Dog,

Mobility Support Dog, Hearing Dog, Seizure Alert Dog and Diabetic Alert Dog. The Department of Housing and Urban Development (HUD), which is charged with administering the FHA, uses as an example in its regulation entitled "Reasonable accommodations"[7] a blind applicant for rental housing who needs a seeing-eye dog to have an equal opportunity to use and enjoy a dwelling.

A qualifying "service animal" must be trained to work for a disabled individual,[8] but there is no specified amount or type of training that an animal must receive,[9] or type or amount of work a service animal must provide.[10] Rather, the relevant question is whether the animal helps the disabled person perform tasks to ameliorate the ADA disability.[11]

Requests for service animals generally are not controversial: the issue of whether the person is physically "disabled" is usually straightforward. And given the lack of specific parameters for the requisite training, it is fairly simple to produce evidence that the subject animal has received training and is certified to accomplish the tasks needed for the person to reside independently in a home.

The less common, but increasingly growing, occurrence is a resident's request for an "emotional support" or "emotional assistance" animal, also usually a dog. This type of request prompts the inquiry into whether the resident (or a person associated with the resident) has a handicap or disability within the meaning of the FHA—without the benefit of visible evidence as would be found with a physical disability.[12]

III. Definition of "Disability" under the FHA and New York State's Counterpart

An individual has a handicap or disability, for the purposes of the FHA, if he or she has (a) "a physical or mental impairment which *substantially limits* one or more of such person's major life activities," (b) "a record of such impairment," or (c) is "regarded as having such an impairment."[13] "Substantially limited" is defined as either: "(i) [u]nable to perform a major life activity that the average person in the general population can perform; or (ii) [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity."[14] In determining whether an individual is substantially limited in a major life activity, it is important to consider: "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."[15] Major life activities include "[c]aring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working."[16] Following the ADA Amendment Act of 2008 ("ADAAA"), "major life activities no longer need to be of 'central importance'" to most people's daily lives.[17]

Although the section of the New York State law requiring the provision of reasonable accommodations to disabled renters is largely similar to the analogous provision of the FHA,[18] under the New York State Human Rights Law (N.Y. Executive Law §§ 291 *et seq*.) (NYSHRL), the term "disability" is more broadly defined. Disability means:

> a physical, mental, or medical impairment resulting from anatomical, physiological, genetic, or neurological conditions which prevents the exercise of a normal bodily function *or* is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such impairment or (c) a condition regarded by others as such an impairment.[19]

"Fairly read, the [NYSHRL] covers a range of conditions varying in degree from those involving a loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity and thus may lead to more serious conditions in the future."[20] "An individual can thus be disabled under the [NYSHRL]…if his or her impairment is demonstrable by medically accepted techniques; it is not required that the impairment substantially limit that individual's normal activities."[21] In other words, under the NYSHRL, if the claimed disability does not "substantially limit" major life activities and/or cause the loss of a bodily function, then it should have a name, accepted by the relevant professional community.[22]

Note, then, that FHA regulations interpret "physical or mental impairment" to include any "mental or psychological disorder," such as "emotional illness,"[23] and that some courts construe "mental impairment" under the FHA as a generic term that incorporates multiple diagnoses…."[24] Thus, under the FHA, "there is no specific diagnosis needed to establish a disability under the [FHA]."[25] In such a case, however, under both the FHA and the NYSHRL, the resident will need to demonstrate that the impairment substantially limits a major life activity, or results in the loss of a normal bodily function.

IV. Accommodating Individuals with Disabilities So They Have an Equal Opportunity to Use and Enjoy a Dwelling

Under the FHA, in order to demonstrate the need for a reasonable accommodation in housing, applicants "must show that, but for the accommodation, they likely will be denied an equal opportunity to enjoy the housing of their choice."[26] NYSHRL §

296(18)(2) imposes a similar requirement that a person with a disability requesting an accommodation must show that "such accommodation may be necessary to afford said person with a disability equal opportunity to use and enjoy a dwelling...."[27] So both statutes focus on whether residing with an animal may likely improve a person's quality of life at home. That said, interestingly, although the state statute modifies the term "necessary" with the phrase "may be," the courts interpreting the NYSHRL typically require an applicant to demonstrate necessity when evaluating whether a non-pet building should make an exception for one of its residents—not whether there "may be" a necessity.[28]

Whether a requested accommodation is required is "highly fact-specific, requiring case-by-case determination."[29] Additionally, the nature of the accommodation is framed by the nature of the particular handicap or disability alleged.[30]

Effectively, then, to demonstrate one's entitlement to an emotional support animal, an individual may demonstrate that the prohibition on housing an emotional support animal in the apartment "causes the denial" of the individual's right to equal "use and enjoyment" of that apartment,[31] or even merely that the animal enables one to better use and enjoy the apartment. The focus is not on the animal, since unlike with a service animal, an emotional support animal need not undergo any training whatsoever. As one court has reasoned: "In some instances, a plaintiff may have a disability that requires an assistance animal with some type of training; in other instances, it may be possible that no training is necessary."[32] Thus, the relevant inquiry for a request for an emotional support animal centers not on the attributes of the animal but rather on the characteristics of the individual, and how the individual benefits from the presence of the animal.

V. Requisite Documentation

Upon a landlord's or board's receipt of a request from a disabled person for permission to keep a service animal or an emotional support animal, pursuant to the FHA, "it is reasonable to require the opinion of a physician who is knowledgeable about the subject disability and the manner in which a service dog can ameliorate the effects of the disability."[33] Additionally, on occasion, laypersons, while not competent to offer specific diagnoses, are considered qualified to testify generally as to whether a person is suffering from a mental impairment under the FHA.[34]

HUD and the Department of Justice (DOJ) have provided guidance in their "Joint Statement on Reasonable Accommodations under the FHA" dated May 17, 2004 ("Joint Statement"), as to what kinds of information a housing provider may request from a person with a disability who has sought an accommodation if the alleged disability is not obvious:

> [I]n response to a request for a reasonable accommodation, a housing provider may request reliable disability-related information that (1) is necessary to verify that the person meets the Act's definition of disability (i.e., has a physical or mental impairment that substantially limits one or more major life activities), (2) describes the needed accommodation, and (3) shows the relationship between the person's disability and the need for the requested accommodation. *Depending on the individual's circumstances*, information verifying that the person meets the Act' s definition of disability can usually be provided by the individual himself or herself (e.g., proof that an individual under 65 years of age receives Supplemental Security Income or Social Security Disability Insurance benefits or a credible statement by the individual), a doctor or other medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual's disability may also provide verification of a disability. *In most cases*, an individual's medical records or detailed information about the nature of a person's disability is not necessary for this inquiry.
>
> Once a housing provider has established that a person meets the Act's definition of disability, the provider's request for documentation should seek only the information that is necessary to evaluate if the reasonable accommodation is needed because of a disability.[35]

Notwithstanding what the Joint Statement suggests, courts interpreting the FHA and reasonable accommodation requests based on an alleged mental disability have generally placed great value on, and seemingly required, documentation from a medical or therapeutic professional substantiating the claim of disability and/or that the accommodation is necessary to alleviate the disability. Typically, the treating therapist describes the nature of the condition, how it has been treated and with what medications, if any, and how the condition has impeded the resident's functioning.[36]

The same seems to be true for New York State courts interpreting the NYSHRL.[37] The outcome in these cases, in which the courts seemingly ignore the modifier "may be" to the word "necessary" in the statute's

wording, and require documentation from a professional substantiating that the resident needs the accommodation to alleviate the disability, may make sense in instances where the resident did not demonstrate that the impairment substantially limited a major life activity, or resulted in the loss of a normal bodily function. Presumably, in contrast, a resident with a severe, undisputed disability from which it can be inferred that an animal would ameliorate the symptoms would have a lesser burden in demonstrating the "need" for the animal.

VI. Landlord's and Board's Obligations to Other Residents and Applicants' Obligations

Courts agree that a landlord/board may request, and indeed may have a duty to request, additional information from the applicant if the initial paperwork is incomplete. Landlords need to enforce the same lease provisions that govern all of its tenants. A tenant's harboring a dog in an apartment contrary to a prohibition in the lease is considered a substantial violation of the lease.[38] Similarly, cooperative and condominium boards have fiduciary duties to their tenant-shareholders and unit owners, respectively.[39]

Thus, landlords and boards are authorized to and should request additional documents reasonably necessary to make a meaningful review and an informed decision about whether the animal is necessary to ameliorate the disability.[40] Once they receive qualifying-disability information, nexus information, or information describing the needed accommodation, any further requests are unnecessary—and at some point are inappropriately intrusive.[41]

If an applicant can sustain that burden, there is no real argument supporting a denial of a pet request on the ground that the request cannot be reasonably accommodated. An accommodation is not reasonable only "if (1) it would impose an undue financial and administrative burden on the housing provider or (2) it would fundamentally alter the nature of the provider's operations."[42] A fundamental alteration is a modification that alters the essential nature of a provider's operations.[43] HUD has already pre-determined that permitting an animal for a qualified disabled person does not fundamentally alter the essential nature of a housing development/apartment building's operations by promulgating a specific regulation stating that it is unlawful for a housing provider with a no-pets policy to refuse to permit a blind person to live in a dwelling unit with a seeing-eye dog.[44]

That, of course, does not mean the emotional support animal may have full rein of the premises. A landlord or board is within its rights to and, for the benefit of its other residents, should consider placing limits on and set parameters for emotional support animals. Common examples include mandating the use of a leash in common areas, the use of a freight elevator, the use of a separate entrance to and exit from the building, and the use of a separate outdoor path.

A resident claiming a disability who protests these types of limitations has the burden of demonstrating why they are not reasonable.[45] That said, extra security deposits and fees for the retention of an emotional assistance animal are unlawful.[46] Nor may an application to retain an emotional assistance animal be rejected because of the animal's breed, size, or weight.[47] However, if the landlord/board's practice is to assess its residents for any damage they cause to the premises, it may likewise charge the tenant/shareholder/unit owner for the cost of repairing any damage caused by the emotional assistance animal.[48] Presumably, then, if an emotional support animal resides next door to a resident allergic to the animal, the resident with the animal would be obligated to pay for allergy-reduction mechanisms such as a "HEPA" air purifier or other items necessary to reduce the resultant allergic reactions.

VII. The Future of Emotional Support Dog Applications and Landlords'/Boards' Conundrum

As landlords and boards grapple with an increasing influx of emotional support dog applications, the DOJ, on behalf of HUD, has taken a particularly proactive approach in support of applicants for emotional support animals. Its recent lawsuit against a cooperative is especially notable because it succeeded two state courts' decisions upholding the cooperative's rejection of those same applications. In 2012, East River Housing Corp., a private cooperative in Manhattan ("Cooperative"), commenced two separate legal proceedings against tenant-shareholders for harboring dogs without permission. During the pendency of the proceedings, each tenant-shareholder filed a discrimination complaint with HUD. In late 2013, the state courts separately found against the tenant-shareholders and, respectively, ordered the removal of the dog or face eviction, and, where the second tenant-shareholder voluntarily removed the dog, enforced a proprietary lease provision entitling the Cooperative to recover its attorneys' fees caused by the breach of the proprietary lease.[49] In both matters, the courts rejected the tenant-shareholders' claims of disability of depression, which they belatedly realized was alleviated by the dog's presence and concomitant emotional support.

In the meantime, while the state court proceedings were pending, HUD issued charges of discrimination, charging the Cooperative with engaging in discriminatory housing practices in violation of the FHA. Notwithstanding the determinations in the state court proceedings, in December 2013, as a result of the HUD charges, the DOJ commenced a federal action against the Coopera-

tive on behalf of those and a third tenant-shareholder, seeking declaratory, injunctive, and monetary relief.[50] The DOJ asserts that the Cooperative, which permits dogs only upon board approval, but without setting forth any parameters, lacks a written or established policy or procedures for providing reasonable accommodations for individuals who require service or support animals because of a disability. Currently, according to the Southern District Court of New York's docket's website, the parties are exchanging discovery and the Cooperative has moved for partial summary judgment, for severance of the causes of action as they relate to the individual underlying complainants and to dismiss one of the causes of action, and the motion has not been fully briefed.[51]

This action suggests that in the federal government's view, tenants (including tenant-shareholders) whose mental health symptoms improve after they have harbored dogs without seeking advance permission may qualify as having a "disability" mandating a "reasonable accommodation," if they can document that they have a mental health condition with symptoms that improved following the acquisition of the dog. It also indicates that, while state courts may look skeptically on the claims of tenants who belatedly assert a disability upon being caught residing with a dog, a pet policy which fails to set forth an exception and/or procedures for providing reasonable accommodations for disabled residents may trigger claims filed with HUD—and even lawsuits by the United States government.

VIII. Conclusion

Confusion among landlords, boards and residents alike is inevitable and understandable. Charged with abiding by discrimination laws, landlords and boards must perform thorough and acute—yet non-"intrusive"—investigations of applications for emotional support dogs in view of a perceived growing trend of fraudulent applications. The easiest and first step in avoiding or defending against litigation is for landlords and boards to implement an exception within a pet policy for animals assisting persons with disabilities, set forth a procedure for requesting such an exception and apply the policy and procedure consistently. Being mindful of the housing discrimination laws and knowing which documentation is appropriate and adequate to support an exception to the policy is the next best step—for applicants as well to expedite approvals of their submissions. Finally, for all interested parties, keeping an eye on the DOJ's litigation against East River Housing Corp. and any other similar lawsuits will be instrumental in better understanding the relevant criteria of emotional support dog applications which will be considered dispositive.

Endnotes

1. Title VIII of the Civil Rights Act of 1968 (Fair Housing Act) prohibited discrimination in the sale, rental and financing of dwellings based on race, color, religion, sex or national origin, and was amended in 1988 by the Fair Housing Amendments Act, which, *inter alia*, expanded the coverage of the Fair Housing Act to prohibit discrimination based on disability.
2. Though antiquated, "handicap" was the commonly accepted term in 1968. It has since been generally substituted with the more modern term "disability."
3. 42 U.S.C. § 3604(f)(2).
4. 42 U.S.C. § 3604(f)(3)(B). The FHA's definition of "dwelling" appears to cover "second" and "weekend" homes as well. *See, e.g.*, United States v. Columbus Country Club, 915 F.2d 877, 881 (3d Cir. 1990) (holding that country club summer bungalows which could be leased by "annual members" constituted a "dwelling" for purposes of the FHA); Conn. Hosp. v. City of New London, 129 F. Supp. 2d 123, 135 (D. Conn. 2001) (viewing the inquiry as turning on whether "plaintiffs' occupancy resembles that of a resident…more than that of a hotel guest") (quotation marks omitted); Hernandez v. Ever Fresh Co., 923 F. Supp. 1305, 1308-09 (D. Or. 1996) (temporary, seasonal housing for migrant farm workers constituted a dwelling under the FHA).
5. Ayyad-Ramallo v. Marine Terrace Assocs. LLC, 18, 2014 WL 2993448, *5 (E.D.N.Y. May 30, 2014) (citation omitted); *see* Echeverria v. Krystie Manor, LP, 2009 WL 857629, *7 (E.D.N.Y. Mar. 30, 2009); *see also* Hevner v. Vill. E. Towers, Inc., 2011 WL 666340 (S.D.N.Y. Feb. 7, 2011).
6. *See* 28 C.F.R. § 36.104.
7. 24 C.F.R. § 100.204(b), Example 1.
8. *See* Access Now, Inc. v. Town of Jasper, Tenn., 268 F. Supp. 2d 973, 980 (E.D. Tenn. 2003).
9. *Id.* ("the issue of whether the horse is a service animal does not turn on the type and amount of training"); *see also* Green v. Hous. Auth. of Clackamas Cty., 994 F.Supp. 1253, 1256 (D. Oregon 1998) ("[t]here is no requirement in any statute that an assistance animal be trained by a certified trainer"); *see also* Bronk v. Ineichen, 54 F.3d 425, 430-431 (7th Cir. 1995).
10. *Access Now, Inc*., 268 F.Supp.2d at 980.
11. *See id.; Bronk*, 54 F.3d at 431 (focusing on the degree to which the purported service animal "aids the [person] in coping with their disability"); Vaughn v. Rent-A-Center, Inc., 2009 U.S. Dist. LEXIS 20747, 29-30, 2009 WL 723166 (S.D. Ohio 2009).
12. An emotional support animal is distinguishable from a psychiatric service animal (PSA), as the latter is regarded as a service animal for purposes of the ADA. A PSA's primary function is not to provide emotional support, but to perform tasks which enable its handler to fully function, and works in distracting public environments to mitigate the handler's psychiatric disability, not just in the handler's home. *See* U.S. Dep't of Justice, *Nondiscrimination on the Basis of Disability in State and Local Government Services*, 75 Fed. Reg. 56164, at 56193 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 35, app. A); *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 75 Fed. Reg. 56236, 56267 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 36, app. A).
13. 42 U.S.C.A. § 3602(h) (emphasis added).
14. 29 C.F.R. § 1630.2(j)(1). *See* Amador v. Macy's East-Herald Square, No. 12 CV. 4884 MHD, 2014 WL 5059799, at *16 (S.D.N.Y. Oct. 3, 2014).
15. 29 C.F.R. § 1630.2(j)(2).
16. 29 C.F.R. § 1630.2(i)(1)(ii).
17. Graham v. Three Vill. Cent. Sch. Dist., 2013 WL 5445736, at *11 (E.D.N.Y. Sept. 30, 2013) (quoting D'Entremont v. Atlas Health Care Linen Servs. Co., No. 12–CV–0060 (LEK/RFT), 2013 WL 998040, at *6 (N.D.N.Y. Mar. 13, 2013 (citation omitted)); *see* Franchi v. New Hampton Sch., 656 F. Supp. 2d 252, 259-60 (D.C.

N.H. 2009) (plaintiff mother suing private boarding school sufficiently alleged that the daughter's eating disorder substantially limited the major life activity of eating, thus constituting a disability within the meaning of the FHA, because the alleged condition required a careful watch over her food intake to protect against potentially dangerous weight loss).

18. *See* Williams v. N.Y. City Housing Auth., 879 F. Supp. 2d 328, 336 (E.D.N.Y. 2012); *see infra*.

19. N.Y. Exec. Law § 292(21) (McKinney 2014) (emphasis added); State Div. of Human Rights v. Xerox Corp. 65 N.Y.2d 213, 219, 480 N.E.2d 695, 698, 491 N.Y.S.2d 106, 109 (1985).

20. Matter of Doe v. Bell, 194 Misc.2d 774, 779, 754 N.Y.S.2d 846, 851 (Sup. Ct. N.Y. Co. 2003) (*quoting Xerox Corp*. 65 N.Y.2d at 219, 480 N.E.2d at 699, 491 N.Y.S.2d at 109; *see* Reeves v. Johnson Controls World Services, Inc., 140 F.3d 144, 155-156 (2d Cir. 1998) (plaintiff's panic disorder was a disability under the New York City Human Rights Law because a "literal reading of the statute treats a medically diagnosable impairment as necessarily a disability").

21. Wilson v Phoenix House, 978 N.Y.S.2d 748, 763 (Sup. Ct. Kings Co. 2013).

22. The New York City Human Rights Law (NYCHRL) may define disability even more broadly, as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." New York City Administrative Code (N.Y.C. Admin. Code) § 8-102(16)(a). From a review of the case law, it does not seem that the NYCHRL is regularly invoked in emotional support pet cases. Other municipalities throughout the state also have their own particular definitions and requirements.

23. 24 C.F.R. § 100.201.

24. Douglas v. Kriegsfeld Corp., 884 A.2d 1109, 1131 (D.C. 2005).

25. Rutland Court Owners, Inc. v. Taylor, 997 A.2d 706, 711 (D.C. 2010), *citing* Douglas, *supra*.

26. *See* Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565, 578 (2d Cir. 2003) (*citing* Smith & Lee Assocs., Inc. v. City of Taylor, 102 F.3d 781, 795 (6th Cir.1996); *see also In re* Durkee v. Staszak, 223 A.D.2d 984, 985, 636 N.Y.S.2d 880, 881-82 (3d Dep't 1996) (affirming determination that petitioner in ADA and Rehabilitation Act case involving the provision of emergency housing had failed to establish that he was emotionally dependent on his dog).

27. *See In re* Kennedy St. Quad, Ltd. v. Nathanson, 62 A.D.3d 879, 880, 879 N.Y.S.2d 197 (2d Dep't 2009).

28. *See e.g.* The N.Y. State Div. of Human Rights v. 111 East 88th Partners, N.Y.L.J., Sept. 18, 2014, 1202670317446, at *1 (Sup. Ct. N.Y. Co.) (finding that although tenant may have had a record of a disability in the past, where his impairment had not limited his day-to-day activities, and he could not demonstrate a current impairment, or provide any evidence as to when he might again experience the same symptoms and their severity, he was unable to demonstrate that the dog "is necessary for the enjoyment of the apartment"); *see also Kennedy St. Quad, Ltd.*, *supra* (although the complainants submitted evidence that the dog helped them with their symptoms of depression, they failed to demonstrate that the dog was actually necessary in order for them to enjoy the apartment); *In re* 105 Northgate Co-op. v. Donaldson, 54 A.D.3d 414, 416, 863 N.Y.S.2d 469, 470 (2d Dep't 2008); *In re* One Overlook Ave. Corp. v. N.Y. State Div. of Human Rights, 8 A.D.3d 286, 287, 777 N.Y.S.2d 696 (2d Dep't 2004); Landmark Props. v. Olivo, 5 Misc. 3d 18, 21, 783 N.Y.S.2d 745, 748 (App. Term 2d Dep't 2004); Contello Towers Corp. v. N.Y. City Dep't of Hous. Pres. & Dev., N.Y.L.J., Nov. 17, 2004, p. 19, col. 1 (Sup. Ct. Kings Co.) (granting Article 78 petition because there was "no evidence in the record to establish that allowing an exception to the no-pet rule in this instance was necessary to afford [the tenant] equal opportunity to use and enjoy the apartment"). Notably, in contrast, the NYCHRL does not make any reference to "necessity." It simply requires a reasonable accommodation whenever doing so "enables" a person with a disability to enjoy certain rights. *See* Comm'n of Human Rights v. Riverbay Corp., 2011 N.Y. OATH LEXIS 156, 25-26 (2011). While it may be informative to review analogous statutes and caselaw, the Local Civil Rights Restoration Act of 2005 mandates a more liberal construction and broader application of remedies under the NYCHRL. *Riverbay Corp.*, *supra* at 30-32. In that connection, the NYCHRL has a broader definition of "reasonable accommodation" (N.Y.C Admin. Code) § 8-102(18)), in that it does not permit any category of accommodation to be "excluded from the universe of reasonable accommodation." Phillips v. City of New York, 66 A.D.3d 170, 182, 884 N.Y.S.2d 369 (1st Dep't 2009) (rejected by Jacobsen v. New York City Health & Hospitals Corp., 22 N.Y.3d 824, 988 N.Y.S.2d 86 (2014).

29. Hubbard v. Samson Mgmt. Co., 994 F.Supp. 187, 190 (S.D.N.Y. 1998).

30. *See* New York State Div. of Human Rights v. 111 E. 88th Partners, 2012 N.Y. Misc. LEXIS 2647, 25, 2012 N.Y. Slip Op. 31475(U), 19 (Sup. Ct., N.Y. Co. 2012), *citing Hubbard*, *supra*.

31. See United States v. Cal. Mobile Home Park Mgmt. Co., 107 F.3d 1374, 1380 (9th Cir. 1997).

32. Ass'n of Appartment Owners of Liliuokalani Gardens v. Taylor, 892 F. Supp. 2d 1268, 1287 (D. Haw. 2012).

33. *In re* Kenna Homes Coop. Corp., 210 W.Va. 380, 392, 557 S.E.2d 787, 799 (W.Va. 2001); *see* Overlook Mut. Homes, Inc. v. Spencer, 666 F. Supp. 2d 850, 856-57 (S.D. Ohio 2009) (housing corporation was entitled to question the treating psychologist about the alleged disability and the need for the dog).

34. *See* Douglas v. Kriegsfeld Corp., 884 A.2d 1109, 1131 (Dist. Col. App. 2005).

35. Joint Statement of the Department of Urban Housing and Development and Department of Justice, *available at* http://www.hud.gov/offices/fheo/library/huddojstatement.pdf, pp. 13-14 (emphasis added).

36. *See* Rutland Court Owners, Inc. v. Taylor, 997, A.2d 706, 711-712 (D.C. 2010) (determination of disability was based on sufficient evidence where, *inter alia*, psychiatrist testified that cooperative shareholder suffered from bipolar disorder, post-traumatic stress disorder and basic mood instability, which were treated with a number of medications, and that these conditions impeded shareholder's ability to organize, concentrate, focus his attention and stay motivated to complete tasks); Prindable v. Ass'n of Apartment Owners of 2987 Kalakaua, 304 F. Supp. 2d 1245, 1255 (D. Haw. 2003), *aff'd sub nom.* Dubois v. Ass'n of Apartment Owners of 2987 Kalakaua, 453 F.3d 1175 (9th Cir. 2006) (issue of fact as to whether condominium unit owner's roommate had a disability where physician concurred with behaviorist's evaluation that roommate had symptoms of depression, that a pet would "have a positive impact on [his] condition and a separation from his pet would exacerbate his condition," another physician identified roommate as suffering from a mental dysfunction that impaired his ability to work, and roommate averred that he had HIV, depression and anxiety, and had been unable to work); *see also* HUD v. Dutra, 2 Fair Housing-Fair Lending (P-H) P25,124, at p. 26,059, 1996 HUD ALJ LEXIS 55, 21-22, 1996 WL 657690 (HUDALJ 1996) (landlord violated the FHA by refusing to grant a mentally disabled man a reasonable accommodation to allow him to keep his emotional support cat in a no-pets apartment where he established that having his cat live with him greatly increased his enjoyment of his apartment and the quality of his life, and "[b]oth Dr. Gallo and Dr. Merritt were of the opinion that Complainant derived a therapeutic benefit from keeping his cat").

37. *See* N.Y. State Div. of Human Rights v. 111 East 88th Partners, 2012 N.Y. Misc. LEXIS 2647, 23, 2012 N.Y. Slip Op. 31475(U) (Sup. Ct., N.Y. Co. 2012) (issue of fact as to whether tenant had a "disability" and whether his pet was "necessary" for him to enjoy and use the premises where he provided medical and psychological evidence in support of his claim of a disability where he submitted his medical record and laboratory reports, his psychotherapist's treatment notes from 2002 to 2010 and documentation from his psychotherapist, discussing his history of treatment for Dysthymic Disorder, characterized by depressed mood for most of the day, for more days than not, for at least two years, manifested by overeating, low self-esteem, low energy and feelings of hopelessness, being distrustful and isolating himself; he was also a diabetic, and the dog provided tenant with unconditional affection and comfort, also lifting his spirits; even landlord's expert did not opine that tenant was a well-adjusted adult); Crossroads Apartments Assoc. v. LeBoo, 152 Misc. 2d 830, 578 N.Y.S.2d 1004, 1007 (City Ct., Rochester 1991) (tenant created an issue of fact as to whether he had an emotional and psychological dependence on the cat which required him to keep the cat in the apartment by submitting the affidavits of his treating psychiatrist, his clinical social worker, and a certified pet-assisted therapist who all described his mental illness, his course of treatment, and concluded that he received therapeutic benefits from keeping and caring for his cat, and that the keeping of the cat assisted him in his use and enjoyment of his apartment by helping him cope with the daily manifestations of his mental illness); *cf. In re* Kennedy St. Quad, Ltd. v. Nathanson, 62 A.D.3d 879, 880, 879 N.Y.S.2d 197 (2d Dep't 2009) (although the complainants submitted evidence that the dog helped them with their symptoms of depression, they failed to present any medical or psychological evidence to demonstrate that the dog was actually necessary in order for them to enjoy the apartment); *In re* 105 Northgate Co-op. v. Donaldson, 54 A.D.3d 414, 416, 863 N.Y.S.2d 469, 470 (2d Dep't 2008) (annulling New York State Division of Human Rights discrimination finding because "the complainant failed to demonstrate, through either medical or psychological expert testimony or evidence, that she required a dog in order to use and enjoy her apartment unit"); *In re* One Overlook Ave. Corp. v. N.Y. State Div. of Human Rights, 8 A.D.3d 286, 287, 777 N.Y.S.2d 696 (2d Dep't 2004) (where mother claimed that her son suffered from dysthymia, a form of depression, and that he should be able to keep a companion dog in the apartment in order to alleviate his depression and thus use and enjoy the apartment, she failed to demonstrate through either medical or psychological expert testimony or evidence that her son required a dog in order for him to use and enjoy the apartment); Landmark Props. v. Olivo, 5 Misc. 3d 18, 21, 783 N.Y.S.2d 745, 748 (App. Term 2d Dep't 2004) (affirming denial of a reasonable accommodation claim because the tenant "submitted only the ambiguous statement of his physician that depressed people may benefit from having pets and notes from his medical records that he was anxious about possibly losing his dog").

38. *See, e.g.* Bovin v. Galitzka, 250 N.Y. 228, 165 N.E. 273 (1929) (landlord had right to terminate lease by reason of tenant's violation of provision of occupancy agreement which prohibited harboring and maintaining animals in the demised premises); Hillman Hous. Corp. v. Krupnik, 40 A.D.2d 788, 337 N.Y.S.2d 547 (1st Dep't 1972) (injunctive relief to remove a dog is available where lease forbids harboring dogs); Triangle Mgmt. Corp. v. Innis, 62 Misc. 2d 1095, 312 N.Y.S.2d 745 (Civ. Ct. N.Y. Co. 1970) (harboring a dog in an apartment contrary to a prohibition in the lease was considered a substantial violation of the lease).

39. *See In re* Levandusky v. One Fifth Ave. Appartment Corp., 75 N.Y.2d 530, 553 N.E.2d 1317, 554 N.Y.S.2d 807 (1990); Bd. of Mgrs. of Fairways at N. Hills Condo. v. Fairway at N. Hills, 193 A.D.2d 322, 603 N.Y.S.2d 867 (2d Dep't 1993).

40. *See, e.g.,* Hawn v. Shoreline Towers Phase I Condo. Ass'n, 2009 U.S. Dist. LEXIS 24846, 2009 WL 691378 at ** 3-4 (N.D. Fla. 2009) (board properly sought more information after it received a short, one-page letter from one physician, whose letter provided very little information about the plaintiff's alleged disability, and another from a chiropractor, whose letter did not provide any whatsoever, and neither letter indicated whether plaintiff's limitations and difficulties were temporary or permanent, nor did they indicate that the dog was actually "necessary…to afford [the plaintiff] equal opportunity to use and enjoy a dwelling," as opposed to just desirable and helpful, and, notably, the letters also did not describe the providers' individual qualifications, background, or treatment history with the plaintiff); Jankowski Lee & Assoc. v. Cisneros, 91 F.3d 891, 895 (7th Cir. 1996) (board faulted for not requesting additional information from tenant alleging handicap under the FHA).

41. *See, e.g.,* Sabal Palm Condos. of Pine Island Ridge Ass'n v. Fischer, 2014 U.S. Dist. LEXIS 36040, 52 (S.D. Fla. 2014) ("Sabal Palm had already received detailed—and in the case of the medical records, confidential—information addressing these three points. Asking for even more medical records providing nexus information was clearly 'highly intrusive,' and the intrusion was not necessary.").

42. Schwarz v. City of Treasure Island, 544 F.3d 1201, 1220 (11th Cir. 2008).

43. *Schwarz*, 544 F.3d at 1220.

44. 24 C.F.R. § 100.204(b)(1), *supra* at 6; *see, e.g.*, Sabal Palm Condos. of Pine Island Ridge Ass'n v. Fischer, 2014 U.S. Dist. LEXIS 36040, 24 (S.D. Fla. 2014) (The *raison d'être* of plaintiff condominium association was to provide housing, which would not be fundamentally altered by allowing a disabled resident to keep a service dog).

45. *See, e.g.*, Stevens v. Hollywood Towers & Condo. Ass'n, 836 F. Supp. 2d 800, 810 (N.D. Ill. 2011) (where condominium unit owner claimed that it was unreasonable to require her to carry her dog in a pet carrier because of her disability and physical limitations, which made it impossible for her to manage a carrier and her other belongings, and that the use of the building's side entrances was problematic because it required her to walk a greater distance and put her at risk of being hit by oncoming traffic, increasing her anxiety stemming from her disability, the court determined that she needed to provide evidence that she was disabled, that she needed the dog to treat her disability, and that her disability made it necessary for her to travel through the complex by the path of her choosing); Prindable v. Ass'n of Apartment Owners of 2987 Kalakaua, 304 F.Supp.2d 1245, 1259 n.29 (D. Haw. 2003) (to succeed in his challenge to the limitations the association had placed on his use of the dog, the plaintiff would have to come forward with evidence that he had a disability that not only required the use of a dog, but which also required him to take the path of his choice through the building).

46. Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt., 778 F. Supp. 2d 1028, 1040 (D.N.D. 2011), *citing* Joint Statement of the Department of Urban Housing and Development and Department of Justice, *available at*, http://www.hud.gov/offices/fheo/library/huddojstatement.pdf, *supra*, at p. 9, ¶11, Example 2.

47. HUD Notice: FHEO-2013-01, "Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs," p. 3; *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdfhttp://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf.

48. *See* Joint Statement of the Department of Urban Housing and Development and Department of Justice, *available at* http://www.hud.gov/offices/fheo/library/huddojstatement.pdf, p. 9, Example 2.

49. E. River Hous. Corp. v. Aaron, N.Y.L.J., Oct. 25, 2013, 1202624958690, at *1 (Civ. Ct., N.Y. Co.) and E. River Hous. Corp. v. Gilbert, N.Y.L.J., Jan. 9, 2014, 1202638977520, at *1 (Civ. Ct. N.Y. Co.).

50. Compaint by Plaintiff, United States v. East River Hous. Corp., S.D.N.Y. No. 13 Civ. 8650.

51. One of the issues raised in the motion practice, following an Appellate Division order in favor of the Cooperative (*In re* E. River Hous. Corp. v. N. Y. State Div. of Human Rights, 116 A.D.3d 562, 984 N.Y.S. 2d 331 (1st Dep't 2014)), is whether permitting one of tenant-shareholders to pursue her claim with HUD and in federal court, after the New York State Division of Human Rights (to which HUD originally transferred the tenant-shareholder's complaint) earlier dismissed her complaint for lack of probable cause, contravenes the election of remedies provision contained in Executive Law § 297(9) (9 N.Y.C.R.R. § 465.5[e][2][vi]).

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New State Law Requires Sprinkler System Clauses in Leases

By Adam Leitman Bailey and Dov Treiman

Effective December 3, 2014, all residential leases in New York State require a notice to the tenant about the presence or absence of sprinkler systems in the "leased premises."[1] The new law, while defining what a sprinkler system is, does not define what a "lease" is or what "premises" are. The law is effective through the entire State of New York and makes no exceptions for premises that are governmentally regulated or even governmentally run. However, while stating what must exist, the law has no enforcement mechanism on its face and no penalty stated for noncompliance. Where there is no question whether the document in question really is some kind of lease, it appears clear that the law covers both main leases and subleases, and both new leases and renewal leases.

The law is short and simple. It says, "1. Every residential lease shall provide conspicuous notice in bold face type as to the existence or nonexistence of a maintained and operative sprinkler system in the leased premises. 2. For purposes of this section, 'sprinkler system' shall have the same meaning as defined in section one hundred fifty-five-a of the executive law. 3. If there is a maintained and operative sprinkler system in the leased premises, the residential lease agreement shall provide further notice as to the last date of maintenance and inspection."[2]

While most leases call themselves "leases," there are other names as well. Even where the name is modified in some manner, common perception fails to recognize a lease as being such. Thus, many cooperators under "proprietary leases" are so focused on their being shareholders in the corporation that they lose track of the fact that they are also conventional tenants in a conventional landlord-tenant relationship.

The bylaws of the overwhelming majority of cooperative corporations require that the development's proprietary leases be identical to each other. Since this new law requires that all residential leases issued on or after December 3, 2014 contain the required language,[3] this means that in order to issue *one* proprietary lease to the new owner of an apartment in a cooperative complex, *all* of the proprietary leases for that complex will have had to have been amended on or prior to December 2, 2014. Since the statute specifies that the new language has to be in bold print[4] (without specifying just what the language is), this means that it will not be good enough for the Board of Directors to pass a resolution that all of the leases in the complex are "deemed" or considered amended by adding this language. It will actually have to be done in real time on real paper. We have no way of predicting the results if a shareholder simply refuses to sign the new lease. We note that in some cooperative developments, this could mean the forced reissuance of hundreds of leases.

Other leases for residential space go by the name "occupancy agreement," but are nonetheless actually leases. In fact, there is no legal requirement for what the parties call the agreement. Even more confusing, some leases deny that they are leases. This is typical of leases that call themselves licenses. While *some* licenses really are licenses, licenses are difficult to draft correctly and therefore the courts hold many documents that want or claim to be licenses to actually be leases. As a result, the parties holding this kind of lease could be very surprised to find out that this statute also applies to them. The consequences for such a document failing in good faith to include the required sprinkler language are, at this point, too difficult to imagine. But, on the flip side of the issue, if there is a license where one of the parties claims that it is really a lease and the document *includes* the mandatory sprinkler language, the party arguing that it is a license may be finding itself to have accidentally conceded that it was a lease.

While leases given in some form of regulatory housing typically have lease clauses that the lease must contain, required languages in unregulated residential leases are exceedingly rare. Generally speaking, in the State of New York, a landlord and a tenant could write on the back of a cocktail napkin, "The apartment at 123 Mockingbird Lane will be rented to the tenant to live in for X months at $Y rent per month" and, once they sign it, they have a "residential lease" within the meaning of this new law. Now the law requires that cocktail napkin to state facts about whether or not there is a sprinkler system and what its recent maintenance history is and to do so "in bold face type."[5] So, while the rest of the cocktail napkin can be handwritten, the sprinkler language has to be machine generated. And the law does not specify what happens if the cocktail napkin fails to obey the law. Is this no longer a valid lease under New York law? Nobody knows. However, if it is *not* a valid lease, the courts will probably find that there is a valid month-to-month tenancy and will give both sides the minimal protections that kind of tenancy accords somewhat differently inside the boundaries of New York City and outside those boundaries.

Particularly inside the City of New York, folks who are subletting may find themselves in for quite a surprise from this statute. First of all, as sublessors, they have essentially no control over any sprinkler system and neither any access whatsoever to the maintenance records, nor the ability to demand such access. If they are rent-regulated tenants, their last renewal lease could have been two years earlier. And, even if it is more than two years after this law's enactment, and

therefore they have knowledge from their own renewal lease, by the time they sublet that information could be nearly two years out of date.

With regard to rent regulated leases, we note that the statute requires that the lease set forth "the last date of maintenance and inspection."[6] However, on the probably valid assumption that the lease is offered as early as 150 days before the expiration of the last lease, the landlord will be filling out "the last date of maintenance and inspection" on a date that is nearly half a year prior to the lease going into effect. So, the *effective* date of the lease may be after a maintenance and inspection that took place between the time of the lease offer and the time of the lease acceptance (even assuming that the tenant is absolutely prompt in accepting the lease renewal, a not particularly valid assumption). Should the landlord have to notify the tenant of a *different* date of maintenance and inspection after the offer? Perhaps the landlord should notify the tenant of a different date of maintenance and inspection, but we note that under rent stabilization, the landlord cannot *change* the lease offer. So, the lease signed by the tenant may have information that is no longer true, information that perhaps this new law requires and the rent stabilization law simultaneously prohibits. This problem could possibly be solved by the landlord mailing an update on the date the renewal lease is to take effect.

On the subject of rent stabilization, we note that this lease renewal would be *different* from the lease it renews, but while rent stabilization requires that the renewal of the lease be on the same terms and conditions as the expiring lease, this notification of the status of the sprinkler system is not a "term and condition"; it is merely a notification. So, at least as to *that* matter, rent stabilization should present no problem under the new statute.

Where this law can have a substantial anti-consumer effect is on the question of subletting. In residential rentals in buildings of three units or fewer, in coops, and in public housing or other housing where there are governmental qualifications for tenancy, there is no statutory right to sublet. However, in buildings of four or more units that are not in those special situations, New York law presents a statutory right to sublet, provided the tenant follows to the letter a clearly described procedure set forth in the statute.[7] There are several steps to that procedure and the *first* step in the procedure includes sending to the landlord a copy of the proposed sublease.[8] Under this new statute, the landlord can drag the sublet-wanting tenant through the rest of the sublet procedure and then, even though the landlord was in possession from the very beginning of the ace in the hole that was going to allow denial of the sublet request, at the very end of the procedure deny the request because the sublease did not comply with this new statute. And two things are going to make it very likely that the sublease *won't* comply with the new statute: The first is that the subletting tenant will have no warning in the sublet law that leases need to have any particular language; the second is that the sublet-wanting tenant probably has no access to the maintenance history of the sprinkler system and no way to demand it.

This law will affect at least tens of thousands of dwelling arrangements where people will have absolutely no idea they are in violation of the law. In the City of New York, this will include sublets and apartments of all kinds in buildings with fewer than six residential units. The larger buildings will also be affected, but they are more likely to *expect* obscure laws to be ruling them. In the vast rural parts of the state, tens of thousands of rentals will be affected in places where people are living in a fool's paradise that housing regulation is a New York City phenomenon alone.

And all of these places, in large buildings and small, inside New York City and outside it, will all have the same question we can't answer: How is this thing going to be enforced? Possible enforcement mechanisms include courts finding leases that lack the required language aren't valid leases at all. Perhaps, the New York State Attorney General's Office will take the attitude that folks who rent to several or more different tenants with leases that lack this mandatory language are guilty of fraudulent business activities and are subject to fines and penalties. Perhaps fire insurers will deny coverage of fires in tenancies where the insured failed to insist upon this language being present in the lease and are therefore, under the insurer's theory, partially responsible for their own fire damage. Or perhaps they will deny coverage on the theory that the renter fraudulently claimed to have a lease.

We doubt that the Legislature really thought through any of the issues that are presented in this article. Private communications with legislators have informed us that the Legislature realizes that the statute is heavily flawed and it can be expected to be repairing it in the coming years. Until then, this law will serve as a stellar example of the law of unintended consequences. Whatever those consequences may be, these authors, as the drafters of all the Blumberg-Excelsior New York residential leases of the last decade, have updated all of our lease forms to include the required language. We are advised that the new forms will be available in plenty of time for the December 3, 2014 effective date of the statute.

Endnotes

1. Act of August 5, 2014, ch. 202, 2014 N.Y. Laws, S. 5212-A (McKinney).
2. N.Y. Real Prop. Law §231-a (2014).
3. *Id*. at §231-a (1).
4. *Id*.
5. *Id*. at §231-a (1).
6. *Id*. at §231-a (3).
7. N.Y. Real Prop. Law §226-b (2)(a) (2014).
8. *Id*. at §226-b (2)(b).

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Bergman on Mortgage Foreclosures: When the Borrower Attacks the Action Time After Time

By Bruce J. Bergman

Some borrowers never get discouraged. They default, but then try repeatedly to vacate that default no matter how many times they lose. Or, having interposed an answer which is stricken, they assault various subsequent stages of the foreclosure asserting the very same defenses previously banished by the court.

While not meaning to cast aspersions upon counsel diligently protecting a borrower's rights, the obvious detriment of such tactics to lenders and servicers is twofold: the time consumed by way of case delay in fending off these attacks and the legal expense incurred in the process. While the legal fees should later be recouped, the irony is that when application is made for reimbursement upon the judgment of foreclosure and sale, courts simply do not always reimburse all the legal cost visited upon the foreclosing plaintiff. And if the attorneys' fees are expended *after* the judgment has issued (such as a post-judgment borrower's motion or upon a deficiency judgment motion) it is usually too cumbersome and time consuming to go back and amend the judgment to apply anew for legal fees—especially when the paramount goal is to finally arrive at the end of the action.

When a court rejects a borrower defense once, it is reasonable to assume that it will again do so when later the borrower asserts it yet again, and then again. Need a foreclosing plaintiff worry that a court will buy the ploy next time around? Probably not, but it cannot be said with total assurance that such a scenario is impossible.

But then, a recent case [*Eastern Sav. Bank, FSB v. Brown*, 112 A.D.3d 668, 977 N.Y.S. 2d 55 (2d Dept. 2013)] confirms a dual helpful principle.

In a matter where a defendant borrower repeatedly moved to vacate a default and then each stage of the foreclosure thereafter, an appeals court ruled that it is correct to deny yet another motion a) where it is premised upon grounds asserted in the prior motions previously denied by the court from which no appeal was taken[1] or b) premised on grounds that were apparent at the time the borrower made the prior motions but did not assert the points.[2]

In other words, if a borrower could assert five existing defenses (even if fanciful or without foundation), uses one on a motion to vacate a default, loses, then makes another motion springing one of the defenses held in reserve, it won't work.

This will helpfully serve to defeat some wily borrowers. Unfortunately it does not mean that such borrowers cannot *make* such dilatory motions, just that the chances of defeating those motions are considerably stronger.

Endnotes

1. Citing *Viva Dev. Corp. v. United Humanitarian Relief Fund*, 108 A.D.3d 619, 620 (2013); *Discover Bank v. Qader*, 105 A.D.3d 892 (2013); *JMP Pizza, LLC v. 34th St. Pizza, LLC*, 104 A.D.3d 648, 648 (2013); *47 Thames Realty, LLC v. Robinson*, 85 A.D.3d 851, 852 (2011); *Robert Marini Bldr. v. Rao*, 263 A.D.2d 846, 848 (1999).
2. Citing *Lambert v. Schreiber,* 95 A.D.3d, 1282, 1283 (2012).

Mr. Bergman, author of the four-volume treatise, *Bergman on New York Mortgage Foreclosures,* Lexis-Nexis Matthew Bender, is a member of Berkman, Henoch, Peterson, Peddy & Fenchel, P.C. in Garden City. He is a fellow of the American College of Mortgage Attorneys and a member of the American College of Real Estate Lawyers and the USFN. His biography appears in *Who's Who in American Law* and he is listed in *Best Lawyers in America* and *New York Super Lawyers*.

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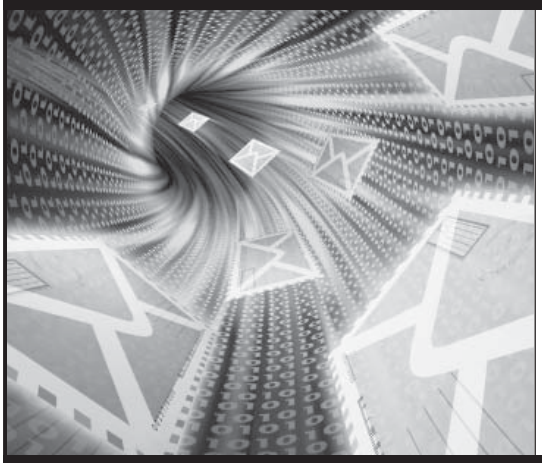

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