LJN LAW JOURNAL NEWSLETTERS

NEW YORK REAL ESTATE LAW REPORTER®

An ALM Publication

Volume 33, Number 12 • October 2017

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Airbnb and Rent Stabilization: A Survey

By Jeffrey Turkel

Over the past several years, rent-stabilized tenants have turned to Airbnb and similar services to monetize their below-market leases and earn extra income. Landlords seeking to evict such tenants for profiteering have been largely successful. This article examines the state of "Airbnb" jurisprudence to date, focusing on the First Department's recent 3-2 decision in *Goldstein v Lipetz* (150 AD3d 562 [1st Dept 2017]).

The Equities

The theoretical underpinning of all profiteering cases was set forth over 30 years ago in a much-cited quotation from *Continental Towers Ltd. Partnership v Freuman* (128 Misc.2d 680, 680-81 [App. Term First Department 1985)]:

> The integrity of the rent stabilization scheme is obviously undermined if tenants, who themselves are the beneficiaries of regulated rentals, are free to sublease their apartments at market levels and thereby collect the profits which are denied the main landlord.
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> * * *
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> This practice, which the Rent Stabilization Law was designed to prevent, is not to be condoned by permitting the tenant to remain after the fraud has been found out.

Subtenants or Roommates?

Rent-stabilized tenants are allowed to sublet their apartments under certain conditions. *See* RPL § 226-b; RSC § 2525.6. RSC § 2525.6(b), however, prohibits a tenant from charging a subtenant more than the stabilized rent, plus a 10% surcharge if the apartment is furnished.

Rent-stabilized tenants are also allowed to have roommates. *See* RPL § 235-f; RSC § 2525.7. Because a rent-stabilized tenant can be evicted for profiteering with respect to a subtenant, but not with respect to a roommate, *see First Hudson Capital LLC v Seaborn* (54 AD3d 251 [1st Dept 2008]), tenants in profiteering cases will often claim that their multiple short-term occupants are roommates, not subtenants.

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In the pre-Airbnb case of *220 W. 93rd St., LLC v Stavrolakes* (33 AD3d 491 [1st Dept 2006]), the First Department held that renting to "short-term transient" occupants was "in the nature of subletting rather than taking in roommates." Since then, courts have consistently deemed short-term occupants to be subtenants, thus making rent-stabilized tenants subject to eviction. *See, e.g., Goldstein*; *355-7 LLC v Steele* (53 Misc 3d 150(A) [App. Term, 1st Dept 2016]); *Brookford, LLC v Penraat* (47 Misc 3d 723 [Sup. Ct. New York County 2014]).

What Is Profiteering?

The majority in *Goldstein* discussed in some depth the issue of when profiteering has occurred. The court began by observing that RSC § 2525.6(b) allows a rent-stabilized tenant to charge a subtenant a maximum 10% premium for a furnished apartment. Because apartments rented to short-term occupants are necessarily furnished, the rent charged to the subtenant will be measured against the previous rent, plus the 10% surcharge, to determine whether the tenant has profiteered.

The next issue is the timeframe in question. The tenant in *Goldstein* argued that her "profiteering was insubstantial" when her Airbnb rate was measured against her stabilized rent on a monthly basis. The majority, however, took a *per-diem* approach:

> Defendant sublet her apartment on a daily basis and, perforce, she had less Airbnb revenue in months during which her apartment was sublet for fewer days. To determine defendant's profit from subletting, her income from the subletting should be compared to the share of her rent attributable to the days she was actually hosting a subtenant in the apartment, not to her rent for the entire month during which the subletting occurred.

Based on this methodology, the majority held that the tenant had "realized a 72% profit" for the 338 days she rented out the apartment, which represented "about seven times the 10% premium." *See also 335-7 LLC, 42nd* and *10th Assocs., LLC v Ikezi* (50 Misc 3d 130(A) [App. Term, 1st Dept 2015]); *PWV Acquisition, LLC v Poole* (2017 WL 550196 [Sup. Ct. New York County]); *Brookford*.

In *Goldstein*, the tenant also argued that her profiteering was "'insubstantial when viewed in the context of a forty (40) year tenancy.'" The majority rejected this claim out of hand, stating:

> The implication of this analysis, in which whether the unlawful conduct of sufficient duration to be considered material is determined by comparison to the total length of tenancy, has the effect of rendering lawful for a long-standing tenant the exact same conduct that would be unlawful for tenant who has a shorter history in his or her apartment.
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> * * *
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> In our view, subletting of an apartment at an excessive rental rate for 338 days over a year and a half, has taken place … for a substantial period of time, and thus constitutes unlawful profiteering, regardless of the duration of the tenancy before the unlawful conduct began."

Can Profiteering Be Cured?

In *Goldstein*, the majority held that First and Second Department case law "establishes that, once substantial profiteering has been established, the tenant is subject to eviction without any right to cure, as a matter of law." The court distinguished the case at bar, wherein the tenant had engaged in profiteering for 18 months, from cases, such as *Cambridge Dev. LLC v Staysna* (66 AD3d 614 [1st Dept 2009]), where the illegal conduct had taken place over a shorter period:

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Jeffrey Turkel, a member of this Newsletter's Board of Editors, is a partner in the Manhattan Real Estate Law Firm of Rosenberg & Estis, P.C. Mr. Turkel represented the prevailing owner in *Brookford*.

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New York Real Estate Law Reporter® (ISSN 0894-4903) is published monthly by Law Journal Newsletters, a division of ALM.

Telephone: (800) 756-8993
Editorial e-mail: wampolsk@alm.com
Circulation e-mail: customercare@alm.com
Reprints: www.almreprints.com

New York Real Estate Law Reporter 021873
Periodicals Postage Paid at Philadelphia, PA
POSTMASTER: Send address changes to :
ALM
120 Broadway, New York, NY 10271

Published Monthly by:
Law Journal Newsletters
1617 JFK Boulevard, Suite 1750, Philadelphia, PA 19103
www.ljnonline.com

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> While there are cases in which tenants who have overcharged their subtenants have nevertheless been permitted to cure, in such cases … the illegal subletting generally has been of short duration. Moreover, in this context, 'cure' does not mean simply the termination of the illegal subletting, but also the refund to the subtenants of the overcharges (internal citations omitted).

See also 42nd and 10th Assocs., LLC; PWV Acquisition, LLC.

The Effect of Short-Term Renters on Other Tenants

Courts are usually reluctant to evict tenants, especially rent-regulated tenants. That is not the case, however, with profiteering, where short-term rentals negatively impact other tenants in the building. This was a factor in the majority opinion in *Goldstein*:

> Defendant's exploitation of her rent-stabilized leasehold disregarded, not only the rights of her landlord, but also the rights of all of her fellow permanent residents of the building, whether shareholders or lessees. The other residents did not bargain to share the building where they made their homes with a continuous stream of transient strangers (to defendant no less than to themselves) of unknown character and reputation, drawn to the building from all over the world by Internet advertising.

See also 335-7 LLC.

Practitioners should keep two things in mind. First, the tenant in *Goldstein* has claimed an as-of right appeal to the Court of Appeals based on the First Department's split decision. The Court of Appeals, however, has yet to determine whether it has jurisdiction. Second, as the sharing economy grows, there will be more tenants subletting their apartments, leading to more decisions, more clarified rules, and, perhaps, more exceptions.

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COOPERATIVES & CONDOMINIUMS

Condo Board Was Intended Beneficiary of Agreement

Board of Managers of 100 Congress Condominium v. SDS Congress

LLC, NYLJ 7/7/17, p. 28, col. 2
AppDiv, Second Dept.
(memorandum opinion)

In an action by a condominium board against a contractor and an engineering firm for breach of contract and professional malpractice, the engineering firm appealed from Supreme Court's denial of its motion to dismiss. The Appellate Division modified to dismiss the malpractice claim, but otherwise affirmed, holding that the condominium board's complaint sufficiently alleged that the condominium was either an intended beneficiary of the contract with the engineering firm or a successor-in-interest to the sponsor's construction contracts.

The contractor, an alleged agent of the sponsor, retained the engineering firm to inspect the building throughout construction. The condominium board brought this action against both the contractor and the engineering firm alleging that the building had been negligently constructed and inspected. The board contended that the engineering firm had breached its contract, and that the firm had committed professional malpractice. Supreme Court denied the engineering firm's motion to dismiss, and the firm appealed.

The Appellate Division first held that the complaint adequately alleged that the condo board was an intended third party beneficiary of a contract between the sponsor and the engineering firm. The court also noted that condominium unit owners are sometimes considered successors-in-interest of condominium sponsors, and held that whether the unit owners in this case should be considered successors-in-interest was a question of fact, precluding dismissal of the complaint. The court did, however, dismiss the professional malpractice claim , noting that the professional negligence claim was merely a restatement of the breach of contract claim.

Fair Housting Act Claim Against Condominium Board

Gutierrez v. McGrath Management Services, Inc.

NYLJ 7/7/17, p. 28, col. 5
AppDiv, Second Dept.
(memorandum opinion)

In an action by condominium unit owner against the condominium board, the management company, and individual board members alleging tortious interference, battery, defamation, and violations of the Fair Housing Act, unit owner appealed from Supreme Court's dismissal of her complaint. The Appellate Division modified to reinstate the battery claim against a board member, and the Fair Housing Act claim against the condominium board, and otherwise affirmed.

Unit owner had fallen behind in her maintenance payments. Subsequently, a board member allegedly accosted unit owner in the condominium's pool area, grabbing her and informing her that she was not permitted in the pool area because she was behind in monthly payments. The condominium board also posted notices apparently indicating that unit owner was in arrears. As a result of these actions, unit owner brought a claim for tortious interference with contract, allegedly because the board was interfering with her contract with her tenant; for battery against the unit owner who had accosted her; for violation of the Fair

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Housing Act and for defamation. When Supreme Court dismissed the complaint against all defendants, and unit owner appealed.

In modifying, the Appellate Division first agreed with Supreme Court that the tortious interference claim could not stand because there was no indication that unit owner's tenant had breached any contract with tenant. The Appellate Division also upheld dismissal of the defamation claim because truth is a defense and there was no allegation that any of the statements made by the board were untrue. But the Appellate Division held that that battery claim against the board member who had grabbed the unit owner should survive a motion to dismiss, as should the Fair Housing Act claim alleging that the board had attempted to prevent her from using the common facilities because she was of Hispanic descent.

The court did sustain dismissal of the Fair Housing Act claim against the management company because the factual allegations in the complaint were insufficient to support the claim.

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DEVELOPMENT

Denial of Rezoning

O'Neill Group-Dutton, LLC v. Town Bd. Of Town of Poughkeepsie

NYLJ 7/17/17, p. 21, col. 1
Supreme Ct., Dutchess Cty.
(Pagones, J.)

In developer's article 78 proceeding challenging the town's denial of its application to rezone property, the town moved to dismiss. The court granted the town's motion, emphasizing the limited judicial authority to overturn legislative zoning determinations.

In 2002, developer purchased a 15-acre site, 3.8 acres of which were located in the Town of Poughkeepsie; the remainder was in the City of Poughkeepsie. Developer proposed to develop 84 residential units on the town portion of the site, but the proposal required rezoning. In 2012, the town board created a new designation, the Waterfront Housing Overlay District (WHOD), which was designed to accommodate developer's unit. Before the developer could build, however, the developer's site had to be rezoned with a WHOD designation. The town planning board issued a positive recommendation, and the town board adopted a resolution accepting developer's site plan. The following month, however, the town board did an about-face and rescinded its resolution. The town board then set a public hearing on the application, and ultimately denied developer's application, citing density, the absence of recreational amenities, inadequate parking and inadequate snow storage, among other reasons. Developer then brought this article 78 proceeding contending that the town board's denial was not supported by substantial evidence.

In dismissing developer's claim, the court noted first that an article 78 proceeding is not the proper vehicle for challenging a legislative act, but went on to treat the claim as one for declaratory relief. The court then noted that judicial authority to review legislative zoning acts is quite constrained: The town board's action must be an unreasonable exercise of the zoning police powers. In this case, when the town board's decision was fairly debatable, and where the town board was "uniquely positioned to consider the application," the court was unwilling to overturn the town board's decision.

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LANDLORD & TENANT

Stipulation of Settlement Did Not Constitute Voluntary Surrender

NRP LLC I v. Elo Management LLC

NYLJ 7/10/17, p. 18, col. 1
AppTerm, First Dept.
(memorandum opinion)

In commercial landlord's nonpayment proceeding, landlord appealed from Civil Court's dismissal of the petition against subtenants. The Appellate Term modified to reinstate the petition and grant summary judgment to landlord, holding that the stipulation of settlement between landlord and main tenant did not constitute a voluntary surrender that would permit the subtenants to remain in possession.

In 1979, landlord and main tenant entered into a net lease for the building at 1674 Broadway in Manhattan. The lease provided for arbitration as a mechanism for setting the rent at the expiration of the initial 35-year term. As a result of an arbitration award, confirmed by Supreme Court, tenant's yearly rent increased from $241,999 to $3.15 million. At the new rent, tenant would have been obligated to pay landlord more than tenant was collecting from its subtenants. When tenant could not pay, landlord served tenant with a 10-day notice specifying rent arrears of $2.7 million, and commenced this nonpayment proceeding, naming tenant and all of tenant's subtenants.

Landlord and tenant then entered into a so-ordered stipulation, by the terms of which tenant consented to a final judgment of possession and issuance of a warrant of eviction. On landlord's claim for possession against the subtenants, all parties

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moved for summary judgment, and Civil Court dismissed the petition against subtenants, concluding that tenant's voluntary surrender did not affect the rights of the subtenant to remain in possession.

In modifying, the Appellate Term held that the settlement stipulation between landlord and tenant did not constitute a voluntary surrender agreement that would have permitted subtenants to continue in possession. Instead, the court concluded that landlord had terminated tenant's lease based on tenant's breach of the covenant to pay rent. As a result of that termination, the subleases were also terminated. The court also rejected subtenants' reliance on a paragraph of the net lease providing that if the main tenant were in default in payment of rent for 10 days, the tenant assigns all subleases and rents to landlord until the defaults have been cured. The court concluded that subtenants were not intended to be third-party beneficiaries of this provision in the net lease, emphasizing that no subleases had yet been executed at the time. The court also concluded that the paragraph in question was cancelled along with the rest of the net lease when the court issued a warrant of eviction against the main tenant.

COMMENT

If the prime tenant breaches the terms of a lease, and landlord terminates the lease because of the breach, the termination extinguishes the interests of all subtenants. The doctrine applies even when the breaching tenant agrees with the landlord to surrender the premises. For instance, in Precision Dynamics Corp. v. Retailers Representatives, Inc., *120 Misc.2d 180, the court held that landlord was entitled to a judgment of possession against a subtenant when the insolvent prime tenant failed to pay rent and agreed with landlord to surrender the premises.* Id. *at 180. The court concluded that the subtenant's rights were dependent on the rights of the tenant, which were extinguished under the lease when the tenant failed to pay rent.* Id. *at 183. The agreement between landlord and prime tenant did not operate to expand the subtenant's rights.*

Although a subtenant's right to possession ceases when the master lease is terminated pursuant to its terms, the subtenant remains entitled to damages from the tenant for breach of the sublease agreement. In Goldcrest Transport, Ltd. v. Across America Leasing Corp., *298 A.D.2d 494, the court denied prime tenant's summary judgment motion on a breach of contract claim by subtenant when the subtenant's right to possession was extinguished by prime tenant's breach of the main lease. Shortly after subletting a portion of its leased premises, prime tenant abandoned the premises and stopped paying rent.* Id. *at 495. Because the master lease was terminated by prime tenant's abandonment and failure to pay rent, the subtenant's interest was also terminated.* Id. *at 496. However, that termination did not prevent subtenant from pursuing damages against prime tenant for breach of the parties' sublease agreement.* Id. *at 495.*

By contrast, a tenant's voluntary surrender of its leasehold interest will preserve the subtenant's right to possession. A surrender is voluntary when the landlord and tenant agree to terminate the lease, and where termination is not made pursuant to any provision in the master lease (including a provision permitting termination upon breach by tenant). In Ocean Grille, Inc. v. Pell, *226 A.D.2d 603, the Court held that the tenant had voluntarily surrendered the premises when he terminated the master lease through an out of court settlement agreement with the landlord.* Id. *at 604. Because the termination was not pursuant to any provision in the master lease, the landlord's change of locks wrongfully evicted the subtenant.* Id. *at 605.*

Even if the prime tenant's surrender is "voluntary," the landlord is entitled to evict a subtenant when the subtenant occupied the premises in violation of the lease and without the consent of the landlord. But, even if the main lease required the landlord's consent to any sublease, a sublease is only voidable, not void, and landlord may only evict the subtenant after opting to deny consent. In Ocean Grille, *for instance, the court held that the sublease was valid despite landlord's failure to give consent pursuant to a provision in the master lease prohibited subleases without the consent of the landlord.* Id. *at 604.*

MODIFICATION AGREEMENT TOO INDEFINITE TO ENFORCE

New Whitehall Apartments LLC v. S.A.V. Associates Inc.

NYLJ 7/19/17, p. 21., col. 1
AppTerm, First Dept.
(memorandum opinion)

In landlord's summary holdover proceeding, commercial tenant appealed from Civil Court's award of possession to landlord. The Appellate Term affirmed, holding that a modification agreement purporting to extend the lease for 10 years, but without specifying rent for the final five years, was too indefinite to enforce for the final five-year period.

Tenant's initial lease ran from March 1, 2000 through Dec. 31, 2009, with a series of escalating rents rising to $16,590.42 at the end of the term. In October 2009, the parties entered into a modification agreement purporting to extend the lease through Dec. 21, 2019. For the first two years of the lease, the monthly rent was to be $12,500, and from Jan. 1, 2012 to November 2014, the rent was to be $15,000, but the lease specified no rent for the period between December 2014 through 2019. When, after December 2014, landlord brought this summary holdover proceeding, tenant contended that the lease entitled tenant to remain in the premises for another five years. Civil Court disagreed and awarded possession to landlord. Tenant appealed.

In affirming, the Appellate Term, concluded that it would be illogical

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to assume that tenant, whose monthly rent was $10,000 in March 2000 and $15,000 in 2014, would not be obligated to pay any rent for the remaining five years. As a result, the court concluded that Civil Court had properly credited landlord's testimony that the modification agreement was supposed to extend the lease for five years, not 10, and that the inclusion of the 2019 date was the result of a typographical error.

Questions of Fact Remain On Succession Rights

90 Elizabeth Apt. LLC v. Eng
NYLJ 6/29/17, p. 21, col. 1
AppTerm, First Dept.
(memorandum opinion)

In landlord's summary holdover proceeding, landlord appealed from Civil Court's denial of its summary judgment motion. The Appellate Term affirmed, holding that landlord had failed to establish an absence of issues of fact on occupant's defense that she had succeeded to her parents' rent control rights.

Occupants, sister and brother, have lived in the apartment since sister was born in 1971. Their parents, the original statutory tenants, were admitted into nursing homes in 2005 and 2010, respectively. The father died in 2012, and the mother's appointed guardian surrendered tenancy rights in October 2015. Landlord then brought this summary holdover proceeding to remove sister and brother, and sought summary judgment. Civil Court denied the summary judgment motion and landlord appealed.

In affirming, the Appellate Term concluded that the mother's formal surrender of tenancy rights through her guardian did not, as a matter of law, deprive the children of succession rights under the rent control law. The court emphasized that the children had lived in the apartment as part of the family unit for decades until their parents moved out, and held that landlord was not entitled to summary judgment.

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REAL PROPERTY LAW

Failure to Provide Evidence That Sale of Rights Is Expedient

Hahn v. Hagar
NYLJ 7/21/17, p. 25, col. 5
AppDiv, Second Dept.
(Opinion by Connolly, J.)

In an action by life tenant and two remaindermen seeking authorization to sell the development rights to a farm, plaintiffs appealed from Supreme Court's dismissal of the complaint. The Appellate Division affirmed, concluding that the development rights were real property but that plaintiffs had not established that selling the rights would be expedient.

The parties to the action are all siblings. Their parents left a life estate in the family's 101-acre farm to their son for life, or for so long as he used the land for farming. Upon his death, or at the time he ceased farming the land, the property and its improvements would go to the son and his three sisters in equal shares. The son and two of his sisters became interested in preserving the property as farmland by selling some of the development rights associated with the farmland or placing a conservation easement on the farm. When the third sister objected, her siblings brought this action pursuant to RPAPL 1602 seeking a judgment enabling them to sell the development rights to the farm to preserve it as a farm, or enabling them to place a conservation easement on the farm. Supreme Court dismissed the action, concluding that relief under section 1602 was unavailable because development rights are not real property within the meaning of section 1602. The life tenant and the plaintiff sisters appealed.

In affirming, the Appellate Division disagreed with Supreme Court's conclusion that development rights did not constitute "real property or a part thereof" within the meaning of RPAPL 1602. The court concluded that development rights were components of the bundle of rights that makeup real property. But the court then concluded that the son and the plaintiff sisters had not established that the proposed sale of development rights would be expedient. In particular, the court emphasized that the plaintiff siblings presented no evidence of a proposed buyer, and no evidence of the value of the property with and without the development rights. The court also noted that they presented no evidence that sale of the development rights was necessary to preserve the property. As a result, the court affirmed the Appellate Division's dismissal of the complaint.

COMMENT

Section 1602 of the Real Property Actions and Proceedings Law permits a holder of one or more possessory or future interests in real property to apply to the court for an order directing that the whole or a portion of the property be mortgaged, leased, or sold. RPAPL Section 1604 qualifies Section 1602, authorizing the court to grant the application so long as the application is expedient.

In most cases decided under section 1602, the applicant is a life tenant whose interest was acquired by will. Unless express language in the will establishes that testator did not want the property sold, courts generally grant the life tenant's application, even over the objection of remaindermen, especially if the life tenant is generating little benefit from the life estate. For instance,

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in In Matter of Gaffers, *254 A.D. 448, 450 , the court granted the life tenant the authority to sell a house when the house did not generate enough rent to cover taxes and maintenance. Similarly, in* In Re Estate of Sauer, *194 Misc. 2d 634, 638, the court granted the life tenant's application to sell when the life tenant desired to relocate and the will provided that the life tenant could not be forced to sell his interest "until he so desires" — an indication that testator intended to give the life tenant control over sale. And in* Matter of Strohe, *5 Misc.3d 1028(A), the court authorized sale by a life tenant who sought to use sale proceeds to help defray the cost of the his assisted living.* Id. *at *5-*6. The court emphasized the will testator's overall intent to benefit the life tenant and provide him with a reasonable residence for his lifetime.* Id. *at 5. In each of these cases, the remaindermen had objected to the sale.*

But, if the testator's circumstances or the language of the will indicate that the testator did not want the property sold, courts will find the sale inexpedient even if retaining the property economically disadvantages the life tenant. In Matter of Talmage, *13 Misc. 3d 1205A, *7–8 (Sur. 2007) affirmed by* In Re Talmage*, 64 A.D. 3d 662, the court denied a petition by testator's wife, the life tenant, when testator's daughters by a prior marriage objected to the sale of property that formed part of a larger compound held by the family for more than a century. The court emphasized the efforts testator had made during his lifetime to avoid sale of the property, together with a provision in the will leaving the property to the wife only so long as she continues to live on the premises or until she remarries, whichever comes first. In denying the wife's application, the court emphasized the potential divesting conditions that distinguished the wife's interest from the ordinarily life estate.*

No Obligation to Extend Party Wall Upward

145 W. 21st Realty LLC v. First West 21st Street LLC

NYLJ 7/13/17, p. 21, col. 2
Supreme Ct., N.Y. Cty
(Levy, J.)

In an action by landowner against neighbor for trespass, encroachment and negligence in construction of neighbors' building, neighbor sought summary judgment dismissing the complaint. The court granted neighbor's motion , holding that neighbor had no obligation to extend a party wall upward when neighbor built a new and taller building on its parcel.

Landowner owns a five-story residential building adjacent to neighbor's newly constructed 14-strory building (Chelsea Green). Before construction of Chelsea Green, the neighbors shared a party wall. When neighbor built Chelsea Green, neighbor did not use the party wall, but built its own wall exclusively on its own parcel, and then cantilevered the top floors of its building above the existing party wall. The cantilevered wall never encroached on landowner's parcel. Landowner's complaint, however, is that by building the new wall instead of using the party wall, neighbor made it impossible for landowner to extend the party wall upward in a way that maximized the available space on landowner's parcel.

In granting summary judgment to neighbor, the court held that a property owner who chooses not to use a party wall may use its own side of the wall for any purposes, so long as none of its structures impair the integrity of the wall or cross the property line. Although the neighbor in this case had a right to carry the party wall upward, the neighbor had no obligation to do so. Because none of Chelsea Green's structure encroached on landowner's parcel, Chelsea Green did not infringe on any of landowner's rights.

Questions of Fact About Location of Easement

Finster Inc. v. Albin

2017 WL 2976276, 7/13/17
AppDiv, Third Dept.
(Opinion by McCarthy, J.)

In landowner's action for a declaration that it owns a right of way over neighboring parcels at the location of an existing driveway, neighbors appealed from Supreme Court's award of summary judgment to landowner. The Appellate Division modified to deny the summary judgment motion, holding that questions of fact remained about the location of the easement.

Landowner acquired title to its property in 2007, and built a garage in 2008 on a portion of the property located in a former quarry. Because a steep grade separates the quarry area from the remainder of the property, landowner used a driveway over neighboring parcels to obtain access to the garage. Landowner's parcel and the neighboring parcels had earlier been owned by a single owner, and when that owner sold off the neighboring parcels, he reserved a right of way in favor of landowner's parcel "where said road or driveway now exists at or near same." In 2012, a neighbor erected a gate preventing landowner from using the driveway, and landowner brought this action for a declaration that it owns a right of way across the neighboring parcel, either as a product of an express easement or an easement by necessity. Supreme Court awarded landowner a preliminary injunction, and the granted landowner summary judgment on the merits of the claim. Neighbors appealed.

The Appellate Division first agreed with Supreme Court that landowner had established the existence of an express easement by reference to the deeds expressly reserving the easement. But the Appellate Division then held that the deeds did not conclusively establish the location of the easement. Submissions by the respective parties placed the easement's location in doubt, and made summary judgment inappropriate.

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Landowner Established Express Easement

Michel v. Baierwalter
NYLJ 6/28/17, p. 21, col. 3
Supreme Ct., Nassau Cty
(Feinman, J.)

In an action by landowner to enjoin neighbors' interference with an easement over their land, all parties moved for summary judgment. The court granted landowner's summary judgment motion, holding that landowner had established an express easement dating back to an 1853 deed.

Landowner's parcel abuts a path known as Shore Road. Neighbors' parcels also abut Shore Road. Landowner contends that the only access from her parcel to a public road is by traveling along Shore Road, and she sought a declaration that she has an easement to traverse Shore Road, and an injunction compelling neighbors to remove any obstructions to the easement.

In awarding summary judgment to landowner, the court relied on the affidavit of an expert who traced a unbroken chain of title reserving the right of way over Shore Road for the benefit of landowner's parcel to a recorded deed dating from 1853. The court held that neighbors had constructive notice of the easement, and that as a result of the express easement, it was unnecessary to consider landowner's claims to an easement by necessity or implication. In light of the easement, landowner was entitled to an injunction against obstruction of access.

Quiet Title Action Not Time-Barred

Fabtastic Abode, LLC v. Arcelia
NYLJ 8/18/17, p. 30, col. 3
AppDiv, Second Dept.
(memorandum opinion)

In an action by mortgagor's successor to quiet title, mortgagee appealed from Supreme Court's denial of its motion to dismiss the complaint as time-barred. The Appellate Division affirmed, holding that the action was timely.

In 1985, mortgagee's decedent transferred the subject property to mortgagor, taking back a purchase money mortgage that was to be repaid in installments through November 2005. Mortgagor defaulted in 1989, and mortgagee's decedent brought a foreclosure action. No judgment of foreclosure and sale was entered, but, in 1998, Supreme Court authorized mortgagee's decedent to take possession and manage the property in accordance with the terms of the mortgage. The mortgage itself assigned rents and profits derived from the premises to mortgagee until the mortgage was paid. In 2012, mortgagor's successor brought this action to quiet title, seeking a judgment that the mortgage was paid and that the successor had unencumbered title to the property. Mortgagee sought summary judgment dismissing the complaint as time-barred, and Supreme Court denied the motion. Mortgagee appealed.

In affirming, the Appellate Division held that the action was not one to discharge a mortgage on the ground that an action to enforce the mortgage is time-barred. As a result, RPAPL 1501(4) did not bar the action. The court then held that the action was not one to redeem a mortgage by making payment, so that CPLR 212(c) did not bar the action. As a result, the quiet title action was timely.

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