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Constitutional Challenges Potentially Affecting Landlord-Tenant Law

By
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The past two and a half years have been a challenging and unprecedented period for New York and the rest of the country. Nevertheless, as we all continue to adjust to post-COVID realities, New York real estate practitioners and the real estate industry more generally should be monitoring several pending constitutional challenges in the federal courts that, if successful, could profoundly alter New York's real estate landscape. We summarize those challenges below.

Rent Stabilization Law/HSTPA Challenges

As readers of this column are aware, New York State enacted the Housing Stability and Tenant Protection Act (HSTPA) in June, 2019. The HSTPA, *inter alia*, significantly strengthened and expanded rental and housing regulations under the Rent Stabilization Law of 1969 and the Emergency Tenant Protection Act (collectively, the "RSL").

In the wake of the HSTPA's enactment, a total of five cases were filed in New York's federal courts challenging the HSTPA and/or the RSL more generally on constitutional grounds. Specifically, *Community Housing Improvement Program et al. v City of New York et al.*, No. 19-cv-4087, and *74 Pinehurst LLC et al. v State of New York et al.*, No. 19-cv-6447, were filed in the U.S. District Court for the Eastern District of New York (collectively, the "EDNY Challenges"), while *Building and Realty Institute of Westchester and Putnam Counties, Inc. et al. v State of New York et al.*, No. 19-cv-11285 ("*BRI*"), *G-Max Management, Inc. et al. v State of New York et al.*, No. 20-cv-634

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("*G-Max*"), and *335-7 LLC et al v City of New York et al.*, No. 20-cv-01053 ("*335-7*"), were filed in the U.S. District Court for the Southern District of New York (collectively, the "SDNY Challenges" and with the EDNY Challenges, the "RSL Challenges"). Collectively, the RSL Challenges assert that the RSL, as amended by the HSTPA, effects both physical and regulatory takings (facially and as applied) in violation of the U.S. Constitution's Takings Clause and also violates the Due Process and Contracts Clauses, among other alleged infirmities.

By order dated September 30, 2020, the Eastern District (Eric

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R. Komitee, J.), finding itself constrained by Supreme Court and Second Circuit precedent, dismissed the EDNY Challenges (*see Community Hous. Improvement Program v City of New York*, 492 F Supp 3d 33 [ED NY 2020]). By orders dated March 8, 2021 (Edgardo Ramos, J.) and September 14, 2021 (Kenneth M. Karas, J.), the SDNY Challenges met the same fate (*see Bldg. and Realty Inst. of Westchester and Putnam Ctys., Inc. v New York*, 2021 WL 4198332 [SD NY Sept. 14, 2021] [deciding both *BRI* and *G-Max*]; *335-7 LLC v City of New York*, 524 F Supp 3d 316, 320 [SD NY 2021]).

The plaintiffs in all cases appealed the rulings to the U.S. Court of Appeals for the Second Circuit.

The Second Circuit heard joint oral argument on the appeals in the EDNY Challenges on February 16, 2022. No decision has yet been issued, but the general expectation of those who observed oral argument is that the Second Circuit panel (consisting of Circuit Judges Guido Calabresi, Barrington D. Parker and Susan L. Carney) will affirm the Eastern District's ruling. Additionally, the Second Circuit heard oral argument on the *335-7* appeal on March 30, 2022, and the appeals on *BRI* and *G-Max* are awaiting an oral argument date.

Of course, any affirmance of the District Courts' rulings by the Second Circuit may not be the last word. While petitions for certiorari to the United States Supreme Court ordinarily stand a very small chance of success (approximately 1% of all petitions, and 4% of petitions submitted by counsel, are granted [*see* https://www.scotusblog.com/2022/01/the-statistics-of-relists-over-the-past-five-terms-the-more-things-change-the-more-they-stay-the-same/, last visited July 28, 2022]), in recent years the Supreme Court has issued several rulings reaffirming and expanding the rights of real property owners. *See, e.g., Cedar Point Nursery v Hassid*, 141 S Ct 2063 (2021) (state regulation compelling property owners to permit certain individuals access to real property for three hours per day, 120 days per year was a *per se* physical taking requiring just compensation); *Knick v Twp. of Scott*, 139 S Ct 2162 (2019) (property owner may bring takings claim immediately in federal court and need not first exhaust state law remedies); *see also Pakdel v City and County of San Francisco*, 141 S Ct 2226 (2021). As such, a certiorari petition presenting multiple constitutional challenges to a law that many see as an attack on fundamental property rights could be of keen interest to the High Court.

In their Landlord-Tenant Law column, Gary Rosenberg and Alexander Lycoyannis summarize several pending constitutional challenges in the federal courts that, if successful, could profoundly alter New York's real estate landscape.

Personal Guaranty Law Challenge

In the aftermath of the COVID-19 outbreak, New York City enacted a local law on May 26, 2020 purporting to temporarily suspend personal guaranty provisions contained in certain commercial leases (the "Guaranty Law"). As subsequently renewed and extended, the Guaranty Law permanently barred the enforcement of guaranties within its scope for the period from March 7, 2020 through and including June 30, 2021. This column focused on the Guaranty Law shortly after it was enacted ("Temporary Suspension of Personal Guaranties," June 3, 2020). We concluded by noting that "[g]iven its total suspension of certain guaranty obligations, judicial review of this new law . . . seems inevitable," and, as we discussed, one of the most fertile grounds for challenge was the U.S. Constitution's Contracts Clause (*id.*).

Shortly after that column, on July 10, 2020, a group of owners filed a constitutional challenge to the Guaranty Law (as well as two companion laws governing expanding the definitions of commercial and residential tenant harassment) in the U.S. District Court for the Southern District of New York. In *Melendez et al. v City of New York et al.*, No. 1:20-cv-05301, the plaintiffs asserted, *inter alia*, that the Guaranty Law violates the Contracts Clause and, further, is preempted by New York State law.

By decision and order dated Nov. 25, 2020, the District Court (Ronnie Abrams, J.) denied the plaintiffs' motion for an injunction enjoining enforcement of the challenged laws and granted the defendants' motion to dismiss the complaint. *See Melendez v. City of New York*, 503 F Supp 3d 13 (SD NY 2020).

However, in an Oct. 28, 2021 opinion, the Second Circuit, *inter alia*, reversed the District Court's dismissal of the plaintiffs' Contracts Clause challenge to the Guaranty Law, vacated the denial of preliminary injunctive and declaratory relief, and remanded the case to the District Court. *See Melendez v City of New York*, 16 F4th 992 (2d Cir 2021). We discussed this ruling last fall ("Could NY's Guaranty Law Be Found Unconstitutional?," December 1, 2021) and noted that the Second Circuit identified five factors leading to its conclusion that the plaintiffs should not have been denied injunctive relief: (1) the Guaranty Law did not effect a temporary or limited contract impairment, but permanently impaired contracts for a 16-month period; (2) guarantors achieved full relief without furthering the law's public purpose; (3) the law misallocated economic burdens upon owners; (4) relief under the law was not conditioned on need; and (5) owners were not compensated by reason of their guaranties' impairment.

After remand and the joinder of issue, on March 28, 2022 the plaintiffs moved for summary judgment on their contracts clause claim and an order declaring the Guaranty Law to be unconstitutional. As could be expected, the plaintiffs' briefing relies heavily on the Second Circuit's decision and, further, attacks the process by which the Guaranty Law was enacted as having been informed by little substantive debate, deliberation or analysis. As extended by the court at the parties' request, briefing on the motion will be complete by mid-October with oral argument to be scheduled by the court thereafter.

By reason of the dispositive motion currently pending in *Melendez*, owners should prepare for the possibility that any COVID-related commercial rent arrears claims they may have written off as uncollectible due to the combination of an undercapitalized tenant entity and the Guaranty Law may spring back to life in the foreseeable future.

Similarly, guarantors of commercial tenants in arrears who did not make deals with their landlords and vacated solely in reliance on the Guaranty Law should consider whether to seek to resolve the arrears prior to a summary judgment ruling in *Melendez*.

Conclusion

The New York real estate industry and the landlord-tenant bar are facing many day-to-day challenges on which they understandably must focus. Nevertheless, the aforementioned tenant protection laws—which most have now taken for granted as immutable facts of life—are facing serious constitutional challenges that owners and tenants alike would be wise to monitor.