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Claim of Non-Purchasing Tenant Status Rebuffed

By Deborah E. Riegel

When developers convert occupied buildings to condominiums or, less frequently, cooperative ownership, non-purchasing tenants are protected from eviction. When tenants in those buildings acquire vested rights as non-purchasing tenants is significant for developers, because the timing dictates the number of units that will be available for sale to outside purchasers. It is, therefore, no surprise that this is a highly charged and contested issue. *Kessler v. Carnegie Park Associates, et al.*, represents the most recent effort by a group of tenants to expand their rights and to retain possession of otherwise unregulated units. In *Kessler*, plaintiffs unsuccessfully claimed that eligible senior citizens and eligible disabled persons are entitled to non-purchasing tenant status under the Martin Act upon acceptance of a non-eviction offering plan for filing. The Supreme Court and the Appellate Division made short-shift of their baseless claims and dismissed the complaint on a pre-answer motion to dismiss, recognizing that plaintiffs had ignored the statutory differences between eviction plans and non-eviction plans.

General Business Law 352-eeee sets forth the rights of tenants in occupancy, as well as the obligations of sponsors, with respect to conversions of occupied properties. A non-purchasing tenant obtains the right to remain in possession for so long as he or she chooses, subject to not unconscionable rent increases. Non-purchasing tenants may not be evicted, other than for cause (*e.g.*, breach of a substantial obligation of their tenancy or nuisance). In *MH Residential I, LLC. v. Barrett*, 78 AD3d 99 (1st Dept. 2010), the First Department determined that market tenants whose leases expired prior to the effective date of an offering plan were not entitled to non-purchasing tenant status. Against that backdrop, the plaintiffs in *Kessler* asserted a new and unique theory as a pathway to non-purchasing tenant status. The four named plaintiffs in *Kessler* asserted that they were entitled to non-purchasing tenant status as eligible senior citizens and eligible disabled persons within the meaning of GBL 352-eeee(1)(f) and (1)(g).

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Plaintiffs commenced their action in Kings County against 11 defendants, without regard to the location of the properties at issue. The HFZ defendants were the sponsors of four conversions in Manhattan, and none of the plaintiffs resided in any of the HFZ defendants' properties.

Plaintiffs' complaint alleged that eligible senior citizens and eligible disabled persons acquired non-purchasing tenant status as soon as the offering plan was accepted for filing by the New York State Attorney General. First, plaintiffs claimed that the Martin Act does not draw any distinction between the rights afforded to eligible senior citizens and eligible disabled persons in Eviction Plans and Non-Eviction Plans. Second, plaintiffs relied on a memorandum issued by the Real Estate Finance Bureau of the Attorney General of the State of New York, dated Aug. 31, 2016, which revised its regulations related to the rights of eligible senior citizens and eligible disabled persons.

The Martin Act affords developers two paths to conversion of an occupied property – Eviction Plans and Non-Eviction Plans. Under Eviction Plans, the Martin Act provides that 51% of "tenants in occupancy" must purchase their respective units in order for the plan to be declared effective. Eligible senior citizens and eligible disabled persons are specifically excluded from the definition of "tenants in occupancy." As relates to Eviction Plans only, the Martin Act goes on to provide:

> " … no eviction proceedings will be commenced at any time against either eligible senior citizens and eligible disabled persons." GBL 352-eeee(2)(d)(i)."

No comparable protection for senior citizens or disabled persons appears in GBL 352-eeee(2)(c), the section applicable to non-eviction plans. In *Kessler*, plaintiffs all resided in buildings which were converted pursuant to Non-Eviction Plans. Because eligible senior citizens and eligible disabled persons are subject to statutory protections as non-purchasing tenants far earlier in the conversion process under Eviction Plans (*i.e.*, when the AG accepts a plan for filing in the case of an Eviction Plan, as opposed to when it declares a plan effective under a Non-Eviction Plan), plaintiffs strained to eviscerate the distinctions between the two.

Plaintiffs' arguments focused purely on the definitions of eligible senior citizens and eligible disabled persons, to the exclusion of the substantive sub-sections of the Martin Act. Although GBL 352-eeee(1) sets forth relevant definitions, Plaintiffs' argument (and the AG's Memorandum) ignored the fact that those defined terms appear only in GBL 352-eeee(2)(d) (Eviction Plans) and nowhere in GBL 352-eeee(2)(c) (Non-Eviction Plans).

Both Supreme Court and the Appellate Division rejected Plaintiffs' claims, focusing on the differences between the text of the two subsections. The Appellate Division held:

> We reject plaintiffs' textual arguments in light of the structure of 352-eeee. Special rights for eligible senior citizens and disabled persons are identified only in section 352-eeee(2)(d), which governs eviction plans. Thus it would be contrary to rules of interpretation to apply them to non-eviction plans. As we have previously determined "General Business Law §352-eeee (2)(d), by its terms, applies only to eviction plans" (internal citations omitted).

While the Appellate Division did not expressly speak to the validity of the AG's Memorandum because the regulations adopted by the AG applied to offering plans accepted for filing after the offering plans were filed in *Kessler*, the strong language of the holding calls into question

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Deborah E. Riegel, a partner at Rosenberg & Estis, P.C., represented the owners in the *Kessler* case.

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the validity of the regulations and whether they are, in fact *ultra vires* (*i.e.*, beyond the AG's rule making authority). As such, as to offering plans filed prior to Sept. 1, 2016, eligible senior citizens and eligible disabled persons unquestionably enjoy no additional rights as non-purchasing tenants under Non-Eviction Plans. Developers who have and will file Non-Eviction Plans after Sept. 1, 2016 will have to make the choice of complying with the AG's regulations or pursuing a challenge.

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DEVELOPMENT

Cemetery Entitled to Use Variance

Matter of White Plains Rural Cemetery Association v. City of White Plains

NYLJ2/1/19, p. 28, col. 5
AppDiv, Second Dept.
(memorandum opinion)

In a hybrid declaratory judgment action/article 78 proceeding, both the city and landowner appealed from Supreme Court's judgment declaring that landowner needed a use variance, but granting so much of the petition as challenged the denial of the use variance. The Appellate Division affirmed, holding that landowner had established the factors necessary to qualify for a use variance.

Landowner, a non-profit public cemetery association, proposed to build a crematory on the cemetery property. Landowner sought an interpretation of the ordinance that the crematory is a permitted use under the cemetery's legal nonconforming use. In the alternative, landowner sought a use variance for the crematory. The Zoning Board of Appeals (ZBA) denied landowner's application. Landowner then brought this article 78 proceeding. Supreme Court upheld the ZBA's determination that the crematory was not part of the existing nonconforming use, but concluded that the cemetery was entitled to a use variance. Both parties appealed.

The Appellate Division started by noting that deference is accorded to a board's interpretation of a zoning ordinance, and rejected the cemetery's attempt to import the definition of "cemetery corporation" in the Not-for-Profit Corporation Law to support its contention that a crematory is not distinct from cemetery use. The court concluded that the ZBA's reliance on definitions in the Merriam-Webster dictionary was not irrational or unreasonable. The court then noted that zoning boards also have broad discretion in considering variance applications, but nevertheless held that the ZBA in this case had acted arbitrarily in concluding that the cemetery had not established hardship. The court noted that the cemetery had produced profit-and-loss statements indicating that it had operated at a loss for five years, and the court concluded that the ZBA had erroneously determined that the cemetery's evidence conflicted with tax documents showing a positive income for one of the years. The court noted that the ZBA had failed to differentiate investment accrued in the statutorily mandated maintenance fund from the cemetery's net operating losses. As a result, the court concluded that there was no rational basis for a finding that the cemetery was not experiencing hardship. The court then held that the ZBA had no adequate basis for its conclusion that the crematory would alter the essential character of the neighborhood.

Comment

Generally, when nonconforming users seek use variances, New York courts require them to show that the property cannot yield a fair return either as a nonconforming use without the variance, or in a manner conforming with the zoning requirements. The Court of Appeals articulated that principle in Crossroads Recreation, Inc. v. Broz, *4 N.Y. 2d 39, where the court upheld denial of a use variance to the owner of a nonconforming gasoline station. Because the owner did not establish that the land's current use as the gasoline station without the variance did not yield a reasonable return, the court concluded that it was unnecessary to consider whether conversion to permitted uses (retail stores, real estate offices, etc.) could yield a reasonable return. Similarly, in* Matter of Nemeth v. Village of Hancock Zoning Bd. of Appeals, *the Third Department annulled the Zoning Board of Appeal's determination that granted the owners of an industrial manufacturing business — a nonconforming use — a use variance to expand the facility, finding that even if there were sufficient proof of the inability to yield a reasonable return utilizing the property as it presently existed without the expansion, the owners presented no evidence of the financial implications of converting the entire property to residential use — the conforming use in that zone. 127 A.D.3d 1360 (2015).*

When the nonconforming use is a cemetery, however, New York law makes conversion into a conforming use nearly impossible. First, sections 1512(a) of the Not-For-Profit Corporation Law and 163 of the General Municipal Law designate all conveyed cemetery lots as indivisible except with the consent of the lot owners, and after a burial, inalienable. Section 1513(d) of the Not-For-Profit Corporation Law also allows cemeteries to convey lots in inalienable form at the time of conveyance, prior to an interment. See also, In re Turkish's Estate, *48 Misc.2d 600 (N.Y. Sur. Ct. 1965) (explaining that New York law's establishment of inalienable cemetery lots effectuates mankind's natural desire to rest without disturbance). Section 1513(d) thus prohibits public cemeteries from selling, mortgaging, or leasing lots held in inalienable form,*

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