LJN LAW JOURNAL NEWSLETTERS

NEW YORK REAL ESTATE LAW REPORTER®

An ALM Publication

Volume 37, Number 9 • May 2021

INDEX

Appellate Division Overturns Supreme Court Order to Partially Demolish 55-Story Building

By Paul D. Selver and James P. Power

In *Committee for Environmentally Sound Development* ("*CESD*") *v. Amsterdam Ave. Redevelopment Associates LLC*, 2021 NY Slip Op 01228 (1st Dept. Mar. 2, 2021), the Appellate Division, First Department, overturned a Supreme Court decision that would have required partial demolition of a nearly completed 55-story building at 200 Amsterdam Avenue.

The case involved the interpretation of the New York City Zoning Resolution's definition of "zoning lot," the unit of land used to determine the zoning compliance of all proposed construction work in the City. At issue was whether a zoning lot formed in one of the four ways permitted by the zoning lot definition could consist only of whole tax lots or could include one or more partial tax lots. The specific text, which had been adopted as part of the 1977 amendments to the "zoning lot" definition, provides that a zoning lot may consist of:

> *a tract of land, either unsubdivided or consisting of two or more lots of record contiguous for a minimum of 10 linear feet, located within a single #block#,* which at the time of filing for a building permit (or, if no building permit is required, at the time of filing for a certificate of occupancy) is declared to be a tract of land to be treated as one #zoning lot# for the purpose of this Resolution.

Zoning Resolution S. 12-10 ("zoning lot," subdivision (d)) (emphasis added).

The Zoning Resolution leaves many of the key terms contained within this definition — "tract of land," "unsubdivided" and "lots of record" — undefined. But it does provide, elsewhere in the "zoning lot" definition, that "[a] zoning lot … may or may not coincide with a lot as shown on the official tax map of the City of New York, or on any recorded subdivision plat or deed."

This text was interpreted consistently by the Department of Buildings (DOB) in a variety of settings following its adoption. The first such interpretation was in a memorandum issued contemporaneously with the 1977 amendment by a key DOB official, which stated that "[u]nder this amendment … a single zoning lot …

continued on page 2

In This Issue

'Zoning Lot'

continued from page 1

may consist of one or more tax lots or parts of tax lots". Over the next 40 years, DOB approved scores of construction permits for and certificates of occupancy that certified the zoning compliance of buildings on zoning lots that included partial tax lots, including the building permits and certificates of occupancy for three new buildings constructed on the predecessor to 200 Amsterdam's zoning lot. At the same time, DOB never denied a permit or certificate of occupancy to such zoning lots. And neither the City Planning Commission nor the City Council sought to amend the zoning lot definition to ban their inclusion of partial tax lots.

The 200 Amsterdam Avenue parcel was merged into its predecessor zoning lot in 2015, and the DOB approved the building permit for the 200 Amsterdam Avenue project in 2017. Petitioners challenged the DOB approval to the Board of Standards and Appeals (BSA), arguing that the zoning lot in question, which includes partial tax lots, did not satisfy the requirement that that a zoning lot be "either unsubdivided or consist[] of two or more lots of record." While the BSA appeal was pending, DOB issued a new draft memorandum that would have prospectively prohibited zoning lots from including partial tax lots.

Paul D. Selver is a Partner and co-chair of the Land Use department at Kramer Levin in New York. He counsels and represents both private- and public-sector clients in all aspects of land use and development law, with a special emphasis on environmental, zoning and historic preservation. **James P. Power** is a Partner in the New York office of Kramer Levin. He advises and represents private developers and cultural, educational and health care institutions on real estate development and land use issues in New York City. The authors represented the developers in the 200 Amsterdam Avenue case.

The BSA, after considering both the language of the zoning text and DOB's consistent history of interpretation, concluded that DOB's longstanding interpretation was correct and upheld the building permit. Specifically, the BSA held that the Zoning Resolution's reference to "lots of record" was intended to include all kinds of recorded lots, not merely whole tax lots, and that "unsubdivided" may be interpreted to refer to a parcel of land assembled for development purposes, *i.e.,* a previously recorded zoning lot.

CESD appealed, and the Supreme Court, in *Committee for Environmentally Sound Development v. Amsterdam Ave. Redevelopment Associates LLC*, Index No. 157273/2019 (Sup. Ct., Feb. 23, 2020), overturned the BSA and invalidated the permit. It held that the BSA's interpretation of the "zoning lot" definition was contrary to the plain language of the Zoning Resolution; that BSA's and the developer's reliance on DOB's historic interpretation was unreasonable because DOB had announced its intention to change its interpretation; that the developer had no right to rely on an invalid permit; and that the building must be partially demolished because an invalid permit conferred no right to develop.

The Appellate Division reversed, holding that the relevant provision of the Zoning Resolution is ambiguous, that BSA has special expertise to interpret the Zoning Resolution, and that it had rationally interpreted the zoning lot definition. Thus, the Supreme Court should have deferred to the BSA and not conducted a *de novo* review. The court also held that the controversy had been rendered moot, since the building had been substantially completed and petitioners had failed to exercise proper diligence in seeking injunctive relief against construction.

As counsel to the developer through the DOB and BSA approval processes, we argued, consistent with our own view, that the ambiguous statutory language cannot be

continued on page 3

NEW YORK
REAL ESTATE LAW REPORTER®

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: ssalkin@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
150 East 42 Street, Mezzanine Level
New York, NY 10017

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

ALM
Discover. Connect. Compete.

'Zoning Lot'

continued from page 2

deciphered on its own but must be interpreted in light of the long statutory history of the provision, including the predecessor Zoning Resolution adopted by New York City in 1916, the legislative history leading up to the adoption of the current Zoning Resolution in 1961, the contents of the City Planning Commission report that accompanied the 1977 amendment, the consistent and long-standing interpretation of DOB, the City agency charged with administering the Zoning Resolution officials, and the legislative silence by the City Planning Commission and the City Council in the face of this interpretation. These sources make clear that it has always been the prerogative of a New York City developer to define its own development parcel. In that sense, it is the latter part of the zoning lot definition that controls — that is, a zoning lot may be a tract of land "which at the time of filing for a building permit (or, if no building permit is required, at the time of filing for a certificate of occupancy) is declared to be a tract of land to be treated as one *zoning lot* for the purpose of this Resolution."

We believe that the BSA approached its consideration of the case with an implicit appreciation for the historical prerogative of a developer to define its own zoning lot and a pragmatic understanding of what is involved in creating zoning lots. And the Appellate Division, in reversing the Supreme Court, properly relied on the well-established proposition that courts are to defer to expert agencies in their interpretation of ambiguous statutory language.

—❖—

REAL PROPERTY LAW

Easement By Necessity Claim Fails for Inadequate Proof of Unity of Title At Severance

Creagan v. Stein

NYLJ 2/26/21, p. 27, col. 1
AppDiv, Second Dept.
(memorandum opinion)

In landlocked owner's action for a judgment declaring that he has an easement by necessity over neighboring land, landlocked owner appealed from Supreme Court's grant of summary judgment to neighboring owner. The Appellate Division affirmed, holding that landlocked owner had not raised questions of fact sufficient to warrant trial on the issue of unity of title.

In 1995, landlocked owner acquired his parcel at a tax sale for $6,000. The closest access to a public road is over a private road that lies on a neighboring parcel. Landowner sought a declaration that he enjoys an easement by necessity over that private road. Neighboring owner objected, and Supreme Court awarded summary judgment to neighboring owner.

In affirming, the Appellate Division emphasized that an easement by necessity claim requires proof that the parcel was landlocked by the severance of the landlocked parcel from the access parcel. Therefore, to prevail, the landlocked owner must establish that the two parcels were previously held in unity of ownership. In this case, the owner of the access parcel produced a title examiner and tax maps establishing that the landlocked parcel was previously owned by the Archbishopric of New York and the access parcel was not. The only evidence offered by the landlocked owner was an affidavit of an expert who failed to annex a title search and an 1834 deed on which he relied, making the expert's opinion speculative, conclusory, and without foundation. As a result, access owner was entitled to summary judgment.

Comment

When seeking an easement by necessity, a dominant owner can establish unity of ownership with documentary evidence that traces title to a common grantor. For example, in Stock v. Ostrander, *233 AD2d 816, the Third Department held that the landowner seeking the easement established unity of title with maps and an abstract of title that traced his title and that of neighboring landowners to a common grantor.*

An expert opinion is not sufficient to overcome significant gaps in the documentary evidence For example, in Astwood v. Bachinsky, *186 AD2d 949, the Third Department held that the dominant landowner had not satisfied his burden of establishing unity of title when the dominant landowner's evidence included "a filed map of the Kingston Commons" together with an expert opinion that the respective properties were under common ownership at the time of an 1804 deed. The sources of evidence failed to account for a significant 34-year gap between the 1804 deed and an 1838 deed and neither of these sources of evidence provided adequate detail or were sufficiently accurate or reliable to establish unity of title.*

The dominant owner must establish not only unity of title, but also that necessity existed at the time of severance. For example, in Kent v. Dutton, *122 AD2d 558 the court held that necessity did not exist at the time of severance because a highway provided the landlocked owner access to his parcel at the time title to the property was acquired. Also, in* Astwood, *186 AD2d 949, the court held that dominant owner's failure to establish when title was severed, other than at sometime within a 34-year gap, resulted in a failure to establish the existence of necessity for the easement at the time of severance.*

continued on page 4

Real Property Law

continued from page 3

No Specific Performance When Purchaser Failed To Elect Contract Remedies

W Equities Acquisitions, LLC v. Wyckoff Heights Properties, LLC

NYLJ 1/22/21, p. 20, col. 4
AppDiv, Second Dept.
(memorandum opinion)

In purchaser's action for specific performance of a contract for the sale of a multiple family dwelling, both parties appealed from Supreme Court's judgment dismissing the complaint and also dismissing seller's counterclaim for return of the down payment. The Appellate Division modified to award seller judgment on its counterclaim, holding that purchaser had breached by failing to elect from among available contract remedies.

At the time of contract, the premises were occupied by four rent-stabilized tenants. The sale contract obligated the seller to deliver the premises free of any tenancies. The contract also provided that if seller could not convey title in accordance with the contract's provisions, purchaser could either elect to terminate the contract, or to accept such title as seller could convey, with a credit up to a maximum amount of $75,000. After the parties executed the contract, seller obtained surrender agreements from two of the tenants, but was unable to obtain agreements from the other two, despite offering each of them $75,000. When purchaser's lawyer invoked the contract's time of the essence clause, seller informed purchaser that seller would be unable to deliver premises in accordance with the terms of the contract, and gave purchaser the choice of terminating the contract or taking title with a $75,000 credit. Purchaser rejected invocation of the title clause in the contract and insisted on proceeding to closing. When the contract did not close, purchaser brought this action for specific performance. Seller counterclaimed, seeking to retain the down payment. Supreme Court dismissed both the claim and the counterclaim.

In modifying, the Appellate Division first held that in light of the contract obligation to deliver the premises free of tenancies, seller's inability to obtain surrender agreements constituted title defects within the meaning of the contract's title clause. The court then rejected purchaser's argument that to invoke that clause, seller had to establish that it was impossible to perform, holding instead that the contract required seller to make good faith efforts to convey title in accordance with the contract's terms. In this case, repeated meetings with the tenants, together with the offer to pay those tenants $75,000 each, established that seller had made good faith efforts. At that point, the contract required purchaser to elect one of the two alternatives specified in the contract, and purchaser's failure to elect constituted breach. As a result of that breach, seller was entitled to retain the $190,000 down payment.

Comment

Where a real property contract limits buyer remedies to rescission or accepting title as is in the event that the seller is unable to convey good title, the buyer cannot recover for specific performance or money damages so long as removing the encumbrance is beyond the seller's control and seller acted in good faith to remove it. A seller who makes a reasonable effort and expenditure of money to remedy title satisfied the good faith obligation even if she was successful in clearing the defects. In Karl v. Kessler, *47 A.D.3d 681, the court granted summary judgment dismissing the prospective purchaser's action for specific performance because the sellers demonstrated that they immediately extended a reasonable offer to settle pending litigation and engaged in good faith settlement negotiations. The defect was a notice of pendency filed against the property in connection with a specific performance action brought by prospective vendees on a previous contract.*

By contrast, a seller cannot rely on clauses that limit liability for title defects where the matter is within the seller's control, but she neglects or refuses to make good faith efforts or expend money to clear the defects. For example, in Sevilla v. Valiotis, *29 A.D.3d 775, the court granted summary judgement to the buyers on their specific performance claim and held that the seller did not act in good faith where he attempted to cancel the real property contract by refusing to cure title defects while falsely claiming he lacked the authority to sell the property. In* Sevilla, *a title search revealed that the owner of record of the subject condominium unit was the seller's defunct partnership, the original sponsor of the condominium's offering plan. When purchaser demanded that seller clear the defect by selling the unit on behalf of the partnership, e seller claimed he lacked the authority to sell the property and attempted to cancel the contract on the grounds that he could not convey clear title. The court concluded that seller had not made a good faith effort to cure.*

Subdivision of Dominant Parcel Did Not Terminate Easement

Northwood School, Inc. v. Fletcher

2021 WL 125122
AppDiv, Third Dept.
(Opinion by Garry, J.)

In an action for a declaration that plaintiff school has an express easement over a private right of way, neighboring owners appealed from Supreme Court's declaration that the school enjoyed an easement. The Appellate Division affirmed, concluding that subdivision of the dominant parcel did not terminate the easement with respect to any portion of the parcel.

In 1915, grantor conveyed a parcel of land with an express easement over a driveway leading to Main Street. That driveway became the private right of way now in dispute. That parcel was transferred to new owners in 1935 and 1957,

continued on page 5

Real Property Law

continued from page 4

and both deeds made express reference to the easement. In 1984, the then owner of the parcel subdivided the parcel into two. The deed to the part of the parcel now owned by the school did not make express reference to the easement, but provided that the conveyance was subject to any presently valid and enforceable easements. The school acquired the parcel in 2015 with a deed that made no express reference to the easement, but provided that seller was transferring the property together with all of seller's rights to the property. When the school attempted to use the easement to reach its property from Main Street, neighboring landowners, who had acquired the portion of the original parcel not owned by the school, attempted to block the school's access. When the school brought this action, Supreme Court held that the school was entitled to use the right of way.

In affirming, the Appellate Division held first that the easement survived the 1984 and 2015 transfers even though those transfers made no express reference to the easement because a deed's failure to mention a previously created easement does not terminate the easement. The court then held that subdivision of a dominant parcel entitles all owners of part of that parcel to use the easement so long as the subdivision places no additional burden on the servient parcel. Here, there was no evidence that the school's use would place an additional burden on the servient parcel.

COMMENT

When a dominant estate is subdivided, any portion of the subdivided dominant estate can use the easement so long as the servient estate is not substantially overburdened by the use. In Higgins v. Douglas, *304 A.D.2d 1051, the court held that a servient estate was not overburdened when, after subdivision of the dominant parcel, two families used a right of way easement over the servient estate to reach the shore of Lake Placid. In granting summary judgment to the dominant owners, the court noted that the only facts presented to prove overburdening were the presence of a second family and that the servient owners had young children. These facts alone did not show overburdening sufficient to defeat the subdivided parcels' right to the easement for any reasonable use.*

To date, no New York cases have found that a subdivision of a dominant parcel, alone, has overburdened a servient estate or has exceeded the scope of an easement. If, however, the dominant estate is subdivided, one court has held, albeit in dictum, that each subdivided parcel is limited to the route of the easement in use before the subdivision. In Empire Bridge Co. v. Larkin Soap Co., *59 Misc. 46 (Sup. Ct. 1908) (affd., 117 N.Y.S. 1134), the court, in holding that a landlocked owner acquired an easement by necessity over parcels that separated it from a road, indicated that "no matter into how many parcels [the dominant estate] might be subdivided, [the dominant subdivided parcel] would be entitled" to only the original easement's route through the servient parcel.*

Some subdivided dominant parcels lose access to an easement when a subdividing dominant owner fails to (or opts not to) grant each subdivided parcel an individual right of way over other subdivided parcels to access the easement. In Corrarino v. Byrnes, *43 A.D.3d 421, the Appellate Division held that when the owner of the dominant parcel carved that parcel into seven smaller parcels, three of the smaller parcels had no right to use a dirt path easement between the original dominant parcel and the beach.. The court enjoined the owners of the three parcels that did not abut the servient estate from crossing the other four parcels to reach the dirt path, noting that the owners had no independent right of way over the four abutting parcels.*

JUDGMENT CREDITOR NOT ENTITLED TO COMPEL SALE OF TENANCY BY THE ENTIRETY PROPERTY

Matter of Sklar v. Gestetner
NYLJ 1/15/21, p. 21, col. 1
AppDiv, Second Dept.
(memorandum opinion)

In judgment creditors' proceeding to compel sale of debtor's interest in his homestead, judgment creditor appealed from Supreme Court's denial of the petition and dismissal of the proceeding. The Appellate Division affirmed, holding that judgment creditors had not presented evidence about the value of debtor's interest in the homestead, which was held as tenancy by the entirety property.

In 2012, judgment creditors obtained judgments against debtor for $742,171 and $446,875 respectively. In 2017, they brought the instant proceeding to compel sale of debtor's family homestead, held as a tenant by the entirety with his wife. The parties stipulated that the home was valued at $830,000. CPLR 5206(a) provides a homestead exemption for Rockland County property occupied as a principal residence if the residence does not exceed $150,000 in value. Supreme Court denied judgment creditors' petition based on their failure to establish the value of debtor's interest in the home. Judgment creditors appealed.

In affirming, the Appellate Division emphasized the absolute bar of involuntary partition for tenancy by the entirety property. As a result, judgment creditors could, at most, seek an order that debtor's own interest be sold. The interest purchased at the sale would be a tenancy in common interest subject to the wife's survivorship interest. Because the judgment creditors failed to submit evidence of the value of that tenancy in common interest, debtor was entitled to dismissal of the proceeding.

QUESTIONS OF FACT PRECLUDE SUMMARY JUDGMENT ON SPECIFIC PERFORMANCE CLAIM

Guzman v. Ramos
NYLJ 2/5/21, p. 26, col. 4
AppDiv, Second Dept.
(memorandum opinion)

continued on page 6

Real Property Law

continued from page 5

In buyer's action for specific performance and damages, buyer appealed from Supreme Court's grant of seller's summary judgment motion. The Appellate Division modified to deny the motion, except with respect to buyer's duplicative unjust enrichment claim, holding that the contract was supported by consideration and that buyer's failure to secure a mortgage did not eliminate questions of fact about buyer's ability to perform.

Seller and buyer are sisters. They entered into a sale contract that included a mortgage contingency clause. The contract referred to the down payment as a "gift of equity." Buyer did not procure a mortgage, but allegedly found other sources of financing. Seller did not invoke the mortgage contingency clause, but nevertheless refused to close unless buyer paid $50,000 above the contract price. Buyer then brought this action for specific performance and damages, and Supreme Court awarded summary judgment to seller.

In modifying, the Appellate Division first rejected seller's argument that the contract was not supported by consideration because buyer did not make a down payment. The court observed that the commitment to pay the purchase price constituted adequate consideration to support the contract. The court then held that buyer's failure to obtain a mortgage did not result in cancellation of the contract; the mortgage contingency clause merely gave each party a right to cancel, which seller did not exercise. As a result, seller was not entitled to summary judgment, and questions of fact remained about whether buyer was ready, willing, and able to perform.

—❖—

CO-OPS AND CONDOMINIUMS

Occupation By Family Member of Corporate Principal Does Not Terminate Unsold Share Status

Bellstell 7 Park Avenue, LLC v. The Seven Park Avenue Corp.
NYLJ 2/1/21, p. 18, col. 3
AppDiv, First Dept.
(memorandum opinion)

In an action by a co-op shareholder for a declaration that an apartment retained its "unsold share" status, the co-op corporation appealed from Supreme Court's grant of summary judgment to the shareholder. The Appellate Division affirmed, holding that a principal of a corporate shareholder is not a family member for purposes of paragraph 38 of the uniform co-op proprietary lease.

When the building was converted to co-operative ownership in 1982, the sponsor retained unsold shares in a number of apartment. Those unsold shares are now owned by plaintiff corporate shareholder. When the corporate shareholder sublet one of the apartments to one of its principals, the co-op corporation wrote to inform the corporate shareholder that the shares associated with the apartment would no longer be treated as unsold shares because the apartment was now occupied by a family member of the corporate shareholder. Corporate shareholder then brought this declaratory judgment action contending that the shares retained status as unsold shares. Supreme Court granted summary judgment to shareholder, and the co-op corporation appealed.

In affirming, the Appellate Division rejected the co-op corporation's argument that any individual identified as a principal of a corporate shareholder in a regulatory filing with the Attorney General should be treated as a family member within the meaning of paragraph 38 of the lease. That paragraph terminates unsold share status when "the holder of such shares (or a member of his family) becomes a bona fide occupant of the apartment." The court noted that the co-op corporation could have amended the proprietary lease to clarify who would constitute a family member of a corporate entity, but the corporation did not do so. The court also rejected the co-op corporation's argument that paragraph 38 of the proprietary lease violates Business Corporation Law section 501© by creating a separate class of stock. The court noted that holders of unsold shares are routinely granted special privileges in exchange for regulatory obligations, and unsold shares are, de facto, a different class of stock.

Comment

The offering plan and the proprietary lease determine who enjoys status holders of unsold shares. See generally, 210-220-230 Owners Corp. v. Arancio, *24 Misc 3d 1228[A]. Holders of unsold shares typically have the right to sell, sublet, and renovate units without the co-op board's approval and are traditionally exempt from various financial obligations, such as paying sublet fees.* Id.

Paragraph 38 of the uniform co-op lease terminates unsold share status when "the holder of such shares (or a member of his family) becomes a bona fide occupant of the apartment." Bellstell 7 Park Ave., LLC v. Seven Park Ave. Corp., *190 AD3d 632 [1st Dept 2021].* Bellstell *is a case of first impression on whether occupancy by a family member of the principal of a corporate shareholder terminates status as a holder of unsold shares.*

In Pastena v. 61 W. 62 Owners Corp., *169 A.D.3d 600, the court wrote that "paragraph 38 of the proprietary lease, which purportedly exempts holders of unsold shares from certain expenses and fees assessed by the landlord, is void as a matter of law" 169 AD3d 600.* Pastena *involved a shareholder's attempt to avoid paying subletting fees. The court's statement was dictum because it concluded that shareholder was not a holder of unsold shares but, in any event, the court in* Bellstell *rejected the notion that paragraph 38 is entirely invalid.*

continued on page 7

Co-Ops and Condos

continued from page 7

Abandonment of Easement By Condominium Unit Owner

Board of Managers of the 190 Meserole Avenue Condominium v. Board of Managers of the 188 Meserole Avenue Condominium

NYLJ 2/5/20, p.22, col. 6
AppDiv, Second Dept.
(memorandum opinion)

In an action for a judgment that a condominium enjoyed an easement by grant over a neighboring condominium, servient condominium owner appealed from Supreme Court's grant of summary judgment to dominant condominium owner and denial of summary judgment motion to servient owner. The Appellate Division modified to deny both summary judgment motions, holding that questions of fact remained about whether the easement had been abandoned.

A single principal of three separate sponsor entities built three attached condominium buildings, only one of which fronted on Diamond Street. Before the buildings were built, the sponsors entered into a driveway easement agreement giving the two other entities the right to cross through the servient parcel. The sponsors, however, never constructed the contemplated driveway, but instead created rear yards with landscaping on the dominant buildings. The yards were separated by fences. Subsequently, a purchaser of the ground floor unit of one of the dominant buildings sought to extend the driveway to their unit, as contemplated by the original document creating the easement. Owner of the ground floor unit of the servient condominium, prompting the instant litigation. Supreme Court awarded summary judgment to dominant owner on the issue of liability, and servient owner appealed.

In modifying to deny both summary judgment motions, the Appellate Division relied on testimony of the sponsor's principal that the driveway plan had been discarded. In light of that testimony, and the construction of fences, the court concluded that there were questions of fact about whether the easement had been abandoned. As a result, neither party was entitled to summary judgment.

Comment

To prove abandonment of an easement, a servient property owner must establish an overt act that unequivocally demonstrates the dominant owner's intention to permanently relinquish all right to the easement. In Cascelta Co. LLC v. AJDA, LLC, *2011 NY Slip Op 51488(U), the court granted summary judgment to the servient owner, declaring that the dominant owner had abandoned an easement to use a railroad spur across the servient land by digging up the tracks on the dominant land and regrading the dominant land to create a four foot drop between the servient land and the dominant land. The dominant owner effectively abandoned the easement as a matter of law because the changes made during construction made it impossible to use the easement for its original purpose. These acts were not temporary nor easily undone, and demonstrated an unequivocal intention to permanently abandon the easement.*

Nonuse alone is insufficient to establish abandonment of an easement even if accompanied by a neglect of the land leading to the easement. In Strevell v. Mink, *6 A.D.2d 350, the court reversed the trial court's judgment of abandonment, concluding that although a right of way to the lakeshore had become overgrown and obliterated with the passage of years and lack of use, the dominant owner had not, as a matter of law, abandoned the easement because there was no evidence in the record of any affirmative conduct indicating an intent to abandon the easement. The court concluded that, as a matter of law, a judgment of abandonment cannot be upheld without evidence of active conduct by the dominant owner.*

When a dominant owner makes potentially removable improvements on the dominant land that prevent use of the easement, questions of fact arise about whether the improvements are sufficiently permanent to establish abandonment. In Gerbig v. Zumpano, *7 N.Y.2d 327, the court reversed the lower court's grant of summary judgment in favor of the servient owner and ordered a new trial, holding that the dominant property owner's construction of a patio, fences, and enclosures that obstructed use of the easement was insufficient to show abandonment as a matter of law. The court reasoned that the obstructions could be viewed either as a permanent relinquishment of the easement or as a deferred use, which would be consistent with reliance upon the continued existence of the right of way. Because servient owner had first raised abandonment on appeal, the trial record included no findings on the issue, requiring remand for a new trial.*

Condominium Unit Owner Entitled to Damages for Board's Failure to Approve Transfer

Matter of Kotler v. 979 Corp.

NYLJ 2/11/21, p. 19, col. 3
AppDiv, First Dept.
(memorandum opinion).

In an article 78 proceeding brought by unit owner's estate to compel the co-op corporation to approve the transfer of shares to unit owner's daughter, both parties appealed from Supreme Court's decision vacating the co-op's refusal to approve the transfer but denying the estate's request for damages. The Appellate Division modified to hold that unit owner was entitled to damages and that the co-op corporation was not entitled to collect a transfer fee.

The proprietary lease directs that if a proprietary lessee should die, the co-op board would not unreasonably withhold consent to any assignment or transfer of the lease and stock "provided that such legatee or assignee shall be a financially responsible member of the Lessee's family." When unit owner died, the co-op corporation refused to approve transfer of the shares to unit

continued on page 8

Co-Ops and Condos

continued from page 7

owner's daughter. Supreme Court vacated that refusal, but denied the estate's claim for damages.

In modifying, the Appellate Division noted that the daughter had produced financial statements and documents showing annual income more than double the annual costs of the apartment, and had also shown assets of greater magnitude than those annual costs. The court rejected the co-op's objection based on the low appraised value of the apartment for estate tax purposes, noting that the estate had reached an agreement with the IRS on that issue. As a result, the court concluded that the co-op had no reasonable basis for rejecting the daughter. The court then noted that neither the proprietary lease nor the bylaws made any provision for a transfer fee, so that the co-op had no legal basis for imposing such a fee. Finally, the court held that the estate was entitled to damages caused by the unreasonable refusal to consent. Those damages would be measured by amounts paid after the unreasonable withholding of consent.

COMMENT

When a co-op board unreasonably withholds consent to an assignment or transfer of a shareholder's shares despite a proprietary lease provision prohibiting the board from unreasonably withholding such consent, damages are available as a remedy, not only to the shareholder but to a prospective purchaser. For example, in Miller v. Swingle, *143 A.D.2d 984, the Second Department held that a co-op board was liable for damages suffered by a prospective purchaser when the board unreasonably conditioned approval the acquisition of shares upon the purchaser's agreement to limit professional occupancy to one doctor and one employee.. The proprietary lease authorized professional use of the apartment when permitted by municipal regulation, which authorized occupation by one doctor and two employees. The purchaser, who had made improvements to the apartment pursuant to an agreement with the shareholder, abandoned his interest in the apartment when the co-op imposed conditions on the transfer.*

Outside the co-op context, when a landlord of commercial real property unreasonably withholds consent to a tenant's assignment in violation of a covenant not to unreasonably withhold such consent, the tenant may obtain damages equal to the benefit of the bargain between the tenant prospective subtenant. For example, in Giordano v. Miller, *288 A.D.2d 181, the Second Department held that a landlord, who had unreasonably withheld consent to a tenant's assignment of a commercial lease was liable for damages equal to $15,344.14, which was the sum the prospective subtenant had agreed to pay the tenant for the assignment.*

In the context of a residential lease of real property, R.P.L. §226-b makes the computation of damages irrelevant in most cases because §226-b authorizes a landlord to withhold consent unreasonably as long as the landlord releases the tenant from the lease. For example, in Bennett v. Rockrose Dev. Corp., *106 A.D.2d 256, the First Department held that tenant was not entitled to assign the last six months of her rent-stabilized lease because, under §226-b, a landlord may unreasonably withhold consent to an assignment and the tenant's sole remedy is a release from the lease. The court noted that §226-b would not apply if tenant's lease provided a greater right to assign, but found no evidence of such a greater right. Section 226-b(3), however, expressly exempts proprietary leases from the statute's application.*

—❖—

LANDLORD & TENANT LAW

HSTPA Did Not Apply Retroactively to Personal Use Petition

Matter of Harris v. Israel
NYLJ 2/11/21, p. 19, col. 1
AppDiv, First Dept.
(memorandum opinion)

In landlord's petition to recover possession for personal use, landlord appealed from Appellate Term's reversal of Civil Court's judgment awarding landlord possession. The Appellate Division reversed, holding that the HSTPA did not apply retroactively to landlord's petition.

Landlord has spent several years recovering possession of apartments in the building for personal use. When landlord sought to recover the instant unit, Civil Court awarded landlord a judgment of possession. After that judgment was rendered, the state legislature enacted the Housing Stability and Tenant Protection Act of 2019, which limits owners to recovery of a single rent-stabilized apartment in any building for personal use. The Appellate Term concluded that the HSTPA applied to landlord's petition, and reversed the judgment of possession. Landlord appealed.

In reversing, the Appellate Division noted that four months after the Appellate Term's decision, the Court of Appeals, in *Matter or Regina Metro Co. LLC v. DHCR*, 35 NY3d 332, limited the retroactivity provisions of the HSTPA. The court relied on Regina to hold that the new statute did not apply to landlord's petition, where Civil Court had already awarded possession before enactment of the statute.

—❖—