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In Memoriam—Beverly T. Mitchell

This issue of the *Journal* is dedicated by the Section's Executive Committee to the memory of Beverly T. Mitchell, a beloved member of the Committee, who died on February 17, 1998 from injuries sustained in a pedestrian/vehicle accident. Beverly was a principal in the Albany firm of McNamee, Lochner, Titus & Williams, and was Co-Chair of the Section's Committee on Commercial Leasing. While one could determine her many accomplishments from her resumé—i.e., valedictorian of her Albany Law School class—you did not know the real Beverly until you met her. She was an absolute delight to work with, being able to represent her clients to the fullest while not turning a typical transaction into an adversarial proceeding. She always rose above the fray. For someone with so many gifts and skills—intelligence, wisdom, common sense, grace—she was incredibly modest. She treated all people equally and with true kindness and decency. The Executive Committee has lost a wonderful colleague and contributor, the legal community has lost a role model attorney, and the world has lost an exquisite person. To her husband, Bob, her parents, siblings and the rest of her family, we send our deepest sympathies—their loss is immeasurable.

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Issue: Whether an agreement between a tenant and landlord/mortgagor that extended the term of the lease constituted a new lease subject to an existing mortgage or was a continuation of an existing lease.

Analysis: The Court of Appeals affirmed the decision of the Supreme Court, holding that the lease extension agreement entered into between MSRA and EAB was a new and separate agreement subject to the existing mortgage. Judge Ciparick, writing for a unanimous Court, noted that the original lease had no option to renew, and that the agreement entered into in October 1992 was with a new landlord, MSRA. Furthermore, the new agreement incorporated terms from the original Montaco lease, including paragraph 7, and contained several new provisions that were to take effect after the expiration of the Montaco lease. One of these new provisions, the Court believed, was the prohibition on the prepayment of rent.

As a result, the Court ruled that the lease extension was an entirely new agreement instead of a continuation of the original agreement, and that the rent prepayment should be applied to the new lease term rather than the original lease term. The Court went on to hold that since pledged collateral cannot be impaired by a postdated agreement, and since Dime's mortgage predated the new lease, EAB's rights pursuant to the lease were subordinate to the terms of Dime's mortgage. Accordingly, the Court of Appeals affirmed the judgment of the Supreme Court and Appellate Division that the new lease was subject to the covenant prohibiting the prepayment of rent without the mortgagee's permission.

R. Joseph Coryat '99

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Landlord-Tenant: Successor landlord not liable for predecessor's rent overcharges. *Gaines v. New York State Division of Housing and Community Renewal*, 1997 WL 638455 (N.Y. 1997).

Facts: In a CPLR article 78 proceeding, a tenant challenged a determination of New York State Division of Housing and Community Renewal (DHCR) made in response to her 1991 filing of a rent overcharge complaint against the owner of a New York City rent-stabilized apartment. At the time of the complaint, the owner of the property, Cornelia Associates (Cornelia), was also a debtor-in-possession in a chapter 11 proceeding. Two years later when DHCR made a determination on the complaint, ACB Realty Corporation, the current owner, purchased the property. In its decision, DHCR determined that as a consequence of the intervening judicial sale of the property, the successor landlord was not liable for the rent overcharges exacted by the previous owner and was only liable for the refund of an excess security deposit.

The dispute began in 1991 when Cornelia was in chapter 11 bankruptcy. By July 1992 the Bankruptcy Court of the Southern District of New York judicially ordered Cornelia to sell the property to Home Savings Bank of America (Home Savings), the holder of the mortgage. In June of 1993, Home Savings sold the property to ACB. After the sale of the property to ACB, DHCR made a determination that liability was to be assessed against Cornelia in the amount of $12,147.84, and against Home Savings in the amount of $1,466.17.

Carryover liability for rent overcharges by predecessor landlords is authorized by Rent Stabilization Code N.Y. Comp. Code R. & Regs title 9, section 2526.1(f)(2) (hereinafter N.Y.C.R.R.). This provision, however, also extends an exemption from carryover liability to current owners who purchase upon judicial sale.[1] Tenant argued that ACB, a successor purchaser, should be liable for the entire overcharge because it was not the "purchaser at the judicial sale." On review, the commissioner of DHCR ruled that the judicial sale exemption in the code is applicable to current owners who have taken title through a purchaser at a judicially ordered sale. The Supreme Court denied tenant's challenge to DHCR's determination. The Appellate Division reversed finding nothing in the regulation to indicate that the exemption should be applied to successor purchasers and noted that successor purchasers may obtain a clause in the contract of sale to protect themselves from possible overcharge liability.[2] DHCR was granted leave to appeal.

Issue: Whether the judicial sale exemption for landlord carryover liability created in section 2526.1(f)(2) of the Rent Stabilization Regulations applies to an owner who takes title through a purchaser at a judicially ordered sale.

Analysis: Applying a standard of judicial deference toward DHCR's interpretation of the Rent Stabilization Code, the Court of Appeals found that DHCR's interpretation of the judicial sale exemption to include successor purchasers is "rational, and consistent with the policies behind both the imposition of carryover liability in general and the judicial sale exemption from such liability."[3] The court agreed with DHCR that the lack of available presale rental records necessitates the extension of the exemption to successor purchasers. Moreover, given DHCR's role in promulgating and administering the regulation, its determination should be upheld, "if that interpretation is not irrational or unreasonable."[4]

Construing the language of 2526.1(f)(2), the court found that the phrase "no records sufficient to establish the legal regulated rent were provided at [the] judicial sale" was a condition precedent that, when met, gives an exemption to both a purchaser "at" the sale and "a current owner who purchases upon such judicial sale." By applying the plain meanings for the word "upon," the court determined that a successor purchase was contingent upon the judicial sale such that the source of the purchase was the judicial sale, and the result of the judicial sale was the successor purchase.

The court noted that historically, carryover liability for rent overcharges had been judicially imposed before its inclusion in the current Rent Stabilization regulations. From the former Rent Stabilization Code, the court derived the rationale for carryover liability, which stems from a section that mandated the keeping of records of the legal rent by landlords at all times. This requirement made it possible for a successor landlord to be able to protect itself in the event the previous owner was guilty of a rent overcharge. In the case of title obtained through a judicial sale, an exemption from carryover liability was created for landlords where rent records were not available. This exemption was meant to prevent properties from being unmarketable in sales where the previous owner, turned debtor-in-possession, had no incentive to provide records.[5]

Based on these considerations, the court determined that the successor purchaser would be affected by the unavailability of prior rental records where a judicial sale has occurred to an equal if not greater degree than a purchaser at the judicial sale. The court reasoned that the probability of unavailability of records increases for successor purchasers and thus an inequity would arise in imposing carryover liability resulting from pre-judicial sale overcharges. Expanding on the notion of adverse impact on the marketability of judicial sales, the court continued that the risk of unknown carryover would decrease the amount a purchaser would be willing to pay. The Court of Appeals rejected the Appellate Division's notion that absent a legal exemption, a successor purchaser could require a protection clause in the contract, pointing out that such an act would shift the risk of unknown overcharge back to the purchaser at the sale and that this would also have an adverse effect on judicial sales. Without a persuasive argument for affirming the appellate decision, the order was reversed, with costs, and the petition dismissed.

Natalie A. Bruzzese '99

Endnotes

1. Section 2526.1(f)(2) of 9 N.Y.C.R.R. provides:

   (f) *Responsibility for overcharges.*

   (2) For overcharge complaints filed or overcharges collected on or after April 1, 1984, a current owner shall be responsible for all overcharge penalties, including penalties based upon overcharges collected by any prior owner. However, in the absence of collusion or any relationship between such owner and any prior owner, where no records sufficient to establish the legal regulated rent were provided at a judicial sale, a current owner who purchases upon the judicial sale shall be liable only for his or her portion of the overcharges, and shall not be liable for treble damages upon such portion resulting from overcharges caused by any prior owner.
2. Gaines v. New York State Division of Housing and Community Renewal, 230 A.D.2d 631, 646 N.Y.S.2d 106, (1st Dept., 1996)
3. Gaines v. New York State Division of Housing and Community Renewal, 1997 WL 638455, (N.Y.) (No.158). *1
4. *Gaines*, 1997 WL 638455, (N.Y.)(No. 158)*3
5. *Id.* at *1 (citing *Matter of* Sharon Towers Realty v. New York State Div. of Hous. and Community Renewal, Sup Ct, Queens County, 1988 and Matter of Herman Mgt., Inc v. New York City Conciliation and Appeals Bd., Sup Ct., N.Y. County, 1985.)

* * *

Landlord-Tenant: Rent stabilization as it applies to lodging houses such as a hotel. *Gracecor Realty Co., Inc. v. William Hargrove*, 90 N.Y.2d 350, 660 N.Y.S.2d 704 (1997).

Facts: Appellant-landlord brought a holdover proceeding against respondent-tenant arguing that the tenancy had expired and the tenant's right to occupy the space was terminated by a properly served 30-day notice of termination. The property in question was a hotel owned by the landlord that the tenant had lived in for a continuous two-year period and used as his only place of residence.

The tenant argued that the space was subject to rent stabilization rules as a "housing accommodation" and that landlord was thus required to state in the notice of termination the authorized grounds for terminating a rent-stabilized tenancy, which was not done. The Civil Court, New York County, granted tenant's motion to dismiss, agreeing with tenant that the facility was governed by rent stabilization laws and landlord failed to state grounds for the termination in the termination notice.

The landlord appealed the dismissal to the Supreme Court, Appellate Term, which affirmed the lower court's decision.[1] On further appeal, the Supreme Court, Appellate Division, also affirmed the decision, and granted the landlord leave to appeal to the Court of Appeals.[2]

Issue: Whether the space a tenant occupies in a lodging house, such as a hotel, fits within the definition of "housing accommodation" under the Rent Stabilization Code and is therefore subject to rent stabilization regulations.

Analysis: The Rent Stabilization Law ("RSL") is a New York City law that governs rent stabilization within the city.[3] RSL covers