INSIDE THE MINDS

Representing Consumers in New York Real Estate Transactions

Leading Lawyers on Negotiating Property Deals and Overcoming Legal Challenges

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Representing Purchasers and Renters in New York Real Estate Transactions and Litigation

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Introduction

Real estate law incorporates the legal rights and restrictions pertaining to property owners, buyers and sellers, tenants and shareholders, developers, lenders, neighbors, and numerous other parties. Real estate attorneys must be able to perform myriad tasks ranging from comparing potential development sites and reviewing offering plans to drafting purchase and sale agreements and litigating lease disputes. More so than arguably any other field, real estate law is *incredibly* geography specific. Whereas states heavily shape real estate law, many cities have their own regulations tailored to meet their specific needs based on population size, density, average household income, and similar factors. Accordingly, real estate transactions and litigation are highly fact-specific and depend on state and federal statutes, city regulations, zoning ordinances, neighborhood trends, supply and demand, and property values. This chapter provides a brief insight into the unique laws, court decisions, and trends in real estate law, heavily focusing on New York State and New York City. This chapter further offers invaluable advice to attorneys and their clients on the factors to consider when engaging in real estate transactions and subsequent litigation.

Unique Features of New York State and New York City Real Estate Law

New York State and New York City real estate laws are a breed of their own. This is essentially true of real estate law in any state or city, largely because the laws affecting property-based transactions and rights are generally not contained in one central statute. Unlike a commercial transaction lawyer who heavily relies on the Uniform Commercial Code,[1] a tort lawyer who focuses on common law, or a patent lawyer who solely considers the US Code,[2] a real estate lawyer must consider an array of laws. Thus, in as much as Florida real estate law cannot be compared with New York real estate law, neither can Yonkers real estate law be compared with New York City real estate law, despite their geographic proximity. This section identifies some of the unique features of New York State and New

[1] U.C.C. §§1-101 to 9-709 (1977).
[2] 35 U.S.C.§§1-390 (2012).

York City real estate law by considering taxes, the duty to mitigate, zoning and land use restrictions, rent control and rent stabilization laws, the cooperative structure, and ground leases.

Taxes

Notably high transfer taxes in New York City have a significant impact on real property transactions. The New York City real estate transfer tax and the New York State real property transfer tax combined are some of the highest in the country, totaling an estimated 3 percent of the overall consideration. These transfer taxes apply to the conveyance of real property or interest in real property. They also apply when a party transfers 50 percent or more of an ownership interest in a corporation, partnership, cooperative, or other legal entity that owns or leases real property. Pursuant to New York tax law, real estate transfer taxes must be paid by the seller or grantor; however, if the seller or grantor is either exempt or fails to pay within the requisite period of time, the buyer or grantee must pay the tax.[3] Of course, the responsibility to pay these taxes can be contractually shifted.

The real estate transfer and mortgage recording tax rates in New York City and New York State are astronomical. The New York City real estate transfer tax rates are as follows: 1 percent for residential properties when the consideration is $500,000 or less; 1.425 percent for residential properties when the consideration is more than $500,000; 1.425 percent for commercial properties when the consideration is less than $500,000; and 2.625 percent for commercial properties when the consideration is more than $500,000.[4] The New York State real property transfer tax imposed on residential or commercial properties sold for less than $1 million is $2 per $500 of the purchase price, and for residential properties sold for $1 million or more, there is an additional 1 percent tax (known as the "mansion tax").[5] In addition to a transfer

[3] N.Y. TAX LAW § 1404 (McKinney 2013).
[4] New York City Department of Finance, *Real Property Transfer Tax (RPTT)*, NYC, http://www.nyc.gov/html/dof/html/business/rptt_refunds.shtml (last visited June 30, 2014).
[5] *Real Estate Transfer Tax*, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, http://www.tax.ny.gov/ bus/transfer/rptidx.htm (last visited June 30, 2014).

tax on the conveyance of title, there is also a tax on mortgaging the property. While the seller must pay the abovementioned transfer taxes, the purchaser who secures a new mortgage must also pay a New York State mortgage recording tax: $0.50 for every $100 of mortgage debt and, depending on the nature of the mortgagee and mortgaged premises, certain additional taxes.[6] New York City further imposes hefty mortgage recording taxes: 2.05 percent when the loan is less than $500,000 for residential or commercial property; 2.175 percent when the loan is $500,000 or more for residential property; and 2.8 percent when the loan is $500,000 or more for commercial property.[7]

As a result of these taxes, real estate transactions in New York City are generally more expensive than those in other cities. Since the transactions are more expensive (among other complicating factors) and errors stand to have greater repercussions, unlike in many other cities and states, the buyer and seller generally both hire attorneys.

Duty to Mitigate

The duty to mitigate (and often the lack thereof) further differentiates real estate law in New York from real estate law in other states. In New York, commercial lessors do not have a duty to mitigate if the tenant breaks the lease and prematurely vacates[8]; however, as a practical matter, landlords often settle cases and find new tenants rather than take the risk a tenant who vacates will not pay rent for the remainder of any lease term. Whereas the duty to mitigate is well settled in the commercial context, [9] in

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[6] N.Y. TAX LAW § 253 (McKinney 2013); *Mortgage Recording Tax*, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, http://www.tax.ny.gov/pit/mortgage/mtgidx.htm (last visited June 30, 2014).

[7] N.Y.C. ADMIN. CODE § 11-2601 (West).

[8] *See*, *e.g.*, *Holy Properties Ltd., L.P. v. Kenneth Cole Prods.*, 87 N.Y.2d 130 (1995) (where the tenant vacated a ten year commercial lease after six years due to an alleged deterioration in the building's service, the New York Court of Appeals found the tenant breached the lease without cause, the landlord had no duty to even try to find a replacement tenant, and the tenant owed the landlord $718,841.51 in back rent).

[9] *See Gordon v. Eshaghoff*, 876 N.Y.S.2d 433, 434 (N.Y. App. Div. 2009) (finding "the Supreme Court properly determined that the plaintiff, a residential landlord, was under no duty to mitigate her damages caused by the defendants' breach of the parties' lease"); *Rios v. Carrillo*, 861 N.Y.S.2d 129 (N.Y. App. Div. 2008) (finding residential landlords have no duty to mitigate); *Jonassen v. Kirtland,* 899 N.Y.S.2d 60, 60 (City Ct. City of

New York, courts are somewhat less confident when applying this rule in the residential context. This may be because courts presume it is easier to re-rent a residential space (where the monthly payment often ranges from $500 to $5,000) than a commercial space (where the monthly payment is often tens or hundreds of thousands of dollars), and thus do not want to reward the indolent landlord. Alternatively, this may be because New York State courts are, generally speaking, pro-tenant.[10] Whatever the reason, attorneys should advise their clients to keep this in mind when prematurely breaking a lease or failing to expeditiously re-rent an unexpectedly vacant unit.

Zoning and Land Use Restrictions

New York City also has numerous, unique zoning and land use regulations that affect everything from air rights to commercial operations to residential construction. There are three basic zoning districts in New York City: residential, commercial, and manufacturing. These three districts are further categorized based on low, medium, or high density. As expected, some of these districts overlap and create "special-purpose zoning districts" such as "a commercial overlay district" (where residential districts allow for a limited number of commercial establishments) or a "limited height district" (where new buildings in historic districts, identified by the New York City Landmarks Preservation Commission, cannot be over a certain height). Special zoning rules are also in place for specific parks and streets such as the High Line in Manhattan and Coney Island in Brooklyn. Thus, attorneys should counsel clients to consider these zoning districts, and the resultant restrictions imposed on properties therein, before purchasing, renting, or engaging in any transaction for a specific parcel of land in New York City.

While most development efforts are "as-of-right" and thereby allow the property owner to engage in any construction or operation provided the

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Ithaca 2009) (noting "we are beginning to see in the few reported decisions that lower courts are straining to avoid the harshness of the Holy Properties and Rios rules when they find other rules to apply" and ultimately refusing to award the landlord more than one month's rent where the tenant vacated the premises three days into a one year lease).

[10] *See infra* the section entitled "Challenges in Litigating Real Estate Cases in New York City."

owner complies with any applicable zoning resolution and secures a permit from the Department of Buildings, certain projects require approval and/or review by the City Planning Commission.[11] For instance, a commercial property owner must obtain approval from the City Planning Commission for a variety of reasons, including obtaining an easement to use another's property for a specific purpose; opening outdoor seating at a restaurant (referred to as an "enclosed sidewalk café"); or using city property to provide a public service (e.g., private bus stop posts). To add another layer of red tape, a developer's actions may also be subject to the Uniform Land Use Review Procedure,[12] such as site selection for sewage treatment plans, fire houses, libraries, and housing and urban renewal projects. A skilled real estate attorney can advise on relevant zoning requirements, identify endeavors that require municipal approval, and help clients navigate what can be an arduous application and approval process.

Rent Control and Rent Stabilization Laws

New York City, similar to many cities in New York State—but unlike many other heavily populated cities throughout the nation—also has incredibly strict rent control laws and a rent stabilization program. These laws serve to protect tenants from dramatic price increases and ensure affordable housing. Rent control establishes a base rent (a price cap), adjusted biannually, that a landlord can charge a tenant (or a tenant's successor) who has lived in the same apartment continuously since July 1, 1971. Rent control does not apply to units built after 1947. Rent stabilization, established by the New York City Rent Stabilization

[11] New York also upholds the doctrine of vested rights which secures a property owner's right to complete a development project, rendered nonconforming by a subsequent zoning ordinance where the owner's "actions relying on a valid permit [are] so substantial that the municipal action results in serious loss rendering the improvements essentially valueless." *Matter of Exerter Bldg. Corp. v. Town of Newburgh*, 980 N.Y.S.2d 154, 159 (N.Y. App. Div. 2014). Of, course, this right is not absolute and property owners must be vigilant to current and prospective zoning ordinances. For instance, in *Matter of Exeter Bldg. Corp. v. Town of Newburgh*, the Appellate Division for the Second Department found plaintiff developers did not have a vested right to amend the site plan and continue developing 34 residential buildings in light of a zoning change since the developer failed to timely fulfill 18 conditions in its three year exemption from the re-zoning. *Id.* at 160.

[12] N.Y.C. CHARTER § 197-c (West).

Law of 1969[13] and the New York City Rent Stabilization Code[14], effectively serves to ensure affordable housing once an apartment is vacated and no longer is subject to rent control. Rent stabilization applies to tenants living in buildings with six or more units, constructed prior to January 1, 1974, who took occupancy after June 30, 1971. Rent stabilization does not apply to non-profit housing or apartments converted to cooperatives or condominiums and vacated after July 1, 1993. Pursuant to the Rent Act of 2011,[15] rent stabilization is limited to apartments where the rent is less than $2,500 per month and is either vacant or valued at $200,000 for two consecutive years. However, some buildings converting from commercial or industrial use to residential use can secure temporary rent stabilization in return for a temporary real estate tax break. These highly detailed rent control and rent stabilization regulations clearly impact real estate law, investors, landlords, tenants, and development in New York City. The rent control laws and rent stabilization program affect not only a tenant's ability to find available units, but also a property owner's ability to raise rents.

Cooperatives

The residential structures and applicable law in New York City are also significantly different from those in other cities. Whereas many cities do not even have cooperatives (colloquially known as "co-ops"), most of the residential buildings in New York City are cooperatives rather than condominiums. A cooperative is a legal entity, often a corporation, that owns real estate. When buying a unit in a cooperative, the buyer obtains shares in the legal entity (becoming a "shareholder") instead of obtaining a deed to the unit itself. By contrast, when buying a unit in a condominium, the buyer secures a deed to a specific unit and obtains an undivided interest in the common areas.

Real estate transactions and litigation are heavily affected by the prevalence of cooperatives in New York City on many levels. Generally speaking, cooperatives are more financially stable than condominiums

[13] N.Y.C. ADMIN. CODE §§ 26-501 to 26-520 (2013).
[14] N.Y. COMP. R. & REGS. tit 9 §§ 2520.1-2520.13 (2014).
[15] N.Y. Unconsol. Ch. 249, § 1 (West).

since they can secure financing for the real estate as a legal entity (in contrast to condominiums, where individual owners must finance their units), and have a stricter approval process. In fact, cooperatives, like financial lenders, often require potential shareholders to disclose every possible financial statement confirming net worth, liquid assets, annual income, and tax returns. They even subject potential shareholders to, what can be, a grueling interview. Further, many cooperatives require buyers to make a 20 to 25 percent down payment, and certain luxury cooperatives prohibit buyers from seeking financing to cover the unit. Unlike condominiums, cooperatives can reject potential buyers outright without stating any reason. Aside from implementing a stricter vetting process, unlike condominiums, cooperatives often have stricter rules regulating sundry minutiae from using garbage disposals and washers and dryers to limiting or banning subletting. More recently, cooperatives have loosened their reins and condominiums have implemented increasing regulations; nevertheless, the cooperative and many of its characteristics distinguish real estate law in New York City from real estate law in other municipalities.[16] Attorneys should pay close attention to the specific rules and regulations outlined in the New York State Condominium Act,[17] Business Corporation Law,[18] and Cooperative Corporations Law.[19]

Ground Leases

Ground leases (also known as "land leases") are unique real estate transactions prevalent in New York City and in select other large cities such as Los Angeles. Ground leases are long-term leases, generally spanning fifty or ninety-nine years, for unimproved or vacant land. They are often "triple net leases" where the lessee/tenant must make improvements to the land and pay all expenses (specifically, net real estate

[16] *See generally* 19A NEW YORK JURISPRUDENCE § 139 (2d ed., 2014) ("[T]he interest in a cooperative apartment is sui generis in modern property law because it does not fit neatly into traditional property classifications… The unique dualism of personalty and realty interests has led to many legal complexities in determining which property interest will predominate under various types of actions involving cooperative apartments. The courts have rejected any rigid characterization of a cooperative apartment as either realty or personalty, even for purposes of uniformity.").
[17] N.Y. REAL PROP. LAW §§ 339 to 339-KK. (McKinney 2013).
[18] N.Y. BUS. CORP. LAW §§ 401-2000 (McKinney 2013).
[19] N.Y. COOP. CORP. LAW §§ 1-134 (McKinney 2013).

taxes, net building insurance, and net common area maintenance) except for any mortgage on the lessor's/landowner's fee interest and income taxes. Under this arrangement, the landowner transfers virtually all of the benefits and burdens of ownership to the tenant for the duration of the lease and retains a reversionary interest in the property at the expiration of the term. Ground leases have both positive and negative attributes and New York real estate attorneys must be careful to apprise landowner and tenant clients of such.

From the tenant's perspective, ground leases can be favorable since they guarantee a relatively fixed rent immune from market fluctuation (subject, of course, to contractual provisions), have lower upfront costs than purchasing a property (since there is no land acquisition expense), and involve rent payments that are deductible on federal and state income taxes. However, ground leases also have notable downsides to the tenant since they incorporate long-term restrictions on use and development of the property and provide an interest in a diminishing asset (since the value and marketability of any development on the underlying property is effectively zero, to the tenant, at the end of the term).

From the landowner's perspective, there are plentiful benefits to entering a ground lease. Ground leases allow the landowner to maintain fee ownership of the property, secure a regular income stream, retain some control over the use and development of the property (e.g., the landlord can require the tenant to secure approval before changing the agreed upon commercial project on the property), obtain certain tax advantages compared with selling the property, engage in limited management based on the terms of the ground lease, and, generally speaking, avoid the risk of development. Notwithstanding these benefits, ground leases also have some downsides to the landowner. Specifically, the landowner lacks significant control since the tenant receives wide discretion to use the property; may or may not be able to increase rent (regardless of skyrocketing property prices) until the existing ground lease expires or the tenant breaches the lease, depending on the agreed-upon terms (e.g., there might be a fixed rent, re-appraisal procedure, or scheduled increase based on an index that captures growth in real estate prices); must pay income tax rates rather than capital gains rates on rent payments collected; and bears the risk the tenant will prematurely abandon the development

project and either be forced to secure a new tenant or to expend personal capital to complete the project.

In New York, residential condominiums built on ground-leased land are restricted to certain areas (Battery Park City and Roosevelt Island); commercial development on ground-leased land faces no such geographic restrictions. Additionally, given the unique nature of this arrangement, the ground lease and related loan documents are significantly more complex than a standard commercial or residential lease. They must incorporate an array of provisions to protect the lender's investment and balance the interests and requirements of both the landowner and tenant, who stand to gain or lose a significant amount of capital from the arrangement.

Current Trends, Notable Cases, and Contentious Topics in New York State and New York City Real Estate Law

Increased Focus on Airbnb

In recent years, there has been, and will continue to be, an increased focus on the propriety of Airbnb, a home rental website prevalent in large cities such as London, Paris, New Orleans, San Francisco, and, of late, New York City. Courts, government agencies, landlord/tenant attorneys, and real estate attorneys are increasingly honing in on three Airbnb-specific questions: (1) does Airbnb violate state law?; (2) can Airbnb hosts (those who rent their homes through the program) be evicted and/or fined by their landlords?; and (3) in the event Airbnb is a lawful operation, are hosts subject to certain taxes?

In terms of state law, Section 4 of the 2010 revised New York State Multiple Dwelling Law, commonly referred to as the "Illegal Hotel Law" or "Vacation Rental Ban," provides that "Class A Multiple Dwellings" which include tenements, various types of apartments, and all other multiple dwellings except Class B multiple dwellings (hotels, boarding houses, and other "temporary abodes") "shall only be used for permanent residence purposes."[20] "Permanent residence purposes" are defined as the "occupancy

[20] N.Y. MULT. DWELL. LAW § 4(8a) (McKinney 2013).

of a dwelling unit by the same natural person or family for thirty consecutive days."[21] Under this provision, many argue Airbnb illegally converts apartments into unlawful, short-term hotels. New York State Senator Liz Krueger even stated in an April 14, 2014 press release:

> Real estate is an extremely well-developed industry here in New York City, where density is what we do best. There's a reason that we zone certain areas, buildings, and neighborhoods to be residential—both because we need to protect the limited housing stock we have from being arbitraged into other uses, and because residents living side-by-side and on top of one another in apartment buildings deserve some ground rules and guarantees about what they have to put up with. Companies like Airbnb have decided to ignore all that, so they can pull in revenue from the estimated two thirds of their New York City business that's illegal. What do they care? They don't live in these buildings.[22]

The New York County Supreme Court seemingly agreed with Senator Krueger when issuing a decision in *City of New York v. Smart Apartments, LLC, et al.* enjoining a smaller, less well-known, Airbnb-like company, Smart Apartments, from "advertising, contracting for, and/or allowing the transient occupancy."[23] In *Smart Apartments*, the City of New York sued Smart Apartments for violating Chapter 225 of the Laws of New York of 2010[24] (barring individual(s) from occupying a multiple dwelling for less than thirty consecutive days); New York City Administrative Code §28-118 (prohibiting conversion from a long-term use building to a transient use building without securing a building permit and new certificate of occupancy); and New York City Administrative Code §20-700 (prohibiting

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[21] *Id.*

[22] Press Release, New York State Senator Liz Krueger, Sen. Krueger's Statement on the Use of Airbnb for Floating Brothels (Apr. 14, 2014), http://www.nysenate.gov/press-release/sen-kruegers-statement-use-airbnb-floating-brothels.

[23] *City of New York v. Smart Apartments, LLC, et al.*, 959 N.Y.S.2d 890 (N.Y. Sup. Ct. 2013).

[24] *Id.* (establishing Chapter 225 of the Laws of New York of 2010 is codified in New York's Multiple Dwelling Law § 4(a)(8), New York City's Housing Maintenance Code § 27-2004.a.8(a), and New York City Building Code § 310.1.2).

deceptive trade practices).[25] The City further sought to enjoin Smart Apartments from operating during the pendency of the action. While Smart Apartments argued the City was engaging in "selective non-enforcement" by pursuing them instead of the larger Airbnb enterprise, the Court granted the City's requested relief noting that "placing unsuspecting tourists in illegal, dangerous accommodations constitutes irreparable injury, especially if there is a tragic fire; and the equities lie in favor of shutting down an illegal, unsafe, deceptive business…"[26]

In terms of the risk taken by Airbnb hosts, the fact is, many residential leases require tenants to secure approval before subletting the premises or hosting guests for more than a specific period of time. Accordingly, Airbnb hosts in New York City may or may not face eviction from their landlords for violating their lease terms. In fact, the Honorable Jack Stoller in the Manhattan Housing Court, demonstrated just how unsettled these Airbnb claims are when issuing a shocking decision in *Gold Street Properties v. Freeman* on June 16, 2014.[27] In *Gold Street Properties*, the Court ruled a landlord could not evict a tenant when renting out her unit through Airbnb in violation of the lease since the tenant timely complied with the landlord's request to cease the objectionable conduct. The court noted "without a rationale such as the integrity of the Rent Stabilization Law and Code at stake, there is no discernable obstacle to cure by ceasing the conduct objected to" and further held the tenant did not violate the New York State Multiple Dwelling Law since that law "is generally aimed at the conduct of owners of property, not the tenants."[28]

Aside from eviction, in the event the landlord is fined by a government agency based on a certain Airbnb-rental, depending on the lease terms, the tenant may also be forced to reimburse the landlord sums expended to pay the fine. Owners and shareholders in condominiums and cooperatives, respectively, also risk violating contracts. When condominium owners rent out their units using Airbnb, they are often in violation of the board's right

[25] *Id.* at 225.
[26] *Id.* at 233.
[27] Brendan Pierson, *Eviction Rejected for Tenant Who Stopped Using Airbnb*, N.Y.L.J., June 20, 2014, http://www.newyorklawjournal.com/id=1202660117355/Eviction- Rejected-for-Tenant-Who-Stopped-Using-Airbnb?slreturn=20140623153526.
[28] *Id.*

of first refusal. When cooperative shareholders rent out their units using Airbnb, they are typically in violation of the contract of sale, which requires cooperative approval to sublet, assign, or otherwise rent out the property.

In terms of taxes, Airbnb further operates on tenuous grounds. The New York City Department of Finance imposes the "Hotel Room Occupancy Tax,"[29] known as the "hotel tax," and the New York State Department of Taxation and Finance imposes the New York State sales tax, New York City sales tax, and the New York State Hotel Unit Fee. As of December 20, 2013, the hotel tax is 5.975 percent and must be collected from the occupant of any room at a hotel. Under the hotel tax, while an apartment building, in general, can be considered a hotel, a building "is not considered a hotel if rooms are only rented for up to fourteen days or are only rented once or twice during any four consecutive tax quarters of a twelve-month filing period."[30] However, because Airbnb is not currently recognized as a "hotel," it is not subject to this tax and New York State has not profited from the venture. This will be a hot topic in New York State and New York City since Airbnb constitutes serious competition for typical hotels, government entities stand to collect millions of dollars in taxes by recognizing Airbnb as a lawful program, and tenants and property owners alike have a vested interest in limiting unknown, transient occupants in their place of residence.

Increased Scrutiny and Oversight of Cooperatives and Condominiums

The seminal case, *Levandusky v. One Fifth Avenue Apartment Corp.*,[31] established deference to cooperative boards; however, today, in New York City, where apartment prices are skyrocketing and apartment availability is scarce, courts

[29] N.Y. Unconsol. Ch. 288-C, § 1 (West).

[30] *Hotel Occupancy Tax*, N.Y.C. DEP'T OF FIN., http://www.nyc.gov/html/dof/html/business/hotel.shtml (last visited June 24, 2014).

[31] *Levandusky v. One Fifth Ave. Apt. Corp.*, 553 N.E.2d 1317 (N.Y. 1990) (applying a business judgment-like rule and requiring cooperative board rules and actions to be "in good faith in the exercise of the honest judgment in the lawful and legitimate furtherance of corporate purposes" in order to "protect[] tenant-shareholders against bad faith and self-dealing"). *See also 40 W. 67th St. v. Pullman*, 100 N.Y.2d 147, 153 (N.Y. App. Div. 2003) (upholding *Levandusky* and the now time-honored precept that cooperative board decisions and actions shall receive deference under a business judgment-like rule provided they were "[1] for the purposes of the cooperative, [2] within the scope of its authority, and [3] in good faith").

are taking a keener eye to cooperative rules and actions. The Second Department for the Appellate Division demonstrated this trend when ruling *In the Matter of Marla Cohan v. Board of Directors of 700 Shore Road Waters Edge, Inc.* that the cooperative board acted beyond its authority when assessing a $3,000 illegal sublet fee on a shareholder since none of the governing documents, particularly the proprietary lease, by-laws, shareholder handbook, or "house rules," memorialized the violated rule.[32] Lower level courts have further upheld this trend, limiting the deference traditionally afforded cooperatives. For instance, in *Kaplan v. Park South Tenants Corp.*,[33] plaintiff lessees moved to enjoin defendant cooperative corporation's board of directors from taking any action to prevent them from installing exterior air conditioning units on their private terraces, and relocating telecommunications conduits from the center of their unit bathrooms to the walls of their unit bathrooms. Plaintiffs argued the lease affords them the exclusive use of their terraces, and, while they must secure written consent to make alterations, the board cannot unreasonably withhold such consent. In response, defendant claimed the requested alterations "violate[d] the [h]ouse [r]ules," were "contrary to longstanding board policy," and would "set a precedent for similar applications."[34] When considering the plaintiffs' application, the New York State Supreme Court for New York County found the board was "not sheltered from review by the business judgment rule" and unreasonably withheld consent. The Court further noted the plaintiffs' leases took precedence over the house rules since they were issued first in time. Similarly, in *Elias, et al. v. Orsid Realty Corp., et al.*,[35] the same court found a cooperative corporation and its managing agent could not disqualify potential shareholders simply because they sought to finance more than two-thirds of the purchase price under the "Financing Rule."[36] The Court acknowledged cooperatives have an interest in "assuring future shareholders' ability to pay maintenance charges regularly, as their failure to pay timely imposes a financial burden on other shareholders to make up the shortfall and maintain the cooperative's financial viability;" however, the Court noted the

[32] *In re Marla Cohan v. Bd. of Dirs. of 700 Shore Road Waters Edge, Inc.*, 969 N.Y.S.2d 547, 550 (N.Y. App. Div. 2013).
[33] *Kaplan v. Park South Tenants Corp.*, No. 157669/13, 2014 WL 1092445, at *1, (N.Y. Sup. Ct. Mar. 18, 2014).
[34] *Id.* at *1.
[35] *Elias v. Orsid Realty Corp.*, No. 106727/10, 2013 WL 861559, at *5, (N.Y. Sup. Ct. Mar. 1, 2014).
[36] *Id.*

consideration of only this factor "to the exclusion of other factors that may bear on the adequacy of the buyers' finances and be rationally and legitimately related to the buyers' financial strength, is contrary to the cooperative's interests: the touchstone of reasonableness in this context."[37] Accordingly, these decisions illustrate cooperative boards are increasingly subject to judicial scrutiny and cannot wholly rely on business judgment deference.

Further demonstrating increased oversight of cooperatives and condominiums, the New York State Senate is currently reviewing a proposed bill to create an "Office of the Cooperative and Condominium Ombudsman." This ombudsman will oversee cooperative and condominium board elections and meetings, mediate disputes between owners/boards and tenants/shareholders, and conduct public hearings for the benefit of the tenants/shareholders. Attorneys should advise building owners (and potential buyers) to closely track this bill, since, if it passes, they will face increased legal and accounting costs.

Increased Focus on Rents, Rent Stabilization, and Affordable Housing

In the upcoming years, there will also be an increased focus on rent prices, rent stabilization, and affordable housing, particularly in New York City, now run by Mayor Bill de Blasio. All of these rent-based changes will be key to property owners, landlords, tenants, and investors alike.

On June 23, 2014, the New York City Rent Guidelines Board voted to allow rent increases of up to 1 percent on rent-stabilized apartments and 2.75 percent on two-year leases.[38] This rent increase is notably lower than in previous years, and yet, landlords and consumers will be greatly affected by the decision. Landlords have heavily lobbied for rent increases to cover the rising costs of maintenance and oversight. Tenants, however, with the vocal support of Mayor de Blasio, continue to preach there is a "tale of two cities" and any rent increase goes to a "pattern of unfairness."[39] The debate for a rent increase versus a rent freeze should continue to garner widespread attention.

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[37] *Id.*
[38] Mireya Navarro, *Panel Backs Rent Increase of One Percent*, N.Y. TIMES, at A23 (June 24, 2014).
[39] *Id.*

On January 8, 2014, the Division of Housing and Community Renewal (DHCR) passed twenty-seven amendments to the Rent Stabilization Code.[40] These amendments, which are notably tenant-friendly, come to the dismay of property owners and landlords alike. One amendment allows the Tenant Protection Unit to investigate and prosecute rent law violations *sua sponte*, even when no tenant has filed a complaint.[41] A second amendment requires the property owner to provide the first tenant of a deregulated unit with written notice explaining, in part, why the unit is being deregulated, the rent computation, the date of the last legal regulated rent, and a statement that the tenant can verify the last legal regulated rent or the maximum rent by contacting the DHCR.[42] The amendments even introduce an array of exceptions to the four-year statute of limitations on rent overcharge disputes.[43] These amendments impose more onerous obligations on existing owners and landlords and are pertinent to consumers interested in purchasing or investing in rent-stabilized property. Whereas developers have already come together to pursue legal recourse and invalidate these new rules,[44] it is clear rent stabilization will continue to be a hot topic in the near future.

The judiciary has even taken an interest in rent-based issues. In fact, on March 31, 2014 the US Court of Appeals for the Second Circuit certified the following question for appeal in *Santiago-Monteverde v. Pereira*: "Whether a debtor-tenant possesses a property interest in the protected value of her rent-stabilized lease that may be exempted from her bankruptcy estate pursuant to New York State Debtor and Creditor Law §282(2)[45] as a 'local public assistance benefit?'"[46] If the question is answered in the affirmative, rent-stabilized leases need not be categorized as an asset in a

[40] N.Y. COMP. R. & REGS. tit 9 §§ 2520.1-2520.13 (2014).
[41] *Id.* § 2520.5(o).
[42] *Id.* § 2520.11(u).
[43] *Id.* § 2526.1(a)(3).
[44] *See* Kaitlin Ugolik, *NYC Developers Claim Rent Control Rules Abuse Due Process*, LAW360 (Feb. 25, 2014), http://www.law360.com/articles/513047/nyc-developers-claim-rent-control-rules-abuse-due-process (discussing the lawsuit commenced on February 24, 2014 in New York State Supreme Court, Kings County, *Portofino Realty Corp. v. New York State Department of Housing and Community Renewal* (501554/2014) wherein developers argue the new rent stabilization rules violate due process and constitute an "assault upon owner's rights.")).
[45] N.Y. DEBT. & CRED. §§ 1-291 (McKinney 2013).
[46] *Santiago-Monteverde v. Pereira*, 747 F.3d 153 (2d Cir. 2014).

personal bankruptcy action and thereby used to pay off creditors. By contrast, a decision in the negative will effectively allow creditors to take over rent-stabilized leases and ultimately allow the landlord/property owner to impose a market rate rent on the specific unit. With such a financial stake at risk, attorneys for landlords, property owners, and cooperative boards of rent-stabilized buildings should keep an eye out for the Second Circuit's decision.

Regarding affordable housing, New York City's new mayor has proactively campaigned to implement a mandatory inclusionary zoning plan in lieu of the current 80/20 housing program.[47] Under a mandatory inclusionary zoning plan, developers would be required to offer a certain amount of affordable units, indefinitely, in any new residential rental project. While no such mandatory inclusionary zoning plan is currently in place, attorneys on behalf of tenants, developers, and individual/corporations in the market to build, invest, or rent should be on the lookout since any such plan will have financial impacts and potentially affect neighborhood dynamics. If, for instance, under the new plan, developers are required to provide 30 or 40 percent affordable units, rather than 20 percent affordable units, with no additional tax incentive, they must increase the price of non-affordable units to recover the same return.

Increased Transactions and Litigation

Finally, as the economy continues to recover from the financial crisis of 2008, there will be a notable uptick in real estate transactions and development in general, which, of course, will result in increased litigation. For instance, there is a growing trend for commercial condominiums to transform into commercial, mixed-use properties. Unlike commercial condominiums, mixed-use properties are easily-tradable assets, appeal to investors, can be sold in piecemeal and

[47] Under the 80/20 program, the New York State Housing Finance Agency offers tax-exempt financing to multifamily rental developments where 20 percent of the project's units are reserved for affordable/low-income households (e.g., the rent is capped at 30 percent of the applicable income limits) and 80 percent of the project's units can be rented out at market rates. By taking advantage of this program, the developer secures 4 percent Low Income Housing Tax Credits. New York State Homes and Community Renewal, *80/20 Housing Program*, http://www.nyshcr.org/topics/developers/multifamily development/8020housingprogram.htm (last visited June 30, 2014).

retained in part as a long-term investment, and enable the property owner to reap optimal federal and state tax credits (such as new markets and low-income housing tax credits). Ultimately, as developers invest in new residential and commercial projects, negotiations and disputes involving everything from contractual obligations to lending propriety to nonpayment will surge.

Challenges in Litigating Real Estate Cases in New York City

A notable challenge in litigating real estate cases in New York City is that courts are, generally speaking, incredibly "pro tenant." This is true in both the residential and commercial context, even when there is evidence the tenant failed to timely pay rent or is otherwise in violation of a lease agreement. Accordingly, landlords and their attorneys frequently have an uphill battle.

In keeping with this pro-tenant stance, in the residential context, courts strictly enforce notice requirements imposed on landlords pursuing non-payment or holdover proceedings.[48] In a nonpayment proceeding, a landlord must show a "demand of the rent has been made, or at least three days' notice in requiring, in the alternative, the payment of the rent, or the possession of the premises, has been served upon [the tenant]…"[49] In New York, many courts have ruled the written rent demand should include not only a summary of unpaid rents but also a highly detailed schedule itemizing any other amounts sought.[50]

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[48] *See*, *e.g.*, *Lambert Houses Redevelopment Co. v. Jobi*, No. L&T 039411/13, 2014 WL 2198291 (N.Y. Civ. Ct. May 23, 2014) (even though the landlord served a Section 8 tenant with numerous notices to recertify her Section 8 subsidy and sent a 10 day notice of termination demanding rent arrears, the court invalidated the termination of tenant's Section 8 subsidy since the notices failed to strictly adhere to the incredibly detailed requirements and deadlines specified in the HUD Regulations and Handbook); *622 W. 141st LLC v. Garcia*, 217 N.Y.L.J. 82 (N.Y. Sup. Ct. 1997) (noting "factual errors contained in predicate notices [] are not susceptible to amendment" and finding a written rent demand defective since it did not account for rent credits due and owing, and thus did not provide "an approximate good faith amount of rent that was due").

[49] N.Y. REAL PROP. ACTS. LAW § 711(2) (McKinney 2014).

[50] *See 501 Seventh Ave. Assoc., LLC v. 501 Seventh Ave. Bake Corp.*, 801 N.Y.S.2d 233, 233(N.Y. App. Term 2005) (finding petitioner landlord's written rent demand sufficient where it included a summary of arrears specifying aggregate base rents, additional rents, and other charges allegedly owed under a commercial lease agreement and "a 20-page

In a holdover proceeding, depending on the nature of the tenancy and basis for the action, the landlord must send the tenant a notice of termination, a notice to cure, and/or a notice of intent not to renew a lease. These notices must contain specific information and be served within a particular period of time—often a certain number of days prior to commencing an action. For instance, before commencing an eviction proceeding to oust a month-to-month tenant, the landlord must serve a written, thirty-day notice of termination. This notice of termination must provide the date by which the tenant must vacate the premises and warn if the tenant does not vacate the premises by the identified date, the landlord will commence a holdover proceeding.[51] Before bringing a holdover proceeding to evict a tenant for violating the lease, the landlord must serve a notice to cure. The notice to cure "must set forth sufficient facts to establish grounds for the tenant's eviction, and inform the tenant as to how the tenant violated the lease, as well as the conduct required to prevent eviction" and is "insufficient where it fails to apprise the tenant of the condition that the landlord wishes to have cured or fails to reference the specific section of the lease that addresses the condition."[52] Before bringing an eviction proceeding against a non-primary resident of a rent stabilized apartment, the landlord must serve a notice of intent not to renew, also known as a "Golub Notice" between 90 and 150 days before the lease expiration and a 30-day notice of termination.[53] Thus, the requirements to end a landlord-tenant relationship are highly specific and require strict compliance.

'tenant history' itemizing on a monthly basis the rental amounts claimed to be due"); *Riverbay Corp. v. Carrey*, 906 N.Y.S.2d 744, 744 (N.Y. Civ. Ct. 2010) (where the demand specified the total sums sought along with carrying charges, prior surcharges, community complaint surcharges, legal and late fees, parking fees, storage fees, and administrative fees).

[51] N.Y. REAL PROP. LAW § 232-a (McKinney 2014). *See Islands Heritage Realty Corp. v. Joseph*, 929 N.Y.S.2d 200, 200 (N.Y. Dist. Ct. 2011) ("The landlord must serve a RPL § 232-a notice of termination at least 30 days before expiration of the monthly term as a condition precedent to bringing a holdover proceeding").

[52] *Westhampton Cabins & Cabanas Owners Corp. v. Westhampton Bath & Tennis Club Owners Corp.*, 882 N.Y.S.2d 124, 125 (N.Y. App. Div. 2009).

[53] *Atl. Westerly Co. v. Cohen*, No. L&T56644/05(N.Y. Civ. Ct. 2005). *See Koros v. Salas*, 841 N.Y.S.2d 820, 820 (N.Y. Civ. Ct. 2007) ("Failure to serve such notice within the requisite 'window period' is a fatal defect that deprives the Court of jurisdiction and requires the landlord to offer a new lease… Under those circumstances, the landlord must then wait until the new 'window period' begins prior to the expiration of the new lease

Further demonstrating the judiciary's pro-tenant leaning, courts in New York are fairly inclined to grant Yellowstone injunctions. When a commercial tenant has a non-rent dispute (e.g., when the landlord seeks to evict the tenant for breaching the lease), the tenant can secure a Yellowstone injunction that allows the tenant to remain in the premises while litigating the alleged breach. In New York, the standard to obtain a Yellowstone injunction is lower than the standard to obtain any other type of injunction. To secure a Yellowstone injunction, the movant must prove he or she: holds a commercial lease; received a notice of default, notice to cure, or notice of termination; is seeking to stay the termination of the lease *before* it actually expires; and is prepared and has the ability to cure the alleged default without having to vacate the subject premises.[54] This is in stark contrast to the prerequisites to secure a preliminary injunction, which are based on the likelihood of success on the merits, the risk of irreparable harm, and a balancing of the equities.[55] Such a low standard protects the tenant in various situations, such as when the landlord asserts a breach of lease to evict the current tenant for any number of legitimate or pretextual reasons (such as personal conflict or a desire to secure a higher-paying tenant).[56]

Factors to Consider When Advising a Client Purchasing a Residential or Commercial Property

When purchasing residential or commercial property, the individual or company (and/or the individual's or company's attorney) should review countless factors. A non-exhaustive list of important factors to consider includes: any building declarations, by-laws, house rules, and offering plans; board of director minutes; the building's reserve fund (or lack thereof); property condition disclosures; zoning laws affecting the property; the status of title; and the space itself, as compared with legal documents, records, or other representations.

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before commencing another holdover proceeding to recover possession on the ground of personal use").

[54] *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (1990).

[55] *St. Paul Fire and Marine Ins. Co. v. York Claims Serv., Inc.*, 765 N.Y.S.2d 573 (N.Y. App. Div. 2003).

[56] *See*, *e.g.*, *Stix Rest. Group, LLC v. Christos Realty Inc.*, No. 156833/2013, 2013 WL 5290147 (N.Y. Sup. Ct. Sept. 16, 2013) and *93 S. St. Rest. Corp.v. S. St. Seaport Ltd P'ship*, No. 156165/13 (N.Y. Sup. Ct. July 22, 2013).

Declarations, Bylaws, House Rules, and Offering Plans

First and foremost, when looking to purchase property, an attorney should help a client determine whether the client wants to invest in a cooperative or a condominium. While cooperatives and condominiums are becoming increasingly similar, there are still notable differences.[57] Whether the client decides on a cooperative or a condominium, the real estate attorney should direct the client (or personally assume the responsibility) to review all documents enumerating rules and imposing limitations on the shareholder/owner. The client, or attorney, should focus on any declarations,[58] bylaws,[59] house rules,[60] and offering plans.[61] The attorney or potential shareholder/owner should review all of these documents closely. Who collects the building trash? Who can secure a seat on the board? Are there rights of first refusal (which can have a great impact on the market value of a commercial condominium)? Does the building have a homeowners' association to oversee planning and ensure uniform operations throughout the building? How are certain costs allocated? For example, in a commercial condominium, the building may allocate costs among owners in an atypical manner and require a ground floor

[57] *See supra* the discussion on cooperatives within the section entitled "Unique Features of New York State and New York City Real Estate Law."

[58] Declarations legally establish condominiums and provide various covenants pertaining to the sale, ownership, and use of the property. *See* N.Y. REAL PROP. LAW § 339-n (McKinney West) (requiring condominium declarations to describe the property, physical building structure, building units, common areas, and approved uses).

[59] Bylaws regulate internal operations and meetings held by the condominium's or cooperative's board of director or managers. *See id.* (establishing condominium by-laws regulate the election, removal, authority, and duties of the board of managers; common charges; common elements; conveyances, sales, and leasing of units; payment, collection and disbursements of funds; etc.).

[60] House rules, issued by the governing board, impose restriction on the "day-to-day affairs of the cooperative" ranging from financial matters to pet restrictions to parking rules. *Levandusky v. One Fifth Ave. Apt. Corp.*, 553 N.E.2d 1317 (N.Y. 1990).

[61] Offering plans, for cooperatives, which must be approved by the New York State Attorney General, provide an abundance of information, describing the building's history, establishing income tax deductions available to shareholders, identifying liens on the building, explaining relevant local laws, discussing house rules, providing features and rules of the building (e.g., pertaining to recreational facilities, façade, common areas, etc.), and confirming whether the building has been pre-approved by certain lending institutions. *See* STATE OF NEW YORK ATTORNEY GENERAL, COOPERATIVE AND CONDOMINIUM CONVERSION HANDBOOK, *available at* http://www.ag.ny.gov/sites/default/files/pdfs/publications/COOP%20CONDO%20Conversion%20Handbook.pdf.

retail owner to pay the expenses of an elevator only used by upstairs tenants. This is something the purchaser should know well in advance of committing to the property. There may also be discrepancies between information provided in the offering plan and the space itself. Potential purchasers should pay close attention to any such differences and adjust their offer prices accordingly.

Board of Directors Minutes

Before buying a unit in a condominium or cooperative, a purchaser should review any minutes maintained by the board of directors or managers. Minutes often reveal information that is not otherwise available, such as accounts of delinquent tenants/shareholders, recurring problems, and widely held concerns among the residents.

The Building's Reserve Fund

The purchaser should determine whether the building has a reserve fund and, if so, the amount of reserves therein and any notable fluctuations over recent years. Cooperatives and condominiums use reserve funds to finance large projects such as renovations and construction. The building's reserves, or lack thereof, can potentially affect the buyer's ability to obtain financing for a unit in the building, and provide valuable insight into any major problems. If the building has a low reserve fund, this may mean the building is operating in the red, lacks essential funds, has numerous delinquent tenants, or may be considering raising common charges in the near future.

Property Condition Disclosures

The purchaser should closely review any available property condition disclosure statement.[62] While this requirement does not preclude the seller

[62] New York Property Law §462 provides a seller of residential real property must produce a property condition disclosure statement when producing the real estate purchase contract. N.Y. REAL PROP. LAW § 462 (McKinney West). However, New York Real Property Law §461 defines "residential real property" as a "a one to four family dwelling used or occupied, or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons" excluding "(a) unimproved real property upon which such dwellings are to be constructed, or (b) condominium units or cooperative

from conveying the property "as is," the seller must answer specific questions pertaining to ownership, environmental conditions, structural considerations, and mechanical systems and services.[63] The disclosure statement includes a multitude of questions ranging from whether there are any features of the property shared in common with adjoining land owners (e.g., walls, fences, or driveways) to whether there are any electric or gas utility surcharges (e.g., for line extensions, special assessments, or homeowner association fees) to whether the basement has seepage resulting in standing water.[64]

Zoning Laws

The purchaser should be mindful of all applicable zoning laws affecting the property. If a purchaser is buying property to run a manufacturing business, it is, of course, not productive to look at property in a residential zone. While the purchaser may be able to obtain a variance or special use permit, zoning ordinances should be a major consideration.

Status of Title

The purchaser should closely review the status of title. The purchaser should confirm the property is recorded in the seller's name and the seller actually has the right to convey any interest therein. The purchaser should further confirm there are no liens encumbering the property.

The Actual Space and Square Footage

The purchaser should review recorded documents, circulars from the seller, and the actual space itself. The purchaser should enlist the assistance of a title company and compare recorded documents (such as prior deeds and documents on file with the Department of Buildings) with the actual space considered. Often, a structure undergoes internal changes (such as newly erected walls or units), but the recorded documents fail to accurately reflect these changes.

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apartments, or (c) property in a homeowners' association that is not owned in fee simple by the seller." *Id.* § 461.

[63] *Id.* § 462.

[64] *Id.*

Similarly, the purchaser should compare any and all representations regarding the property made by the seller, seller's attorney, or seller's real estate broker with the space itself. It is not uncommon to receive different measurements of the square footage for the same piece of property, especially in New York City. For instance, in a newly constructed building where the walls have yet to be erected, the developer may assert a square footage that goes to the end of the wall itself, even though pipes will be installed and sheetrock will be laid, which will, of course, eat into the usable space. Taking steps to measure the actual size of the space with the alleged size of the space is especially important when looking to rent or buy real estate in New York City, since a small change in square footage might have larger ramifications (e.g., a bedroom turns out to be too small and must be used for an office). Disputes about square footage frequently arise. Ultimately, the purchaser should be overly cautious, comparing the physical space with descriptions in official documents, marketing materials, or representations, since any variation may affect the purchaser's interest, the purchaser's needs, and the property's market value and selling price.

Helping a Client Decide on an Offering Price and Negotiate a Contract

Buying a piece of property is no light matter. Accordingly, attorneys can help an individual or corporate client determine how much to offer, negotiate the terms, and preemptively tackle common obstacles.

Real estate attorneys can actively help a client determine how much a property is worth and how much to offer when seeking to enter a contract. To effectively research the property's value or calculate a reasonable offer price, attorneys can take on a broker-like role and review past purchase prices available on a county or city-run website, as well as any appraisal report. Attorneys may also review public records to determine the sale price of similar properties based on factors such as square footage and neighborhood. They may even communicate with the seller or seller's attorney to obtain disclosures regarding past flooding, storm damage, recent construction, or other property defects that may not be readily ascertainable or in plain view. Real estate attorneys should also advise clients to have an engineer inspect the premises so that any defects or structural problems are

uncovered and considered when calculating an offer price. Whether the property is "move-in ready" or must undergo significant renovation can, and should, affect the offer price.

Negotiating the Contract

If the client plans to borrow funds to secure the property, the real estate attorney should negotiate with the seller to condition the purchase on the client's ability to secure financing. While many contracts are contingent on the purchaser's ability to obtain a commitment letter from a lending institution, they often are not contingent on the purchaser's ability to obtain actual loan approval.

Most importantly, once the parties agree on the price and other conditions, an attorney should commit all of the pertinent information to writing. While verbal offers and agreements are common, they are non-binding. Accordingly, there is a risk that even after making the verbal offer and overseeing inspections, the deal can still fall through. The seller may still be showing the property to other potential purchasers in hopes of obtaining a higher offer price. Meanwhile, the buyer may be incurring expenses in efforts to close on the property (such as hiring professionals to inspect the property). A letter of intent agreeing on basic terms can serve as a "placeholder" in the interim of time from when the parties agree to enter into a formal contract and when the parties actually sign a comprehensive contract. An attorney can help prepare letters of intent, making sure to include certain clauses regarding good faith negotiation, exclusivity, or non-circumvention.[65] While letters of intent can be useful, attorneys must remember they are only enforceable where the parties express an intent to be bound; an "agreement to agree, which leaves material terms of a proposed contract for future negotiation, is unenforceable."[66] Further, without the proper language, letters of intent, if signed by both parties, may be construed by a court as an enforceable contract.

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[65] Todd D. Soloway & Joshua D. Bernstein, *The Enforceability of Letters of Intent*, N.Y.L.J. (Jan. 29, 2014), http://www.newyourlawjournal.com.

[66] *Id.* (quoting 2004 *McDonald Ave. Realty v. 2004 McDonald Ave. Corp.*, 858 N.Y.S.2d 203, 204 (N.Y. App. Div. 2008).

Commonly Litigated Areas

Some of the more commonly litigated matters in the real estate arena are as follows: non-payment and lease violations,[67] nondisclosures, appraisals, and nuisance disputes among neighbors.

Nondisclosures

Nondisclosures in both the residential and commercial real estate context are widely litigated issues. New York upholds the *caveat emptor* doctrine, meaning sellers cannot be held liable for failing to disclose information about the subject property when they are dealing with buyers in an arm's length transaction. The only exception to this is where the seller actively conceals some defect about the property.[68] Applying this principle in *Simone v. Homecheck Real Estate Servs, Inc.,* the Second Department recognized "to maintain an action to recover damages for active concealment in the context of a fraudulent nondisclosure, the buyer must show, in effect, that the seller thwarted the buyer's efforts to fulfill the buyer's responsibilities fixed by the doctrine of *caveat emptor*."[69] Thus, in *Simone*, the Court ruled where the seller's disclosure statement did not identify any material defect in the property and the buyer entered a contract of sale only to discover numerous problems (water leaks, deck sinking, mold behind walls in the basements, a cracked chimney, etc.), the buyer had a viable cause of action for fraudulent misrepresentation.[70] By contrast, in *New York Spot Inc. v. 442 West 22nd Street LLC*, the Kings County Supreme Court found the building buyer did not have a cause of action based on non-disclosure.[71] In *New York Spot Inc.*, the building buyer asserted the building seller failed to disclose certain tenants entered leases that allowed them to pay rent below the market rate or the legally allowed rent. The Court noted the rents charged were "plain on the face of those

[67] *See supra* footnotes 33 to 41.
[68] *See* N.Y. REAL PROP. LAW § 465 (McKinney 2014)("Any seller who provides a property condition disclosure statement or provides or fails to provide a revised property condition disclosure statement shall be liable only for a willful failure to perform the requirements of this article").
[69] *Simone v. Homecheck Real Estate Servs., Inc.*, 840 N.Y.S.2d 398(N.Y. App. Div. 2007).
[70] *Id.*
[71] *N.Y. Spot Inc. v. 442 West 22nd Street LLC*, 920 N.Y.S. 2d 242 (N.Y. Sup. Ct. 2010).

leases and should have been apparent to any buyer who had checked the law concerning preferential leases."[72]

Disclosures under the Interstate Land Sales Full Disclosure Act of 1968 (ILSA)[73] are also highly litigated. ILSA mandates developers disclose certain information and prohibits developers from engaging in any practices to defraud prospective purchasers when selling unimproved parcels of land. ILSA applies not only to "the sale of lots" but also to the sale of condominiums.[74] *Board of Mgrs. of the Park Slope Views Condominium v. Park Slope Views, LLC* provides an illustrative example of ILSA-based litigation. In *Board of Mgrs. of the Park Slope Views*, a board of managers and twenty-three individual unit owners sued the condominium's sponsor, the sponsor's controlling principal, and agents who sold units prior to the condominium's construction (collectively, "sponsor defendants").[75] The plaintiffs alleged the sponsor defendants failed to adhere to the purchasing agreement, marketing materials, and offering plan when constructing the condominium, which ultimately violated New York City's building code, and further failed to disclose these defects when inducing them to purchase units. The Court recognized these facts constitute a valid cause of action and refused to grant the sponsor defendants' motion to dismiss the ILSA claim.

Appraisal and Square-Footage Disputes

Appraisal and square-footage-based disputes are another hotly litigated area in real estate law. The property purchaser often engages in litigation with the bank's appraiser, an individually secured appraiser, and any other party who made a representation as to the value or square footage of a piece of property (e.g., the seller or the seller's broker) when a discrepancy arises. For instance, in *Estrada v. Metropolitan Property Group*, the First Department upheld the dismissal of the residential cooperative purchaser's fraud claims against a broker, bank, and appraiser when ruling the purchaser could not have "reasonably relied" on misstatements about

[72] *Id.*
[73] 15 U.S.C. § 1703(a)(2) (2012).
[74] *Cruz v. Leviev Fulton Club, LLC*, 711 F. Supp. 2d 329, 331 (S.D.N.Y. 2010).
[75] *Bd. of Mgrs. of the Park Slope Views Condo. v. Park Slope Views, LLC*, 39 Misc. 3d 1221(A), 1221A (N.Y. Sup. Ct. 2013).

square footage of the apartment where advertisements indicated the subject unit was 500 or 550 square feet, and, when seeking to refinance a mortgage three years later, the purchaser learned the property was 376 square feet and essentially worth $110,000 less than the consideration paid.[76] The First Department noted "plaintiff should have taken the opportunity to inspect the apartment before he contracted to buy it."[77] While Subtitle F of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[78] introduced new regulations to make appraisals more accurate and neutral, the fact is, appraisers issue reports for the benefit of the bank, and potential purchasers should perform their own due diligence before signing a contract or mortgage. In any event, notwithstanding these new regulations, appraiser-based disputes continue to be litigated.

Nuisance Disputes among Neighbors

Additionally, apartment owners and renters alike often commence lawsuits to enjoin or sanction neighbors for making too much noise, producing fumes, or otherwise violating their right to quiet enjoyment and the warranty of habitability. These nuisance-based lawsuits are particularly common in New York City, where the population density is high and tenants are often in close proximity to one another. Property owners and renters often bring their landlords or building owners into an action primarily directed at a neighbor to hold that party responsible for the alleged problem, too.[79] As poignantly noted by the District Court of New York in Nassau County in *Upper East Lease Assocs, LLC v. Cannon*:

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[76] *Estrada v. Metro. Prop. Group, Inc.*, No. 110123/11, 2012 WL 3541292, at *1-2 (N.Y. Sup. Ct. July 30, 2012), *aff'd Estrada v. Metro. Prop. Group, Inc.*, 973 N.Y.S.2d 147 (N.Y. App. Div. 2013).

[77] *Id.*

[78] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376.

[79] *See, e.g.*, *129th St. Cluster Assoc. LP v. Levy*, No. 67445/11, 2012 WL 6682140 (N.Y. Civ. Ct. Dec. 19, 2012) (recognizing excessive noise supports a nuisance cause of action); *George v. Bd. of Dirs. of One W. 64th St., Inc.,* No. 114555/09, 2011 WL 3898076 (N.Y. Sup. Ct. Aug. 19, 2011) (refusing to dismiss plaintiff cooperative shareholder's cause of action for breach of the warranty of habitability as against the building and cause of action for private nuisance against a neighboring tenant who played amplified music for hours each day).

> In modern high-rise apartment settings, a tenant's home is *not* the tenant's castle. Landlords of such dwellings have a corresponding duty to prevent one tenant's habits from materially interfering with another tenant's right to quiet enjoyment. When a tenant's smoking results in an intrusion of second-hand smoke into another tenant's apartment, and that tenant complains repeatedly, the landlord runs a financial risk if it fails to take appropriate action, over a period of several months, to rectify a second-hand smoke nuisance, justifies a rent abatement, and excuses the tenant from any obligation to pay rent after her constructive eviction.[80]

Essential Components of Every Real Estate Litigation Strategy

Real estate litigation is notably disparate from most other types of litigation since the parties often want to maintain a relationship, even after the dispute is over. For example, a commercial tenant may not want to relocate even after suing the landlord for rent abatements since the underlying business may have established loyal patrons in the neighborhood and would incur significant expense to move physical infrastructure and necessary equipment. Alternatively, a property owner renting space to a restaurant in New York City may dispute Local Law 11[81] scaffolding that entombs the restaurant's outdoor seating space during the summer months; nevertheless, that does not mean the renter wants to, or can afford to, break the lease and cut all ties with the landlord to move the restaurant. Thus, real estate attorneys often must consider litigation a negotiation tool that is a means to an end, recognizing the client's business strategy has a significant effect on the litigation strategy. This may mean the attorneys proceed in a less contentious manner, or may even mean that attorneys take a more aggressive approach to put pressure on their adversary to come to a settlement. The approach ultimately depends on the characteristics, goals, and financial abilities of the parties involved.

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[80] *Upper East Lease Assocs., LLC v. Cannon*, 924 N.Y.S.2d 312, 312 (D. Ct. Nassau Cnty. 2011).
[81] N.Y. C. ADMIN. CODE §§ 28-302.1-28.302.6 (West).

Documentary evidence should also heavily shape any litigation strategy. In real estate actions, documents are at the heart of every dispute and resultant litigation. In a foreclosure action, the note and mortgage are crucial. In a breach of contract agreement, the purchase and sale agreement or lease are key. In a non-payment proceeding, predicate notices and rent payment records are essential. Where there is a "flaw" or "red flag" in the documentary evidence, the attorney should keep this at the forefront of his or her mind when determining whether to aggressively litigate the case, attempt to settle the matter, or discontinue the action to remedy the identified error.

Conclusion

This chapter covers the tip of the iceberg, depicting the incredible breadth of real estate law. In New York State (especially in New York City) the regulations and restrictions are endless. As the new mayor for New York City fully takes the stage and the economy continues to recover, transaction and litigation attorneys alike should be on the lookout for an even greater increase in the number and complexity of real estate laws. When taking on transactional real estate work in New York, attorneys should carefully consider the client's property needs (the proposed use of the space); relevant documents (e.g., deeds, leases, and contracts of sale), and market realities (such as property availability and economic trends). Attorneys should review the property underlying the transaction to ensure it strictly conforms to the representations made in pertinent agreements and records. When tackling real estate-centered litigation, attorneys should be particularly mindful of judicial leanings, the strength of essential documentary evidence, and the client's ultimate goal at the end of the day. Whereas real estate attorneys generally assume a narrow area of expertise (such as residential landlord/tenant litigation or commercial real estate financing), real estate transactions are the base of real estate litigation. The terms of a lease can make or break a deal and determine who prevails in a resultant litigation. Accordingly, real estate attorneys should encourage clients to keep them "in the loop" at the earliest possible stage. Additionally, real estate attorneys should do their best to stay apprised of pending state legislation, judicial trends, jurisdictional predicates, and city ordinances that stand to affect their client's real estate interests.

Key Takeaways

- Apprise both landowner and tenant clients of the unique features of New York State and New York City real estate laws: taxes; the duty to mitigate; zoning and land use restrictions; rent control and rent stabilization laws; the cooperative structure; and, in some cases, ground leases.
- Warn landlord clients the requirements to end a landlord-tenant relationship are highly specific and require strict compliance, and that tenants are usually protected, even when the landlord asserts a breach of lease to evict the current tenant for any number of legitimate or pretextual reasons.
- When helping a client purchase residential or commercial property, consider any building declarations, by-laws, house rules, and offering plans; board of directors minutes; the building's reserve fund (or lack thereof); property condition disclosures; zoning laws affecting the property; the status of title; and the space itself, as compared with legal documents, records, or other representations.
- Once the parties agree on the price and other conditions, commit all of the pertinent information to writing. A letter of intent agreeing on basic terms can serve as a "placeholder" in the interim of time from when the parties agree to enter into a formal contract and when they actually sign a comprehensive contract.
- Since the parties of a commercial real estate litigation often want to maintain a relationship after the dispute is over, consider litigation as a negotiation tool that is a means to an end, recognizing the client's business strategy has a significant effect on the litigation strategy.

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Acknowledgment: *Special thanks to Windels Marx Associate, Kelly D. Schneid, for her research and drafting of this chapter. Contributions were also made by Christina J. DeLay, Amy Korn, and Robert G. Wilk.*

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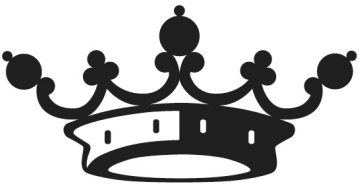

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