
CLIENT ADVISORY

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VENERABLE "RULE AGAINST PERPETUITIES" MUST STILL BE CONSIDERED IN NEGOTIATING LEASES, AGREEMENTS

All law students become familiar with a complex legal doctrine known as the "Rule Against Perpetuities." The rule is intended to prevent unreasonable restraints against the alienation or productive use of real property. It provides that to be valid, any future property interest granted in a transaction must necessarily "vest" or take effect, if at all, within the lifetime of one or more living persons plus 21 years. Where the parties are companies rather than individuals, so there are no "measuring lives," the limitation period is simply 21 years. Any provision of an instrument purporting to grant an interest that may vest beyond that time is invalid. Many lawyers describe the Rule Against Perpetuities as something they are forced to study for the bar exam, but then never think about again. But the rule still has important consequences today, as illustrated by **Bleecker St. Tenants Corp. v. Bleecker Jones LLC**, 65 A.D.3d 240, 882 N.Y.S.2d 42 (1st Dep't 2009).

In this case, the parties entered into a commercial lease providing for an initial term followed by a series of renewal options that, if all were exercised, would last for a total of 104 years. After the initial 14-year lease term had expired, leaving the tenant in possession as a month-to-month tenant, the landlord asked the court to determine that the options violated the Rule Against Perpetuities. The court held that they did, because the options were exercisable for longer than 21 years and "the renewal option clause [gave] the tenant an ability to renew the lease after it already expired." The court added that if not for this problem, it would have upheld the options, especially in the absence of any evidence that the options negatively affected the property's potential sale price.

In invalidating the options, the court noted that a recognized exception to the Rule Against Perpetuities exists for renewal options that are considered "'part of' the lease." To fall within the exception, such options must satisfy the conditions that they "(1) originate in one of the lease provisions, (2) are not exercisable after lease expiration, and (3) are incapable of separation from the lease." A lease renewal provision that satisfies these condition will be upheld, as occurred in **Double C Realty Corp. v. Craps, LLC**, 58 A.D.3d 480, 870 N.Y.S.2d 333 (1st Dep't 2009).

Another New York court recently construed the Rule Against Perpetuities in the context of a condominium transaction. **Rozina v. Casa 74th Development, LLC**, Index No. 100617/09 (Sup. Ct. N.Y. Co. June 2, 2009). The parties entered into an option agreement for the purchase of a condominium unit, requiring the purchasers to close within 30 days after receiving notice from the Sponsor. Because of the downturn in the real estate market, the purchasers did not wish to close. They argued that their agreement was invalid because it failed to specify a deadline for the Sponsor to give notice of a closing, and therefore could have resulted in a transfer more than 21 years later. The court disagreed, finding that the provision was acceptable under the Rule Against Perpetuities statute. It observed that the Offering Plan contained various provisions that "sharply limited" the time during which any transfer of the unit could be delayed. "Therefore, as indicated by the Offering Plan, the vesting of plaintiffs' estate is dependent on contingencies that were intended to occur well within the perpetuities period" and the agreement was enforceable.

UNIT OWNER'S OPTION TO ACQUIRE ANY "CONTIGUOUS" UNIT INCLUDES ONE ON THE FLOOR BELOW, COURT HOLDS

A Condominium's By-Laws provided that upon the sale of any unit in the building, the "immediately contiguous Unit Owners" had the right of first refusal to purchase the unit. The owner of a space in the basement entered into a contract of sale. Was the owner of a first-floor unit entitled to exercise the right of first refusal and acquire the basement space? Yes, answers the court in **Benjamin v. Madison Medical Building Condominium Board of Managers, 2009 WL 3296667, 2009 NY Slip Op. 7339 (App. Div. 1st Dep't Oct. 15, 2009).**

The court first held that the basement space constituted a "unit" for purposes of the By-Law provision. Next, the court held that although located on different floors, the first-floor and basement were "immediately contiguous" "by reason of the common border, namely, the floor of plaintiff's [first floor] unit and the ceiling of the basement." The court also rejected defendants' contention that the meaning of the phrase "immediately contiguous" was unclear, holding that "the term 'immediately contiguous' was plain and unambiguous [so that] extrinsic evidence proffered by defendants could not be considered."

ALLOWING INSURANCE COVERAGE ON PREMISES TO LAPSE HELD TO BE "INCURABLE VIOLATION" OF COMMERCIAL LEASE

Many commercial leases require the tenant to maintain specified types and levels of insurance coverage on the premises. A tenant's allowing this insurance coverage to lapse is an "incurable violation" of the lease that allows the landlord to terminate the lease. **Kyung Sik Kim v. Idylwood, N.Y., LLC, 2009 WL 3349426, 2009 NY Slip Op. 07457 (App. Div. 1st Dep't Oct. 20, 2009).**

In this case, the court found that the tenants "had not previously and continuously maintained insurance coverage as required by their commercial lease." This violation was a material breach of the lease and provided grounds for the landlord to give notice of termination. The tenants' attempt to cure the violation by procuring insurance coverage for the remainder of the lease term was insufficient, because this still would "not protect [the landlord] against the unknown universe of claims arising during the period of no insurance coverage."

COOPERATIVE SHAREHOLDERS WERE ENTITLED TO CONTINUE TO ENCLOSE TERRACE FOR "SUN ROOM," COURT HOLDS

In 1968, the tenant-shareholders of a cooperative unit had "a sun room built on the terrace appurtenant to their penthouse apartment." After more than 35 years, the Board of Directors demanded that the tenant-shareholders remove the sun room. After a trial, the trial court found that the tenant-shareholders were entitled to maintain the sun room, and the appellate court affirmed the decision, for several reasons. First, the court found that "the 'exclusive use' of the roof appurtenant to the penthouse apartment afforded [the tenant-shareholders] under the proprietary lease included the right to enclose the space." Second, "[t]here [was] sufficient evidence to find that the board approved the initial construction of the sun room in 1968 and, in any event, ample evidence that the board knew about the room from the time of its construction and forbore to challenge the legality of the construction for some 35 years." Third, "[t]his evidence of the board's knowing forbearance also supports the court's finding that the board waived any lease requirement of written approval for structural alterations." **Kiam v. Park & 66th Corp., 2009 WL 3126862, 2009 NY Slip Op. 6785 (App. Div. 1st Dep't Oct. 1, 2009).**