nyrej

Top 2020 legal developments affecting NY's CRE industry - by Thomas Kearns

January 19, 2021 - Front Section

2020 will be remembered for COVID-19 and more COVID-19. The pandemic closed offices and retailers for a time and reduced office occupancy dramatically for nine months. It is beyond the scope of this column to cover all the litigation and government actions that arose in the pandemic's wake so I instead focus on a few items that may have lasting impact: Operating covenants/litigation disclosure.

A Delaware court in AB Stable v Maps Hotels ruled in the sale of the Waldorf Astoria and other hotels that the seller failed to comply with a covenant in the sale agreement to continue to operate the hotels in the ordinary course in the face of the pandemic. The clause required the buyer's reasonable consent to change operations, but the seller never asked for consent and took steps that were not mandated by any emergency executive orders or law. The same decision held that the

pandemic was not a material adverse event giving the buyer a right to cancel the deal since the sale agreement defined a material adverse event with a carve-out for “natural disasters or calamities.” The court also excoriated the seller for misleading the buyer about certain litigation in which the seller repeatedly stated the litigation was brought by a 20-year-old taxi driver in California when the seller knew very well that the plaintiff was a well-known, sophisticated adverse party. The court determined that the buyer was entitled to receive its deposit back. The 200 plus page decision is a law school class in itself and worth reading on a cold winter’s day.

Disclosure of ownership of LLCs and corporations. Congress passed the Anti-Money Laundering Act of 2020 under which companies must report ownership of the entity to the Financial Crimes Enforcement Network of the Dept. of the Treasury (FinCEN). Existing companies have two years from enactment (not yet signed into law as of the date I am writing this) and new companies will have to file immediately. Company owners and executives should expect lots of inquiries from their lawyers and accountants to ensure compliance with this law and it will add a significant administrative burden to real estate joint ventures.

City law vitiating guarantees upheld. The City Council passed a law designed to protect individual guarantors from claims by landlords for rent during the pandemic where the tenant’s business was a food or non-essential business that was closed by government action. The law was upheld by the trial court which held that the constitution’s contracts clause does not restrict government actions in the public interest.

Visual Artists Rights Act of 1990 (VARA). I have written often about the 5 Pointz case in Queens in which a trial court granted $6.75 million in damages to street artists against a developer who whitewashed street art that had been installed with the consent of the property owner. The destruction occurred after a restraining notice was rejected by the trial court but without notice to the artists. The Second Circuit rejected the appeal holding that the street art was protected by VARA and, since the destruction was willful, the damages would stand. (Castillo v. G&M Realty, L.P.)

Lease settlement agreements. A common method of settling commercial lease disputes was outlawed by New York’s Court of Appeals in Trustees of Columbia v. D’Agostino Supermarkets when the court held that the typical penalty for defaulting on installment payments, the reimposition of all past due rent, was held to be an unenforceable penalty when damages were a multiple of the agreed settlement amount. The practical effect of the court’s decision is to render unenforceable as a violation of New York public policy a standard protection utilized by landlords to protect against a potential bankruptcy filing by the tenant.

Thomas Kearns is a partner with Olshan Frome Wolosky LLP’s real estate department, New York, N.Y.