



Top 2023 legal developments affecting New York's commercial real estate industry - by Thomas Kearns

January 30, 2024 - Front Section



Thomas Kearns

2023 was a year of dramatically increased interest rate pressure on commercial real estate caused by the Federal Reserve's actions to curb inflation. The rate environment resulted in reduced level of transactions but legislatures and regulators continued to pass laws affecting New York's commercial real estate industry. Here are a few highlights.

1. Federal Corporate Transparency Act. 2023 brought Federal regulations as to the implementation of the recent statute to force most limited liability companies to separately disclose ownership of the LLC in a federal filing. The act is effective as of January 1, 2024 with the different deadlines depending on whether the LLC was formed before or after January 1, 2024. Expect your lawyer to mention this filing and to pay additional fees and suffer through a new set of administrative headaches.

2. New York's Transparency Act. Piggybacking on the Federal act, a similar LLC ownership disclosure regime was passed by New York's legislature. Fortunately, the bill's original requirement that the information be made public was negotiated out of the bill by the governor at the last minute.

3. Piercing the WeWork Veil. In 260-261 Madison Ave LLC v. WeWork 261 Madison LLC, the court permitted the landlord to pursue a claim against the WeWork parent company despite the fact that the parent company was not on the lease and not a guarantor. The decision illustrates that merely creating a stand-alone special purpose entity, without more, may not insulate the parent company from liability. Of course, with WeWork's subsequent bankruptcy, the landlord at 261 Madison may still be out of luck but the decision is a warning to other tenants that liability for lease obligations may ultimately rest with the parent company depending on the facts and the exact wording of the lease and any guaranty.

4. COVID Era Guaranty Law Unconstitutional. During the COVID 19 pandemic the City passed a law rendering lease guarantees for certain kinds of small business retail leases unenforceable. The Second Circuit Court of Appeals found the law unconstitutional under the Commerce Clause which limits impingement on contracts. Among the factors cited were that the law did not restrict its benefits to tenants who where forced to shut down and was not conditioned on need. While not binding on state courts, the decision is persuasive authority.

5. Retainage on Construction Contracts. On November 17, 2023, the General Business Law has been amended to limit retainage for construction contracts for \$150,000 or more to 5% of the contract amount. The amendments also require that the retainage must be released within 30 days of substantial completion. The amendments were effective immediately.

6. Transfers of LLC Interests. In the context of a divorce, the wife was to get a 99% LLC interest under the prenuptial agreement but the LLC agreement provided that the husband was the manager and a transferee would be admitted as a member of the LLC only with the manager's consent. The court in Bich v. Bich had no problem holding that the transfer of the LLC interest in this case was a transfer only of the economic interest and not of any management or voting rights attached to the

interest unless the husband as a manager of the LLC consented. So the holder of a 99% economic interest had no vote or say in the management of the LLC.

7. Are Emojis Binding? While far from earth shattering, I will close with a Canadian 2023 court decision which was fun to read. In a dispute over whether a series of emails created a binding contract, the court held that the use of “thumbs up” in an e-mail sufficient to manifest assent to contract, if that intent can otherwise be shown.

Thomas Kearns is a partner with Olshan Frome Wolosky LLP, Manhattan, N.Y.

New York Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540