NEW YORK COURT OF APPEALS ROUNDUP

RENT ABATEMENT REQUIRES DEMONSTRATED DAMAGES OR NON-TRIVIAL LOSS OF USE

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In *Eastside Exhibition Corp. v. 210 East 86th Street Corp.*, the Court of Appeals interpreted the longstanding "all-or-nothing" rule that a partial eviction from rented space justifies full rent abatement, finding the rule inapplicable in certain circumstances, such as the circumstances of that case. We address below this decision, as well as the Court's decisions in separate appeals interpreting two provisions of the Drug Law Resentencing Act of 2009, a statute enacted to ameliorate some of the effects of the now-repealed "Rockefeller drug laws." Finally, we discuss the Court's decision considering for the first time whether the "scaffold law" applies to a factory worker engaged in cleaning a product in the course of a manufacturing process, and holding that it does not.

No Rent Abatement

The maxim 'de minimis non curat lex' carried the day for a commercial landlord whose tenant sought unsuccessfully to avoid paying any rent under a lease after the landlord, without giving notice to or receiving permission from tenant, entered the premises and installed two cross-bracing beams that occupied only 12 square feet of the 15,000 to 19,000 square foot leasehold. In *Eastside Exhibitions Corp. v. 210 East 86th Street Corp.*, the Court of Appeals, in an opinion for a 6-1 majority by Judge Carmen Beauchamp Ciparick, held that without any effect on the tenants' use and enjoyment of the leasehold or demonstrable damages, the interference by the landlord was too trivial to support a claim of partial eviction and justify total rent abatement to the tenant.

However, both the spirited dissent by Judge Susan Phillips Read and the limiting language of the majority should caution commercial landlords that a tenant who can demonstrate a genuine loss of use and enjoyment of the premises, however

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insignificant, but caused by more than a trivial taking, may face full rent abatement. The majority clearly limits its holding to "the circumstances of this case" and emphatically declares it does not "jettison or overrule" the "very long standing" rule in New York that the remedy for partial eviction is total abatement.

Based on the opinion, it appears that anything beyond a trivial taking will become a sharp question of fact and expert opinion, and that the assertion of the draconian nature or the feudal origin of rent abatement may not carry the day for the landlord. Such arguments can be met by the historic fact that many of the core principles of our current jurisprudence have earlier origins than feudal times.

The underlying facts of the case are not complicated. Eastside was the tenant of 210 East 86th Street Corp. under a long-term lease. In 2002, the landlord, without permission or prior notice, entered the premises and installed two bracing beams. The work resulted in a change in patron flow of one floor of the leasehold and a slight diminution of a waiting area space on another floor. The bracing beams were concededly unaesthetic.

Eastside stopped paying rent and brought an action for abatement and other relief. The Supreme Court granted a TRO to prevent further work and to require the quick completion of the work underway. At a non-jury trial, the parties stipulated as to the 12 square feet taken by the bracing beams and the total leasehold space. The Supreme Court dismissed Eastside's claim and entered judgment for 210 East 86th Corp. for the unpaid rent, holding that the taking of the 12 square feet was de minimis and did not justify full rent abatement.

The Appellate Division modified the judgment, holding that there was no de minimis exception to the general rule that an unauthorized taking constituted an eviction. The court concluded, however, that full rent abatement was inappropriate and sent the case back to the Supreme Court to determine Eastside's actual damages. When Eastside failed to prove damages, the Supreme Court awarded none. The Appellate Division affirmed, and the Court of Appeals granted leave.

It is interesting that the holding appears to be limited to a commercial lease and that the rule with respect to a trivial taking from a residential leaseholder may raise other issues and produce a different result.

Drug Resentencing

As Chief Judge Jonathan Lippman explained in his opinion for the majority in *People v. Sosa*, the purpose of the Drug Law Resentencing Act of 2009 (DLRA), a remedial statute, is "to afford relief to low level, non-violent drug offenders originally sentenced under a

scheme that [the now-repealed Rockefeller drug laws] often mandated 'inordinately harsh punishment.'" The conditions for eligibility to obtain relief under the DLRA were at issue in Sosa and another recent decision of the Court, *People v. Steward*.

Exclusion Offense. At issue in Sosa was the requirement that the applicant for relief not be serving a sentence on a conviction for an "exclusion offense" or have a predicate felony conviction for such an offense. CPL Section 440.46(5) defines an exclusion offense as a "violent felony offense" for which the applicant was convicted "within the preceding ten years, excluding any time during which the offender was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony [i.e., the drug felony for which the applicant seeks sentencing relief]." The case turned on the meaning of "preceding," specifically whether the period should be counted back from the date of the resentencing application or of the conviction resulting in the sentence at issue.

Sosa had been convicted of a violent felony in 1995. He was convicted of the non-violent felonies of criminal possession of a controlled substance in the third and fourth degrees in 2002, and sentenced on those crimes in 2003 to concurrent indeterminate prison terms of 10-20 years in the aggregate. Because the time period between the violent felony and the non-violent felonies was less than 10 years, his application for resentencing on the 2002 conviction for his non-violent possession felonies was filed in late 2009, but "deemed filed" by the Supreme Court in early 2010. It was undisputed that if the 10-year-plus DLRA period looks back from the date of conviction for the non-violent offense to the date of conviction of the violent offense, Sosa would not be eligible for Resentencing Act relief. If the look-back period was measured from the date of his resentencing application to the date of his violent felony conviction, however, Sosa would be eligible to have a court consider reducing the 10-20-year sentence imposed in 2003.

The Court agreed with the conclusion of the First Department below, as well as of all of the other departments of the Appellate Division, that the look-back period should be measured from the date a defendant sought relief from his sentence. The majority in Sosa, although noting the Legislature's purpose in passing the DLRA, relied upon statutory construction and not legislative intent in interpreting the CPL provision. The statute limited the categories of persons who could seek relief, but was not so restrictive as to render ineligible for relief anyone who was convicted of a non-violent drug offense under the Rockefeller drug laws and had also been convicted of a violent felony within a period of 10 years plus the length of his incarceration for that violent felony and/or other offense.

Judge Eugene F. Pigott Jr. dissented, and Judges Susan Phillips Read and Robert S. Smith joined in his opinion. Judge Pigott interpreted the statute's (in our view ambiguous) language and construction, and also considered that the "underlying intent of the DLRA reforms was not, in [his] view, to permit drug offenders with violent histories to reap the benefits of these reforms on a 'rolling' basis by counting the time they are incarcerated on the drug felony offense as part of the 10-year look-back period."

Predicate Felony Conviction. In *People v. Steward*, the Court affirmed the decisions of the Appellate Division, First Department, in two cases concerning the construction of the DLRA's phrase "predicate felony conviction for an exclusion offense." CPL 440.46(5). Such a conviction renders a defendant ineligible for resentencing.

Defendants in both cases admittedly had prior violent felony and non-violent felony convictions. However, in one case the defendant had been arraigned as a predicate felon based on his non-violent felony, and in the other case the defendant had been adjudicated a predicate felon based upon his non-violent felony. In a unanimous decision by Judge Pigott, the Court held that a prior violent felony conviction need not have been adjudicated as a predicate conviction to be considered such for DLRA purposes.

The Steward decision did hold open the possibility that a defendant with a predicate violent felony conviction can, in certain circumstances, have his sentence reconsidered under the DLRA, however. The statute provides that hearings may be held to "determine any controverted issue of fact relevant to the issue of sentencing." CPL 440.46(3). Under this provision, "a defendant has an opportunity to challenge the validity of the predicate felony conviction as part of his resentencing application."

Limit on Labor Law §240(1)

In imposing a limit upon the protection provided to workers by Labor Law §240(1), the Court also acknowledged in Dahar v. Holland Ladder & Manufacturing Co. that, as courts have interpreted it in many cases, the statute gives to certain workers rights "going well beyond the common law." Examples include imposing liability on contractors and owners who had nothing to do with a plaintiff's accident, and excluding as irrelevant consideration of the fault of a plaintiff in cases in which a violation of the statute has been found to exist. Here, however, the Court drew the line.

Plaintiff in Dahar was working on a ladder to clean a wall module that had been manufactured by his employer West Metal Works Inc., a third-party defendant. Defendant Bechtel National Inc. was buying the module from West. The Martin

defendants were West's landlords. In the course of plaintiff cleaning the module, the ladder he was using collapsed and he was injured when he fell to the ground. Plaintiff sued Bechtel and the landlords under Labor Law §240(1), and other defendants on various other theories.

Plaintiff claimed that Bechtel and the landlords were "contractors and owners," but because the Court unanimously held plaintiff was not engaged in activity that §240(1) protects, it never had to reach that issue.

Plaintiff's position for coverage under the statute was described by the Court as a simple one. He claimed that he had been, under the express language of the statute, "cleaning" the module that was a "structure" when the ladder failed to give him "proper protection."

In rejecting plaintiff's assertions, the Court, in an opinion by Judge Robert S. Smith, stated that every case it had decided involving the statutory term "cleaning" (with one exception, the cleaning of a railroad car) involved cleaning windows of a building. The opinion noted that no case had been found in the history of the Court or in that of the Appellate Division, in which the coverage of Labor Law §240(1) had been extended to reach a factory employee engaged in cleaning a product in the course of a manufacturing process.

The Court declined to extend the statute as plaintiff wished as it would take the statute far beyond its intended reach. It therefore affirmed the Appellate Division's dismissal of the complaint.