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Real Property—Leases——Covenants

Peter Todoro

sumed to be eight per cent of the "fair value of the entire property". In order to determine whether a net of eight per cent is being earned, the landlord must serve on his tenant a verified bill of particulars setting forth, *inter alia,* the gross rental received for the preceding year and the expenses incurred for that same year.

In *In Re Trustees of Masonic Hall and Asylum Fund,*[36] the question arose as to whether the court could properly consider savings in expenses accruing before the trial but after the filing of the application or whether the figures of the preceding year were the sole consideration in determining whether a reasonable return was being received. Here, the saving was the result of a conversion to public utility electric current for heating the premises rather than generating their own electricity, as had been done previously.

The Court of Appeals, adopting the reasoning of *Matter of Alibel Corp.,*[37] held that although the fair rental is to be fixed as of the date of the application, the court may properly consider changes in expense or income where they are "fixed in amount and determined as to obligation or liability prior to the filing of the petition" even where their effect would be felt only after the date of the application. As the conversion was conceived and initiated before the filing of the application, it was proper to take the contemplated saving (estimated to be over one hundred thousand dollars annually) into account in determining the net return. The further holding exclusive of changes arising after filing of the application was felt necessary to prevent possible unveiling of complex issues of evaluation at the last moment.

The holding is in line with the general judicial preference for dealing with things as they exist at the time of trial rather than giving a decision on an obsolete set of facts.[38] To have decided otherwise would have given the landlord a greater rate of return than the court had determined to be his due.

Leases—Covenants

Weiss v. Mayflower Doughnut Corp.[39] was an action by a tenant who conducted a drug store and luncheonette business under a lease containing a restrictive covenant. In a previous action by this tenant against his landlord,[40] the Court interpreted the covenant as prohibiting the landlord from

36. 1 N. Y. 2d 616, 136 N. E. 2d 889 (1956).
37. 285 App. Div. 140, 136 N. Y. S. 2d 344 (1st Dep't 1954).
38. *Cf. Doyle v. Chatham & Phenix National Bank,* 219 App. Div. 522, 220 N. Y. Supp. 231 (2d Dep't 1927), construing N. Y. Civ. Prac. Act §245-b.
39. *Weiss v. Mayflower Doughnut Corp.* 1 N. Y. 2d 310, 135 N. E. 2d 208 (1956).
40. *Weiss v. Maidmen,* 308 N. Y. 840, 126 N. E. 2d 178 (1955).

leasing any other part of the building for use as a luncheonette or other similar competing business unless it was operated by the plaintiff. During the course of the first trial, Mayflower leased a portion of the building for use as a restaurant. Mayflower argued that they were planning to open a restaurant, not a luncheonette and secondly that as a result of plaintiff's failure to join them in its previous action against the landlord, they incurred expenses and obligations to the amount of $125,000. The Court of Appeals held that as matter of law the evidence did not warrant the finding that Mayflower's business was to be a restaurant rather than a luncheonette and that this action was also not barred by laches.

Although the judgment in the previous action was not res judicata as against defendant,[41] nevertheless Mayflower was bound by the previous construction because of its admitted notice of the restrictive covenant.[42] The Court said that the issue turned on the similarity of business and their competitiveness. The evidence showed that Mayflower expected the average check to be 50¢, which was comparable to the plaintiff's; that the price of food was approximately the same and that a dishwasher capable of handling 6,000 dishes per hour would be installed to handle 119 guests. Mere elaborate interior decorations, 28 waitresses and Muzak to entertain the guests would not make it a business dissimilar to the plaintiff's.

Essentially, the defense of laches consists of an unreasonable delay by a plaintiff to the prejudice of the defendant.[43] The use clause contained in defendant's lease, that the premises were to be used as a restaurant, was not sufficient to put the plaintiff on notice that the business was to be similar to his. Therefore, plaintiff's failure to join Mayflower in the previous action was not unreasonable. Further, assuming that the delay in instituting the present action was undue, the defense of laches would not deny the plaintiff equitable relief unless the defendant changed its position because of the plaintiff's conduct. But here the defendant had prior notice of the restrictive covenants and, relying on information obtained from the landlord, had accepted a known risk.

Leases—First Option to Purchase

Leases frequently contain an agreement on the part of the lessor giving the lessee an option to purchase the demised premises during or at the expiration of the term. There is a distinction drawn between an absolute option to purchase and a first option to purchase. The latter is either an option con-

41. *East New York and Jamaica R. Co. v. Elmore* 53 N. Y. 624 (1873).
42. *Waldorf-Astoria Segar Co. v. Salomon* 184 N. Y. 584, 77 N. E. 1197 (1906).
43. *Marcus v. Village of Momaroneck,* 283 N. Y. 325, 28 N. E. 2d 856 (1940).