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Real Property—Leases—First Option to Purchase

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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).

ditioned upon the owner's willingness to sell, or a first refusal if he offers to sell the premises to others.[44] In the event the lessor receives a bona fide offer from a third party, he is obligated to offer the lessee the property at the offering price.[45]

The problem confronting the Court in *Cortese v. Connors*[46] involved the interpretation of a first option to purchase in a lease, and whether the lessee by his conduct, had rejected a bona fide offer. The lease granted to the lessee a first option to purchase "under the same terms at which it is *offered for sale.*" (Emphasis added). Before a third party had made an offer, the lessee told the lessor's broker that the listing price was too high. The lessor thereupon made a contract with a third party at a price considerably lower than the listing price, treating the lessee's action as a rejection of his first option to purchase.

The Court held that the lessee could not be treated as having rejected his option until a third party had made a bona fide offer to the lessor. Until such time, the lessee had nothing to reject, and the selling price, regardless of how close it approximated the value placed upon the property by the lessee, could not be a bona fide offer. Under the Court's interpretation, the lessor could sell to a third party only after he had received an offer from such third party and given the lessee his right of first refusal. This interpretation was in line with prior decisions in this area.[47] The Appellate Division interpreted the phrase, "offered for sale", as meaning the most reasonable offer made by the lessor — in other words, a bona fide offer which the lessee could accept or reject as he so desired.[48]

A study of the consequences attending the course adopted by the Appel late Division will reveal the correctness of the position taken by the Court of Appeals. If the offering price of the lessor is to be used to determine what is or is not a bona fide offer, then in most cases the first option to purchase is rendered ineffective, and does not give the lessee the benefit of his bargain. The lessor would have the ability to price the premises out of the purchasing reach of the lessee, receive a refusal from the lessee, and then sell the premises

44. *R. I. Realty v. Heckscher,* 254 N. Y. 121, 172 N. E. 262 (1930); *London v. Joslovitz,* 279 App. Div. 252, 110 N. Y. 2d 56 (3d Dep't 1952).

45. *Jurgensen v. Morris,* 194 App. Div. 92, at 94, 185 N. Y. Supp. 386, at 387 (2d Dep't 1920); *Accord, Gilbert v. Van Kleeck,* 284 App. Div. 611, at 620, 132 N. Y. 2d 580, at 588 (3d Dep't 1954).

46. 1 N. Y. 2d 265, 135 N. E. 2d 28 (1956).

47. *Sargent v. Vought,* 194 App. Div. 807, at 810, 185 N. Y. Supp. 578, at 708 (2d Dep't 1920); *Jurgensen v. Morris,* 194 App. Div. 92, 185 N. Y. Supp. 386 (2d Dep't 1920).

48. *Cortese v. Connors,* 1 A. D. 2d 35, at 40, 147 N. Y. S. 2d 908, at 913 (3d Dep't 1955).

to another. By declaring the necessity of a bona fide offer by a third party and its presentation to the lessee before sale, the Court gives meaning and substance to the agreement between the lessor and lessee, and establishes a fair price which can be presented to the holder of the first option to purchase.

TAXATION

Validity of Tax Deeds

Section 69 of the Tax Law[1] specifies the notice requirements to be given by the tax collector prior to his collection of taxes. The Court in *Werking v. Amity Estates*[2] held that failure by the collector to comply substantially with the provisions of the statute was a jurisdictional defect and rendered a subsequent tax sale void.[3] This was so even though the property owner received actual notice of the tax assessment in compliance with section 69(a),[4] for the actual posting is one of the steps by which jurisdiction is obtained to sell the property.[5]

Section 131 of the Tax Law[6] provides that the conveyance of the tax deed is presumptive evidence that all prior proceedings were regular and in accordance with the law. This presumption merely places the burden on the taxpayer to prove the contrary. Once he introduces evidence of this, the pre-

1. N. Y. TAX LAW §69 Notice by collector; general. Every collector, upon receiving a tax-roll and warrant, shall forthwith cause notice of the reception thereof to be posted in five conspicuous places in the tax district, specifying one or more convenient places in such tax district where he will attend . . . at least three days . . . in each week for thirty days from the date of the notice . . . which days shall be specified in such notice, for the purpose of receiving the taxes assessed upon such roll.

2. 2 N. Y. 2d 43, 137 N. E. 2d 321 (1956).

3. *Olds v. City of Jamestown*, 280 N. Y. 281, 20 N. E. 2d 756 (1939).

4. N. Y. TAX LAW §69(a) Statement of Taxes. The collector shall immediately after the receipt of a tax-roll and warrant mail to each owner of real property included in such tax-roll . . . a statement of the amount of taxes assessed against his property with a notice of the dates and places fixed by him for receiving taxes. . . .

5. *Seafire, Inc. v. Ackerson*, 193 Misc. 965, 76 N. Y. S. 2d 805 (Sup. Ct. 1947), *aff'd.*, 275 App. Div. 717, 87 N. Y. S. 2d 438 (2d Dep't 1949), *aff'd.*, 302 N. Y. 668, 98 N. E. 2d 478 (1951).

6. N. Y. TAX LAW §131 Deed and application therefor. The owner of any certificate of sale of land sold by the comptroller or the department of taxation and finance for taxes . . . and not redeemed . . . must make application in writing to the department of taxation and finance for a conveyance of the land . . . within four years after the expiration of one year from the last day of the sale . . . . Every such conveyance shall be presumptive evidence that the sale and all proceedings prior thereto, from and including the assessment of lands sold . . . were regular and in accordance with all the provisions of law relating thereto. After two years from the date of record of such conveyance such presumption shall be conclusive.