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Real Property—Percentage-of-Sales Lease

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ably capable of two constructions, the construction which limits the restriction, rather than the one which extends it, should be adopted.[19]

In construing the restriction, the Court was influenced by the fact that plaintiff's interpretation would result in over fifty-five per cent of the total area of the lot being unavailable for building, while defendant's interpretation would render only twenty-two per cent of the lot unusable. Plaintiff's contention that the front of the lot could be determined as the side toward which the building faced was rejected, apparently because "the front of a building is not determined by the position in which that building is erected on the lot."[20]

After finding that the defendant had not violated the setback restriction, as correctly construed, the Court supplied a second ground for reversal;[21] the parties had executed a bilateral release.[22] There would seem to be a construction problem here also, but if so it was ignored. The Court seems to have gone a little out of its way in this case to express its views on the narrow constitution of restrictions, perhaps for the benefit of the lower courts, which had not hesitated to grant the plaintiff his injunction.

Percentage-of-Sales Lease

In every contract there exists an implied covenant of good faith and fair dealing.[23] In *Mutual Life Insurance Co. of New York v. Tailored Woman, Inc.*,[24] defendant leased the first three floors of a building on a percentage of gross sales basis and later leased the fifth floor on a straight rental basis. The tenant moved its fur department from the lower floors to the fifth floor. The Court dejected the landlord's claim that this breached implied covenants against diversion of sales, and decided that all that was necessary was for the tenant to conduct a women's clothing store of the same general character as when it entered the lease. The landlord also claimed that the percentage rental was to be paid on sales made "on, in and from the demised premises," and since customers entered through the lower floors these sales were "from" the lower floors. The Court held that sales made to customers sent to the fifth floor by salespeople on the lower floors

19. *Schoonmaker v. Heckscher*, 171 App. Div. 148, 157 N. Y. Supp. 75 (1st Dep't), *aff'd* 218 N. Y. 722, 113 N. E. 1066 (1916).

20. 307 N. Y. 575 582, 122 N. E. 2d 918, 922 (1954). See *Rollins v. Armstrong*, 251 N. Y. 349, 167 N. E. 466 (1929).

21. A third ground for denial of injunctive relief was the failure to prove damages; the uncontradicted expert testimony was to the effect that the house as built actually enhanced the value of neighboring property.

22. "And whereas the parties now desire to release each other from any *future* liability arising from said agreement . . . the parties . . . hereby release each other . . . from all *future* liability . . ." (italics supplied.)

23. *Kirke La Shelle Co. v. Armstrong Co.*, 263 N. Y. 79, 188 N. E. 163 (1933).

24. 309 N. Y. 248, 128 N. E. 2d 401 (1955).

were sales "from" the main store and subject to percentage rent. However, some fur sales were not made "from" the main store, and these were not subject to percentage rent.

The dissent felt that removal of the fur department was a breach of faith even though the lease did not specifically require operation of a fur department. "A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed."[25]

Where a store was rented on a percentage of gross sales basis, the lessee was held liable for the percentage on total gross sales even though he moved two departments into an adjoining building.[26] It has been held that a tenant is not justified in removing its most lucrative departments to other premises in an effort to diminish rent which was based on percentage of gross sales.[27] In these cases, however, there appeared to be an intent to reduce the rent coupled with an actual reduction. In the instant case the tenant moved because it was necessary to expand, and in the lower court's decision[28] it was pointed out that sales actually increased, resulting in higher rent to the landlord.

Distinguishing between sales made as a result of referrals from salespeople on lower floors and other sales is more difficult to rationalize. The fur department was advertised downstairs, customers had to board the elevators on the lower floors, and furs were stored and prepared there. It would seem that these sales, also, were "from" the main store.

Reopening Tax Foreclosure Defaults

City of New York v. Nelson [29] presented the problem of whether relief may be afforded a party under section 108 of the Civil Practice Act[30] from a default judgment in an in rem tax foreclosure action obtained pursuant to the provisions of the Administrative Code of the City of New York.[31] The Court held that section 108 provided for no such relief, even though the city acquired properties assessed at $52,000 for a total tax arrearage of $887, and though it was no fault of the owner that the tax was unpaid. The Court felt, "the power to afford relief

25. *Wood v. Lucy, Lady Duff-Gordan,* 222 N. Y. 88, 91, 118 N. E. 214 (1917).
26. *Cissna Loan Co. v. Baron,* 149 Wash. 386, 270 Pac. 1022 (1928).
27. *Dunham & Co. v. 26 East State Street Realty Co.,* 134 N. J. Eq. 237, 35 A. 2d 40 (1943).
28. 123 N. Y. S. 2d 349 (1953).
29. 309 N. Y. 94, 127 N. E. 2d 827 (1955).
30. N. Y. CIV. PRAC. ACT § 108, allows a court to relieve a party from a judgment taken against him "through his mistake, inadvertence, surprise, or excusable neglect."
31. Tit. D, c. 17.