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Lease Required Terrorism Insurance, Ruling Says

BY JOEL STASHENKO

ALBANY—The tenant of a commercial building in Manhattan violated its lease by acquiring insurance that provided coverage for damage due to many typical acts of terrorists but which expressly carried a binder stating that "terrorism is excluded," a unanimous Court of Appeals decided yesterday.

Also yesterday, in separate cases the Court removed an administrative hurdle for a couple who wants to clear their Manhattan apartment building of all rent-stabilized tenants and convert it into a private residence and decided that New York City, not the owners of property adjacent to its sidewalks, is liable for maintaining the sidewalk wells in which trees are embedded.

The insurance case, *TAG 380 LLC v. ComMet 380 Inc.*, 79, was a direct result of the Sept. 11, 2001, terror attacks on the World Trade Center and of subsequent concerns by commercial property owners that occupants carry proper insurance against potential future attacks.

TAG 380, a company managed by real estate developer Sheldon H. Solow, has a lease with the owner of a Manhattan commercial building at 380 Madison Ave. The lease requires TAG 380 to carry full insurance against damage caused by, among other things, windstorm, hail, smoke, riot, "civil commotion" and contact with the building by an airplane. The 25-year lease, which is set to expire in 2014, does not specifically require coverage for acts of terrorism.

TAG 380 renewed its insurance policy in 2002, during a period in which insurers began to deny coverage for damage resulting from terrorist acts. TAG 380's policy explicitly said, "TERRORISM IS EXCLUDED."

A few months later, building owner ComMet 380 Inc. informed TAG 380 it was in default on its lease because of insufficient insurance coverage. TAG 380 sued.

"ComMet contends that 'terrorism' includes actions taken by individuals who may use any of the enumerated perils to cause damage to the building," Judge Carmen Beauchamp Ciparick wrote yesterday for the Court. "TAG, on the other hand, contends that the insurance it procured provided coverage for any of the named perils and thus it met its obligations under the lease, even though its policy excluded 'terrorism.' TAG is mistaken."


Judge Ciparick

The tenant's policy violates Insurance Law §3404, which codified New York's standard fire insurance policy against all "direct loss" caused by fire and lightning and set a minimum level of coverage, the Court concluded. By providing coverage for many kinds of damage caused by terrorists, but by specifically excluding coverage for terrorism, other sorts of mayhem will not be insured against and the minimum coverage requirements of Insurance Law §3404 are being violated, the Court decided.

The term terrorism "is not limited to a specific cause of harm (e.g., a fire, explosion, collision with an aircraft), but rather it can also describe individuals, with a common purpose, who may potentially utilize any of the lease's named perils to cause damage to the building," Judge Ciparick wrote. "Thus, by purchasing a policy that excludes from coverage all methods potentially used by terrorists, including the named perils in the lease, TAG breached its lease."

The Court granted ComMet's request for damages for the cost of additional insurance coverage it acquired because it believed TAG 380 was underinsured starting in 2002, plus attorney's fees.

Yesterday's ruling reversed a 5-0 determination by an Appellate Division, First Department, panel (NYLJ, Feb. 15, 2007). In *Tag 380 LLC v. ComMet 380, Inc.*, 40 AD3d 1 (2007), the panel held that because a policy covered some terrorist acts, it should not be construed as covering all terrorist acts. The judges concluded that TAG 380 did not have a duty to maintain terrorism insurance on the Madison Avenue building.

The Court yesterday reinstated the decision of Manhattan Supreme Court Justice Marcy S. Friedman.

Bruce G. Paulsen of Seward & Kissel, attorney for ComMet, called yesterday's decision a "great" one.

"It clarifies the Insurance Law, it defines terrorist acts and it makes clear that the Courts' prior precedents, as well as the New York Insurance Law, mandated that the coverage required in our lease does not exclude terrorism," Mr. Paulsen said in an interview.

Mr. Paulsen said New York's standard fire insurance policy is used widely throughout the country. Yesterday's decision holds that "any such exclusion [of terrorist acts] would be violative of New York public policy, as well as the Insurance Law," according to Mr. Paulsen.

In 2002, subsequent to TAG 380's purchase of its disputed policy, the Insurance Department issued a circular letter to insurers in which it ruled that terrorism exclusions are against the public policy of New York and barred under the state's standard fire insurance policy.

Warren A. Estis of Rosenberg & Estis represented TAG 380.

"We are extremely disappointed that the Court of Appeals did not follow the tenant's position or the Appellate Division's ruling concerning the interpretation of the language of the lease," Mr. Estis said.

He estimated that TAG 380 faces about $130,000 for the cost of additional insurance ComMet purchased for the building starting in 2002. But Mr. Estis said the cost of legal fees the Court ruled TAG 380 must pay are likely to be "significantly" higher than the insurance costs.

Housing Conversion

In *Pultz v. Economakis*, 80, the Court unanimously decided that the owner of residential buildings need not receive approval from the Division of Housing and Community Renewal to convert rent-stabilized apartments to use as the owner's residence.

NYLJ PHOTO/RICK KOPSTEIN

47 East 3rd St. was at issue in 'Pultz v. Economakis.'

Writing for the Court, Judge Theodore T. Jones Jr. held that 9 NYCRR §2524.4(a) provides for owner occupancy of rent-stabilized units in circumstances like those under which Alistair and Catherine Economakis want to evict all 15 of the tenants in a five-story tenement they own at 47 East 3rd St. in the East Village.

The tenants contended that a related provision in the Rent Stabilization Code governing the "market withdrawal" of housing requires that in instances where multiple rent-stabilized units are being eliminated from the housing market, the Division of Housing and Community Renewal must give its approval.

"Of course the Legislature intended to make more rental housing available, but it also intended to allow owners to live in their own buildings if they choose to do so," Judge Jones wrote.

The Court stressed that the couple must establish in a holdover proceeding in Civil Court their "good faith" attempt to recover the units in their building for use as Mr. Economakis' primary residence.

The decision affirmed a unanimous ruling by the First Department, in *Pultz v. Economakis*, 40 AD3d 24 (2007) (NYLJ, Feb. 16, 2007).

Among the plans the couple have for their building is a gym, a playroom, a library, five bedrooms and six baths.

Jeffrey Turkel of Rosenberg & Estis argued for the Economakises.

Stephen Dobkin of Collins, Dobkin & Miller represented the tenants.

Tree Well Liability

The judges unanimously concluded in *Vucetovic v. Epsom Downs, Inc.*, 81, that New York City is still responsible for maintaining the wells in sidewalks containing trees, despite a 2003 city law absolving the city of responsibility in most cases for maintaining the sidewalks.

The law, Administrative Code §7-210, was approved as a way of shifting liability for sidewalk accident claims to adjacent private property owners who failed to maintain sidewalks in a "reasonably safe condition." The owners of one-, two- and three-family residences are exempt from the requirement.

The Court called the tree well issue a "close question," but said it agreed with the lower courts who found that Administrative Code §7-210 is silent about tree wells that dot the 12,000 miles of city sidewalk.

"Given the statutory silence and the absence of any discussion of tree wells in the legislative history, it seems evident that the City Council did not consider the issue of tree well liability when it drafted section 7-210," Judge Victoria A. Graffeo wrote for the Court. "If the City Council desired to shift liability for accidents involving tree wells exclusively to abutting landowners in derogation of the common law, it needed to use specific and clear language to accomplish this goal."

NYLJ PHOTO/RICK KOPSTEIN

A city tree well

The decision dismissed a complaint by Dzafer Vucetovic and his wife for injuries he suffered when he tripped on the cobblestones around a tree well on East 58th Street in Manhattan between Second and Third avenues. He had attempted to sue Epsom Downs, Inc., the owner of a commercial and residential property adjacent to the sidewalk.

Yesterday's ruling upheld a 3-2 determination by the First Department, in *Vucetovic v. Epsom Downs, Inc.*, 45 Ad3d 28 (2007) (NYLJ, Sept. 10, 2007).

New York City filed an amicus curiae brief before the Court of Appeals, arguing that Epsom Downs should be found liable for maintaining the tree wells.

Alexander J. Wulwick represented the Vucetovics.

Timothy J. Dunn III of Rebore, Thorpe & Pisarello defended Epsom Downs.

Conviction Reversed

In *People v. Johnson*, 93, the Court unanimously reversed a finding by the First Department that upheld defendant Fatin Johnson's depraved indifference murder and weapons possession conviction for killing his brother Amir on a Manhattan street in 1998.

In a memorandum decision, the Court ruled that a First Department panel's ruling in *People v. Johnson*, 43 AD3d 288 (2007), came before the Court of Appeals' decision in *People v. Danielson*, 9 NY3d 342 (2007). In *Danielson*, the Court ruled that Appellate Divisions' weight-of-the-evidence tests require review of the elements of the crime for which defendants have been convicted (NYLJ, Dec. 14, 2007).

In yesterday's case, the First Department panel failed to attest to the performance of that review, the Court of Appeals held.

"By having chosen to manifest its weight of the evidence review power in a writing, the Appellate Division does not say that it assessed the evidence in light of the elements of the crime as charged to the jury, and the opinion does not otherwise offer confirmation that, in fact, it did," the Court determined. "Accordingly…we remit to the Appellate Division so that it may make such an assessment."

Assistant Manhattan District Attorney Susan Gliner argued for the prosecution.

Laura Burde of the Center for Appellate Litigation represented Mr. Johnson, who is serving a 25-year-to-life sentence in state prison.

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