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The Docket: Is A 'Real Covenant' Just A Contract?

January 11, 2018

Lance Pomerantz, a New York sole practitioner who provides expert testimony, litigation consulting and strategic advice in land title disputes, reviews a recent New York case that asks if a recorded covenant that runs with the land can be "abandoned" in the same way as a contract provision. He can be reached at lance@landtitlelaw.com.

Citation: *New York City Transit Authority. v. 4761 Broadway Associates, LLC*, 2017 NY Slip Op 32718 (Supreme Court, New York County, Dec. 21, 2017).

Facts: In 1926, the City of New York entered into an agreement with the then-owner of the premises located at 4761-79 Broadway in which both parties agreed to have entrances to the neighborhood subway stop located within the building rather than on the sidewalk. The parties to the present-day dispute are the successors in interest to the original 1926 parties.

The recorded agreement required the owner to build two entrances and two stairways and provided that the "Owner at its own cost and expense, ... shall keep all parts of the [entrances and stairs] at all times free from obstructions and in thorough order and repair and in a thoroughly clean, dry, safe and suitable condition for the use of [subway] passengers." The agreement further provided that "[a]ll grants, covenants and agreements herein made by the Owner shall bind and enure to the benefit of the its representatives, successors and assigns ... and shall be real covenants running with the land"

4761 Broadway Associates LLC acquired the building in 1991 and allegedly failed to clean, maintain or repair the subway station, resulting in several personal injury suits against the Transit Authority. In 2008, the Authority sought indemnity from the LLC (pursuant to the 1926 agreement) in one such suit, but the case settled. The Transit Authority eventually repaired the staircases and tried to bill the LLC for the work, leading to the present lawsuit.

The Transit Authority moved for summary judgment on its cause of action for breach of the covenant to clean, maintain and repair and also sought a declaration the LLC is obligated to abide by the covenant going forward.

Holding: Supreme Court (the trial court in New York) determined the covenant ran with the land, but denied summary judgment. The 2008 indemnity case opinion stated "[p]ursuant to the [1926] agreement, 4761 Broadway may have a *contractual* duty to indemnify the Transit Authority....

Further, ... a question of fact exists as to whether the Transit Authority abandoned the agreement” [emphasis supplied].

The key question for the court, therefore, was whether abandonment or waiver can be raised as a defense to a purported breach of a recorded covenant that runs with the land. The court also found the Transit Authority’s argument that abandonment (as the concept is applied in contract law) does not apply to covenants that run with the land failed to sufficiently distinguish the 2008 ruling.

Relevance to the Title Industry: It should be borne in mind this ruling is a trial court denial of summary judgment, but it poses a tantalizing question. Parsing real covenants into contract rights capable of abandonment or waiver and property rights incapable of abandonment or waiver, can present headaches to underwriting counsel asked to omit record exceptions on this basis, as well as claims counsel who can find themselves defending “contract claims,” despite a clear exception in the policy.

Read the full opinion **here**.

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