About the Firm

Founded in 1968, Ruskin Moscou Faltischek P.C. has emerged as Long Island's preeminent law firm. As specialized as we are diverse, we have built cornerstone groups in all of the major practice areas of law, and service a diverse and sophisticated clientele. With more than 60 attorneys, superior knowledge of the law, polished business acumen and proven credentials, Ruskin Moscou Faltischek has earned a reputation for excellence and success. It is this ongoing achievement that makes us an acknowledged leader among our peers and the preferred choice among business leaders.

The strength of Ruskin Moscou Faltischek's resources greatly enhances what we can accomplish for our clients – to not only solve problems, but to create opportunities. We take pride in going beyond what is expected from most law firms. The invaluable contacts and relationships we have nurtured in the business community and our multidisciplinary approach heighten our value-added services.

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action seeking a declaration that the borrower was not obligated to maintain terrorism insurance coverage on the property and that it had no obligation to pay the $2.1 million premium.

The court found that, as a matter of law, the borrower is required to maintain terrorism insurance in the amount of $500 million and that the lender had the right under the mortgage to force-place terrorism insurance coverage up to $500 million. Although "all risk" is not defined in the mortgage, New York courts have consistently held that "all risk" insurance is insurance covering damage resulting from all risks other than those specifically excluded from coverage, *i.e.*, if a risk is not specifically excluded, it is deemed covered. At the time the mortgage was executed, New York courts held that "all risk" policies covered terrorism because it was not specifically excluded from coverage. Because the mortgage requires insurance against "any peril now or hereafter included within the clarification of 'all risk,'" the borrower is required to maintain terrorism insurance coverage, even if subsequent to execution of the mortgage, terrorism coverage was excluded from coverage under "all risk," whereas it was previously not excluded from coverage.

In addition, the court found that the borrower is also required to maintain terrorism coverage up to $500 million under the "other insurance" provision of the mortgage. The Lender's request for additional terrorism insurance was not unreasonable since it had a sufficient basis to require the coverage.

This case demonstrates that the unambiguous insurance provisions of a mortgage will be given their literal meaning by the courts even if at great cost to the mortgagor. Borrower's counsel must review these provisions carefully to protect clients from possible exorbitant premiums.

RMF
RUSKINMOSCOUFALTISCHEK P.C.
Smart Counsel. Straight Talk.
East Tower, 15th Floor
1425 EAB Plaza, Uniondale, NY 11556-1425
New York City ▲ Uniondale ▲ Hauppauge
516.663.6600 ▲ www.rmfpc.com

Department Co-Chairs
Benjamin Weinstock
Eric C. Rubenstein

Conveyancing/Leasing/Lending
Benjamin Weinstock
Eric C. Rubenstein
Patricia M. Schaubeck
David P. Leno

Zoning/Development
Edward A. Ambrosino
David P. Leno

Economic/Industrial Development
Edward A. Ambrosino
Patricia M. Schaubeck

Construction
Michael L. Faltischek
Joseph R. Harbeson

Seniors' Housing
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Real Estate Litigation and Arbitrations
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Foreclosure
Adam L. Browser

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Eric C. Rubenstein

Benjamin Weinstock

Message from the Co-Chairs

In this issue, we address topical subjects of critical interest to the Real Estate industry. Recent decisions affect, in a direct economic way, the business of owners, tenants, borrowers, lenders, brokers and others who make their living in the real estate arena. The lesson learned from these cases, and other situations we encounter on a daily basis, is the absolute necessity for careful document drafting to protect clients' interests. Quality control is a hallmark of RMF's Real Estate Department. Please contact either of us with any matters for which we may be of service.

Inside Update

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Terrorism Insurance Required By Court

by Patricia Schaubeck, Esq., *Editor*

Patricia Schaubeck, Esq.

In a recent decision with far-reaching consequences, the Appellate Division, First Department has interpreted a mortgage to require that the borrower obtain terrorism insurance as part of its "all risk" insurance policy. In addition, the court held that the lender is permitted, pursuant to the terms of the mortgage, to force-place such coverage upon the borrower's failure to do the same, as in *BFP 245 Park Co. LLC v. GMAC Commercial Mortgage Corporation*, 12 A.D.3d 330, 786 N.Y.S.2d 425 (1st Dept. 2004). Here are the details:

On February 2, 2001, the borrower borrowed $500 million from Chase Manhattan Bank secured by, among other things, a mortgage encumbering 245 Park Avenue, New York, New York. Chase subsequently sold $500 million worth of mortgage certificates to various investors. GMAC Commercial Mortgage Corporation was the servicer of the loan for the investors. The mortgage requires that the borrower maintain insurance "against any peril now or hereafter included within the clarification "all risk" or "special perils"… and such other insurance and in such amounts as lender from time to time may reasonably request against such other insurable hazards which at the time are commonly insured against for other first class properties located in the Borough of Manhattan and comparable to the Property." The mortgage also states that if the required insurance is at any time not in full force and effect, the lender has the right, among other things, to purchase the insurance and that borrower will pay all expenses in connection therewith.

At or after the time the mortgage became effective, the property became insured under an "all risk" blanket policy in an amount of over $6 billion, with coverage expiring on October 31, 2001. Terrorism insurance was not specifically excluded from coverage. Prior to the expiration of this policy, the borrower renewed its insurance coverage under a $1 billion "all risk" blanket policy, which contained a $1 million sub-limit for losses caused by, or resulting from, terrorist acts. Lender claimed that the renewal policy failed to meet the insurance requirements of the mortgage, *to wit*, the coverage for terrorist acts was not in an amount at least equal to the unpaid principal balance of the loan. The borrower subsequently informed the lender that it purchased a blanket terrorism policy, including the property, for up to $200 million of terrorism coverage for a premium of $3.2 million.

After the bond rating agencies informed the lender that they would need a total of $350 million of terrorism coverage in order to avoid a downgrade, the lender force-placed $150 million worth of additional terrorism coverage for a premium of $2.1 million and demanded that the borrower pay the lender the premium. Borrower then brought an

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Patricia Schaubeck, Esq. is the editor of this newsletter and an associate in the Real Estate Department at Ruskin Moscou Faltischek, P.C. She can be reached at 516-663-6506 or pschaubeck@rmfpc.com.

Private Interests Benefit From NY Zoning Decision

by David P. Leno, Esq.

David P. Leno, Esq

While many landowners are mulling the decision of the United States Supreme Court in *Kelo v. City of New London* confirming the government's ability to condemn property for use by private interests, a recent New York zoning case also deals with the ability of private industry to enjoy privileges traditionally reserved for public entities. Four months prior to the Kelo decision, the Court of Appeals dealt with a public benefit/private industry balancing test in the *Matter of Crown Communication New York v. Department of Transportation* (4 N.Y.3d 159 (2005)).

In the Crown case, the New York State Police and other state agencies (including the New York State Department of Transportation) contracted with Crown, a private telecommunications company, allowing the company to construct and operate cellular phone towers on state-owned rights of way. Crown planned to construct two towers along the Hutchinson River Parkway in the City of New Rochelle. While Crown presented the construction project to the City of New Rochelle and the public for their review, Crown did not participate in any formal local zoning process. The city did not object to any portion of the proposed construction and benefited from Crown's offer to provide free space at the facilities for the public safety agencies of the city. The DOT served as lead agency under the State Environmental Quality Review Act and issued a negative declaration for the project, citing that the construction of the towers would not present any significant adverse environmental impact. However, once construction of the towers began and Crown entered into several contracts to provide services from the proposed towers, New Rochelle issued a stop work order claiming that the project was subject to local zoning approval and required a special use permit. Crown commenced an action seeking to prevent the city from enforcing its zoning regulations under the premise that Crown is exempt from local zoning because the construction is taking place on public (government) land.

The lower court originally held that the construction of the towers on public land, regardless of whether the construction was performed for the benefit of a private industry, was immune from local zoning. The court stated the "balancing of public interests" mandates that the state's interest outweighed the city's interest. However, the Supreme Court modified its original order and found conversely that "private telecommunications providers licensed to install their equipment on the towers were subject to local zoning regulations." Crown appealed the decision.

The Appellate Division modified the lower court and applied a true balancing test to determine the merits of the case. The court held that "the telecommunications companies are not precluded from enjoying the state's immunity (from local zoning regulations) simply because they are private entities or because collocating on the DOT's towers will advance their financial interests." The decision confirms that even if private entities financially benefit from the "public" status of the property, it does not necessarily mean that the project does not benefit the public. The Court concluded that "it is not the private status of [Crown], but rather the public nature of the activity sought to be regulated by the local zoning authority that is determinative in this case."

The 'balancing test of public interests' was first applied by the Court of Appeals in the *Matter of County of Monroe* (72 N.Y.2d 338). In Monroe, the court needed to determine whether the expansion of a county-owned airport was subject to the zoning regulations of the city where the expansion would take place. The court, in estopping the city from enforcing its zoning regulations, stated that a number of factors need to be weighed in order to make the determination of the public interest, including the nature and scope of the instrumentality seeking immunity, the extent of the public interest to be served and the effect local land use regulation would have upon the enterprise concerned.

In applying the Monroe decision to the Crown case, the court noted that the public benefits clearly outweigh the potential effect on the land use regulation of the city. The communications towers will benefit the state by furthering the construction of a statewide wireless network that will improve communications between government entities across the state in the event of emergencies. The towers will also assist local police by improving communication capabilities. Finally, the tower will assist in providing up-to-the-minute data about the flow of traffic and weather conditions for the Intelligent Transportation System of the DOT. Because of the volume of public benefits derived from allowing a private contractor to enjoy certain immunities typically reserved for government entities, the balancing test leaned in favor of Crown.

The Crown decision will provide a road map for future joint ventures between government and private industry. As long as the public benefit will outweigh any detriment to local zoning regulation, private industry will be able to benefit, financially or otherwise, from privileges and immunities pertaining to public lands.

David P. Leno is an associate in the Real Estate Department at Ruskin Moscou Faltischek P.C. He can be reached at 516-663-6544 or dleno@rmfpc.com.

RUSKIN MOSCOU FALTISCHEK, P.C. ▼ REAL ESTATE LAW UPDATE

Broker Commission Due Without Written Agreement

by Patricia Schaubeck, Esq.

In *Eastern Consolidated Properties, Inc. v. Lucas,* 6 Misc.3d 1036 (Sup. Ct., New York County 2004), the Supreme Court, New York County upheld the right of a broker to recover its commission from the seller of a property upon the broker's procurement of a ready, willing and able buyer. Although the seller and broker did not have a written brokerage agreement, the court found an implied contract of employment between the parties entitling the broker to payment of its commission.

The subject property is located at 981 Second Avenue, New York, New York and is owned by three trusts comprising the Phyllis Lucas Trust and by Peter Lucas, individually. The trustees of the Trust are Peter, Robert and Lucille Lucas and S.I. Bank & Trust. Catherine Paulo, an attorney, vice president and senior trust officer of S.I. Bank, was in charge of the sale of the property.

Ety Lee is a licensed real estate salesperson associated with the plaintiff. In September 1999, Lee placed an unsolicited call to Robert Lucas inquiring if there was an interest in selling the property. Robert Lucas confirmed an interest in selling the property and directed Lee to discuss the matter with Paulo. Lee contacted Paulo and information concerning the plaintiff and the property was exchanged. Lee then made two inspections of the property with Peter Lucas – one by herself and another with one of her clients, Michael Lavian. By this time, Lee was informed that three trusts owned the property, although Lee was not advised as to the number of trustees involved and was specifically told that Paulo was in charge of the sale. Lee was never told that any further approvals were needed on the sellers' side to finalize the sale.

"Generally, when there are multiple owners of a property, a broker is owed a commission when he is advised that all of the co-owners will join in the sale or the broker is unaware that there are co-owners."

Lee made an offer of $1.6 million on behalf of Lavian for the property, to which Paulo responded that an offer from another potential investor for $1.9 million was forthcoming. Lee than revised her offer to a price of $1.9 million, plus the amount of plaintiff's commission of 5%.

After Paulo discussed the revised offer with Peter Lucas, Paulo confirmed with Lee that they "have a deal" and the property was off the market. Lee then prepared a deal memorandum indicating the agreed-upon terms. Lee also submitted Lavian's financial data to Paulo, as requested by Paulo.

Upon instruction by Paulo, the sellers' attorney drafted a contract of sale. Signing of the contract was scheduled for October 22, 1999, but on that day Peter Lucas informed Lee that the deal was off because of a higher offer. In November 1999, Lee sent an invoice to Paulo for $90,000. When payment was not made, plaintiff instituted this breach of contract action.

The court held that the parties had an agreement for the payment of plaintiff's services. Lee produced a ready, willing and able buyer on the sellers' terms and sellers were responsible for the failure of the sale to be completed. Thus, plaintiff earned the commission and defendants are obligated to pay.

It is well settled that a real estate brokerage agreement need not be in writing. An implied agreement may be demonstrated by the acceptance of the efforts of the broker. In this case, the court found ample evidence by the actions of the parties that an implied contract of employment existed between plaintiff and Peter Lucas, Robert Lucas and S.I. Bank, for example, Paulo's statement that "they have a deal," distribution of deal memorandum that was not objected to, Lee's performance of customary brokerage services, etc. The court then found that Lee procured a buyer ready, willing and able to purchase the property on the terms agreed to by the sellers.

Generally, when there are multiple owners of a property, a broker is owed a commission when he is advised that all of the co-owners will join in the sale or the broker is unaware that there are co-owners. In this case, Lee was informed of the additional owners, but was specifically told that Paulo was in charge of the sale of the property and Lee was given no indication that other trustees needed to approve the sale or that they, in fact, had not approved the sale. Therefore, each of Robert Lucas, Peter Lucas and S.I. Bank is liable for plaintiff's commission.

This case clarifies the importance of a written brokerage agreement. Sellers and brokers should not proceed without a written agreement specifying that an agreement exists and specifying when the broker earns the commission.