Real Estate Trends

REALTY LAW DIGEST

By
Scott E.
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Condemnation—Value of Property Must Be Determined as of the Vesting Date Regardless of Effect of COVID-19 Pandemic—Owners Argued That Valuing the Property at the Time When the Pandemic "Lowered the Value of Real Estate in New York City Unjustly Permits Amtrak To Lock In a Discount to the Value of the Property Based On the COVID-19 Pandemic at the Property Owner's Expense"—Court Acknowledged That the Pandemic "Was, In a Lay Sense, an Exceptional Circumstance In the Life of (NYC) and (NYS), the United States and the World. But It Was Not, In a Legal Sense, an 'Exceptional Circumstance' Relative To Determining the Market Value of…Property in (NYC)"—Market Experienced "Shocks" But There "Was a Free Market for Real Estate" In NYC On the Vesting Date—Court Distinguished Great Depression Cases

The plaintiff (Amtrak) acquired property pursuant to its powers of eminent domain pursuant to 49 U.S.C. §24311(a)(1).

The salient issue was "whether the calculation of just compensation should consider the effect of the COVID-19 pandemic on the New York real estate market as of the vesting date."

Amtrak contended that the court should "restrict its analysis to the market value on the vesting date." The property owner (owner) argued that "just compensation requires valuing the property excluding the effect of the pandemic on market value…."

The court explained that "[i]rrelevant evidence is not admissible…. Even if evidence is relevant, the court may exclude it under Federal Rule of Evidence 403, 'if its probative value is substantially outweighed by' the risk that it will confuse the issues, cause undue delay, or waste time."

The court stated that since both federal and state law require courts to determine the amount of just compensation based on the property's "market value on the vesting date, evidence of its value on any other date is irrelevant, and any minimal relevance is substantially outweighed by the risk of wasting time and delay."

The court explained that the U.S. Supreme Court "has repeatedly held that just compensation normally is to be measured by the market value of the property at the time of the » Page 8

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FINANCING

A Potential Enforcement Trap For Mortgage Lenders

BY JEFFREY B. STEINER, SCOTT A. WEINBERG AND JOEL C. HAIMS

Mortgage lenders have many things to worry about when a loan goes into default and they seek to enforce their remedies, whether by foreclosing a mortgage or suing on various guarantees. One thing which may not cross their minds, but can cause a delay in enforcement, is whether or not their lending entity is required to be authorized to do business in the State of New York.

As a matter of practice, many mortgage lenders set up a Delaware entity (usually a limited liability company) for their loan origination platform; some lenders even use a new single-purpose entity (SPE) for each loan. It is unclear how many of these lenders qualify such entities in New York State, not realizing that such failure may negatively impact a future enforcement action.

New York Business Corporation Law ('N.Y. BCL') §1312(a) provides that "[a] foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees and taxes imposed under the tax law or any related statute…"

Similarly, New York Limited Liability Company Law ('N.Y. LLC Law') §808(a) precludes a foreign LLC "doing business" in this state from maintaining an action in New York without first having received a certificate of authority.

If the lending entity seeking to enforce remedies in a New York court has not qualified to do business in New York, N.Y. BCL §1312(a) or N.Y. LLC Law §808(a), as applicable, could serve as an affirmative defense for a borrower or guarantor against such enforcement if the lender is deemed to be "doing business" in New York.

A critical threshold issue, therefore, for a foreign lender looking to file suit in New York but not qualified to do business here is whether it is in fact "doing business" in New York. New York courts have held that N.Y. BCL §1312(a) and N.Y. LLC Law §808(a) present "a 'higher hurdle' than the standard jurisdictional 'doing business' test," and "incidents of business" are insufficient to rebut the presumption that the foreign corporation or LLC is "doing business" in its state of incorporation. *See Crum & Forster Specialty Ins. Co. v. The BCC Group, Inc.*, No. 150826/2014, 2014 WL 4743465, at *1 (N.Y. Sup. Ct. Sep. 19, 2014).

There is "no precise measure of the nature or extent of the activities [that] may be determinative of whether a foreign corporation is doing business in New York and each case must be decided on its own facts." *Netherlands Shipmortgage Corporation LTD v. Madias,* 717 F.2d 731, 735 (2d Cir. 1983).

One way the courts look at it is whether the business activities are "so systematic and regular as to manifest a continuity of activity in this state." *Crum & Forster Specialty Ins. Co.*, 2014 WL 4743465, at *1. Another articulation of the standard is whether there is "ongoing intrastate business activity or the establishment of an ongoing business practice." *See Madias* 717 F.2d at 736.

In *Madias*, for example, a Bermuda company engaged in lending on "floating objects" brought an action in New York to enforce a guaranty. Defendant raised the defense under N.Y. BCL §1312(a) and pointed to the following acts in New York by lender: "the maintenance of New York bank accounts; retention of New York counsel; travel to New York by [lender]'s president to solicit business and to negotiate loans; and the partial closing of 19 of 20 loans transacted by [lender] over a two-year period at its counsel's office in New York." *Madias*, 717 F.2d at 740. The U.S. Court of Appeals for the Second Circuit held that those facts were not sufficient to constitute "doing business" in New York.

But in *Gustavia Home, LLC v. Rutty*, 221 F. Supp. 3d 304, 306 (E.D.N.Y. 2016), the court, in denying lender's summary judgment motion, inferred that a lender whose "business is focused on the buying and foreclosure of New York mortgages and the selling of New York properties [(with nearly forty New York properties with actions filed in its only year of business)] has 'permanent, continuous, and regular' business activities in New York that require a license under B.C.L. §1312(a)."

> New York courts have held that N.Y. BCL §1312(a) and N.Y. LLC Law §808(a) present "a 'higher hurdle' than the standard jurisdictional 'doing business' test."

Lenders setting up a new SPE for each loan may be better protected, since New York courts have found that evidence of a single transaction is insufficient to constitute "doing business" within the meaning of N.Y. BCL §1312(a) and N.Y. LLC Law §808(a), even when the foreign entity "was formed for the sole purpose of" the underlying transaction. *See Dragons 516 Ltd. v. Knights Genesis Inv. Ltd.*, 77 Misc. 3d 1223(A) (N.Y. Sup. Ct. 2023).

However, while an SPE may not be "doing business" by merely originating a single loan, there is no clarity on whether activities related to the underlying transaction, including collecting payments, inspecting the property, or disbursing future advances or reserve funds, could be construed as separate transactions.

The failure to obtain a certificate of authority, according to most courts, is not a jurisdictional impediment to the commencement of a lawsuit for a foreign entity, and is curable by filing after commencement of the case. *See e.g. Basile v. Mulholland*, 73 A.D.3d 597, 597 (1st Dept. 2010)). But there are courts that have held otherwise.

For example, in *One Stone Lending LLC v. Alta Operations, LLC*, No. 850039/2019, 2020 WL 1077590 (N.Y. Sup. Ct. Mar. 06, 2020), the Court found that it "…will not permit a plaintiff to maintain a case where it failed to comply with the publication requirements [for foreign LLC's qualifying in New York] when the case began…".

While there are obviously tax and other implications of qualifying to do business in New York, as well as costs (both in dollars and time) to doing so, given the lack of clarity on what constitutes "doing business" within the meaning of N.Y. BCL §1312(a) and N.Y. LLC Law §808(a), and the uncertainty of being able to effectuate a post-case commencement cure, foreign companies lending in New York that will be conducting other business or providing services related to the underlying transaction should consider qualifying in New York.

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Reasons To Be Wary of Using Large Language Model AI Systems

BY ERIK SHERMAN

TECHNOLOGY can do wonders, but only when people know its limitations. As new types of artificial intelligence have seen waves of hype, there's a popularized rush toward the use of them, particularly large language models, more generally titled generative AI.

Given the promises being made, the interest is understanding. If you could have an actual or nearly unpaid assistant to do research, write a summary, prepare a document draft, develop ideas, prepare an outline, or otherwise under- » Page 7

Stagflation Is a Real Possibility To These Analysts

BY ERIKA MORPHY

A DRUMBEAT for stagflation as a possible scenario for the US economy is growing louder.

Last week, strategists from the Bank of America wrote that the macroeconomic picture is "flipping from goldilocks to stagflation," which they defined as growth below 2% and inflation of between 3% and 4%. Inflation is higher in developed and emerging markets, while the US labor market is "finally cracking," wrote Michael Hartnett.

JPMorgan Chase's Marko Kolanovic raised similar concerns in February. A halt » Page 7

Hilton Projects Rapid Growth of Lifestyle Hotels in College Towns

BY JACK ROGERS

HILTON is expecting its acquisition of the Graduate Hotels brand, which specializes in hotels in near college campuses, to turbocharge the growth of its rapidly expanding lifestyle portfolio.

The hospitality giant announced last week it is acquiring the lifestyle hotel brand from Adventurous Journeys Capital Partners (AJ Capital) for $210M in a deal that gives Hilton worldwide rights to the brand and franchise agreements for existing and signed Graduate hotels. » Page 7

Manhattan Apartment Rents Are Rising Again

BY JACK ROGERS

AFTER a retreat in the second half of 2023 from record-setting rent growth last summer, apartment rents in Manhattan are climbing again in 2024.

The median apartment rent in Manhattan rose to $4,230 in February, an increase of 1.9% over January's median of $4,150. The median rent is still lower than last August's record of $4,400, but it appears to be heading back in that direction.

Rents in Manhattan are nearly 21% higher than pre-pandemic levels, with the average rent per square foot following the same trajectory, rising 6.6% in February to $84.25, which is about 18% higher than pre-pandemic levels, » Page 7

RYLAND WEST/ALM

Median rent in Manhattan is nearly 21% above pre-pandemic level, heading back to record territory.

US Power Grid Struggles To Keep Up With Data Center Growth

BY JACK ROGERS

THE EXPONENTIAL growth of data centers with a tremendous appetite for electricity rapidly is outpacing the capacity of utilities to meet their needs, pushing data center developers to prioritize new markets where they can be sure they can hook up to the grid.

Electric utilities across the U.S. are doubling their forecasts of how much additional power they'll need by the end of this decade to meet surging demand not only for power-hungry AI data processing facilities but also from a resurgence of U.S. manufacturing and the conversion to EVs.

The demand for electricity from data centers alone is projected to consume nearly 10% of the nation's electricity before the end of this decade.

There were about 2,700 data centers in the U.S. in 2022, consuming an estimated 4% of » Page 7