

**THTML, LLC v Trust for Architectural Easements**

2019 NY Slip Op 33518(U)

November 29, 2019

Supreme Court, New York County

Docket Number: 151036/2018

Judge: Shlomo S. Hagler

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17

-----X  
THTML LLC,

Plaintiff,

Index No.  
151036/2018

-against-

TRUST FOR ARCHITECTURAL EASEMENTS f/k/a  
NATIONAL ARCHITECTURAL TRUST, INC.

DECISION/ORDER

Defendant.

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HON. SHLOMO S. HAGLER, J.S.C.:

Defendant Trust for Architectural Easements, f/k/a National Architectural Trust, Inc. ("the Trust") moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor and dismissing the complaint with prejudice. Plaintiff THTML LLC ("THTML") cross-moves for an order granting summary judgment in its favor and, pursuant to section 1951 of the New York Real Property Actions and Proceedings Law, for an order voiding or modifying the conservation easement at issue in this case, in order to allow THTML to transfer all unused development rights to a neighboring property, as otherwise permitted by New York's Landmark Preservation Law and Zoning Resolution 74-79.

**BACKGROUND**

This action, which was filed on February 1, 2018, concerns an Historic Preservation Deed of Easement ("Deed of Easement") made on December 20, 2007 relating to a building (the "Building") located on property known as 126-128 East 13<sup>th</sup> Street, New York,

NY (the "Property").<sup>1</sup> The Building was built in 1903-04 for staging horse auctions. It was later used as a candy factory, a vocational school for women and as the studio of the artist, Frank Stella.

In 2005, the Building was purchased by 15 West 17<sup>th</sup> Street, LLC ("15 West 17th"). Apparently 15 West 17<sup>th</sup> initially planned to demolish the building, but "the Greenwich Village Society for Historic Preservation petitioned the New York City Landmark Commission to designate the . . . Building an individual landmark[, and] [t]he commission calendared an emergency hearing in September 2006 to consider this request." *15<sup>th</sup> W. 17<sup>th</sup> St., LLC v Commissioner of Internal Revenue*, 147 TC 557, 559 (2016).

During 2006, Joseph Sabbagh ("Sabbagh"), a member of 15 West 17th, approached the Trust about donating a conservation easement on the Building to the Trust. Sabbagh aff, ¶ 3. According to Daniel Reardon ("Reardon"), formerly an independent contractor who had acted as an area manager for the Trust and was involved in educating property owners about the Federal Preservation Tax Incentive Program, Sabbagh had previously donated a conservation easement to the Trust on property he owned on 17<sup>th</sup> Street. Leonel declaration, exhibit A (Reardon tr) at 19.

Sabbagh describes the easement at issue in this litigation

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<sup>1</sup> The real property is composed of two parcels, 126-128 East 13<sup>th</sup> Street and 123 East 12<sup>th</sup> Street. The Building is located on the East 13<sup>th</sup> Street parcel.

as "a facade conservation easement." Sabbagh aff, ¶ 2. The text of the Deed of Easement, signed on behalf of 15 West 17<sup>th</sup> by the Managing Member, did not, however, limit the easement to the facade. The Deed of Easement also expressly states:

**"Grant of Development Rights.** Grantor further desires to grant to Grantee any and all Developmental Rights associated with the Premises. For purposes of this Easement, 'Developmental Rights' shall mean any and all rights, however designated, now associated with the Premises that may be used, pursuant to applicable zoning laws or other governmental laws or regulations, to compute permitted size, height, bulk or number of structures, developmental density, lot yield, or any similar development variable on or pertaining to the Premises. *The parties acknowledge such grant shall forever remove the Developmental Rights from the Premises, prohibit Grantor from transferring or otherwise using the Development Rights, and that Grantee hereby extinguishes such Development Rights.*"

Sabbagh aff, exhibit A, Deed of Easement at 4, ¶ 3 (emphasis added). The Deed of Easement was recorded with the Office of the City Register of the City of New York on January 2, 2008. The Recording and Endorsement Cover Page which contains the block and lot number of the Property also contains the following description: "Property Type: Commercial Real Estate Easement Air Rights." Neuner aff, exhibit A.

According to Reardon, in order to qualify for a federal tax exemption for donating a conservation easement, a building had to be listed on the National Register of Historic Places or be a contributing building in a nationally recognized historic district. Leonel declaration, exhibit A (Reardon tr) at 22, 26-

27. In 2007, Sabbagh applied for placement, and the Building was placed on the National Register of Historic Places.

Several years after the Building was listed on the National Register of Historic Places, on May 15, 2012, it was designated by the New York City Landmarks Preservation Commission as an official New York City Landmark.

#### **CHAIN OF TITLE**

In the wake of the 2008 recession, following a Judgment of Foreclosure and Sale, the Property was obtained by White Knight NYC Venture LLC ("White Knight"). See Proulx affirmation, exhibit A, Judgment of Foreclosure and Sale, *White Night NYC Venture LLC v 15 W. 17<sup>th</sup> St., LLC*, Sup Ct, NY County, Index No. 117340/2009. According to Paul Proulx ("Proulx"), an attorney who has represented Sabbagh, and entities with which he was affiliated including THTML, in connection with the Property, "Mr. Sabbagh was intent on reclaiming possession of the Property's air rights." Proulx affirmation, ¶ 5. In an effort to reacquire the air rights, Sabbagh "sought to re-acquire the Property in a new entity, then sell it while retaining the air rights." *Id.*

On July 24, 2015, Sabbagh entered into an agreement with White Night to purchase the Property as assignor for a limited liability company, 28 E. 14<sup>th</sup> Street S Sub LLC ("28 E. 14<sup>th</sup>," a/k/a the "Developer"). On the same day, Sabbagh assigned the Real Estate Sale Agreement to 28 E. 14<sup>th</sup>, with which he was

affiliated.

On October 28, 2015, 28 E. 14<sup>th</sup> assigned the Real Estate Sale Agreement to The Milan Associates, L.P. ("Milan"), a New York limited partnership. See Proulx affirmation, exhibit C, referencing NYSCEF Doc. Nos. 72 & 73 (Agreement to Assign Real Estate Agreement ["Agreement to Assign"]). The Agreement to Assign indicated that 28 E. 14<sup>th</sup> desired "to retain and utilize on the Developer Premises . . . all such rights as now or may hereafter exist, to the unused Excess Floor Area Development Rights (as defined herein) and Bonus Floor Area Development Rights (as defined herein) appurtenant to the Property (together, the 'Subject Floor Area')". *Id.* 28 East 14<sup>th</sup> further indicated that it desired to create an air space parcel which it would then transfer to a new property, and that Milan would transfer the airspace parcel to it. *Id.* The Agreement to Assign also stated, in pertinent part:

"As soon as [28 E. 14<sup>th</sup>] provides [Milan] notice that the Airspace Parcel has been created (the 'Airspace Notice Date'), [Milan] agrees to transfer the Airspace Parcel to [28 E. 14<sup>th</sup>] within 30 days, inclusive of providing (1) a deed for the Airspace Parcel to (the 'Airspace Deed') and its related transfer tax returns, (2) a release of any encumbrances on the Airspace Parcel ('Release')...."

*Id.*, ¶ 5.4.

The Agreement to Assign was signed for Milan by Arthur Minerof, President. It also contained a document entitled Termination of a Single Party Zoning Lot Development and Easement

Agreement, which identified Minerof Entity as the owner of the Airspace Parcel associated with the property, and which purported to transfer the airspace associated with 126-128 East 13<sup>th</sup> Street, New York, NY to 28 E. 14th. See *Id.*

On December 31, 2015, Joseph Sabbagh formed THTML, as the sole member, under the laws of the State of New York. On an unknown date, Milan purported to transfer the air rights to THTML.<sup>2</sup>

#### **CHARITABLE DEDUCTION CLAIMED BY SABBAGH**

While the Property was still owned by 15 West 17<sup>th</sup>, "[b]ased on its donation of the Easement, [15 West 17<sup>th</sup>] claimed a charitable deduction of \$64 million on its federal tax return for 2007." Complaint, ¶ 17. In support of its claim, 15 West 17<sup>th</sup> submitted a letter from the Trust acknowledging receipt of the easement. That letter did not, however, state whether the Trust had provided any goods or services in return for the easement. 15 West 17th also submitted a copy of the appraisal report for the Property

"concluding that, as of February 8, 2008, the property had a fair market value of \$69,230,000 before placement of the easement. The appraisal thus opined that the property—acquired for \$10 million in September 2005—had risen in value by almost 600% in 2-1/2 years. Opining that the property was worth only \$4,740,000 after the donation, the appraisal concluded that the easement had

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<sup>2</sup> The copy of the Bargain and Sale Deed Without Covenant Against Grantor's Acts provided to the court is undated. See Proulx affirmation, exhibit H.

reduced the property's value by \$64,490,000."

*15 W. 17th St. LLC v Commissioner of Internal Revenue*, 147 TC at 560.

Following an audit of its 2007 return, on September 27, 2011, the Internal Revenue Service ("IRS") sent 15 West 17<sup>th</sup> a notice disallowing its claimed charitable deduction. The IRS Commissioner found that 15 West 17<sup>th</sup> had failed to satisfy the requirement of section 170 (f) (8) of the Internal Revenue Code that "the taxpayer substantiates the contribution by a contemporaneous written acknowledgment of the contribution by the donee organization that meets the requirements of subparagraph (B)" stating that no goods or services had been provided to the donor in exchange for the easement. *Id.* at 562. The IRS notice stated that:

"[i]t has not been established that all the requirements of IRC Section 170 and the corresponding Treasury Regulations \*\*\* have been satisfied for the noncash charitable contribution.' In the alternative, the IRS determined that the value of the easement was substantially less than the \$64,000,000 claimed on the return. The IRS determined penalties for gross valuation misstatement under section 6662 (a) and (h) and (alternatively) for negligence under section 6662 (a) and (b) (1)."

*Id.* at 560-561.

On November 2, 2011, 15 West 17<sup>th</sup> challenged the IRS denial of its application for a tax exemption in the United States Tax Court. Following 15 West 17<sup>th</sup>'s filing in the Tax Court, but before the ruling by that court, on June 16, 2014, the Trust



submitted an amended Form 990 for 2007 in connection with the contribution of the conservation easement, stating that the Trust had provided no goods or services in connection with the donation of the Historic Preservation Deed of Easement.

In a December 22, 2016 decision, the Tax Court analyzed the applicable provisions of the Internal Revenue Code to determine whether the statute provided for the later submission by the Trust stating that no goods or services had been received in exchange for the contribution. Concluding that section 170 of the Internal Revenue Code did not provide for such a submission by the Trust, the Tax Court denied 15 West 17<sup>th</sup> St. LLC's motion for partial summary judgment.<sup>3</sup> *Id.* at 588.

#### **DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT**

The Trust moves for summary judgment dismissing the complaint arguing first that THTML has no standing to bring this action because it has no claim to an interest in the Property. The Trust argues that in 2007, when 15 West 17<sup>th</sup> St. donated the development rights, including air rights, associated with the Building to the Trust by means of a conservation easement, those rights were separated from the Property and were extinguished by the Trust, as specified in the Deed of Easement. Thus, when

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<sup>3</sup> In its papers, THTML incorrectly states that the Tax Court granted the Commissioner's motion for summary judgment, however the court's decision states that the court denied 15 West 17<sup>th</sup>'s motion for partial summary judgment. *Id.* at 588.

Sabbagh created new entities to purchase the Property from White Knight, re-sell it to Milan and then have Milan separate the air rights from the Property and transfer those air rights to THTML, another Sabbagh entity, that transfer was illusory, because the air rights had been separated from the Property and extinguished under the original Deed of Easement donated to the Trust in 2007, before the foreclosure sale to White Knight in 2012.

In its brief opposing the Trust's motion for summary judgment, THTML focuses on its argument that because the Building is an historic structure in a non-historic neighborhood, the air rights associated with the Property are not the proper subject of a conservation easement, and the easement created in 2007 should be extinguished or modified by the court. THTML's argument with respect to standing amounts to the notion that it acquired the title to the development rights associated with the Property because Sabbagh "was intent on requiring the rights and restoring the value that was wiped out in the litigation with the IRS." Plaintiff's memorandum of law at 16. THTML argues that Sabbagh created vehicles to acquire those rights and that THTML acquired the rights from Milan which acquired the Property and "contemporaneously separated out the air rights and assigned them to THTML LLC." *Id.* THTML never addresses the question of whether any air rights remained to be acquired by White Knight in the tax foreclosure sale that could later be acquired by any of

the vehicles that Sabbagh created after his application for a tax exemption was rejected by the IRS in September 2011.

As the Trust argues, "a grantor cannot convey what the grantor does not own. Thus, a deed from an entity that does not possess title or other conveyable interest is inoperative as a conveyance." *Gilliland v Acquafredda Enters., LLC*, 92 AD3d 19, 25 (1<sup>st</sup> Dept 2011), citing Real Property Law § 245; *Green v Collins*, 86 NY 246 [1881]. Since the development rights, including the air rights, were separated from the Property and conveyed to the Trust in 2007, when Milan acquired the Property in 2015 it did not acquire the development rights, including the air rights, and could not, in turn, convey them to THTML, notwithstanding Sabbagh's intentions, or the detailed steps Milan undertook in an effort to convey such air rights. The reference in paragraph 5.4 of the Agreement to Assign regarding the need to obtain "a release of any encumbrances of the airspace" would appear to indicate some recognition of the problem posed by the Deed of Easement. Though in its complaint THTML claims to own the development rights and, therefore, to have standing, that purported ownership is illusory and cannot be the basis of plaintiff's claim of standing. See *Lauber v Martin*, 37 AD2d 754, 754 (4<sup>th</sup> Dept 1971) ("[Plaintiff] who seeks to enforce the restriction, has not established [itself] to be a party to the conveyance between [the Trust] and [the] grantor; [it] was not on

the face of the deed granted any right to [challenge] the restrictive covenant").

The Trust next contends that even if THTML does have standing, any challenge to the conveyance of air rights to the Trust is untimely. The Trust argues that, in seeking to void the 2007 conveyance of air rights in the Deed of Easement, THTML runs afoul of the six-year statute of limitations for contract claims, since 15 West 17<sup>th</sup> executed and delivered the deed conveying the air rights to the Trust in 2007, more than six years before this action was filed. See CPLR 213.

Citing *Orange & Rockland Util. v Philwold Estates* (52 NY2d 253 [1981]), THTML argues that challenging the restrictions on transfer of air rights is comparable to removing a cloud on title, which is never barred by the statute of limitations. However, the language of the Court of Appeals in *Orange & Rockland Utilities* suggests that that principle is inapplicable to this situation. As the Court of Appeals pointed out, "plaintiffs' title to the property was unchallenged, the dispute involving only the enforceability of the restrictive covenant." 52 NY2d at 260. The Court of Appeals then stated that "removal of the restriction is no different than removal of a cloud on title, as to which the law is well settled that the 'right is never barred by the Statute of Limitations. It is a continuing right which exists as long as there is an occasion for its

exercise.'" *Id.* at 261 (internal citation omitted). Here, in contrast, plaintiff THTML'S title to the air rights is not merely sharply contested, this Court has concluded, as stated above, that the transfer of title to THTML was illusory, since the title to the air rights had already been separated from the underlying Building and Property and had been extinguished as specified in the Deed of Easement. Furthermore, Sabbagh's contorted effort to recapture that title, which included Milan's purported recording of a separate title to the air rights, which had already been donated to the Trust in 2007, and no longer resided with the Property, itself underscores that separation of the air rights from the Property is not like a restrictive covenant which runs with the land, but is a separate property right based upon a separate contract.

THTML suggests that the conservation easement was not properly recorded by the Trust in 2007, and, therefore, any statute of limitations would begin to run in 2018 when Milan allegedly properly recorded the transfer of air rights to THTML. However, that argument itself supports the notion that the transfer of air rights is not a cloud on the title, but rather, a transfer of property, which undercuts its argument that the donation of a conservation easement is merely a cloud on title and, therefore, there is no statute of limitations for challenging the conservation easement. If Sabbagh believed the

conservation easement was not properly created and recorded, he had six years from 2007 in which to challenge its validity, but he failed to do so in a timely manner.

For these reasons, this Court concludes that THTML lacks standing and that its challenge to the conveyance is untimely and, therefore, this Court need not reach THTML's arguments that the sole purpose of the easement was to protect the Building's facade, and that the limitation on the transfer of air rights is not the proper subject of a conservation easement here because the neighborhood in which the Building is located is not itself an historic or landmarked district.

Regarding THTML's equitable argument that Sabbagh was injured by the Trust's failure to provide the proper letter in support of his application for a tax deduction, such a claim, if it exists, belongs to 17 West 15th, the allegedly injured party, and not THTML. Although Sabbagh may have created THTML as part of his effort to recover the air rights that were donated to the Trust in 2007, that entity did not even exist when the original transaction occurred or when 15 West 17<sup>th</sup> filed for a tax exemption, and, therefore, has no standing to raise any claim with respect to such an equitable claim.

Similarly, this Court need not address THTML's argument that its predecessor was a victim of the Trust's incompetence in failing to include in its original gift acknowledgment the

statement that it had not provided any goods or services in return for the donation of the easement. Moreover, to the extent that the request for a tax exemption was denied because of the failure of the Trust to include that language in its letter of acknowledgment, the decision of the Tax Court indicates that the taxpayer must substantiate "the contribution by a contemporaneous written acknowledgment of the contribution by the donee that meets the requirements" of section 170 (f) (8) (A). See *15 W. 17th St. LLC v Commissioner of Internal Revenue*, 147 TC at 562. Thus, it was the taxpayer's responsibility to obtain the necessary information from the Trust to justify its application and to verify that its application for a tax deduction was complete and met the requirements of the Internal Revenue Code.

#### CONCLUSION

Accordingly, for the reasons set forth above, it is hereby ORDERED AND ADJUDGED that defendant's motion for summary judgment dismissing the case is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED AND ADJUDGED that plaintiff's cross motion for an order voiding or modifying the conservation easement at issue in

this case, in order to allow THTML to transfer all unused development rights to a neighboring property, as otherwise permitted by New York's Landmark Preservation Law and Zoning Resolution 74-79, is denied.

Dated: November 29, 2019

ENTER:



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Hon. **SHLOMO S. HAGLER, J.S.C.**