

# Commercial Division case review

This article reports on three of the more significant decisions rendered recently in the Commercial Division, Nassau County. In the first decision, Justice Leonard B. Austin denied a motion to dismiss a petition seeking the dissolution of a corporation. Next, Justice Austin granted a Yellowstone injunction regarding a commercial lease. And, finally, Justice Stephen A. Bucaria granted a motion to dismiss an action against Nassau County where the plaintiff did not timely file a notice of claim.

In *Matter of D'Annunzio*, a 50 percent owner of a corporation that specializes in installing and servicing commercial air conditioners and refrigerators petitioned to dissolve the company pursuant to Business Corporation Law § 1104-a. Specifically, petitioner alleged that respondent who owned the remaining fifty percent interest in the company engaged in oppressive conduct towards him by among other things terminating his employment for no legitimate reason, refusing to pay his salary, locking him out of the corporate offices, and using corporate funds to pay personal expenses. Respondent moved to dismiss the petition on the central ground that it failed to state a cause of action.

In deciding the motion, Justice Austin first explained that BCL § 1104-a allows a shareholder with 20 percent or more interest in a privately-held corporation to petition for judicial dissolution where the directors or those in control engage in illegal, fraudulent or oppressive conduct towards her. And, he explained that oppressive conduct is demonstrated where a shareholder is excluded from managing the corporation for no legitimate business reason or personal animus, or where she is terminated without cause, or where she is deprived of obtaining a reasonable return on her investment due to a change in corporate policy.

In denying the motion, Justice Austin held that the petition set forth sufficient facts of oppressive conduct. And, he directed that the parties engage in limited discovery before an evidentiary hearing to resolve the conflicting allegations concerning the petition. And, lastly, he extended the temporary restraining order—preventing employees from using corporate funds except in the ordinary course of business—until the

petition is determined.

In *DHB Industries v. West-Post Management*, a commercial tenant alleged that the landlord breached a lease agreement by failing to provide sufficient air conditioning for the premises. Shortly thereafter, the landlord served the tenant with a notice to cure stating that the lease would be terminated if the tenant did not pay the rent and other charges owed within a certain period of time. Before the notice to cure expired, the tenant moved for a Yellowstone injunction preventing the landlord from terminating the lease until the action is resolved. The landlord then cross-moved to dismiss the complaint for failure to state a cause of action.

As to the Yellowstone injunction, Justice Austin stated that a tenant must satisfy four elements for relief: (1) it holds a commercial lease; (2) it has received from the landlord a notice of default, a notice to cure, or a threat of termination of the lease; (3) its application for a temporary restraining order was made prior to the termination of the lease; and (4) it has the desire and ability to cure the alleged default by any means short of vacating the premises. He then granted the injunction explaining that the tenant had satisfied each element.

As to the motion to dismiss, Justice Austin noted that the complaint alleges four claims: breach of contract, breach of implied warranty of fitness, breach of implied covenant of good faith and fair dealing, and actual and/or constructive eviction. And, he denied the motion to dismiss the breach of contract claim because the complaint properly alleged the existence of a contract, performance,



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breach, and damages.

However, he dismissed the remaining claims. In that regard, he explained that the implied warranty claim has not been extended to commercial property and it is limited to structural or latent conditions (items not at issue here). And, the good faith and fair dealing claim is duplicative of the breach of contract claim. And, finally, the eviction claim fails because the landlord has not deprived the tenant of physical possession of the premises and the tenant continues to occupy the premises.

In *Flanagan v. County of Nassau*, plaintiff commenced an action against Nassau County seeking damages for unlawful retention and forfeiture of his vehicle. The County moved for summary judgment dismissing the action on the ground that plaintiff did not serve a notice of claim within 90 days of the incident under General Municipal Law §§ 50-e and 50-i. In opposition, plaintiff argued, among other things, that he filed his notice of claim within 90 days of the Court of Appeals' decision rendering a section of the Nassau County Administrative Code authorizing civil forfeiture unconstitutional and that the County did not object to the notice at the 50-h hearing.

Justice Bucaria granted the motion. In so doing, he explained that the claim arose in or about March 2003 when the Appellate Division found the code provision at issue unconstitutional and that plaintiff's notice of claim filed almost a year later was untimely. And, he explained that the County did not need to object to the notice at the 50-h hearing because it asserted untimely notice as an affirmative defense in its answer.

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