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Court Grants License To Change Licensing Law Rules

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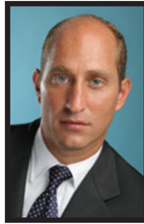

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Since at least as early as 1849, in the case of Dolittle v. Eddy,1 New York law has defined a license as the "authority to enter on the lands of another, and do a particular act or series of acts, without possessing any interest in the land." Unlike a tenant who obtains the exclusive right to use and occupy the premises pursuant to a lease in consideration of the payment of rent, a licensee obtains no interest in the land, but only a revocable privilege to use it temporarily for a specified fee. Although the court in Dolittle recognized that "[i]t is sometimes difficult to distinguish between an easement, a license, and a lease," the authors of this article, nine years ago, published a thorough review of the case law distinguishing leases from licenses,2 and we noted that New York courts had consistently held a license exists when (1) the owner retains absolute control over the premises,3 (2) the owner supplies all of the essential services required for the licensee's permitted use of the premises,4 and (3) the owner may revoke the permitted use of the premises "at will."5 Since then, due to the frustration and delays in evictions that commercial landlords have suffered for decades, practitioners have increasingly advised their clients to turn to licensing and self-help lease provisions to facilitate more swift and less costly eviction proceedings.

In February of this year, in Union Square Park Community Coalition, v. New York City Department of Parks and Recreation,6 the New York Court of Appeals appears to have redefined and narrowed the limits of what distinguishes a license from a lease by expanding the scope of what may be deemed a license.7 In doing so, the court adopted an approach it had never previously used in such cases. By seemingly setting aside the traditional rule distinguishing a lease from a license, the court has made it much easier for landowners to require that users of their premises be subject to controls that traditionally have been included only in leases.

Factors Considered

In Union Square, the court approved an agreement between the City Parks Department and a private business corporation that permits the corporation to operate a seasonal restaurant in the Union Square Park pavilion for a term of 15 years for an annual "license" fee over that term beginning at $300,000 and increasing to a maximum of $450,000, or 10 percent of the annual gross profits of the restaurant, whichever is greater. The agreement also obligates the restaurant owner to invest "at least $700,000 in specified capital improvements." At issue were (a) whether the restaurant constituted a non-park purpose and thereby violated the public trust doctrine, and (b) whether the agreement between the department and the private business constituted a lease, not a license, and therefore whether the agreement amounted to an unlawful alienation of parkland. The court held (a) that the restaurant did not violate the public trust doctrine,8 and (b) that the agreement was a valid license and not a lease.

In holding that the agreement constituted a license, and not a lease, the court relied upon the following factors: (1) that the "language of the agreement confirms what it purports to be—a revocable license," (2) that the "Department retained significant control over the daily operations of the restaurant, including the months and hours of operation, staffing plan, work schedules and menu prices," (3) that the "use of the premises is only seasonal," (4) that use "is not exclusive even in the summer, as outdoor seating is required to be available to the general public (with the exception of an area reserved for the service of alcoholic beverages)," and (5) that the restaurant owner is "obligated to open the pavilion to the public for community events on a weekly basis."

The court also relied upon the agreement's requirements that the restaurant owner comply with extensive environmental standards, "use Greenmarket vendors, offer culinary internships, and host charitable events." In conclusion, the court said: "More importantly, the agreement broadly allows the department to terminate the license at will so long as the termination is not arbitrary and capricious," and, "Consequently, despite the 15-year term and payment structure, we agree with the department that it entered into a valid license arrangement with [the private corporation]." (Emphasis added).

Eschewing Precedent

In so ruling, the court ignored its earlier precedent in Miller v. City of New York,9 a case with facts virtually "on all fours" with Union Square. In Miller, the court had held that an agreement allowing a private corporation to construct a golf-driving range, with accessory shops and a parking lot, on public park land, and to operate the enterprise on a percentage rental basis for 20 years, with certain "revocable" termination rights reserved to the Parks Commissioner, which were not exercisable "at pleasure," was

> as a matter of law and on its face…a lease and not a mere revocable license or grant of a privilege or concession to do particular acts appropriate in a public park and subject to appropriate power in the commissioner to control the opera-

tion and revoke the grant at will.

Contrary to the reasoning given by the court in Union Square, the court in Miller held: (1) that a "document calling itself a 'license' is still a lease if it grants not merely a revocable right to be exercised over the grantor's land without possessing any interest therein but the exclusive right to use and occupy that land," (2) that controls, such as "prices, times of operation and choice of employees, etc., rather strict and detailed [are] but no more than would be reasonably demanded by a careful owner as against a lessee for such a business use and for so long a term," and (3) that a termination clause which is not "revocable-at-pleasure" is not truly exercisable "at will."

Similar to the situation in Miller, the restaurant in Union Square necessarily has exclusive occupancy to park premises for its kitchen and bar facilities; the only exception to exclusivity being certain outdoor seating in the summertime, a requirement that can hardly impinge on the restaurant's otherwise broad exclusive occupancy of the park pavilion and one that, in the long run, may even serve the restaurant's commercial interests. And, as Miller noted, the controls over the restaurant's hours of operation, prices, and staffing do not necessarily turn a lease into a license.

Finally, as in Miller, the agreement with the restaurant is not truly terminable "at will," as the agreement requires that any termination by the city not be "arbitrary and capricious," a standard that subjects any decision by the city to cancel the "license" to possible reversal and/or damages after judicial review. Moreover, the agreement's requirement of the restaurant owner for $700,000 in capital improvements is certainly unlike the typical license situation where the licensor provides all of the essential services required for the use of the premises.

Implications

Contrary to the holding in Miller, Union Square provides authority for commercial property owners (a) to grant licensees more exclusive use and possession of the licensed premises without granting them an interest in the property, (b) for lengthier periods of time than in the typical license agreement granted prior to Union Square, and (c) for "fees" that may be for amounts that would more typically be expected in rental agreements. Commercial property owners who wish to impose "license" terms that more readily resemble lease provisions, which would otherwise have doomed "license" agreements under prior case law,10 may now attempt to implement more expansive license agreements that give them the opportunity and right to remove recalcitrant and/or undesirable licensees without resort to the lengthy, costly, and frustrating litigation that so often characterizes landlord/tenant disputes.

Union Square may enable such owners to terminate a licensee's occupancy and/or to use reasonable self-help to remove the licensee from the premises "at will."

It appears, therefore, that, in Union Square, seemingly in an effort to affirm the power of the city government to determine the best way to use its park space, the Court of Appeals has eschewed its own precedent and that of other courts, regarding the longstanding legal distinction between licenses and leases. Unless Union Square is limited to its own particularized facts as applied to future cases, the court will have, perhaps unwittingly, redefined the legal landscape for real estate attorneys in drafting and negotiating licenses for the use of commercial property.

ENDNOTES:

1. 7 Barb. 74 (Supreme Court, New York County, 1849).
2. See Bailey & Desiderio, "Landlords May Entirely Eliminate Leasing," NYLJ, April 13, 2005.
3. See Karp v. Federated Department Stores, 301 AD2d 574, 754 NYS2d 27 (2d Dept. 2003).
4. See Nextel v. Time Management Corporation, 297 AD2d 282, 746 NYS2d 169 (2d Dept. 2002).
5. See Ark Bryant Park v. Bryant Park Restoration, 285 Ad2d 143, 730 NYS2d 48 (1st Dept. 2001).
6. 22 NY3d 648 (2013).
7. For a more full discussion of how ourts have distinguished licenses from leases, see Bailey & Desiderio, "Landlords May Entirely Eliminate Leasing," NYLJ, April 13, 2005.
8. The court said that the public trust doctrine question was governed by its earlier ruling in 795 Fifth Avenue Corp. v. City of New York, 15 NY2d 221 (1965).
9. 15 NY2d 34 (1964).
10. See fn. 7, supra.