

REAL ESTATE

Judges Can Make Up Real Estate Law As They Go

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Courts are supposed to apply legal principles developed over the years in previous court decisions or through legislation. This creates predictability. It allows participants in real estate transactions—and their counsel—to know with reasonable confidence what the consequences of real estate agreements and deal structures will be.

In a [bizarre decision](#) earlier this year, a trial court in Brooklyn made up principles of real estate law that actually do not exist at all but may have been convenient or helpful for deciding the case.

The underlying facts were complicated. In 2016, a property owner signed a contract of sale. Problems arose with the seller's title. Maybe there was a federal tax lien. The closing dragged out for years. The seller never seemed very enthusiastic about actually closing the deal, or about proceeding in accordance with the pre-closing process contemplated by the contract. The seller tried, ineffectively, to terminate the contract because of the title problems.

Independent of all that, soon after the buyer and seller signed their contract, they also seem to have signed a 99-year lease under which the buyer as tenant

agreed to pay \$10 as rent for the entire lease period.

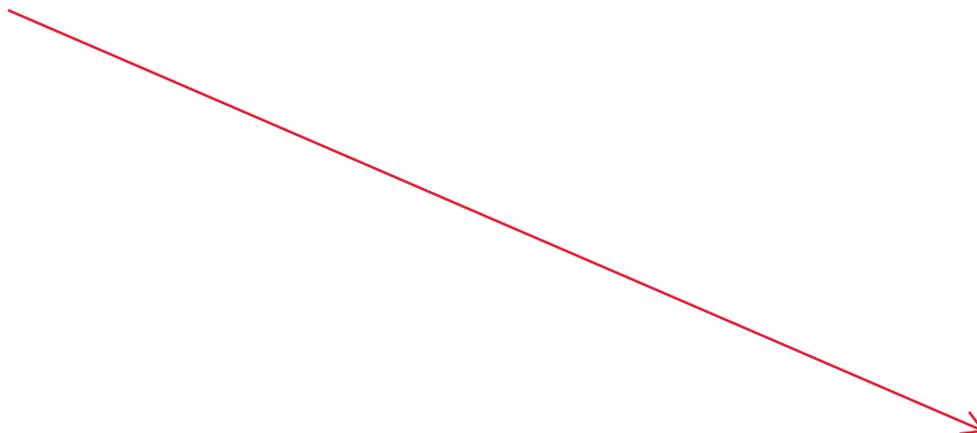
Eventually, in 2022, the seller decided to sell the property to a different buyer. The first buyer went to court to try to block the sale, on two grounds. First, the seller was still under contract to sell the property to the first buyer, which raised complicated factual and legal questions that lie outside the present discussion. Second, the first buyer claimed that it held a 99-year lease that would effectively frustrate or prevent the sale to the second buyer.

The court needed to consider, among other things, the effect of that possible 99-year lease.

The court noted that the New York Tax Law treats 99-year leases as conveyances, and imposes a state transfer tax on them. But no state transfer tax was paid. The court also noted that no one ever bothered to record the 99-year lease.



Based on those two circumstances, the court declared that the lease was “unenforceable.” In other words, failure to pay state transfer tax on a lease or failure to record that lease makes the lease unenforceable, according to the court.





Neither proposition correctly states New York law.

The New York Tax Law establishes an enforcement mechanism for transfer taxes on conveyances of real estate. Nowhere does that mechanism say that failure to pay state transfer tax results in an unenforceable conveyance. It results in penalties, liability for the recipient of the conveyance, interest payments, judgments, foreclosures, and more. The Legislature is really good at coming up with punishments for the real estate industry. If the Legislature intended to invalidate a conveyance for nonpayment of state transfer tax, it would have said so.

On a more technical or perhaps amusing note, the state transfer tax applies only when the amount paid for the conveyance exceeds \$500. Under the facts of this case, the consideration fell short of that threshold by \$490, so no state transfer tax was due in any event.

Likewise, nothing in New York real estate law mandates that anyone must record a lease, even a 99-year lease. Most people do record such leases, for very good reasons. Failure to record doesn't impair the enforceability of the lease as between landlord and tenant. It remains in place as a perfectly enforceable obligation between two parties. If the landlord doesn't live up to its lease obligations, the tenant will have a perfectly good legal claim against the landlord.

Perhaps the court was generally skeptical of the existence of the lease and made up law to invalidate it. Perhaps the court regarded the entire saga as reflecting badly on both buyer and seller. In any case, the treatment of the 99-year lease was an example of creative writing by a court, as opposed to the sound application of established legal principles. If anyone took it seriously, it would undercut the stability that is essential in real estate transactions.

The case demonstrates that one cannot always rely on courts to get it right. In response, participants in real estate transactions ought to try to keep things simple and straightforward, which certainly didn't happen in this particular case. There is also the possibility that the decision will be appealed. It should be, but an appeal probably doesn't justify the expense.

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