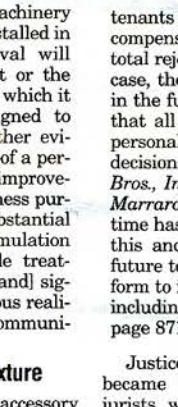
The law of trade fixtures-redux

Generally, when land is taken by the exercise of the power of eminent domain, all that is annexed to the land is appropriated, whether classified as buildings or as fixtures, and the value of the fixtures must be included in determining the total value of the property so appropriated.[1] In New York, trade fixtures are a distinct property interest in eminent domain proceedings, having their own rules of law and valuation.

The law of trade fixtures has evolved over the years as a means to compensate a condemnee who had an interest in the land acquired, which was less than a fee interest.[2] Thus, in order to compensate a tenant, as it must under the Constitution, the overriding rule of condemnation was established that "each owner, landlord or tenant, is entitled to the value of what the Government took from him."[3]



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New York State's highest court, in awarding compensation for trade fixtures which were consequentially damaged by the taking of a waterway, observed that:

> New York takes a broad view in evaluating what improvements are to be regarded as [trade] fixtures. Not only is machinery deemed a fixture 'where it is installed in such manner that its removal will result in material injury to it or the realty, or where the building in which it is placed was specially designed to house it, or where there is other evidence that its installation was of a permanent nature,' but also those improvements which are used for business purposes and which would lose substantial value if removed * * * This formulation of the rules permits equitable treatment of the owner of fixtures [and] signifies a recognition of the obvious realities confronting the business community.[4]

Classic Definition of a Fixture

A fixture is "a thing of an accessory character annexed to houses or lands which become, immediately on annexation, part of the realty itself."[5] A fixture is a chattel attached to the realty;[6] a chattel is an article of personal property which is any species of property not amounting to a freehold or fee in land.[7] The term "trade fixtures" means many things to lawyers in different contexts. In the Law of Eminent Domain, it denotes a claim for compensation for the taking of fixtures, equipment and improvements made to a property.

Again, New York takes a broad view in evaluating what improvements are to be regarded as fixtures.[8] Trade fixtures are items sufficiently annexed to the freehold to become assimilated as part of real estate, yet still retain an individual identity.[9]

But annexation is not necessary to render an article a fixture. The nature of the item or the use to which it is put in the condemnee's business may require fastening by bolts, screws, or other devices of affixation that will secure the item without preventing it from being readily removed and used elsewhere, with like utility and without injury to the item itself or the freehold. It is the intention of the annexor into which the courts inquire and not the manner of fixation, if any. An item may be completely freestanding and be a compensable trade fixture.

In eminent domain cases, the courts have found the intention when they are faced with articles which would have little value when removed or when the removal will result in material damage to the realty or to the item.[10]

Removability Is Not a Test of a Trade Fixture

Removability, has long ceased to be a consideration of compensability of a trade fixture.

In *Matter of City of New York (Ruppert Brewery)*,[11] Justice Sidney A. Fine, sitting in the condemnation part of the New York Supreme Court for the County of New York, wrote:

> Thus it appears that the law, as long established, has clearly negated removability as the test of a fixture. Nevertheless, in this case and in every case involving fixtures tried in this jurisdiction in recent times, the city has relied on physical removability as the principal criterion of compensability. In this case, as in most other cases, it has done so in misapplied reliance on the *Whitlock Avenue* case (178 N.Y. 276) in which the Court of Appeals, after finding a failure of proof with respect to adaptability and intention of permanence, held that the readily removable looms claims by the tenants in that proceeding were not compensable as fixtures. Despite the total rejection of its theory in case after case, the Corporation Counsel persists in the futile repetition of the argument that all removable fixtures are per se personal property. In face of the recent decisions in *Rose v. State, supra*; *Cooney Bros., Inc. v. State*, 24 N.Y.2d 387; and *Marraro v. State*, 12 N.Y.2d 285, the time has surely come for the City to lay this ancient ghost to rest and in the future to adapt its legal posture to conform to its responsibilities to all parties including the Court. 67 Misc.2d 863, at page 871.

Justice Fine's outstanding language became the foundation for all future jurists writing in this area. Thus the *Ruppert Brewery* decision was quoted verbatim by Justice Brown in *Matter of City of New York (Atlantic Terminal)*, 72 Misc.2d 171 (1972), and by Justice Shapiro sitting in the Appellate Division, Second Department in *City of New York (Bedford Stuyvesant-Merrimaker Corporation)*.[12]

Perhaps the best example of the nonrelevance of removability is *Matter of City of New York-Fulton Park (Kerievsky)*.[13] In *Kerievsky*, three partners operated a cabinet shop which had small common woodworking machines. One of the three principals of the condemnee chose to establish a similar but smaller business operation and removed some of the machinery. The condemnor argued that this fact clearly indicated that none of the machines were trade fixtures. The Appellate Court disagreed and held that since the nonremoved machinery, *qua* fixtures, was part of the premises to which the city took title on the vesting, there should be no deduction from the sound value of same. The Court of Appeals affirmed.

It should also be noted that there is no requirement that a trade fixture be actually in use at title vesting, only that it be available and have value.[14]

Recent Case Development

In *Matter of City of New York (Kaiser Woodcraft)*,[15] one had the First Department affirming with slight modification an award made by Justice Howard R. Silver, Bronx Supreme Court for a

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woodworking shop. Most of the fixtures were movable table power saws and similar equipment. The Corporation Counsel argued that table saws and related equipment were movable and of standard design. This matter is currently before the Court of Appeals for review. An earlier case mentioned in this article, *Matter of City of New York-Fulton Park [Kerievsky]*, involved a very similar woodworking shop involving the same types of woodworking machinery which were held to be trade fixtures. The modification to *Kaiser Woodcraft* came to about $15,000 with the elimination of items such as security windows, doors, small hand held tools. And, as of the writing of the paper, it is to be reviewed by the Court of Appeals.

Building Item

In *Marraro v. State of New York*,[16] a "building item," was defined as an item which has lost its identity by becoming a structural part of a building can no longer become the subject of a separate award. *Matter of City of New York (Delancey St.)*, 120 App Div 700."

Marraro v. State of New York, a 1963 case, really is not a good authority for the non-allowance of a trade fixture as a "building item." Indeed, the Court of Appeals affirmed increases in awards made by the Appellate Division for the claims collectively decided. The Court of Appeals noted that "although it is true that electric wiring and plumbing connections would ordinarily be an integral part of the real estate (*Matter of City of New York*, 101 App Div 527, *supra*), in this instance it has been found, in effect, that these connections were easily removable and had been put in by the tenants solely to service fixtures installed for the individual purposes of their several occupancies." Thus, *Marraro* really stands for the opposite proposition for which it is usually cited. In *United States v. Certain Property*, Judge Friendly stated, "Where these items have no connection with the operation of the building and serve no purpose but the proper functioning of the tenant's fixtures, (they) are a part of the fixtures instead of the building."[17]

Further, the *Delancey Street* case cited by the Court of Appeals had absolutely nothing to do with trade fixtures. Rather, the issue in this 1907 case was whether a tenant under a long term lease of land who had erected a building was entitled to share in the compensation for the awarded value of its leasehold. The answer was, yes.

The second case of note was *Matter of Village of Port Chester (Megamat Laundromat)*.[18] Megamat is the first New York case that found commercial laundry machines to be compensable trade fixtures. The Second Department re-iterated the test of a trade fixture, it stated,

> For an item to qualify as a trade fixture, it must pass the three-part test of annexation, adaptability, and intention of permanency (*see Rose v. State of New York, supra* at 86; *Marraro v. State of New York, supra* at 292-293; *Kaiser Woodcraft Corp. v. City of New York*, 39 A.D.3d 131, 837 N.Y.S.2d 2; *Matter of New York City Tr. Auth. [Superior Reed & Rattan Furniture Co.]*, 160 A.D.2d 705, 706, 553 N.Y.S.2d 785; *Matter of City of New York [Merrimaker Corp.]*, 51 A.D.2d 147, 149, 379, N.Y.S.2d 159). A relatively recent criterion also includes as trade fixtures those "items that would lose substantial value if removed even though readily removable" (*Matter of City of New York (Merrimaker Corp.), supra* at 149).

Note that the "substantial damage if removed" criterion mentioned is a relatively recent additional standard, not a mandatory requirement for a trade fixture. It normally is applied to small movable items which would serve no purpose if separated from a machine or other trade fixtures.[19]

Conclusion

The Court of Appeals review of the *Kaiser Woodcraft* case could change New York's law of trade fixtures. New York's law has evolved over a long period of time to the point where Judge Keating noted in the seminal case of *Rose v. State of New York* in 1969, that New York takes a broad view in evaluating what improvements are to be regarded as trade fixtures. A drastic modification of the law which restricts the obligation to fully indemnify and deny constitutionally mandated just compensation is not expected, but we will know soon.

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1. *Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 321 N.Y.S.2d 345, 269 N.E. 2d 895 (1971); reh den 29 N.Y.2d 640, 324, N.Y.S.2d 462, 373 N.E.2d 315 (1971); *Jackson v. State of New York*, 213 N.Y. 34, 106 N.E. 758 (1914).
2. *Rose v. State of New York*, 24 N.Y. 2d 80, 298 N.Y.S.2d 968, 246 N.E.2d 735 (1969).
3. *United States v. Certain Property*, 306 F.2d 439, 453 (2nd Cir., 1962).
4. *Rose v. State of New York*, 24 N.Y. 2d 80, 86, 298 N.Y.S.2d 968, 246 N.E.2d 735 (1969), quoting *Matter of City of New York (Whitlock Ave.)*, 278 N.Y. 276, 281-282, 16 N.E.2d 281 (1938); *see also, Matter of City of New York*, 192 N.Y. 295, 301, 84 N.E. 1105 (1908).
5. Oxford English Dictionary (compact ed. 1973), citing as reference Wharton Law Lex.
6. *Matter of City of New York (Triborough Bridge)*, 159 Misc. 617 (Sup. Ct. N.Y. County, 1936).
7. *People v. Holbrook*, 13 Johns 90 (1816).
8. *Rose v. State of New York*, 24 N.Y. 2d 80, 86, 246 N.E.2d 735 (1969).
9. *Matter of City of New York (Allen St.)*, 256 N.Y. 236, 246 (1931).
10. *United States v. General Motors*, 323 U.S. 373 (1942); *City of Buffalo v. Michael*, 16 N.Y.2d 88 (1965).
11. *Matter of City of New York (Ruppert Brewery)*, 67 Misc 2d 863, 325 N.Y.S.2d 438 (1971);
12. *Matter of City of New York (Bedford-Stuyvesant-Merrimaker)*, 51 A.D.2d 147, 379 N.Y.S.2d 159 (1976).
13. *Matter of City of New York - Fulton Park (Kerievsky*, 14 57 A.D.2d 954, 395 N.Y.S.2d 99 (1977), aff'd. 44 N.Y.2d 974, 408 N.Y.S.2d 501, 380 N.E.2d 327 (1978).
14. *Matter of Mayor of New York*, 39 App Div 589, 57 N.Y.S. 657 (1st Dept. 1899).
15. *Matter of City of New York (Kaiser Woodcraft)*, 39 A.D.3d 131 (1st Dept. 2007) lv to appeal to Court of Appeals granted.
16. *Marraro v. State of New York*, 12 N.Y. 2d 285, (1963).
17. *United States v. Certain Property*, 306 F2d 439, 450 (2d Cir. Ct. 1962).
18. *Matter of Village of Port Chester (Megamat Laundromat)*, 42 A.D.3d 465 (2d Dept. 2007); After re-trial, the matter has been appealed again.
19. *Matter of City of New York (Bedford-Stuyvesant-Merrimaker)*, 51 A.D.2d 147, 379 N.Y.S.2d 159 (1976).