

## New York

# Top ten 2012 real estate laws affecting comm'l. brokers

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Now that 2013 is here it is important to be aware of the changes in the law for our industry. This is not a list about the best events from 2012, but, instead, a list that highlights the new legal landscape that you face as a commercial real estate professional in 2013. Being familiar with these laws, regulations and opinions may help you to better address your customer's / client's goals and make you money.

## Medicare Tax of 3.8%

The Internal Revenue Code at 26 USC §1411 is first effective in 2013 and a tax will now be due at the rate of 3.8% on net investment income, inclusive of a passive business such as real estate rentals. However, certain real property professionals may be exempt from this tax pursuant to 26 USC §469 if they are able to demonstrate that they spent more than 750 hours working in rental real estate during the subject year as a principal, not an employee, coupled with certain additional qualifications. The takeaway is that real estate professionals who are greatly immersed in renting their holdings should consult with an advanced tax professional and structure their work schedule to avoid this tax as it can greatly impact the profitability of one's holdings.

## Partial Eviction, Trivial Interference & Rent Abatements

The Court of Appeals in *Eastside Exhibition Corp. v. 210 East 86<sup>th</sup> Street Corp.* reiterated that the remedy for a partial eviction is a full rent abatement before stating that a landlord's placement of cross-bracing between two steel support columns, which minimally impeded the flow of foot traffic and created a slight diminution in a waiting area, was not a partial eviction. Instead, the court held that a trivial interference only gives rise to actual damages to be determined under the circumstances. The takeaway is that a commercial tenant's right to an unabridged possessory interest in their leasehold is no longer absolute and trivial interference by the landlord is permissible without a windfall being bestowed upon the tenant in the form of rent being cancelled. A tenant should be mindful of defining a trivial interference in their lease agreement and identifying what degree of interference should give rise to a full rent abatement; meaning, what would interfere with their possessory interest to an extent that their purpose of the rental is undermined.

## Prejudgment Interest in Breach of Contract Suit

The Court of Appeals in *J. D'Addario & Co., Inc. v. Embassy Industries, Inc.* clarified if a vendor was entitled to statutory prejudgment interest at 9% pursuant to CPLR §5001(a) when a purchaser defaulted by failing to appear at a closing while the contract of sale had a liquidated damages provision (a/k/a predetermined damages provision) that was the "sole remedy" and did not reference the CPLR section. The court suggested that a contractual clause expressly addressing statutory interest would have prevented the entire lawsuit and suggested that real estate professionals insert such a clause in their future contracts. Yet, the court found that the facts that the deposit was placed in an interest-bearing account coupled with the "sole remedy" language resulted in an expressed intent by the parties to negate the statutory prejudgment interest default rule under principles of freedom of contract. The takeaway is to expressly state every aspect of your intent concerning statutory interest within a liquidated damages clause of a contract of sale and not leave holes in your contract to be governed by the default statutory rules.

## Real Estate Broker's

### Duty at an Open House

The Court of Appeals in *Douglas Elliman LLC v. Tretter* defined the scope of a real estate broker's fiduciary duty of undivided loyalty to its client when acting as an exclusive seller's agent.

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