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# Samit G. Patel Successfully Defends Bank on Multiple Appeals to Obtain Permanent Injunction Prohibiting Large-Scale Development in Manhattan's Lower East Side

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Cullen and Dykman is constantly breaking new ground and actively engaging in the evolution as well as the preservation of the Manhattan skyline on behalf of its banking clients.

In 2016, a Bank's Borrower, which was an entity that held a ground lease on property located on the Lower East Side of Manhattan, commenced an action against a major real estate developer to enjoin its proposed large-scale development on an adjoining lot. The Borrower asserted a number of adverse effects, discussed below, that it would sustain if the development were to proceed.

In 2017, shortly before the court hearing on the Developer's motion to dismiss the Borrower's Amended Complaint, the Firm filed an emergency application seeking to intervene in that action and to file a complaint in intervention on behalf of the Bank. The Firm sought declaratory and injunctive relief to enjoin the development as it would adversely affect the Bank as well.

## The Development

The development would have included an approximately 80-story high-rise tower cantilevering over the lot on which the Borrower had a ground lease and on which the Bank held a leasehold mortgage. It would have taken years to complete, and it would have had a permanent negative impact on and around that mortgaged property, including by altering traffic patterns and pedestrian flow and reducing access to light and air. The Bank maintained that the development also would have resulted in a seizure of what are known as development rights (or air rights) associated with the mortgaged property, thereby impairing the Bank's collateral. This is because the development required a merger of the zoning lot comprised of the mortgaged property with the adjoining lot on which the 80-story tower was to be built. In the proposed complaint in intervention, the Firm maintained that the Bank was a "party in interest" as that term is defined in the New York City Zoning Resolution, whose consent was required, but not obtained, in order for the Developer to utilize those development rights, which in turn, would have resulted in transferring them away from the mortgaged property so as to effectuate a merger with the adjoining lot.

## The Appeals Court Allows the Case to Proceed Against the Developer

The Developer had maintained, among other things, that the Borrower did not have a true ground lease which would otherwise be necessary for the Borrower to have an interest in the development rights and that thus, the Borrower was not a “party in interest” whose consent was required. The Developer also sought to prevent the Bank from intervening in the lawsuit, arguing that its interests were adequately represented by the Borrower.

Nevertheless, the trial court allowed the Bank to intervene in the action and denied the Developer’s motion to dismiss, finding that the Borrower was a “party in interest.”<sup>[1]</sup> The trial court held that all that remained to be determined was whether a certain Waiver of Declaration of Zoning Lot Restrictions previously executed by the Borrower in connection with a prior zoning lot merger, and which referenced another instrument, a Zoning Lot Development Agreement (the ZLDA), resulted in a waiver of the Borrower’s right to object to any future zoning lot mergers. The Bank had also previously executed a similar Waiver of Declaration. <sup>[2]</sup>

In 2018, the Developer filed the first of its two appeals, arguing that the Borrower’s Amended Complaint should have been dismissed. The Firm, on behalf of the Bank, moved for and obtained an order granting intervention in that appeal. This was to bolster the Borrower’s position and thereby ensure the protection of the Bank’s rights.

In 2019, New York’s Appellate Division First Department affirmed the trial court’s order denying the Developer’s motion to dismiss and confirmed that the Borrower was a “party in interest.” As a result, the case against the Developer was allowed to proceed.

## The Appeals Court Upholds the Permanent Injunction

Back in the trial court, the parties had also been engaged in discovery, which included depositions of land use experts opining on the zoning lot merger process in New York City. The Developer’s expert maintained, among other things, that the previously executed Waivers of Declaration resulted in a waiver of the Bank’s and the Borrower’s rights to object to the future merger of the mortgaged property with other lots.

At the conclusion of discovery, the Bank and the Borrower moved for summary judgment seeking a permanent injunction to enjoin the proposed development. The Firm argued that it had already been held, both by the trial court and the Appellate Division, that the Borrower was a “party in interest,” and that as a result, so was the Bank. This was based on what is known as the law of the case doctrine, which prevents re-litigation of issues previously decided where the interests of the parties are identical. The Firm also argued that notwithstanding the prior execution of Waivers of Declaration, a technical reading of those instruments confirmed that the Bank’s right to object to the development had not been waived.

In 2021, the trial court granted summary judgment in favor of the Bank and its Borrower, finding that the Waivers of Declaration were unambiguous and did not result in a waiver of the Bank’s or the Borrower’s right to object to future mergers of the mortgaged property with other lots. Consequently, the trial court issued a permanent injunction enjoining the development absent the consent of both the Bank and the Borrower.

Once again, the Developer appealed and attempted to re-litigate the issue of whether the Bank and the Borrower were “parties in interest.” The Developer further argued that not only did the Waivers of Declaration result in a waiver of future objections to zoning lot mergers, but that the trial court’s injunction was overbroad and was an unconstitutional taking, in violation of the Fifth Amendment. In November 2022, the Appellate Division once again sided with the Bank and the Borrower and affirmed the trial court decision, rejecting all of the Developer’s arguments. As a result, the permanent injunction remains in effect and the Developer made no timely attempt to seek leave to appeal to New York’s highest court or otherwise litigate the matter further.

### The Broader Implications of the Injunction

As further publicized [here](#), the adverse effects of the development had been the subject of significant local political interest as well as other lawsuits brought by local advocates, all of which had been unsuccessful in prohibiting it from going forward. The Firm, on behalf of its banking client, is proud to have played a critical role in obtaining positive results for the local community.

The permanent injunction also ensures the stability and predictability of the procedures for zoning lot mergers as set forth in New York City’s Zoning Resolution. If it had not been granted, banks holding ground lease mortgages would have been adversely affected by such transfers of development rights constituting their collateral without their consent. As a consequence, ground lease mortgages would have become less secure, thereby resulting in a chilling effect on ground lease mortgage lending by community banks and other financial institutions, an industry that involves vast sums of money in New York City.

The case is a prime example of the Firm’s ability to swiftly execute novel litigation strategies in high stakes situations involving some of the most complex and esoteric areas of the law, along with the Firm’s relentlessness and perseverance in ensuring its clients’ rights.

## Footnotes

[1] Since the trial court had just then granted intervention to the Bank, a decision had not been made at that time as to whether the Bank was also a “party in interest.”

[2] A Waiver of Declaration and a ZLDA are just a few of the instruments that may be necessary in order to effectuate a zoning lot merger, but not all such instruments are executed by all parties involved. In this case, neither the Bank nor the Borrower executed the ZLDA and the terms of the ZLDA were not expressly incorporated by reference into the Waivers of Declaration, key facts which ultimately proved dispositive.

## About Cullen and Dykman’s Banking and Financial Services Department

Banking and financial services are at the core of our firm’s practice. Our lawyers represent some of the largest U.S. and international financial institutions and a variety of financial services companies, ranging from regional financial powerhouses to national credit unions to local community banks. With a team of highly experienced lawyers and a comprehensive suite of expert practice areas, we serve these clients in virtually every way possible.

## About Cullen and Dykman

Cullen and Dykman ([www.cullenllp.com](http://www.cullenllp.com)) has been providing legal services to institutional clients since 1850. The firm represents a wide range of clients, including banks and other financial institutions, energy, telecommunications and water companies, construction companies, insurers, educational institutions, religious organizations, and not-for-profits. With over 170 attorneys in seven offices located throughout the Northeast and MidAtlantic regions, Cullen and Dykman is strategically positioned to meet the changing needs and demands of our clients.

## Practices

- Banking and Financial Services
- Commercial Litigation

## Attorneys

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