

CLIENT ADVISORY

AUGUST 2002

LIABILITY FOR FAILURE TO PROVIDE SECURITY REVISITED

In the September, 2001 issue of our Newsletter, we highlighted the case of Chianese v. Werner Meier, 285 A.D.2d 315 [1st Dept., 2001], in which the Appellate Division, First Department, denied the request of a landlord and managing agent to apportion their liability for injuries to a tenant with the person who had intentionally assaulted and injured the tenant. A tenant had been brutally attacked in her third floor apartment by a man who entered through the wide-open front doors of her building. The front doors had been propped open by a kick-stop that the superintendent had installed years earlier. It was sufficiently demonstrated that it was the habit of the superintendent to leave the building's front double doors open when he was going in and out of the building or cleaning the floors. Several tenants, including the injured tenant, had complained on numerous prior occasions about this practice. As a result of her severe injuries from the assault, the tenant was awarded a judgment against both the landlord and the managing agent for \$1,100,000.00. The landlord and managing agent had sought to avoid paying half of the judgment by claiming that they were only partially responsible for the attack and that the man who actually attacked the tenant should be responsible for the other half of the judgment. The Appellate Division had held that the landlord and the managing agent were required to pay the entire judgment without apportioning any percentage of the judgment to the man who had actually committed the crime.

On June 13, 2002, the Court of Appeals reversed this decision. In Chianese v. Werner Meier, (2002 WL 1291324, 2002 Slip Op. 04816), the Court of Appeals rejected the Appellate Division's application of Section 1602(5) of the Civil Practice Law and Rules ("CPLR"). Under the general rule set forth in Article 16 of the CPLR, personal injury defendants, the landlord and managing agent in this case, whose pro rata shares of fault are found to have been 50% or less, are jointly and severally liable for a plaintiff's non-economic loss **but only to the extent of their pro rata share**. This limitation upon liability is lifted if the exception set forth in CPLR Section 1602(5), is found to apply to the case. Specifically, CPLR Section 1602(5) removes the benefit of the pro rata liability limitation for defendants found to be less than 50% at fault in "actions requiring proof of intent". The Appellate Division had held that the intentional crime of assault within this exception, and held both the landlord and managing agent responsible for the entire award. The Court of Appeals disagreed and ruled that the case brought by the injured tenant against the landlord and managing agent was essentially a negligence case, and that the jury had made no finding of intent nor was one required in order to enter judgment against them. As a result of this reversal, the landlord and managing agent were permitted to reduce their liability by seeking apportionment of that liability with the non-party intentional tortfeasor, resulting in their responsibility for the judgment being limited to their respective pro rata shares of the injured tenant's non-economic loss.

This decision's lessening of property owners' and agents' exposure to liability for the full amount of a judgment is greater incentive for property owners and agents to double efforts to ensure that they provide reasonable security to persons to whom they owe a duty of care. The more reasonable the security, the greater the chance that liability will be found to be under the critical 50% benchmark. The failure to take and reasonably maintain safety precautions can not only regrettably result in someone getting hurt, but may now also result in property owners and agents losing the benefit of this decision and becoming unnecessarily liable for the full amount of a judgment.

THE "BOOK" FOR THIS MUSICAL IS A PROPRIETARY LEASE

The responsibility for floor repairs is an issue that often arises between unit owners and their respective cooperative corporations or condominium associations. In cooperatives, it is imperative that parties review the terms of their proprietary lease (the "Lease") for direction on the resolution of such disputes, since the Lease governs the rights and responsibilities of shareholders of a cooperative corporation. In the matter of Mahony v. Hurley (NYLJ, 7/31/02, p. 20, col. 5), Justice Philip Straniere of the Richmond County Civil Court found a unique way to make this point while guiding the parties (and all unit owners) through this type of dispute. Citing lyrics from "Oklahoma" and "The King and I", and invoking images of Lynette "Squeaky" Frome, "Squeaky the Mouse", the "Rolling Stone" and "Simon and Garfunkel", Judge Straniere described the case before him: "Claimant alleges that at all hours of the day and night squeaking and creaking sounds emanate from the Hurley Apartment (the 'Upstairs Neighbor'). It is not 'The Sounds of Music' to Claimant's ears nor is it 'The Sweetest Sounds' he ever heard. He (Claimant) would prefer that 'The Sounds of Silence' be generated from the defendant's unit. 'The Sound and the Fury' that has followed resulted in the Claimant asking the defendant Grymes Hill Owners Corp. (the 'Corporation') to turn the 'Noises Off' ". The Corporation hired an engineer, but his report could only speculate as to the cause of the discordant floor "music" because the Upstairs Neighbor would not permit the removal of carpeting to examine the flooring. The court listened to audiotapes, which tapes were played for the court after a questioning of the Claimant by the Upstairs Neighbor's attorney described as "bringing back memories of conspiracy theorists analyzing photographs of the grassy knoll for evidence of a second gunman". According to Judge Straniere, the tapes contained "more creaks than the reed section of an elementary school orchestra". As is true of many proprietary leases, if it was determined that the sub-flooring was causing the noise, then the Corporation would be responsible for correcting the condition and restoring the Upstairs Neighbor's apartment at its expense. If the cause of the noise was the outer floor, then the Corporation could remedy the situation and assess the Upstairs Neighbor. Judge Straniere outlined the burden upon claimants generally. To prevail, claimants would have to establish the cause of the creaking floor, prove which party was responsible, demand that party fulfill its obligations under the Lease, and upon failure of that party to act, either make the repairs themselves or obtain two estimates as permitted under the applicable court rules. Judge Straniere also noted that this Lease would permit the Corporation to remove the Upstairs Neighbor's carpeting for the purpose of locating the cause of the squeak and allocating the cost. After examining the Lease and house rules, Judge Straniere temporarily closed this "show" (dismissed the action without prejudice) so that the Claimant could follow the procedures in the Lease and house rules and re-open the show, perhaps in another "theatre", and in another month's newsletter.

WINDOW GUARD REMINDER

When the heat and humidity of this summer recedes, many apartment dwellers will open their windows to let in the fresh air. An annual inspection of all window guards should be made by the building superintendent to ensure compliance with the Window Guard Law, including the windows in first floor apartments. We suggest that this annual inspection be completed before the air-conditioning season is over.