GANFER & SHORE, LLP

CLIENT ADVISORY

AUGUST 2007

A WORD TO OUR CLIENTS AND FRIENDS

As some of you may know, our firm's offices at 360 Lexington Avenue were affected by the steampipe explosion on July 18. The building was closed temporarily, but fortunately we were able to secure temporary office space until the premises were reopened one week later. As of July 25, we have returned to our offices and are fully operational as usual.

This incident is a reminder that all buildings and businesses should have contingency plans for how they might deal with different types of emergency situations that may arise. While no one can anticipate or plan for every conceivable emergency scenario, in general, the more advance planning that has taken place, the better equipped any business will be if the unexpected occurs. Buildings should also check their insurance policies to insure that they have appropriate insurance coverage, including loss of rents coverage, to provide protection against these situations.

POTENTIAL LATE NOTICE OF OCCURRENCE IMPERILS COOPERATIVE'S INSURANCE COVERAGE

A recent case involving a dispute between a Cooperative and its liability insurance carrier, **426-428 West 46th St. Owners, Inc. v. Greater New York Mutual Ins. Co., 2007 N.Y. Slip Op. 51420(U), 2007 WL 2127341 (Sup. Ct. N.Y. Co. July 25, 2007)**, is a reminder to carefully consider placing a building's carrier on notice of every occurrence that might give rise to future litigation.

In this case, a tenant in a leased apartment in the Cooperative's building fell off a staircase leading to a loft area within the apartment, landing on the floor about 8 or 9 feet below and suffering injury. The building superintendent was alerted and called 911, and the board president visited her in the hospital sometime later. The Cooperative did not notify its liability insurer of this occurrence at the time. About 10 months later, the injured tenant filed a personal injury suit against the Cooperative and others, at which point the Cooperative did notify the carrier. The insurance carrier's position was that the Cooperative had forfeited coverage for this claim, because the tenant's fall represented an "occurrence" that should have been reported to the carrier promptly after it occurred. The Cooperative responded that at the time, it was unaware that the tenant had fallen but believed that she was suffering from an illness or medical condition, and that when the Board President visited her in the hospital, it was not apparent or mentioned that she had been hurt in a fall. The court found that a factual issue existed concerning whether the Cooperative should have realized that an occurrence had taken place that might result in a claim, so that a trial was necessary on this issue.

Thus, insureds should bear in mind that "occurrences" under an insurance policy are not limited to actual litigation claims, but also include events that may result in future litigation, and that failure to report such occurrences promptly may lead to the forfeiture of insurance coverage or to costly litigation regarding the existence of coverage.

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JUDGE ENJOINS LANDLORD FROM BRINGING CIVIL COURT HOLDOVER PROCEEDING BASED ON EXISTENCE OF "BLACKLIST"

A recent decision of the Supreme Court, New York County, if followed by other judges, may result in a substantial change in New York landlord-tenant practice.

The case, **Weisent v. Subaqua Corp., 2007 N.Y. Slip Op. 51428(U), 2007 WL 2140947 (Sup. Ct. N.Y. Co. July 5, 2007)**, arose from a routine dispute as to whether a resident was entitled to succeed to the lease of a rent-stabilized tenant's apartment upon the tenant-of-record's death. In New York City, this type of dispute is usually settled through a summary proceeding brought by the landlord in the Housing Part of the New York City Civil Court. Here, however, the tenant sued first in the Supreme Court, seeking a declaration that she was entitled to continue leasing the apartment under the rent stabilization laws.

At the outset of the case, the tenant moved for an injunction against the landlord's bringing any litigation against her in the Housing Court. The tenant acknowledged, and the court agreed, that Housing Court is usually the preferred forum for resolving landlord-tenant disputes. However, the tenant argued that if she brought a case against her landlord in Housing Court, her name would be placed on a "blacklist" maintained by commercial firms known as tenant screening bureaus, who purchase data on Housing Court cases from the Office of Court Administration. The court agreed that this would result in "irreparable harm" to the tenant because it found that once "blacklisted," a tenant may find it very difficult or impossible to locate housing in the future.

This reasoning could apply to virtually any residential landlord-tenant dispute. If the decision is followed by other judges, it may result in more landlord-tenant litigations taking place in Supreme Court, where litigation typically takes longer and is more expensive than Housing Court proceedings.

CONDOMINIUM BOARD'S DEMAND FOR ADVANCE PAYMENT OF COMMON CHARGES PLACED SELLER, NOT BUYER, IN DEFAULT

A Condominium Board's demand that the prospective purchaser of a unit prepay two years' worth of common charges placed the seller, not the purchaser, in default under their contract of sale. As a result, the purchaser was permitted to cancel the contract and recover her downpayment, according to **Lisenenkov v. Kaszirer, 838 N.Y.S.2d2d 545 (App. Div. 1st Dep't June 21, 2007)**.

In this case, the parties' contract of sale contained standard provisions requiring that at closing, the seller deliver a statement from the Condominium that the seller was current in her payment of maintenance and assessments, and provide the purchaser with insurable title. Although there appears to have been no claim that the seller was actually delinquent in making these payments, the Condominium was concerned about the purchaser's credit-worthiness and refused to deliver such a statement unless the purchaser paid two years of common charges in advance, which she refused to do. Because the seller was unable to deliver this statement, the purchaser's lender declared that title was uninsurable and the sale aborted.

The purchaser's ensuing suit for return of her downpayment was successful. The court found that the purchaser was not obliged to pay the advance as demanded by the Condominium and was not responsible for the Condominium's decision not to issue the statement confirming that the seller's maintenance payments were current. Under the contract, it was the seller's obligation to deliver the statement and insurable title, and the seller's failure to do so excused the purchaser's non-performance and required the return of her downpayment. The decision did not address any potential claims that either party might have against the Condominium for blocking the sale.