
CLIENT ADVISORY

JUNE 2005

APPELLATE DIVISION HOLDS THREE-YEAR TIME LIMITATION APPLIES TO CLAIM ARISING FROM N.Y.C. ADMINISTRATIVE CODE

The New York City Administrative Code imposes many obligations on property owners. In Mindel v. Phoenix Owners Corp., 2005 WL 913370 (App. Div., 1st Dep't Apr. 21, 2005), the Appellate Division, First Department, addressed a claim under Administrative Code § 27-860. That section requires that when a building is erected or enlarged so that it is taller than a preexisting neighboring building, the owner of the taller building must raise or offset the neighbor's chimneys to conform with applicable height requirements, and thereafter maintain and repair such chimneys.

In Mindel, the owners of a Manhattan brownstone sued an adjoining cooperative under this provision. The complaint, filed in 2002, alleged that plaintiffs had paid to repair their chimneys in the course of remodeling the brownstone between 1996 and 1998. They claimed that the cooperative had refused to reimburse these expenses, allegedly in violation of Section 27-860 and of a stipulation that had resolved a prior similar litigation between the parties. The trial court observed that the case raised issues that had never previously been litigated under Section 27-860, including whether the plaintiffs had waived their rights by repairing the chimneys themselves rather than notifying the cooperative to do so. The court did not reach the merits of the dispute, however, because plaintiffs' claims had not been brought within three years, which the court held was the applicable statute of limitations.

On appeal, the Appellate Division agreed that New York's three-year limitations period for actions based on violation of a statute applies to claims under Administrative Code § 27-860, and affirmed dismissal of the case as untimely. The court rejected plaintiffs' contention that the action was timely under the six-year statute of limitations for contract claims, because the cooperative's earlier stipulation requiring it to comply with Section 27-860 added nothing to its preexisting legal obligations. This case emphasizes the lesson that legal claims should be pursued promptly to avoid the risk of losing them altogether. Ganfer & Shore, LLP represented the defendants in this case.

STATE LAW REQUIRES LANDLORDS TO ALLOW TENANTS TO OPERATE DAY CARE CENTERS IN APARTMENTS

A New York State statute (Social Services Law § 390) contains licensing requirements for child day care centers and homes. The statute forbids municipalities from prohibiting operation of licensed day-care facilities in private homes or multiple dwellings or imposing special zoning or regulatory requirements on them. New York courts have consistently held that Section 390 establishes a public policy that forbids private landlords from prohibiting day-care facilities in their tenants' apartments. (While Section 390 excludes certain facilities located in the City of New York from its coverage, at least one court has held that most facilities in New York City are still covered.)

In Alpha Dynamics Ltd. v. Martinez, NYLJ May 11, 2005, p. 22, col. 3 (Civ. Ct., Bronx Co.), the Civil Court reaffirmed that Section 390 authorizes licensed day-care facilities to operate in rented homes or apartments even over the landlord's objections. In this case, the landlord alleged that a tenant's operation of a day-care center in her apartment constituted grounds for eviction

because a "Section 8" subsidized housing contract, whose terms are fixed by federal law, and the tenant's lease both forbade any commercial use of the apartment. Rejecting this argument, the court found no intent in either federal statute, regulations, or the standard Section 8 contract to override the specific state-law protections of Section 390.

The court also rejected the landlord's allegation that the day-care center was unlawfully overcrowded, noting that no notice to cure containing this allegation had been served on the tenant and that the landlord had never requested the licensing authority or fire department to investigate. Finally, the court also rejected the landlord's argument that it had "economic good cause" for eviction because the day care center's presence made it difficult and expensive to obtain insurance for the building, noting that the tenant had provided proof of her own insurance, but holding that, in any case, this issue would not be grounds for terminating the lease.

Cooperative boards and condominium associations should be aware that their residents may also invoke Section 390 in challenging any restriction on their right to operate a day-care center or similar facility in a residential unit, despite provisions in proprietary leases, condominium declarations, or bylaws that would otherwise prohibit such a use.

DISCOVERY TO PROCEED ON CLAIM THAT BOARD DISCRIMINATED IN DISAPPROVING SHAREHOLDERS' APPLICATION TO BUY APARTMENT

As discussed in recent issues of this Client Advisory, recent court decisions have tended to uphold decisions made by cooperative boards and condominium associations based on their business judgment. Still, boards' discretion in decision-making is not unlimited, particularly when allegations of discrimination based on impermissible factors such as race or religion are raised.

In Cohen v. Seward Park Housing Corp., NYLJ Apr. 27, 2005, p. 18, col. 3 (Sup. Ct., N.Y. Co.), the court denied a motion by a Cooperative and its Board members to dismiss a complaint charging them with breach of fiduciary duty as well as religious-based discrimination. The complaint alleged that the Board had refused to allow plaintiffs, who were shareholders in the Cooperative, to purchase an apartment adjoining their own. Instead, the Board claimed that the contract price was too low and exercised a right of first refusal over the apartment, which then stayed vacant for more than one year before being sold to an outsider, although plaintiffs repeatedly offered to buy it from the cooperative for an increased price. Plaintiffs alleged that the Board had not exercised its right of first refusal when other shareholders, including at least one Board member, submitted comparable applications to acquire additional apartments. According to plaintiffs, the Board's decision-making could only be explained as being based on Board members' "personal animosities" against plaintiff and discrimination against their religion.

The court found that plaintiffs had sufficiently pleaded a claim of bad faith and therefore denied the Cooperative's motion to dismiss. In reaching this conclusion, the court pointed out, among other things, that this case had been brought as an action for monetary damages, rather than in the form of an "Article 78 proceeding," a type of litigation that is subject to different procedural rules. The court also upheld plaintiffs' pleading of religious discrimination as sufficient under the New York State Human Rights Law.