
CLIENT ADVISORY

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CONDOMINIUM OWNER COULD EVICT TENANT WHO CREATED NUISANCE BY NOXIOUS ODORS, FLOODING

The owner of a condominium unit was permitted to evict a tenant who created a nuisance in her apartment through noxious odors, under the Appellate Division decision in Zipper v. Haroldon Court Condominium, 39 A.D.3d 325 (1st Dep't Apr. 17, 2007).

According to the decision, the tenant's apartment was the subject of recurring complaints of extremely bad odors. The court found that the odors "were not of the unavoidable variety," but according to all the credible testimony, were so severe, persistent, and unacceptable as to constitute a nuisance and warrant eviction. The court also noted what was described as a "Collyer Mansion like condition" in the apartment, which had not been cured despite previous measures ordered by the trial court to assist the tenant, and evidence that leaks into the apartment below the tenant's apartment were caused by the tenant's creating or allowing floods to occur in her apartment.

This decision should assist landlords whose tenants' poor housekeeping or unsanitary behavior creates seriously troublesome conditions. In these situations, counsel should be consulted to create a record that the tenant has been warned of the problems originating from his or her apartment and, after a reasonable opportunity, has been unwilling or unable to correct them.

PROSPECTIVE COOP PURCHASER IS NOT A THIRD-PARTY BENEFICIARY UNDER PROPRIETARY LEASE, COURT RULES

Most cooperative proprietary leases require the Board of Directors' consent before any shares may be sold or transferred. If the Board declines to approve a sale, the prospective purchaser will not be able to proceed with the transaction, and may resort to litigation. The courts have rejected several legal theories typically relied upon by would-be purchasers, such as breach of fiduciary duty, holding that no fiduciary duty is owed to an applicant.

Claims by a disappointed purchaser of a commercial unit against a Board of Directors and its members, as well as the seller, were rejected in 85 Fifth Ave. 4th Floor, LLC v. I.A. Selig, LLC, 14 Misc. 3d 1219(A), 2006 N.Y. Slip Op. 52542(U), 2006 WL 3931458 (Sup. Ct. N.Y. Co. Oct. 3, 2006). The plaintiff in this case was the contract vendee of a commercial cooperative unit. The Board decided that plaintiff was an "unsuitable candidate" and rejected its application. The seller then terminated the contract of sale and returned plaintiff's downpayment. Plaintiff then sued the seller, the Board of Directors, and all of the Board members. All of plaintiff's claims were dismissed.

First, plaintiff contended that the seller had breached the contract of sale, because the Board's rejection of plaintiff's application allegedly was untimely under the proprietary lease, so that there was no valid rejection and the seller was bound to consummate the sale. The court held that the cited provision of the proprietary lease existed to benefit the parties to the lease, not third parties such as a

prospective purchaser. Plaintiff was not an intended third-party beneficiary of the proprietary lease, so it could not maintain a breach-of-contract claim based upon such provision.

Similarly, the court dismissed plaintiff's claim for breach of the proprietary lease against the seller, because plaintiff was not a party to the lease. The court also dismissed a claim for breach of the implied covenant of good faith and fair dealing under the proprietary lease, because no such covenant could be implied in plaintiff's favor from a contract to which plaintiff was not a party. Plaintiff's fourth claim, for tortious interference with contract by the Board and its members, was rejected because a necessary element of such a claim is breach of the underlying agreement, and the court had already held that no breach occurred. The court also rejected a claim for "civil conspiracy," because there was no underlying breach of contract or tort that the parties could have conspired to commit. Finally, plaintiff's claim for an injunction against selling the unit to anyone else was also denied, because absent any breach of contract, there was no basis for any injunction.

ONCE OFFERING PLAN IS ACCEPTED, MARTIN ACT PROTECTS TENANTS IN OCCUPANCY FROM EVICTION

When a residential building is converted from rental status to cooperative or condominium ownership, complex issues arise as to the legal rights of existing residents. Because residents may enjoy the right to purchase apartments at a favorable "insider" price or to remain in occupancy as renters following the conversion, the building owner or sponsor may have an economic incentive to oust as many of the tenants as possible. The rights of tenants under these circumstances are governed by, among other things, the provisions of a New York State statute known as the Martin Act.

In **322 West 57th Owner, LLC v. Penhurst Productions, Inc.**, 15 Misc. 3d 1105(A), 2007 N.Y. Slip Op. 50515(U), 2007 WL 824105 (Civil Ct. N.Y. Co. Mar. 19, 2007), a Civil Court judge recently held that once a sponsor's offering plan for a non-eviction plan is accepted for filing by the Attorney General, the Martin Act precludes the owner from seeking to evict tenants simply because their leases have expired. This is so even where the tenants are "unregulated" tenants who are not protected under the rent control or rent stabilization laws.

In reaching this conclusion, the court held that it is the offering plan's being accepted for filing that activates the Martin Act's protection of tenants from eviction. In a previous decision involving the same building, another Civil Court judge had decided that that the mere filing of an offering plan with the Attorney General did not preclude the landlord from seeking to evict unregulated tenants as holdovers, so long as no independently unlawful conduct such as harassment took place. (For discussion of this decision, see the November 2006 issue of this **Client Advisory**.) On the other hand, the court rejected the owner's argument that the Martin Act protections would not apply until the offering plan actually became effective, which would be some months or years after it was accepted for filing. The court observed that the intent of the statute was to allow tenants in occupancy at the time a plan was accepted from filing to either purchase their units on the same terms available other tenants, or to continue in occupancy as renters.

Nor, the court held, did the fact that the tenants' leases had expired and they were occupying their apartments as holdovers negate their status as "tenants in occupancy" entitled to the Martin Act's protections. Even if the owner had brought holdover proceedings against the residents before the plan became effective, each resident was still a tenant in occupancy, protected by the statute, so long as a warrant of eviction had not been issued against him or her. Under these circumstances, the owner could only seek to evict the tenants for cause, such as non-payment of rent, refusal of reasonable access to the premises, or another breach of an obligation of the tenancy. Because no such grounds for termination were alleged, the court dismissed all of the holdover proceedings.