
CLIENT ADVISORY

MARCH 2006

LANDLORD MAY BE LIABLE FOR CONTRACTOR'S NEGLIGENT PERFORMANCE OF FACADE WORK LEADING TO MOLD CONTAMINATION

The owner of residential premises has a nondelegable duty to maintain them in a safe condition. Therefore, a claim that a contractor's negligence in performing façade repairs led to mold contamination may proceed against both the owner and the contractor, according to the Appellate Division decision in **Daitch v. Naman**, 807 N.Y.S.2d 95 (App. Div. 1st Dep't Jan. 19, 2006).

In this case, after complaining about water and dust problems beginning soon after the repair project commenced, the plaintiff allegedly developed respiratory problems that her experts attributed to mold contamination in her apartment resulting from the repairs. The court found that factual issues existed concerning whether the plaintiff had complained about mold contamination in time for the owner to have taken remedial action before she became ill, and whether, even if plaintiff had not complained specifically about mold, the alleged mold problem was a foreseeable result of the water and dust conditions about which she had complained. Accordingly, the owner's motion to dismiss the case was denied. The contractor's motion to dismiss was also denied, because failure to exercise due care in this type of repairs might have presented a foreseeable risk of harm to the tenants.

NEW CITY LAW AFFECTS BUILDING OWNERS' RESPONSIBILITY FOR GRAFFITI

A recently enacted New York City law provides that building owners have a duty to keep their buildings free of graffiti. The law also establishes a City-run graffiti abatement program, in which buildings may participate upon execution of the owner's written consent and waiver of liability. Additionally, upon finding graffiti on a residential building of six or more units or a commercial building, the City may serve the owner with a notice to remove or conceal the graffiti within 60 days. Upon receiving such a notice, the owner may either remove or conceal the graffiti itself or enroll in the City's graffiti abatement program. Failure to take one of these steps can result in a fine of between \$150 and \$300 imposed by the Environmental Control Board (but not more than once in a six-month period, and not during the winter months). Ultimately, if the owner fails either to remove or conceal the graffiti or to join the City program, the City can seek an ECB finding that the property has become a nuisance, which will allow the City to gain access to the property for the purpose of removing or concealing the graffiti even without the owner's consent. The new law takes effect March 29, 2006.

Copies of the consent and waiver form are available on the City's website or from Ganfer & Shore, LLP. The form requires owners to indemnify the City from claims arising from the graffiti removal, so owners should consult with counsel before signing it.

APARTMENT RESIDENT MAY BE ENTITLED TO "TENANT IN OCCUPANCY" STATUS UNDER OFFERING PLAN THOUGH NOT NAMED ON LEASE

When a building is converted to condominium or cooperative ownership, existing tenants are permitted to purchase their apartments. Sometimes, however, it is not clear who should be considered

a "tenant in occupancy" for this purpose. The recent Appellate Division decision in Steier v. Schreiber, 2006 WL 224051 (App. Div. 1st Dep't Jan. 31, 2006), addresses this issue.

In this case, Schreiber was a long-term resident of the apartment at issue and the sole tenant on the lease. In 1988, Steier moved into the apartment as Schreiber's roommate, but did not become a tenant of record. In 1999, Schreiber moved out of the apartment and into a nursing home. This led the landlord to bring a holdover proceeding on the ground that the apartment was no longer Schreiber's primary residence. Steier, who was still living in the apartment, agreed to pay use and occupancy while the proceeding was pending. Thereafter, the landlord allowed the holdover proceeding to become dormant. Steier continued to reside in the apartment, although she continued to pay use and occupancy rather than rent and was never issued a lease.

In June 2002, a condominium offering plan took effect. The sponsor sent a contract to purchase the apartment to Schreiber's representative rather than Steier. Steier, claiming to be the tenant in occupancy, tendered a signed contract with the applicable downpayment, which the landlord rejected. Steier then sued both the sponsor and Schreiber for a determination that Steier was the tenant in occupancy entitled to purchase the apartment.

The Appellate Division ruled that Steier should prevail because Schreiber had permanently vacated the apartment in 1999. While a temporary period of absence for medical reasons would not affect a tenant's status as a tenant in occupancy, here the evidence demonstrated that Schreiber's medical condition was permanent and that she had moved out of the apartment with no intention or ability to return. Based upon a "practical analysis of the relationship of the competing parties to the demised premises," the court concluded that Steier was the only person who had resided in the apartment for the past several years and that she was entitled to buy the apartment.

NEW LEGISLATION MODIFIES PUBLICATION REQUIREMENTS FOR LIMITED LIABILITY COMPANIES

Many New Yorkers own real estate and other assets through limited liability companies (LLC's). Under existing law, a New York LLC must publish a "legal notice" advertisement once per week for six consecutive weeks in two approved newspapers in the county where the LLC will operate.

New legislation effective June 1, 2006, shortens the required publication period to four weeks instead of six, but modifies the publication requirements in other ways that many LLC owners will consider onerous. For most LLC's, the required notice will have to identify the 10 persons with the most valuable ownership interests. In addition, the publication requirement will now apply to out-of-state LLC's operating in New York, as well as to New York LLC's.

Moreover, if an LLC does not file proof of publication with the Secretary of State within 120 days after formation, its authority to do business in New York will be suspended. For both domestic and foreign LLC's formed before June 1, 2006, the LLC will have until December 1, 2007 to publish or its authority will be suspended. Existing LLC's that have not published and wish to remain in good standing, without publicly disclosing the identity of their owners, would be well-advised to start the publication process promptly so that it can be completed before June 1, 2006.