

CLIENT ADVISORY

MARCH 2007

EXCESSIVE NOISE FROM VENTILATION SYSTEM VIOLATED COOPERATIVE'S WARRANTY OF HABITABILITY

Any lease of residential real property, including a cooperative proprietary lease, is deemed to contain a warranty of habitability. This warranty, codified in Real Property Law § 235-b, provides that the landlord or lessor is deemed to have warranted that the premises are fit for human habitation and the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous or hazardous to their life, health, or safety.

In Misra v. Yesid, 2007 N.Y. Slip Op. 1371, 2007 WL 474018 (1st Dep't Feb. 15, 2007), the Appellate Division upheld a trial court decision holding that a Cooperative had breached the warranty of habitability based upon excessive noise from the Cooperative's ventilation system, which was located directly above the plaintiff's unit. The plaintiff claimed that her apartment was uninhabitable for more than two years because the ventilation system was so loud that she was unable to live in peace and quiet. Plaintiff contended that despite being on notice of the problem, the Cooperative failed to take any effective remedial action. In support of her claim, plaintiff produced reports from the Cooperative's own engineer, indicating that the level of noise and vibrations exceeded those permitted by the New York City Administrative Code. The Court accepted plaintiff's contentions and rejected the Cooperative's argument that the plaintiff had not suffered any damages because she had been traveling and was away from the apartment for some or all of the time period in question. The court ordered a hearing to determine the amount of plaintiff's damages, which could include, but were not limited to, the amounts she paid in maintenance charges during the period in which the apartment was uninhabitable. However, the Court dismissed plaintiff's claim for breach of the warranty of habitability insofar as it was asserted against the Cooperative's management company, because only the landlord or lessor owes obligations under the warranty of habitability.

The Appellate Division also affirmed the trial court's ruling that plaintiff's could pursue a claim of fraud against the person who sold her the unit and the seller's real estate broker. There were issues of fact as to whether the broker had actively concealed the noise problem by reducing the fan speed of the ventilation system when plaintiff came to visit the apartment before acquiring it.

FEDERAL COURT SUSTAINS NEW YORK'S "LIS PENDENS" STATUTE

When the title to or use, possession, or enjoyment of real property is at issue in a pending litigation, New York law allows a party to the case to file a Notice of Pendency, commonly known as a "lis pendens," against the property. This tactic provides a powerful weapon in litigation because title to a property encumbered by such a notice is usually rendered unmarketable. Because the improper filing of a notice of pendency can cause serious damages to the owner, the courts are authorized to impose substantial sanctions against parties and their counsel for misusing this remedy. (Please see the August 2004, May 2006, and August 2006 issues of this *Client Advisory*.) In Diamond v. Pataki, 2007 WL 485962 (S.D.N.Y. Feb. 14, 2007), a federal court upheld New York's lis pendens statute against the latest in a series of constitutional challenges to its validity. The Court held that the statute served the valid purpose of placing potential third-party purchasers on notice that the property was involved in litigation that might affect their rights.

NEW LEGISLATION PROTECTS OWNERS OF RESIDENCES UNDERGOING FORECLOSURE

Effective February 1, 2007, a new statute known as the Home Equity Theft Protection Act imposes new requirements on residential real estate transactions involving property on which a defaulted loan is being foreclosed.

The legislation is intended, according to its sponsor, to protect property owners from “scams” designed to “manipulate homeowners into transferring title to their property or selling their home for a pittance” to avoid foreclosure. The statute applies only to property owned by a natural person, rather than by a corporation or limited liability entity, and the property must contain one to four dwelling units, at least one of which must be owner-occupied. The law does not apply when a home is sold to a purchaser who intends to use it as his or her primary residence, nor to sales conducted through a court-supervised foreclosure process, but is targeted primarily at those who acquire distressed properties for purposes of resale. The law apparently applies to condominium units, but not to cooperatives, which are generally treated as personal property, rather than real estate.

New **Real Property Law § 265-a** governs the procedures applicable to the sale of a home that is in foreclosure. The contract of sale must provide the seller with a five-day cooling-off period after the contract is signed, and the seller must be provided with a cancellation form that the homeowner can complete and return to the purchaser if he or she decides to cancel the transaction. To safeguard the homeowner’s ability to cancel the sale, which cannot be waived, none of the purchase price or other consideration may be paid to the homeowner during the five-day period, nor may the purchaser take any action intended to pressure the seller to waive the right to cancel. The statute also prohibits the making of any false or misleading statements in connection with the sale. A sale of residential real estate induced by a violation of these requirements may be set aside in a suit brought within two years after the transaction is recorded. Finally, reconveyance arrangements, under which the purchaser acquires the property with a promise to re-sell it back to the homeowner, are not permitted unless the seller has a reasonable ability to pay for the repurchase.

Real Property Actions and Proceedings Law § 1303 governs the obligations of lenders about to foreclose on residential real property. The foreclosing party must provide the homeowner with a statutory notice, warning them about persons that may promise to save their home and advising that the New York State Banking Department can provide them with information about government agencies, legal aid entities, and non-profit agencies that they can contact for information about the foreclosure process. Additionally, **Banking Law § 595-a(1)** now prohibits any mortgage lender or mortgage broker from lending or assisting in a transaction that the lender or broker knows violates Real Property Law § 265-a.

Although the new legislation is designed to protect homeowners, concerns have been expressed that it may adversely impact upon the foreclosure process and the insurability of title to some properties. The courts will undoubtedly be called upon to construe and apply several provisions of the legislation and we anticipate reporting on some of these cases in future issues of this *Client Advisory*.