
CLIENT ADVISORY

MAY 2006

COURT DISALLOWS NEIGHBOR'S IMPROPER FILING OF NOTICE OF PENDENCY AGAINST CONDOMINIUM UNITS AND AWARDS COSTS

A recent decision by the Supreme Court, New York County, reiterates that in a dispute concerning common elements of a Condominium building, the Board of Managers is the sole proper defendant and claims may not also be asserted against individual Unit Owners. The court also cancelled the recording of a Notice of Pendency that had been filed against all of the individual Condominium Units and awarded costs and expenses.

Benjamin Partners, LLP v. 583-587 Broadway Condominium, Index No. 115272/04 (Sup. Ct. N.Y. Co. Apr. 10, 2006) is an encroachment litigation between the owners of two neighboring buildings. In the course of wall and façade repairs, the defendant Condominium applied an inch-thick stucco protective coating to the building's exterior wall. Plaintiffs, owners of the contiguous property, sued the Condominium's Board of Managers as well as the owners of all the individual Condominium Units, contending that the stucco coating encroached into the air space above plaintiffs' building. Plaintiffs sought an injunction directing defendants to remove the stucco coating, as well as damages. Defendants denied any encroachment and asserted that even if any encroachment did exist, it would be *de minimis* and non-actionable.

Plaintiffs then filed a Notice of Pendency in the action. The Notice of Pendency recited that the premises affected by the litigation included each of the Condominium Units, and plaintiffs recorded it against the block and lot corresponding to each of the Units. As a result, it would be virtually impossible for the Unit Owners to sell or refinance their Units, because title insurance companies will refuse to insure title to a property encumbered by a Notice of Pendency and financial institutions generally will not lend on such a property.

The Unit Owners moved to dismiss the action insofar as it was asserted against them, and the Condominium and the Unit Owners moved to cancel the Notice of Pendency. The court granted both motions. With respect to the motion to dismiss the Unit Owners as defendants, the court reasoned that the Board of Managers of the Condominium, and not any individual Unit Owner, had sole control over the common elements of the Condominium, including the exterior walls and façades. Accordingly, the claims against the Unit Owners had to be dismissed pursuant to the Appellate Division's decision in **Pekelnaya v. Allyn, 25 A.D.3d 111 (1st Dep't 2005)** (discussed in the January 2006 issue of this Client Advisory). Because the individual Unit Owners were no longer parties, the Notice of Pendency was cancelled as to their Units.

The court also concluded that plaintiffs should not have filed the Notice of Pendency at all because their encroachment cause of action did not "affect the title to, or the possession, use or enjoyment of [defendants'] real property" as required for the filing of a Notice of Pendency under CPLR 6501. The court cited precedent holding that the encroachment claim did not meet this standard, and that the notice of pendency "statute must be strictly construed because of its drastic impact." The Court also directed that plaintiffs pay the defendants' costs and expenses incurred as a result of the Notice of Pendency, in an amount to be determined later.

Ganfer & Shore, LLP represents the Condominium in this case. We have also represented other property owners in obtaining the cancellation of improperly filed Notices of Pendency, with costs or sanctions, such as occurred in **Yenom Corp. v. 155 Wooster Street, Inc., 23 A.D.3d 259 (1st Dep't 2005)**, and **Tribeca Equities, Ltd. v. 19-21 Leonard Street Condominium, Index No. 109406/03 (Sup. Ct. N.Y. Co. Sept. 12, 2003)** (both discussed in the August 2004 and December 2005 issues of this Client Advisory).

REAL ESTATE BROKER'S FILING OF NOTICE OF PENDENCY HELD IMPROPER, TORTIOUS

Another recent decision holding that a Notice of Pendency was improperly filed is **Talk of the Millennium Realty Inc. v. Sierra**, N.Y.L.J., Jan. 18, 2006, p. 20 (Sup. Ct. Richmond Co.). In that case, a real estate broker filed a Notice of Pendency in its suit against a property owner for a commission allegedly owed. The court cancelled the Notice of Pendency because the action sought only money damages and did not affect title to or the use, benefit, or enjoyment of the property, and it is well-settled that a broker may not file a Notice of Pendency to enforce a claim for commissions. Although the Real Property Law and the Lien Law provide procedures by which brokers may secure their claims for commissions on certain transactions, those provisions did not apply to the subject transaction and did not include filing a Notice of Pendency. Accordingly, the court held that "the plaintiffs' actions of filing a notice of pendency constitute a tort" and that "the defendants are entitled to judgment on [their counterclaim against the broker] with a trial to take place solely to determine the amount of damages the defendants suffered by the plaintiffs' wrongfully encumbering, even temporarily, defendants' title."

LENDER NOT REQUIRED TO ASSIGN MORTGAGE TO SAVE BORROWER TAXES UPON REFINANCING

When a mortgage on real property is recorded, a mortgage recording tax, calculated as a percentage of the mortgage, must be paid. When the amount secured by the mortgage is later repaid, the lender must supply the borrower with a satisfaction so that the mortgage can be cancelled of record. When a borrower refinances a property, such as to secure a lower interest rate, it will request the mortgage-holder to execute an assignment of mortgage to the new lender, rather than a satisfaction. This procedure avoids the need to record a new mortgage and pay mortgage recording tax on the amount of the former mortgage that is being refinanced.

Some lenders have refused to execute assignments or have demanded substantial fees for doing so. A lower-court decision rendered in 2005 had suggested that lenders could be required to execute assignments when real property is refinanced, reasoning that it could be an act of bad faith for a lender to act in a way that would provide no benefit to the lender but could cause a substantial loss to the borrower. However, in **767 Third Avenue LLC v. Orix Capital Markets, LLC, 26 A.D.3d 216 (1st Dep't 2006)**, the Appellate Division rejected this theory, holding that where the parties' contract was silent on the matter, a borrower has neither a statutory nor a contractual right to compel the lender to execute an assignment rather than a satisfaction. Accordingly, property owners entering into financing transactions should ensure that this issue is addressed at the time the loan documents are negotiated.