
CLIENT ADVISORY

NOVEMBER, 2002

RIGHTS CAN ACCRUE FROM PROPERTY USE

Property rights of use and access to, over or through property leased to or owned by others ("Easements") should be specifically referenced and described in a written document between property owners, including board members of cooperative corporations or condominium associations (collectively "Owners"), and tenants, shareholders or unit owners. Inclusion of these provisions in a commercial lease or proprietary lease could avoid costly and uncertain litigation or the loss of rights important to Owners. It is important though to have an understanding of how the courts deal with disputes relating to easement claims when written documents are silent. As the case of Saxon Garage Corp. v. Regency East Apartment Corp. (NYLJ, 9/25/2002, p. 18, col. 1) demonstrates, how the property is and has been used is of great significance to a decision on matters not otherwise set forth in written documents.

In Saxon, the Regency Apartment Corp. (the "Coop") had leased garage space in its building (the "Leased Premises") to Saxon Garage Corp. (the "Tenant") pursuant to a thirty-nine year lease (the "Garage Lease"). Well into the term of the Garage Lease, a dispute arose between the Coop and the Tenant over the responsibility of each party to make repairs to the garage. Throughout the term of the Garage Lease, the Coop had used a small portion of the Leased Premises for storage and the removal of compacted garbage generated by the Coop. The compacted garbage is brought into the garage using a mechanical hoist near the storage area and is then brought to the street by the Coop on garbage collection days. There was no mention of the Coop's use of that portion of the Leased Premises in either the Garage Lease or any other written document. Notwithstanding the lack of a written agreement, at the time of the dispute, the Coop had used a portion of the garage for twenty-one years.

The dispute between the Coop and Tenant escalated when the Tenant brought an action against the Coop seeking damages of \$1,000,000 for trespass and an injunction preventing the Coop from using the garage for storage space or for the removal of their garbage. In Saxon Garage Corp. v. Regency East Apartment Corp. (NYLJ, 9/25/2002, p. 18, col. 1), the court faced the question of whether the Coop, as a landlord under the Garage Lease, could establish an "easement by prescription" in the portions of the garage the Coop had itself leased to the Tenant. An easement by prescription is typically a right to use another's property that is acquired over time through the open and obvious use of that property without the other's consent. What is unique about this case is that the party claiming an easement by prescription, the Coop, already owns the property. Without either party being able to locate a case that discussed this issue, the court ruled that there was no reason that a landlord could not have the same right to establish an easement by prescription as a tenant. In New York, Real Property Actions and Proceedings Law ("RPAPL") Section 311 provides that an easement by prescription may be established if it is proven that the property in question was used openly, notoriously and continuously for a ten-year period. The Tenant could offer no evidence contrary to the elements set forth in RPAPL 311, especially that the Coop had been permitted to use portions of the Garage since such an admission would have resulted in the dismissal of their trespass claim, thereby losing whatever leverage was apparently perceived to be gained by escalating the dispute with the Coop. Thus, based upon the Coop's proof that its use of a portion of the garage premises leased to the Tenant had been open, notorious and continuous for the past 21 years, the court ruled that the Coop had established an easement by prescription and dismissed the Tenant's claim of trespass.

COOP'S RECOVERY OF LEGAL FEES

A tenant-shareholder (the "Owner") who had been using a portion of his cooperative building's roof as a terrace for his exclusive use, objected to rules and regulations adopted by his Cooperative Corporation (the "Coop") which would have resulted in his use of the terrace no longer being exclusive. Unable to resolve their differences as to the ownership and use of a portion of the building's roof, the parties sought the assistance of the Supreme Court of the State of New York. In the action, entitled O'Neill v. 225 East 73rd Owners Corp. (NYLJ, 10/21/02, p. 19, col. 6), the Owner brought suit against the Coop claiming that the north terrace area of the building's roof had been allocated for his exclusive use, or, alternatively, that the Coop had waived any right to use the north terrace area of the building's roof. The Coop defended the shareholder's action with counsel provided by its insurance carrier. During the non-jury trial, the presiding justice relied upon his reading of the Coop's proprietary lease to determine the ownership and allocation of the roof and, after trial, found in favor of the Coop, overcoming any claim of exclusive allocation of the north terrace area of the building's roof to the Owner. However, in addition to its ruling on the ownership rights to the building's rooftop terrace, the trial court noted that the Coop's proprietary lease also provided for the awarding of attorney's fees to the successful party and ordered the Owner to pay attorney's fees totaling \$287,488.05. Needless to say, the Owner appealed the ruling and the large award of attorney's fees. The Appellate Division, First Department, supported the trial court's construction of the proprietary lease and its finding that the Coop had the right to establish rules and regulations for the use of the rooftop terrace, and refused to reduce the award by any attorney's fees paid by the Coop's insurance carrier. We understand that the Owner is again appealing the decision.

COOKING ODORS AS TOXIC SUBSTANCES

In Ugweches v. 600 West 218th Street Associates, LLC (NYLJ, 1/23/02, p.18, col.3), a tenant (the "Plaintiff") apparently believed so strongly that his neighbor's spicy food was toxic that it justified his bringing an action in nuisance against the neighbor (the "Neighbor"), the Cooperative Corporation (the "Coop"), members of the board of directors, the building's manager and the building's superintendent. The nuisance action filed by the Plaintiff alleged that there were noxious cooking odors emanating from the Neighbor's apartment below, and that the cooking odors were so awful that they forced him to leave his apartment. The Plaintiff went so far as to file a complaint with the fire department alleging that "toxic substances" were emanating from the apartment. The allegation got the attention of the New York City fire department, and a fire department investigator was dispatched to visit the Neighbor's apartment. The fire department investigator found that no "toxic substances" had been emanating from the Neighbor's apartment and so filed his report. Notwithstanding the fire department's findings, the Plaintiff commenced an action against the Neighbor for nuisance, and alleged that the Coop, members of the board of directors, the building's manager and the building's superintendent were acting in concert with the Neighbor to force the Plaintiff out of his apartment. The Complaint failed to adequately allege, as a matter of law, how all of the named persons and entities were joining in the Neighbor's allegedly toxic cooking, and the court dismissed this allegation. However, the Plaintiff's complaint to the fire department backfired. Justice Solomon permitted the fire department's report to be admitted into evidence by the Neighbor and the Coop so that it could be considered by the court. Since the Plaintiff had no evidentiary or expert support for any of his allegations regarding the toxicity of his Neighbor's cooking, or to refute the findings of the fire department investigator, the court dismissed the Plaintiff's complaint against all of the named defendants. Upon dismissal of the complaint, everyone was invited back to the Neighbor's apartment for a celebratory dinner. Only the fire department inspector showed up.