
CLIENT ADVISORY

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BOARDS AND LANDLORDS SHOULD INSTRUCT BUILDING PERSONNEL HOW TO RESPOND WHEN POLICE SEEK ACCESS TO RESIDENTS

From time to time, police officers or other law enforcement personnel will visit a residential building and request that they be allowed to proceed to a particular apartment. Often, they will ask that they be allowed upstairs without the house telephone or intercom being used to advise the residents that the police will be visiting. These police visits often occur during off-hours such as nights, early mornings, and weekends when management personnel are not readily available. Building owners should advise door personnel in advance what to do in these situations.

As a general matter, building personnel are not legally obliged to grant access to the building to the police. Unless consent to enter is given, either the police must have a duly issued warrant or some exceptional circumstances must exist excusing the requirement for a warrant. Such circumstances could include when someone in the building has called for police assistance, when there is reason to believe that an imminent threat to life or property exists, when an ongoing (as opposed to a concluded) crime is being committed, or when evidence of past criminal conduct is in immediate risk of destruction.

As a practical matter, if the police wish to enter, they are likely to do so regardless of any instructions they may be given at the door. They should not be physically obstructed in any way from doing so. However, the building staff should seek to establish the reasons and circumstances for the requested entry, and make clear that entry has not been authorized. Every situation is different, but basic inquiries ought to be made of the police officers, beginning with whether someone in the building summoned the police, and if not, whether they have a warrant authorizing entry and what is the purpose of the requested entry. Some buildings also have a policy that a staff member, such as a superintendent, will accompany the police officers to the apartment they are visiting.

Police officers seeking to enter the building on police business will probably not wish to discuss the matter with building personnel or anyone else. Building staff should still do their best to obtain the information described above. The goal is not necessarily that the officers will be dissuaded from making an improper entry, but that the officers know that their entry is considered unauthorized.

Moreover, unless the officers provide a cogent reason not to do so, the resident of the apartment that is the focus of the officers' attentions should be advised in advance on the telephone or intercom and told that the officers are coming to the apartment. The building staff member should make it clear that he or she intends to advise the resident. The officers may, at that point, ask that such advance notice not be provided. The building staff member ought to ask for a justification for this request. Justification could include risk to the officers or to residents, the ongoing commission of a crime, or the destruction of evidence.

The building personnel should remain calm and should cooperate as far as possible. The staff member should state that it is the building's policy to cooperate with any and all appropriate law enforcement inquiries, but that a request for the police to enter, especially during off-hours, is extraordinary and they are required to ask these questions and are not authorized to grant access. If the visit is during off-hours, the staff member should also invite the officers to return at a time when the regular business of the building is conducted. The building staff member should also obtain the names, shield or "badge" numbers, and commands of the officers in question (which can be found on their uniforms if the officers decline to provide them orally). This information as well as the officers' answers to the questions discussed above should be noted in the log book or other records of the building for future reference, and management and a board member should be alerted. Any issues concerning interaction between the police and building personnel should be discussed with the building's legal counsel.

APPEALS COURT UPHOLDS NEW YORK'S "NOTICE OF PENDENCY" STATUTE AND PROCEDURES

When a pending litigation involves the "title to, or the possession, use or enjoyment of real property" in New York, under certain circumstances the plaintiff may file a "notice of pendency" pursuant to Article 65 of the New York Civil Practice Law and Rules (CPLR). This notice, commonly referred to as a *lis pendens*, is recorded with the public records for the property. The filing of the notice does not prevent the property owner from selling or encumbering it. However, the notice places any prospective party to a transaction on notice of the litigation, so that any purchaser takes the property subject to the claims asserted in the litigation.

Because a notice of pendency may place a serious cloud on title to the disputed property, New York courts strictly limit the circumstances under which this device may be used. In one case in which Ganfer & Shore, LLP represented the successful party, the court imposed costs and attorneys' fees in excess of \$34,000 against a party and its counsel that engaged in frivolous litigation, including the filing of an improper notice of pendency, together with additional sanctions for pursuing the frivolous claims on appeal. (Please see the December 2005 and August 2006 issues of this *Client Advisory*, available online at www.ganfershore.com, for discussion of this case.) In another case, also handled by this firm, the court awarded costs against a party that misused a notice of pendency to encumber title to all the condominium units in a building, even though the party's claim was properly asserted only against the condominium itself, not the individual unit owners. (This case is discussed in the May 2006 issue of this *Client Advisory*.)

Under the CPLR, a plaintiff may file a notice of pendency without seeking or obtaining court approval. Several property owners affected by such notices have challenged the constitutionality of New York's notice of pendency statute and procedures, arguing that allowing a notice to be filed without court scrutiny deprives them of their property without due process of law under the Fourteenth Amendment to the United States Constitution. However, in its recent decision in **Diaz v. Paterson**, 2008 WL 4601683 (2d Cir. Oct. 17, 2008), the U.S. Court of Appeals for the Second Circuit upheld the statute. The court held that while a notice of pendency can have a significant impact on a property owner's rights, the statute sufficiently protects the owner's rights by limiting the circumstances under which a notice may be filed and by providing for a prompt hearing on the validity of the notice when requested by the property owner.