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# CLIENT ADVISORY

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## **AFTER LENGTHY HEARING, COURT FINDS INSUFFICIENT SCIENTIFIC EVIDENCE OF HEALTH PROBLEMS FROM RESIDENTIAL MOLD**

Recent years have seen an increasing number of claims brought against cooperative and condominium boards and landlords by residents alleging that their health had suffered as a result of alleged mold contamination of their apartments. The recent decision in **Fraser v. 301-52 Townhouse Corp.**, 13 Misc. 3d 1217(A), 2006 N.Y. Slip Op. 51885(U), 2006 WL 2828595 (Sup. Ct. N.Y. Co. Sept. 27, 2006), should prove helpful to defendants in these cases.

The three plaintiffs in this case resided in cooperative apartments that had suffered water damage. Plaintiffs alleged that, as a result, mold had grown in their apartments and they had become ill. Although plaintiffs initially cited a laundry list of health problems allegedly resulting from the mold in their apartments, they ultimately narrowed their claims to include complaints of respiratory problems, rashes, and fatigue. At the defendants' request, the court convened a hearing to determine if there was adequate scientific evidence to support a finding that mold could have caused the plaintiffs' symptoms. The hearing lasted for ten days and included testimony from experts for both sides and the review of dozens of scientific articles and publications of the health effects of mold. After carefully reviewing the parties' evidence and documentation in a 49-page opinion, the court determined that plaintiffs had "failed to demonstrate that the community of allergists, immunologists, occupational and environmental health physicians and scientists accept their theory that mold and/or damp indoor environments cause illness." Accordingly, the court dismissed plaintiffs' claims based on the contention that mold caused their health complaints. Other causes of action for the water damage were allowed to continue.

Although this is an important decision that will be relied upon by many boards and landlords in the upcoming months, it is not the last word on these issues. The decision is by a trial court, not an appellate court, and other judges have allowed mold-related health claims to proceed. In addition, different plaintiffs could present different health experts and scientific reports in urging courts to reach a different result.

## **APPELLATE DIVISION PROVIDES FOR CONDOMINIUM UNIT OWNERS TO BRING DERIVATIVE CLAIMS AGAINST BOARD MEMBERS, MANAGING AGENT AND CONDOMINIUM'S ACCOUNTANT**

May a condominium unit owner bring a lawsuit for conduct causing harm to the condominium? Does a condominium's managing agent owe a fiduciary duty to the unit owners? May unit owners sue the condominium's accountant for alleged professional negligence? The Appellate Division addressed these "significant issues of apparent first impression" in **Caprer v. Nussbaum**, 2006 N.Y. Slip Op. 07443, 2006 WL 2963128 (2d Dep't Oct. 17, 2006).

The court observed that under the New York Real Property Law, ownership of a condominium unit is hybrid in nature, including both a real property interest in the unit itself together with an undivided interest in the condominium's common elements. The unit owners also share in the profits and expenses of the building. Exclusive authority to manage the common elements and

the finances of the condominium is vested by statute in a board of managers, which is given statutory authority to sue for damages to common elements on behalf of two or more unit owners.

Where a financial injury is suffered by the condominium as a whole, the court held, an individual unit owner lacks standing to sue on his or her own behalf. Rather, the court held that the appropriate plaintiff in such a case is the board of managers, acting on behalf of all the unit owners. Otherwise, the court noted that each unit owner could sue for the loss corresponding to that owner's unit, giving rise to multiple litigations and conflicts with the board of managers.

However, the court held that where the board of managers fails to pursue a claim on behalf of the condominium, then an individual unit owner may be permitted to pursue such a claim derivatively, on behalf of and for the benefit of the condominium. The court observed that such derivative suits have long been permitted by shareholders of cooperatives, which are governed by the Business Corporation Law, and held the same general principle applicable to condominiums.

Addressing other claims in the action, the court dismissed a claim for breach of fiduciary duty against the sponsor, holding that there is no fiduciary relationship between the sponsor and the condominium. Turning to claims against the condominium's managing agent, the court held that the managing agent was a fiduciary of the condominium, but not of the unit owners. However, the court held that there was an issue of fact as to whether this managing agent had "aided and abetted" alleged breaches of fiduciary duty by the condominium board members, and allowed that claim to proceed. Finally, with respect to the condominium's accountants, the court allowed plaintiffs' claims for fraud and professional negligence to proceed because the unit owners represented a particularized class of persons whom the accountants knew would rely upon their work.

### **LANDLORD MAY EVICT NON-REGULATED TENANTS WHILE CONVERTING BUILDING TO CONDOMINIUM**

When a building is converted to condominium ownership, pursuant to an offering plan approved by the Attorney-General, existing tenants in the building may have a statutory right under the Martin Act to retain their apartments as tenants if they are unable or unwilling to purchase their units. However, when the offering plan is still in the "red herring" stage and has not yet been declared effective, these protections do not apply, according to the court in **322 West 57th Owner, LLC v. Grozea, L&T Index No. 60472/06 (Civil Ct. N.Y. Co. Sept. 18, 2006)**.

In this case, the landlord, which was sponsoring a conversion plan, brought 34 holdover proceedings seeking to evict tenants whose leases had expired and had not been renewed. Each of the apartments was being rented for more than \$2,000 per month and therefore was not subject to rent regulation. The tenants argued that the landlord-sponsor was seeking to evict them in anticipation of the condominium conversion so that it could sell the apartments as quickly as possible, without regard for the tenants' rights under the statute. The landlord argued that nothing in the statute barred eviction of holdover "free-market" tenants before the offering plan was accepted for filing, and that there was no evidence of any unlawful conduct such as harassment. While the court expressed some sympathy for the tenants' position, it found that the situation was a result of the 1997 "luxury decontrol" rent legislation, and observed that amending the law is a matter for the Legislature, rather than the courts. The landlord was permitted to proceed with the holdover proceedings.