

CLIENT ADVISORY

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COURT HOLDS THAT SECOND-HAND TOBACCO SMOKE IN BUILDING MAY BREACH WARRANTY OF HABITABILITY

In a decision that may have far-reaching consequences for New York property owners if upheld by higher courts, the New York City Civil Court recently held that secondhand tobacco smoke from a neighboring apartment may breach the warranty of habitability that is implied in every residential lease.

In Poyck v. Bryant, 2006 N.Y. Slip Op. 26343, 2006 WL 2472649 (Civil Ct., N.Y. Co., Aug. 24, 2006), the plaintiff owned a condominium apartment that he leased to defendant tenants. The tenants vacated the apartment several months before their lease expired and refused to pay any more rent. The unit owner, as landlord, brought a non-payment proceeding, and the tenants asserted a breach of the implied warranty of habitability as a defense.

Reviewing the facts, the court found that the tenants had lived in the apartment uneventfully for three years until new neighbors moved in next door. The neighbors “constantly smoked” in their apartment as well as in the adjacent hallway, and tobacco smoke penetrated into the tenants’ apartment. The tenants complained to the building superintendent, who spoke to the neighbors, but “[t]he incessant smoke continued unabated.” The tenants then wrote to the unit owner, complaining that the constant tobacco smoke in their apartment not only caused unpleasant odors, but was a health hazard to one of the tenants who was recovering from cancer surgery and was allergic to smoke. The tenants outlined their efforts to alleviate the problem, including sealing their door with weather-stripping and operating around-the-clock air filters, which they said had proved unsuccessful. When the unit owner allegedly did nothing to address the problem, the tenants moved out.

The court held that second-hand smoke entering an apartment may breach the implied warranty of habitability, because “[w]hile there appears to be no reported cases dealing with secondhand smoke in the context of implied warranty of habitability, secondhand smoke is just as insidious and invasive as the more common conditions such as noxious odors, smoke odors, chemical fumes, excessive noise, and water leaks and extreme dust penetration.” The court also cited a Surgeon General’s report and New York City’s anti-smoking law as evidence that the dangers of secondhand smoke are now widely recognized.

The court rejected the unit owner’s argument that he could not be held liable for actions of the neighbors, who were third parties beyond his control, because under certain circumstances, breach of the warranty of habitability can be caused by third parties even without fault of the landlord. Moreover, the unit owner had failed to take any action to alleviate the hazardous condition, such as asking the Board of Managers of the Condominium to intervene or to take legal action against the neighbors. Accordingly, the court ordered a trial on whether the warranty of habitability had been breached. The court noted, however, that plaintiff had properly refrained from asserting any claim against the Condominium Board of Managers itself, because the implied warranty of habitability does not apply to the relationship between a Condominium and one of its unit owners.

COOPERATIVE'S APPROVING APARTMENT SALES THROUGH ONLY A SINGLE BROKER DOES NOT VIOLATE ANTITRUST LAW

A cooperative may adopt a practice that allows purchases of its shares through only one specific real estate broker, according to the recent Appellate Division decision in **Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc.**, 2006 WL 2692486, 2006 N.Y. Slip Op. 6545 (2d Dep't Sept. 19, 2006). The complaint in this case alleged that a cooperative board routinely approved sales of coop units when one particular brokerage firm acted as the broker for the transaction, but had never approved an "outside sale" submitted by any other broker. In fact, the application package that would-be purchasers were required to submit was printed on that brokerage firm's stationery. A competing brokerage firm sued the favored broker as well as the cooperative board and its members, alleging that this practice violated the Donnelly Act, a New York antitrust statute prohibiting conspiracies to restrain trade.

The court disagreed. It observed that an antitrust violation requires a showing that defendants conspired to restrain trade in a particular product market. A single building, the court held, was insufficient to constitute a relevant geographic market. Moreover, the alleged conspiracy to restrain trade was not between competitors, as is also required for a violation of the statute. Accordingly, the appellate court dismissed the antitrust claim against all defendants.

EXCESSIVE INTEREST RATE IN OFFERING PLAN MAY INVALIDATE AGREEMENT UNDER USURY LAWS

Provisions of a condominium offering plan under which purchasers agreed to pay the sponsor a substantial portion of the proceeds from any resale of their apartment may be void as constituting an illegally excessive interest rate under New York's usury statute, according to the court in **Jean v. RS & P/WV-II Limited Partnership**, 13 Misc. 3d 1201(A), 2006 WL 2469798 (Sup. Ct. N.Y. July 10, 2006).

Plaintiffs bought their apartment for \$217,000 when their building converted to condominium ownership in 1986. Under the offering plan, the sponsor agreed to lend purchase money to purchasers. No interest payments were required. Instead, the purchasers agreed that when they eventually resold their condominium, they would pay the sponsor a portion of the purchase price equivalent to the percentage of the purchase price that was originally borrowed. In this case, the purchasers borrowed 50% of the initial purchase price, so they would owe the sponsor 50% of the proceeds when they resold the apartment. (Under the agreement, if plaintiffs had repaid the loan without selling their apartment, they would also have owed 50% of the apartment's value at the time.)

In 2005, plaintiffs contracted to sell their apartment for \$2,025,000 and the sponsor's successor demanded \$1,012,500 as its share of the purchase price. Plaintiffs then sued the sponsor for a declaratory judgment that the terms of the loan violated New York's usury laws, which provide for maximum lawful interest rates in various types of transactions, and that the agreement was therefore void. The court found that one provision of the usury laws might apply if the sponsor's intent at the time of the transaction was to make a loan at an excessive interest rate, rather than to share in an investment in the apartment. The court directed a trial on this issue. The decision is being appealed.