
CLIENT ADVISORY

OCTOBER 2010

COOPERATIVE GRANTED INJUNCTION BARRING NEIGHBORING BAR'S LOUD OPERATION ON ROOF DECK

In an urban environment such as New York City, residents come to accept a certain amount of noise from their neighbors as part of the price that we pay for the advantages of city living. A recent Appellate Division decision in favor of a cooperative against an excessively loud neighboring business, however, recognizes that this principle has limits.

The case, 61 West 62 Owners Corp. v. CGM EMP LLC, 906 N.Y.S.2d 549, 2010 N.Y. Slip Op. 06740 (App. Div. 1st Dep't Aug. 24, 2010), involved a claim for private nuisance brought by a cooperative building against a neighboring bar. The Cooperative asserted that the bar operated on the roof of an adjoining building, including in non-enclosed areas of the rooftop, and played extremely loud music on the rooftop, often continuing until 3:00 a.m. The Cooperative sought an injunction against the bar's operations on the roof. A lower court denied the requested injunction, but the appellate court reversed the decision and directed that an appropriate injunction be granted.

In reaching its decision, the Appellate Division found that affidavits submitted by nine residents of the Cooperative established that the noise levels audible from the bar – which were created intentionally and in furtherance of the bar's commercial purposes – greatly exceeded the maximum noise levels allowable under the New York City Noise Control Code. The Cooperative also submitted the un rebutted affidavit of an acoustics expert, which established that the noise levels audible from the bar were approximately four times the legal limit for a residential neighborhood. This excessive noise level, coupled with the fact that the loud music routinely continued into late hours of the night, led to a finding by the court that that bar's rooftop operations unreasonably interfered with the Cooperative's residents' right to use and enjoy their apartments and gave rise to a claim for private nuisance. The court recognized the cumulative impact of "the nightly assault on the quiet enjoyment of [the residents'] apartments."

Further, the Cooperative showed that the equities weighed in its residents' favor, because the Cooperative was "the owner of a building whose residents have a right to enjoy their apartments in peace, especially during late night hours." By contrast, there was no evidence before the court that the use of the roof deck and the playing of unlawfully loud music on the roof were necessary for the bar's business operations or that the bar needed to play music on the outdoor roof in order to operate and generate income.

The bar owner emphasized to the court that the City authorities had never cited the bar for any noise violations. The court held that this was irrelevant and that the rights of the Cooperative and its residents did not depend on any action by the City. The court also rejected, without comment, the bar's argument that the Cooperative had waited for too long before seeking a legal remedy. The case was remanded to the lower court to determine the specific terms of an injunction.

FEDERAL COURT HOLDS THAT BOARD'S REQUIREMENT OF THREE REFERENCES MAY CONSTITUTE DISCRIMINATION

A cooperative's requirement that prospective purchasers must furnish reference letters from three current residents of the building may constitute unlawful racial discrimination, particularly where the requirement is enforced only selectively. So holds the recent federal court decision in **Fair Housing Justice Center, Inc. v. Silver Beach Gardens Corporation**, 2010 WL 3341907 (S.D.N.Y. Aug. 13, 2010).

In this case, a fair housing organization brought claims alleging racial discrimination by two cooperative buildings. Each Cooperative required that would-be purchasers obtain three references from existing shareholders of the Cooperative. The plaintiff's complaint alleged that the population of the Cooperatives was mostly white and that the buildings had very few, if any, African-American shareholders.

The plaintiff asserted two separate theories in support of its race discrimination claims. First, plaintiff alleged that the three references policy was being enforced in a selective fashion that constituted intentional racial discrimination. The plaintiff sent both white and African-American "testers" who each inquired about purchasing a cooperative unit through a broker who handled many sales in the buildings. According to plaintiff, the white testers were told that they could find a way to fulfill the "technicality" of submitting three references from shareholders even though the applicants did not know any residents, and that the broker would arrange for the references to be submitted. By contrast, the African-American testers were allegedly told that "you have to know three people who live" in the Cooperative and that "you really can't [buy a unit] if you don't have three references from people who currently live there." The court found that these facts, coupled with comments made by the broker about the existing ethnic composition of the Cooperatives and the attitudes of their residents, provided a basis for the case to proceed on a claim of intentional racial discrimination.

In addition, the court held that even apart from the issue of selective enforcement, the three references requirement could constitute unlawful racial discrimination on the basis of "disparate impact." Under this theory, even a practice that does not overtly or intentionally discriminate may be held unlawful if it has a racially discriminatory *effect*. The court found that limiting acceptable references to existing residents of the almost all-white Cooperatives could tend to exclude African-American homebuyers from satisfying the reference requirement.

The court also held that the plaintiff had standing to pursue the litigation, even though plaintiff is an advocacy organization rather than an applicant to purchase shares in the Cooperatives. Accordingly, the court denied the Cooperatives' motions to dismiss the complaint against them.

CITY RELEASES OFFICIAL FORM FOR BEDBUG DISCLOSURES

In last month's *Client Advisory*, we reported on a new New York State law that requires landlords to disclose certain information concerning a property's bedbug history to tenants leasing property in New York City. The New York State Department of Housing and Community Renewal has now issued an official form on which such disclosure is to be provided. Copies of the form may be downloaded from the department's website at <http://www.nysdhcr.gov/Forms/Rent/dbbn.pdf>