
CLIENT ADVISORY

OCTOBER 2007

COOPERATIVE, NOT SHAREHOLDER-TENANTS, HELD RESPONSIBLE FOR REPAIRS TO "SHOWER BODIES"

Disputes frequently arise between cooperatives and their shareholder-tenants regarding responsibility for various types of maintenance and repairs. A dispute over who is responsible for repairs to a type of plumbing fixture known as "shower bodies" led to the court decision in Franklin Apartment Associates, Inc. v. Westbrook Tenants Corp., 2007 WL 2670092, 2007 N.Y. Slip Op. 6630 (App. Div. 2d Dep't Sept. 11, 2007).

In this case, the holder of stock and proprietary leases appurtenant to several cooperative apartments sued the Cooperative, alleging that bathroom leaks had developed in several apartments as a result of problems with plumbing items known as shower bodies. In deciding who must repair the shower bodies, the court reviewed the terms of the proprietary lease. The proprietary lease, using standard language found in many leases, provided that the tenants would be solely responsible for maintenance, repair, and replacement of plumbing fixtures as may be in their apartments. However, the tenants' responsibilities did not extend to "pipes or conduits within the walls, ceiling or floors."

The court observed that "[t]he installation instructions reveal that the shower body is located behind the finished walls.... Thus, unlike various other parts of the shower/bathtub unit, ... the shower bodies are affixed to the building and its water supply lines, and cannot be accessed by tenants without opening the walls." The court held that the intent of the proprietary lease, consistent with reasonable expectations of the parties, was that tenants would be responsible for repairing fixtures within their individual units, but the Cooperative would be responsible for repairs that would require opening of the walls, ceilings, or floors. Accordingly, repairs to the shower bodies were found to be the Cooperative's responsibility.

This case did not address a situation in which the shareholder-tenant had previously replaced the shower body and signed an alteration agreement. In such situations, because many alteration agreements require the shareholder-tenant to assume responsibility for future repairs to the shower body he or she installed, the shareholder-tenant would be responsible for the costs of replacement.

CONDOMINIUM BOARD COULD NOT FILE NOTICE OF PENDENCY BASED ON BREACH OF WARRANTY LITIGATION AGAINST SPONSOR

In real estate litigation, a notice of pendency (sometimes referred to as a "lis pendens") may be filed when a pending action could affect "the title to, or the possession, use, or enjoyment of, real property." The effect of filing such a notice is that subsequent purchasers of the property are subject to any judgment that may be rendered in the litigation. However, because a notice of pendency can dramatically impact a property's marketability, courts have applied a narrow interpretation of the types of cases in which this device may be used. (For further discussion of notices of pendency, please see the May 2006 and August 2006 issues of this Client Advisory.)

In Board of Managers of Woodpoint Plaza Condominium v. Woodpoint Plaza, LLC, 2007 WL 2729789, 2007 N.Y. Slip Op. 6818 (App. Div. 2d Dep't Sept. 18, 2007), a Condominium Board sued the sponsor in an action for "specific performance of warranty provisions of [the] condominium offering plan." The Board filed a notice of pendency against two of the condominium units owned by the sponsor, and the trial court denied a motion to cancel the notice. On appeal, however, the Appellate Division ordered that the notice be cancelled, concluding that an action for specific performance of a warranty did not support the filing of a notice of pendency.

**COURT ALLOWS MALPRACTICE CLAIM AGAINST ATTORNEY
FOR FAILING TO INVESTIGATE SQUARE FOOTAGE DISCREPANCY**

Counsel for a purchaser of condominium space had a duty to investigate discrepancies in the description of the square footage of the property being acquired, according to the recent decision in Nahoum v. Weiss, N.Y.L.J., Sept. 18, 2007, p. 26, col. 3 (Sup. Ct. N.Y. Co.).

The plaintiff contracted with the Board of Managers, of which he was then President, to purchase specified square footage of common area space and also mechanical space in the building. In the contract, the Board represented that at least two-thirds in number and in common interest of all unit owners had approved the transaction. An amendment of the Condominium Declaration was filed to effectuate the purchase. The amendment stated that the sale had been approved by unanimous vote of the unit owners, but it reflected the sale of several hundred less square feet of mechanical space than did the contract of sale. The sale closed in 2002 and the purchaser began making renovations and improvements to the space.

In 2003, a unit owner brought an action against the purchaser and the Condominium, claiming that the sale transaction was illegal. In 2005, after a change in Board membership, the Board also challenged the transaction, on the basis that the sale had not been approved as required by law and that the amount of space transferred under the contract was in excess of that which had previously been disclosed to Unit Owners. The purchaser then filed a legal malpractice action against the attorney who had represented him in the purchase.

The attorney moved to dismiss the claims. The court agreed with the attorney that the legal malpractice claim should be dismissed insofar as it concerned whether the sale had been approved by a sufficient majority of unit owners. Under the condominium statute, a sale of common elements in a condominium requires the unit owners' unanimous consent. The purchaser contended that his attorney should have investigated whether unanimous approval had in fact been given, because the contract of sale recited that the sale had been approved by two-thirds of the unit owners, rather than unanimously. The court noted that the Amended Declaration, which was the legally operative document, stated that the unanimous consent of unit owners had been obtained. Plaintiff failed to cite any authority imposing a duty upon counsel to independently verify the Board's representation that unanimous consent had been obtained, such as by personally questioning all of the unit owners. The court also noted that at the time of the sale, plaintiff was himself a Board member and had ample means to investigate whether the unit owners' unanimous consent had been obtained.

However, the court declined to dismiss the legal malpractice claim insofar as it related to the discrepancy in the square footage figures between the contract of sale and the Amended Declaration. The court held it to be "reasonable to conclude that the firm's duty would encompass noticing any material inconsistency in legal documents which [the attorney and her law] firm reviewed and/or revised and/or drafted in connection with the purchase." While the plaintiff himself could have noted the inconsistent figures, "that fact may be pled by [the] firm as a mitigating factor in the alleged malpractice" but did not warrant dismissal of the claim.