Finkelstein Newman LLP

Finkelstein Newman LLP
Newsletter

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BUYERS BEWARE—NO KIDDING!

Buyers of real property in New York should be aware of a recent decision which impacts the purchase and sale of real estate. In *Huron Street Realty Corp. v. Sol Lorenzo*, a seller of real property was found not to be liable to a buyer for "fraud in the inducement" arising out of misrepresentations made in the contract of sale.

In this particular case, the buyer entered into the agreement based on the seller's representation that a unit within the building was being used solely for commercial purposes. In actuality, at the time the representation was made, the seller knew that a tenant was using the space as a residence. Basic contract law would seem to suggest that these facts presented a winning case for the buyer, however, an appellate court ultimately found in the seller's favor.

To establish a claim for fraud in the inducement, a buyer must show that the seller knowingly made a misrepresentation of a material fact during the negotiations leading up to the agreement. Then the buyer must demonstrate reasonable reliance

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BUSINESS INTERRUPTION: ARE YOU COVERED?

Most shoppers do not expect to contend with construction debris, dust conditions, falling glass, or water leaks when frequenting their local merchant, but that is what some customers encountered while shopping at a Duane Reade located in midtown Manhattan. In *Duane Reade v. 405 Lexington, L.L.C.*, the drug-store chain sued its landlord for "grossly negligent" renovation work which was alleged to have caused the tenant significant monetary damages and business losses. Yet, despite the severity of these allegations, the trial court granted the landlord's motion to dismiss Duane Reade's claims. On appeal, the Appellate Division, First Department, affirmed the trial court's decision. While at first blush that outcome would seem unfair, it is of particular significance that Duane Reade had contractually agreed to limit its landlord's liability for business losses and thereby waived the right to claim for lost profits.

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MATTHIAS LI JOINS FIRM

Matthias Li, our newest associate, received his B.A. in Political Science from the University of Pennsylvania and his J.D. from Fordham Law School. While at Fordham, Mr. Li was a staff member on the Fordham Journal of Corporate and Financial Law and received the Robert Schuman Prize for his achievements in European Union Law and the Archibald R. Murray Award, Cum Laude, for his contributions to public service. During law school, Mr. Li also worked in the Claims Bureau at the New York State Attorney General's Office (as a Legal Aide) where he gained significant litigation experience appearing numerous times before the New York State Court of Claims and Supreme Court.

Admitted to practice in New York State, Mr. Li is actively engaged in all types of civil litigation ranging from prosecuting applications for injunctive and declaratory relief, to disposing of non-payment and holdover proceedings.

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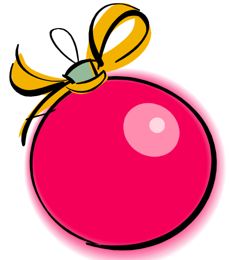
Season's Greetings!

All of us at Finkelstein Newman LLP wish you and yours a joyous holiday season.



UPCOMING SEMINAR

JANUARY 12, 2006

Real Estate Closings In New York: From the Residential Home to the Multi-Unit Dwelling

On Thursday, January 12, 2006, from 8:30 A.M. to 4:30 P.M., partner Lucas A. Ferrara, will be a featured speaker at a continuing legal education ("CLE") seminar at Pace University, sponsored by Lorman Education Services, a national CLE provider.

ISSUES ON THE AGENDA

- The Contract, The Negotiation, The Players and The Closing of the Real Estate Deal
- Title Insurance Issues
- Taxes Due and Tax Strategies
- Cooperative and Condominium Contracts and Closings
- Landlord-Tenant Issues Affecting Real Estate
- Due Diligence Issues Affecting the Multi-Family Dwelling
- Ethical Issues Involving the Real Estate Transaction

CONTINUING EDUCATION CREDITS:

- IACET 0.60
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- NY RE (Pending)

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BUYERS BEWARE—NO KIDDING!

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on the misrepresentation and that damage was suffered. The *Huron* court concluded that, as a matter of law, the buyer had no fraud-related cause of action because the buyer could not establish justifiable reliance on any misrepresentations. Particularly bothered by the fact that the buyer never visited the building prior to closing, the court concluded that the apartment's residential status "could have been ascertained by the buyer by the means available to it through the exercise of ordinary intelligence." This rationale assumes that if the buyer used the means available — visitation of the premises — information about the apartment's actual use could have been obtained.

The court cited two cases in support of its finding, *Matter of Cooke v. Saatchi and Saatchi N. Am.* and *Eisenthal v. Wittlock*. In *Cooke*, the plaintiff-tenant alleged that it was fraudulently induced to pay certain operating expenses under a long-term commercial lease. However, since the landlord furnished annual written statements of its expenses so as to allow the tenant a means for disputing the charges, the court rejected the tenant's claim noting that the tenant was "never denied access to the freely available books and records upon which the landlord's annual statements of operating expenses were based." In *Eisenthal*, the plaintiff-buyer brought an action to have its real-property contract rescinded based on a claim that the defendant-seller misrepresented the property's boundaries. The court rejected this argument because the information was not "within the peculiar knowledge of the defendant and could have been ascertained by the plaintiffs by the means available to them through the exercise of ordinary intelligence." Even if the defendant misrepresented the boundaries, the buyer could have obtained a survey that would have disclosed any irregularities. In both *Cooke* and *Eisenthal*, the plaintiffs' claims were found to be unreasonable since use of accessible information and ordinary means would have uncovered the truth.

In *Huron*, it is not as clear whether the buyer could have readily protected itself against the false statement regarding the unit's "commercial" nature. In what the court claimed to be a fair interpretation of the facts, it concluded that a visit of the building satisfied the definition of "means freely available." However, even if the buyer exercised "ordinary intelligence" and inspected the premises, it is uncertain whether the tenant would have cooperated or willingly volunteered accurate information to a "stranger." Equally questionable is whether the buyer could rightfully rely on representations made by the tenant, a non-party to the contract. Given these complications, it would have seemed reasonable to have allowed the buyer to rely on written representations made by the seller, a party best acquainted with the building's use. However, that is not the standard being espoused by our appellate courts.

In cases dealing with false representations, judges will look to see whether parties acted "reasonably." In this instance, the buyer's failure to make an independent inquiry operated to its detriment. Thus, *Huron's* outcome reinforces that, in addition to securing appropriate representations at the time of contract, it is incumbent upon a purchaser to exercise "due diligence" and "ordinary intelligence" and to investigate the veracity of those assertions. As an additional safeguard, buyers should reserve the right to rescind the transaction or secure a refund or adjustment of the purchase price in the event misrepresentations are subsequently uncovered.

If you have questions or concerns about this recent case, or have a property dispute, please contact partner Lucas A. Ferrara at 212-619-5400 x 211 or email him at LFerrara@FinkelsteinNewman.com.

BUSINESS INTERRUPTION: ARE YOU COVERED? *cont'd from pg. 1*

Specifically, this particular lease provided that the landlord would not carry insurance for any loss suffered by the tenant due to business interruption, and that the landlord would not be liable for any injury or damage to persons, property or interruption of the Tenant's business caused by construction. Tenant unsuccessfully argued that had it known about the extent of the renovations it would not have agreed to those "landlord-friendly" terms and would have negotiated other protections.

The tenant also creatively argued that the lease provisions in question violated a New York statute: General Obligations Law § 5-321 ("G.O.L."). The G.O.L. precludes a landlord from circumventing age-old rules of liability arising out of the landlord-tenant relationship and voids any agreement releasing the landlord from liability for injuries to people or property caused by the landlord's own negligence. While a landlord cannot contractually insulate itself from "grossly negligent" conduct, New York courts have recognized an exception to the G.O.L. that allows sophisticated parties to negotiate the allocation of risk of liability through the use of insurance. As a result, when entering into commercial lease agreements, be mindful that these kinds of provisions are enforceable and consult with an insurance professional to ensure that appropriate business-loss coverage is in place and that your business or property is protected against the full range of possible claims.

If you have questions or comments about this case, or have a lease related dispute, please contact partner Jonathan H. Newman at 212-619-5400 x 205 or email him at JNewman@FinkelsteinNewman.com.

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