Finkelstein Newman LLP

Finkelstein Newman LLP

Newsletter

April 2006
Issue 19

Inside this issue

Finkelstein Newman LLP
225 Broadway, 8th Fl.
New York, NY 10007
212-619-5400
www.finkelsteinnewman.com

LIMITED LIABILITY LOOPHOLE FOR CONDO OWNERS?

In *Pekelnaya v. Allyn*, the Appellate Division, First Department, found that a condominium owner's interest in a building's "common elements"–the land, structures, and facilities held in common with all other owners–may not trigger personal liability for injuries sustained by a third party as a result of defective conditions in those areas. That outcome may seem unfair to members of an injured family whose lives will never be the same. While walking along the sidewalk of an upper-Manhattan building, a father and son were unexpectedly hit by a chain-link fence which fell off the structure's roof. Claiming significant and permanent injuries, the two men later sued the condominium board, as well as the individual owners of the condominium, for millions of dollars in damages.

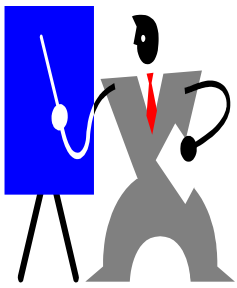
The New York County Supreme Court denied the individual owners' motion to dismiss the negligence case brought against them, finding that since they all shared ownership of the common elements, they were statutorily liable to the injured parties. The unit owners appealed and the appellate court ruled in their favor.

While the outcome was initially disconcerting given the extent of the injuries sustained by the two pedestrians, a closer look at the court's decision reveals that the panel of judges struggled with an area of law that had not been previously addressed by our courts. Although the unit owners of this particular condo each owned a percentage of the common elements, which included the fence located on the roof, the responsibility for the maintenance and repair of these common elements was exclusively vested with the building's board of managers. As a result, the Appellate Division found that the duty to maintain these areas remained with the condominium's board and individual condominium owners could not be held liable for the board's acts and omissions.

At the center of this dispute are two competing policies. From the claimants' perspective, the individual unit owners should be held liable in order to afford injured parties a means of recovery in the event an injury is caused by a building-related defect. After all, in theory, a board could decide not to maintain liability insurance and thereby render the entity judgment proof. From the individual owners' standpoint, absent the requisite control over the building's operations, why

cont'd pg.3

UPCOMING SEMINARS



APRIL 3, 2006

Nuts and Bolts of Residential Real-Estate Closings

On Monday, April 3, 2006, from 6:00 P.M. to 9:00 P.M., partner Lucas A. Ferrara, will be a featured speaker at a continuing legal education (CLE) class sponsored by New York County Lawyers' Association. Joining him will be Adam Leitman Bailey (Adam Leitman Bailey, P.C.), Eric P. Gonchar (Kane Kessler P.C.), Melvyn Mitzner (Commonwealth Land Title Insurance Co.) and Karen Stacey Sonn (Sonn & Associates, P.C.)

The course, which is geared primarily for lawyers, will address the purchase and sale of single-family homes, and cooperative and condominium units. CONTINUING EDUCATION CREDITS: MCLE 3

For information for this course, please contact NYCLA's CLE Department at (212) 267-6646, or at www.NYCLA.org.

APRIL 27, 2006

Commercial Leasing Basics In New York

On Thursday, April 27, 2006, from 8:30 A.M. to 4:30 P.M., Robert Epstein and Lucas A. Ferrara, will be the featured speakers at a CLE seminar sponsored by Lorman Education Services, a national CLE provider. Joining them will be: Alan T. Kramer (Alan T. Kramer, P.C.), Sanford P. Rosen (Sanford P. Rosen & Associates), and James S. Saunders (Newmark Knight Frank).

Editorial Board:
Executive Editor: Lucas A. Ferrara, Esq.
Managing Editor: Helen Frassetti

Finkelstein Newman LLP
Daniel Finkelstein, *Senior Partner*
Jonathan H. Newman, *Managing Partner*
Robert Finkelstein, *Founding Partner*
Lucas A. Ferrara, *Partner*
Melissa Ephron-Mandel, *Of Counsel*
Robert C. Epstein, *Of Counsel*

Associates
Barry Gottlieb
Konstantinos G. Baltzis
Rebecca A. Hanlon
Matthias Li

Law Clerks
Dana Agabiti
Shai Dayan
Dorothy Santos
Alexander Daigle
Michael Harkey

SUBSCRIBE !
If you would like to receive an electronic version of our firm's newsletters or other publications, please send an e-mail to Editor@FinkelsteinNewman.com. (Please include the word SUBSCRIBE in the subject line of your e-mail.)

Disclaimer:

This publication is designed to provide accurate information on the subject matters addressed. It is distributed with the understanding that the publication is not intended to render legal or other professional advice. If such expert advice is needed, readers are encouraged to consult with an attorney to secure a formal opinion. Neither the publisher nor its contributors are responsible for any damages resulting from any error, inaccuracy, or omission contained herein.

© Finkelstein Newman LLP

ISSUES ON THE AGENDA

- Key Issues in Commercial Leasing.
- Handling of Leasing Disputes, Including Tenant Insolvency.
- Differences between Office, Retail and Other Commercial Leases.
- How to Better Work with Brokers.
- Local Leasing Marketplace.

CONTINUING EDUCATION CREDITS:

- PMI 6.5
- NALA 0.7
- CPE 8.0
- NFPA (Pending)
- NY RE (Pending)
- NY CLE 8.0

JUNE 6, 2006

Landlord And Tenant Law In New York

On Tuesday, June 6, 2006, from 8:30 A.M. to 4:30 P.M., partners Jonathan H. Newman and Robert Finkelstein will be the featured speakers at a Lorman-sponsored CLE. Joining them will be Bruce Feffer (Bruce Feffer & Associates) and Bruce S. Leffler (Goldfarb & Fleece)

ISSUES ON THE AGENDA

- Anticipating Litigation: How to Win (Or Lose) Your Case
- Landlord-Tenant Litigation: A Primer
- Let's Make A Deal – Use And Goals Of A Stipulation Of Settlement
- Special Considerations in Commercial Landlord-Tenant Proceedings
- Key Commercial Leasing Issues

CONTINUING EDUCATION CREDITS:

- NY CLE 8.0
- NY RE (Pending)
- IACET 0.65
- CPE 8.0

For pricing information, including group discounts, or to register for these last two courses, please contact Lorman Education Services at (888) 678-5565, or at www.Lorman.com.

HOW TO SUCCEED....?

Those who are related to, and live with, a rent-regulated tenant need not worry about losing their place of residence should the tenant permanently move out or die. According to New York law, delineated family members who meet certain occupancy criteria are eligible to receive a lease in their own names, commonly known as a "succession right." To trigger this entitlement, the family member must reside in the unit with the rent-regulated tenant for at least two years immediately prior to the tenant's death or permanent vacatur. (When the succession claim is being made by a senior citizen or a disabled individual, that occupancy timeframe is reduced to one year.)

But, what if an occupant is acting deceptively, and masks the prime tenant's true status. In most instances, courts will not look kindly upon such "sneaky" practices. However, according to *Riverton Associates v. Knibb,* a recent appellate case, judges may "look the other way" when it comes to "fraudulent" and "dishonest" behavior, at least as far as succession rights are concerned.

In *Riverton*, a granddaughter moved in with her rent-regulated grandmother in 1991 in order to care for her. The granddaughter continuously resided in the apartment as a primary resident, and in 1999, the grandmother died. Instead of informing the landlord of her grandmother's passing, the granddaughter decided to submit renewal leases bearing her grandmother's forged signature. As misleading as these actions might appear, the appellate court was of the opinion that such conduct was not detrimental to the assertion of a successful succession-rights claim. The majority reasoned that the granddaughter's long-term occupancy of the unit, coupled with "the relatively short-lived duration" of the deceit, did not negate the granddaughter's entitlement to remain in the unit as a regulated tenant.

In a vigorous dissent, the Honorable Lucindo Suarez asserted that "the right to succeed to a rent-stabilized tenancy is not automatic" and that the result reached by the majority would "open the door to possible fraudulent claims." While acknowledging that the granddaughter had an independent right to be named as a tenant on a renewal lease issued after her grandmother's death, the dissent was displeased with the granddaughter's misconduct and cogently observed that the integrity of the rent-stabilization scheme is threatened by persons who rely on deception and forgery to conceal their presence from landlords and assert succession rights when it suits their convenience.

So, how does one reconcile the outcome of the *Riverton* case? Quite cautiously. In fact, other reported cases treat this kind of fraud as just one element to be considered by a court. By way of example, in *Garner v. Popolizio*, the occupant attempted to succeed to New York City housing even though he had misrepresented his status and that of his deceased mother. Amazingly, not only did the tenant submit to the Housing Authority a false income affidavit which listed the decedent as the "sole occupant," but the document bore his dead parent's forged signature. Despite this conduct, since the occupant was widely known as a "resident" who participated in project activities, the Appellate Division concluded that his misconduct was not singularly persuasive or dispositive. Thus, fraud and deception on the part of residents seeking to succeed to a regulated unit may not work against them so long as the governing occupancy standards are otherwise satisfied.

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

LIMITED LIABILITY LOOPHOLE FOR CONDO OWNERS?

cont'd from pg.1

should they be liable for the acts or omissions of others? The Appellate Division noted that New York's Condominium Act does not allocate responsibility for injuries sustained by third parties as a result of a defect involving a common element. Without clear guidance from the legislature or the law, the appellate court concluded that it could not find against the individual owners. In essence, the court suggested that legislative change was the proper way to address any perceived disparity or inequity. Yet, it seems that the court left open the possibility that it would find individual unit owners liable when a condominium board has failed to obtain or maintain the appropriate insurance coverage.

If you have any questions or comments about this article, please contact partner Lucas A. Ferrara at 212-619-5400 x 211 or email him at LFerrara@FinkelsteinNewman.com.

WATCH YOUR WALLS: NEW ANTI-GRAFFITI LAW

While some may consider graffiti an appealing aspect of New York City's landscape, the Mayor and City Council sharply disagree. This past December, based upon the conclusion that graffiti is a "public nuisance," one that degrades the quality of life, fosters an atmosphere of neglect and invites criminal activity, Mayor Michael Bloomberg signed a new anti-graffiti law. This regulation imposes a duty on owners of commercial buildings and residential structures with six or more units to keep their property graffiti-free. If detected by city inspectors, owners will receive a notice advising that if such markings are not removed within sixty days, the city will undertake the effort and fine the owner in an amount of at least $150, but not more than $300.

In substance, the law defines graffiti as any "mark" made on a building that is visible to the public from a public place. While there has been some outcry over punishing owners for violations they do not commit, the City plans on implementing procedures so fines need not be incurred. Under the terms of the law, the City will provide graffiti-removal services to building owners when they call 311 and request the City to do so, as long as the owner also executes a written consent and a waiver of liability prior to receiving such services. This option should eliminate the prospect of a fine since the burden of removing the graffiti is shifted back to the City.

One of the more interesting aspects of the regulation is its presumption that any visible graffiti on a building was placed there without the owner's consent. Because this is a rebuttable presumption, it is theoretically possible for an owner to escape monetary liability by asserting that the graffiti is a "desired" element. Will that loophole frustrate the City's ability to enforce the law? Alternatively, if owners legitimately embrace graffiti as an "art form," how does the "consent" element address the public-policy concerns which have been cited in support of the law's enactment? Stay tuned.

If you have any questions or comments about this new law, please contact partner Robert Finkelstein at 212-619-5400 x 227 or email him at RFinkelstein@FinkelsteinNewman.com.

Finkelstein Newman LLP

225 Broadway, 8th Fl.
New York, NY 10007
212-619-5400

Got a question?

Visit us at:
www.FinkelsteinNewman.com