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BEWARE OF FLYING AIR CONDITIONERS!

Just because an air conditioner (a/c) falls on you doesn't mean you'll recover monetary damages for any injuries you incur. At least, that is what the outcome of *Grimaldi v. Manhattan Arms Hotel, Inc.* suggests.

In that case, Grimaldi was passing a Manhattan building when he was hit by a falling a/c unit. Apparently, the tenant (to whom the machine belonged) was so dissatisfied with the building personnel's unresponsiveness to her request to remove the unit that she decided to do it herself; which led to Grimaldi's injury.

The landlord's representative testified that the owner wasn't aware of the unit until the incident occurred. (In fact, the installation of a/cs was violative of building policy.) Although the unit was not "inherently dangerous" and the building was not responsible for its installation or removal, the New York County Supreme Court refused to dismiss the case, citing issues of fact which warranted a hearing or trial. (The Supreme Court was of the belief that the tenant's requests for assistance may have made the accident foreseeable and rendered the landlord "negligent" for failing to provide assistance or to "take other steps to protect passersby.")

On appeal, Appellate Division, First Department, reversed and dismissed the case. Here's how the AD1 put it:

> Even assuming that appellants were under a duty to help the tenant remove the air conditioner, that such duty gave rise to a corresponding duty of care to members of the public at large, and that the tenant's attempt to remove the air conditioner without assistance rendered the accident foreseeable, there is no evidence that the hotel had reason to believe that the tenant would attempt to remove the air conditioner without assistance.

Isn't it more likely than not that a tenant would attempt to remove an a/c if requests for assistance were repeatedly ignored by building personnel? (We certainly think so.)

Under the given facts and circumstances of this case, a hearing or trial was warranted.

What are the chances of that happening now?

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@fnfllp.com. To join the debate, visit us at www.nyreblog.com.

NO GLASS-BLOWING IN MY BACK YARD!

Nathan & Elizabeth Hoogs were granted a special-use permit by the Town of Canaan (Columbia County) allowing them to produce hand-blown glass in an "accessory building" to be constructed on their residential property.

Their next door neighbor, Manfred Ohrenstein, objected to the permit and filed an Article 78 proceeding in the Columbia County Supreme Court contending that the studio did not fit within the Town's "home occupation" parameters and that the use would be at odds with the area's residential character.

When the Supreme Court dismissed Ohrenstein's case, he appealed to the Appellate Division, Third Department, which found the local zoning board's interpretation of the law to be rational and reasonable.

Since retail sales would be restricted, the glass-blowing would occur exclusively within a barn-like structure to be erected adjacent to the Hoogs's home, the building would be painted and trimmed to match the residence, the equipment (a furnace and oven) was akin to that found in a residence, and, all activity would be "conducted wholly within the accessory building," the AD3 concluded that the zoning board's grant of a permit was "neither irrational nor lacking the required support of substantial evidence."

In other words, Ohrenstein got blown away by the glass-blowers.

WHAT DOES "FULL MARKET VALUE" MEAN?

In *Fukilman v. 31st Avenue Realty Corp.*, a group of defendants agreed to purchase 20% of a plaintiff's interests in a corporation known as 31st Avenue Realty Corporation (which owned a medical office building).

While the defendants contracted to acquire that percentage interest at "full market value," a dispute arose as to whether the calculation was to be premised on the property's "highest and best use," or its "currently improved condition." The difference was substantial, with the former totaling $3.6 million, and latter at $2.7 million.

The Nassau County Supreme Court concluded that the $3.6 million calculation applied, as did the Appellate Division, Second Department.

While you might think that "full market value" would encompass a property's "existing use," *Fukilman v. 31st Avenue Realty Corp.* demonstrates that the phrase is afforded a broader interpretation -- one that could have significant financial implications.

Caveat drafters!

If you have any questions or comments about the above articles, please contact partner Lucas A. Ferrara at 212-619-5400 x 211 or email him at LFerrara@fnfllp.com. To join the debate, visit us at www.nyreblog.com.

HOSING YOUR HOME IMPROVEMENT CONTRACTOR

Have you ever had to deal with a home improvement contractor?

It can be quite a nightmare. But do not despair. The displeasure need not be unilateral.

A number of jurisdictions require home improvement contractors to be licensed. And, without that piece of paper, a contract reached with such an individual or entity may be unenforceable; which means that the contractor will be unable to collect any sums claimed to be due despite the work's performance.

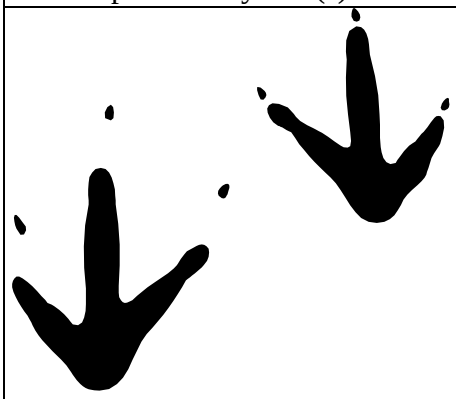
By way of example, in *Flax v. Hommel*, Flax sued David Hommel for breach of contract and to recover damages for work undertaken on Flax's home. Hommel countersued for the contract's unpaid balance.

After the Nassau County Supreme Court refused to dismiss the contractor's counterclaim, Flax appealed to the Appellate Division, Second Department, which reversed.

Here's why:

> A home improvement contractor who is unlicensed at the time of the performance of the work for which he or she seeks compensation forfeits the right to recover damages based on either breach of contract or quantum meruit ... Since Hommel was not individually licensed ... at the time the contract was entered and the work was performed, the alleged contract between Hommel and the plaintiff was unenforceable ....

Please spare us any flak(s) about this case.



NOT A DAY OF THE CONDOR

In *Condor Funding, LLC v. Miles*, Condor alleged that Ginger Miles had illegally sublet her rent-stabilized apartment in order to pursue a teaching assignment in the Lone Star State.

Although the tenant had formally requested the landlord's written approval of the arrangement by complying with the requirements of New York's "sublet law," Condor refused to consent to the transfer, citing a suspicion that the tenant was permanently relocating to Texas.

In an interesting twist, both the New York County Civil Court and the Appellate Term, First Department, slammed Condor for unreasonably withholding consent to the proposed transaction. Here's what the AT1 concluded:

> Landlord arbitrarily and improperly refused to consent to the sublease since it raised no objection to the proposed subtenant and its stated skepticism that tenant might be primarily residing in Texas was purely speculative. Tenant satisfactorily explained her intent to temporarily relocate to gain university teaching experience to augment her income. At the time of her sublease request, tenant had resided in the former loft premises for 25 years and had regularly filed New York State income tax returns listing the premises as her address. Under such circumstances, landlord unreasonably withheld consent in derogation of the remedial purpose of the statute to permit sublets of unused apartments during a time of housing shortage ....

Looks like the tenant won this one by miles.

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NO MORE CANNON FIRE IN HARLEM?

Did you know that firing a cannon while lowering the American Flag is protected speech? (Neither did we.)

In *Harlem Yacht Club v. New York City Environmental Control Board*, the Yacht Club would fire a cannon at sundown alerting boaters and club members that the colors were being retired.

Neighbors (who apparently didn't appreciate the pomp and circumstance) complained about the "unreasonable noise" generated by the cannon fire (which violated local noise codes). Since the City's noise regulations were not "impermissibly vague" nor precluded other avenues of expression, the Appellate Division, First Department, was of the opinion that no constitutional breach was ignited by the City's limitations. As the AD1 observed:

> There is no dispute that the ordinance is content-neutral; respondent met its burden of demonstrating that the ordinance was enacted to further a substantial governmental interest in protecting its citizens from unwelcome noise and is narrowly tailored to achieve that goal ... and petitioners are not without alternative means of communication, as the ordinance does not impose a complete ban on the firing of a cannon and petitioners can still show respect for the flag by firing a cannon at lower sound levels ... Nor is the ordinance, which bans "unreasonable noise," defined as "any excessive or unusually loud sound that disturbs the peace, comfort or repose of a reasonable person of normal sensitivities, injures or endangers the health or safety of a reasonable person of normal sensitivities or which causes injury to plant or animal life, or damage to property or business" ... impermissibly vague ....

Sorry. We gave this one our best shot.

If you have any questions or comments about this article, please contact partner Robert Finkelstein at 212-619-5400 x 227 or email him at RFinkelstein@fnfllp.com. To join the debate, visit us at www.nyreblog.com.

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