Finkelstein Newman LLP

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Newsletter

June 2005
Issue 9

Inside this issue

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MARKET UPDATE: THE EXPANDING REAL-ESTATE BUBBLE?

One need only scan the real-estate section of the local newspaper, or visit a real-estate broker's office or website to see that real-estate prices—both sales prices and rental rates—are on the rise.

After three years of declines, 2004 saw lower Manhattan's first real growth spurt of the new millennium. Although last year saw the addition of approximately 2000 new rental units in the financial district, it is now being reported that 2005 will see more than double that number coming to market in lower Manhattan alone. And, despite the increase in available housing, the rental price for those units will remain high as many are located in new or converted luxury buildings. However, even with increased prices, some experts are speculating that the neighborhoods South of Canal Street remain a "good deal" in comparison to other Manhattan areas.

But the upswing is not just on the rental side. The Real Estate Board of New York ("REBNY") is reporting that cooperative sales are "up" across the board. When looking at apartment type, REBNY reports that studio prices were up 18% in 2004, and two and three-bedroom units were up 12%. In fact, the average price-per-room increased by double digits for all Manhattan neighborhoods, with Downtown and Northern Manhattan showing the highest gains—28% since 2003!

And, it appears that the trend is no different on the condominium front. From 2003 to 2004, REBNY reports a 29% increase in condo sales, with the average price rising by 19%. And, for the first time since REBNY tracked apartment sales, downtown sales (below 42nd Street) out-paced the Upper East and West Sides, with "downtown" apartments showing a median price of $667,000.

Most economists and real-estate industry experts are at a loss when asked to forecast whether there is much more steam left in this market. Notwithstanding any bumps we may encounter along the road, over the long haul, real estate will likely remain a sound, if not rising, investment.

If you have any questions concerning residential real-estate sales or purchases, please contact Jonathan H. Newman at JNewman@FinkelsteinNewman.com or at 212-619-5400 x 205.

Finkelstein Newman LLP
Newsletter

WHAT COULD BE MORE ANNOYING?—NUISANCE!

People often complain about conditions in their apartments that negatively impact the use and enjoyment of their homes. The problematic conditions typically relate to things such as lack of heat or hot water, a malfunctioning stove, or a backed up toilet—something landlords can readily remedy. But, on occasion, the condition is caused by another tenant's behavior. In this latter instance, conditions caused by a neighbor may result in a serious disruption, or force others from their homes. When afforded notice of such situations, it becomes the landlord's obligation to investigate and, if at all possible, stop the offensive or disruptive conduct. Absent corrective action, the landlord may be found to have breached the "warranty of habitability"—a statutory protection available to residential tenants requiring the landlord to keep premises fit for human habitation—and may be held liable to the complaining tenant for the neighbor's conduct. This is because the statutory "warranty of habitability" guarantees tenants housing accommodations that are free from "conditions" that impair their health, safety, or welfare. In other words, even when another tenant is causing the problem, the landlord must still "address" the problematic tenant, or risk liability for damages, a rent abatement, or other available remedies.

So what's a landlord to do? Typically, the answer is to commence a holdover proceeding against the tenant who is committing or creating the nuisance. The authority to seek the eviction comes from lease provisions, rent regulations, and the common law. What constitutes a "nuisance" is subject to some debate, but is most simply defined as conduct that substantially interferes with another's interest in the use and enjoyment of property. Alternatively, the conduct is characterized as that which threatens the health, safety, and comfort of a building's occupants. Isolated instances of conduct will usually not be enough for a nuisance-based holdover proceeding. The general rule is that the conduct complained of must be of a continuing or recurring pattern.

The heart of any nuisance case is a tenant's problematic conduct, which can take many forms. Some examples include a destructive pet, urinating in common areas and other offensive conduct, abusive or anti-social behavior toward the owner, managing agent, building staff or other tenants and occupants, excessive noise or offensive odors, and, in some instances, chronic failure to remit rent. Although any number (or combination) of these (or other) types of conduct may support a nuisance-based holdover, some are litigated more often than others.

Most common today, at least in the cooperative context, are cooperative boards seeking to terminate tenancies for a shareholder-tenant's "objectionable conduct." While such conduct is typically "curable" and thus not a nuisance as a matter of law, often times, the tenant's behavior is such that it is so disruptive, dangerous, or offensive, that it may trigger a nuisance determination. The legal basis for this type of case is a fairly standard proprietary-lease provision permitting cooperative boards or their shareholders to terminate a tenancy on such grounds. When the conduct rises to a nuisance level, the lease provision, as well as the severity of the conduct will allow a cooperative to terminate the shareholder's occupancy rights.

Another basis for a nuisance case is when a tenant maintains an apartment in such a way as to constitute a health or safety hazard. Obviously, if an occupant intentionally sets fires, a court will have no trouble finding that a nuisance has occurred. However, more common is when a tenant accumulates an excessive array of newspapers or garbage and refuses to correct the condition. Extreme cases of clutter may be caused by a psychological disorder known as "disposophobia," a condition marked by an inability to throw things (like garbage) away. Colloquially, this is known as a "Collyer's" case.

In the "City that never sleeps," the most common alleged nuisance, by far, is noise.

cont'd page 3

Finkelstein Newman LLP
Newsletter

A STANDARD CLASH: "SHOULD I STAY OR SHOULD I GO?"

One question that tenants often have is, "What if I don't leave when my lease ends? Can I stay in my space?"

Well, it depends.

If a tenant pays rent after the lease's expiration, and the landlord accepts that payment, a "month-to-month" tenancy is created. That is to say, the landlord has agreed to allow the tenant to stay on a monthly basis. This kind of tenancy is indefinite by nature because the tenant can keep remitting, and the landlord can keep accepting, the money.

However, nothing is "forever." Tenants can not assume that the post-lease expiration rent will be accepted each and every month. In fact, there are no assurances that a landlord will allow it in the first instance. Most landlords are very savvy and, as soon as a lease expires, will commence a holdover proceeding to evict the tenant who has refused to vacate. Landlords who fail to timely commence a holdover proceeding after a lease's expiration, or who inadvertently or intentionally create a month-to-month tenancy, need only serve a 30-day notice of termination upon the tenant and, if the tenant remains thereafter, commence an eviction proceeding.

Landlords must review their lease files and calendar expiration dates so that they know when to reject rental payments and avoid creating month-to-month tenancies. Similarly, tenants need to monitor their lease's expiration date and make advance plans to negotiate a new lease or find alternative space. If subject to rent regulation, a lease is required to be renewed, absent some other entitlement by the landlord to recover the premises. However, in market-rate and commercial tenancies, a tenant is not entitled to a renewal absent some prior agreement (like an option) entitling the tenant to same. Without these protections, in order to avoid a clash, when it's time to go, it's time to go!

If you have questions concerning lease expiration options, please contact Robert Finkelstein at RFinkelstein@FinkelsteinNewman.com or 212-619-5400 x 227.

NUISANCE!

cont'd from page 2

In certain instances, the noise from a neighboring tenant's space may be so great so as to constitute a nuisance.

To help make the determination, the wisest course of action is to hire an acoustic engineer or sound expert to measure the ambient noise in an apartment, as well as the noise condition itself. New York City has a "Noise Code," and it defines the permissible levels of noise in various contexts, including residential settings. When the Noise Code is being violated, the complaining tenant should seek corrective measures from the cooperative board or landlord.

Reported decisions are clear in noting that when one resides in an urban setting, complete silence can not be the expectation or norm. In essence, judges are saying that some level of noise is going to have to be expected

cont'd page 4

Finkelstein Newman LLP
Newsletter

NUISANCE!

cont'd from page 3

and tolerated. But, in extreme situations, noise can, and often does, constitute a nuisance.

An interesting twist on "nuisance" law, are complaints premised on smoking-related odors. While "offensive odor" cases are not particularly new, with folks becoming increasingly health conscious, and with the ever widening ban of cigarette and cigar smoking, more people are objecting to such odors. While tenants are currently permitted to smoke in their own apartments or homes, to the extent that the odors continuously invade another tenant's space, and in view of the ill effects caused by second-hand smoke, the condition may well constitute a nuisance. In one recent case, albeit in the commercial context, a court determined that a tenant's smoking, and the attendant second-hand smoke, triggered an adjoining occupant's "wrongful eviction" type claim.

It is annoying enough to have to complain to a landlord, or to be the recipient of a tenant's complaints about some condition in a residential or commercial space. But when the problem centers around another occupant's conduct, which continuously threatens the health, safety, or welfare of others, that conduct may be a basis for the miscreant's eviction. Since there's nothing more troublesome than living or working with a nuisance, familiarity with nuisance law and the procedures available to correct the condition are of critical importance to both landlords and tenants alike.

For more information about nuisance, please contact Lucas A. Ferrara, at LFerrara@FinkelsteinNewman.com or 212-619-5400 x 211.

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