

THE REAL DEAL

Court decisions clear way for more shoddy development lawsuits

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By Jen Benepe

Although New York State Attorney General Andrew Cuomo has said he is beefing up his office's ability to go after shoddy developers, lawyers say progress is already being made in the courts.

Lawyers are pointing to three decisions that will likely set new precedents for buyers seeking restitution for new condos fraught with problems.

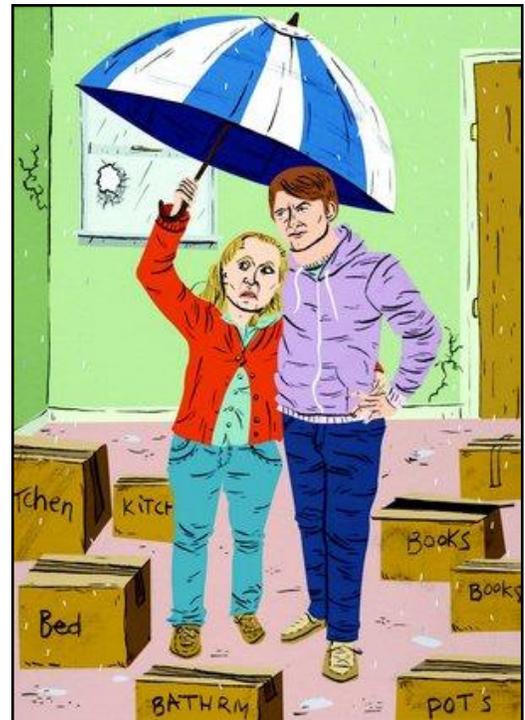
Buckled wood floors, walls raining with runoff water, apartments lacking certificates of occupancy months after being sold, and promised washers and dryers switched for lesser brands are some of the complaints lawyers are hearing — in rising numbers — from owners of new, yet they claim defective, apartments.

A decision reached in the highest state court so far, the Appellate Division, First Department, in October 2007, *Kramer v. Real Estate Ltd. Partnership*, clarified the court's position that it would allow a private lawsuit for fraud and misrepresentation against developers — reversing an earlier court's previous position that only the attorney general's office can sue for fraud in such cases ...

The move supported owners who are frustrated with a spate of poorly constructed condominiums that have at best left them holding the bag — or at worst homeless, said lawyers familiar with the cases.

Another decision handed down in February in Kings County State Supreme Court: *Bridge Street Homeowners Assoc. v. Brick Condominium Developers* "reversed previous reasoning that effectively barred a private lawsuit against developers for inadequate construction," said attorney **Adam Leitman Bailey**, who represented the owners.

In the Bridge Street case, the owners had sued developer Joshua Gutman for lack of fireproofing, a defective roof with penthouse apartments built on top, and walls so thin they claimed they could hear their neighbors brushing their teeth, according to press reports.



The third case, settled in November 2007 in Kings County Supreme Court, concerned the Williamsburg Mews Condominiums. The owners sued and won over a roof that leaked, windows that caused drafts and leaks, flooding, mold, mildew, an inadequate HVAC system that left occupants cold in the winter, and thin sheetrock that violated city fire codes.

Those decisions could open the door for thousands of complaints that have never previously reached the court system for fear of dismissals, said **Bailey**, whose firm, **Adam Leitman Bailey P.C.**, also handled the Williamsburg Mews cases.

Lawyers said that the more expansive interpretations of the law made in these recent court decisions have sidestepped the Martin Act, which normally regulates the responsibilities of the attorney general to act on behalf of aggrieved owners. The courts, they said, can now provide a forum for distressed homeowners to seek reparation and damages.

Powering up the AG's office

To beef up the real estate department, which oversees new condominiums, Attorney General Cuomo announced in January that he would be raising the fees for reviewing and approving condo offering plans to 0.4 percent of the development's offering price. This effectively hikes the maximum fee from \$20,000 to \$30,000.

Cuomo said the extra monies would fund additional lawyers to speed up the backlog of offering plan approvals, which normally take three to six months for approval. The monies are also to be used to beef up mediation and litigation efforts, lawyers close to the office said.

Though Cuomo's office would not comment on how many attorneys it had hired, outside counsel estimated that at least four professionals had been added.

Even with the recent increases in staff, lawyers are doubtful that the attorney general's office will really play an important role in litigating shoddy developments — a reality some lawyers said the courts may have recognized. Whether the courts have intended to take matters into their own hands is not clear, but the net effect has been a real clarification of the law, said [REDACTED].

While the Martin Act gives the AG the power and responsibility to prosecute a sponsor for fraud or misrepresentation of the property being offered for sale in the offering plan, his office has struggled to handle the increased load of offering plans, most lawyers said, and they contend the AG has not handled the rising number of complaints or responded with necessary litigation.

"We could file a complaint with the AG's office — the problem is that lately, they have not been that responsive," said [REDACTED], who heads his own law firm and is currently trying to hammer out a deal with a developer for two lines of apartments that were seriously damaged by weather during construction.

In response to a Freedom of Information Act request from *The Real Deal*, the AG's office said the number of shoddy construction or fraud complaints by new owners submitted to the office increased 2 percent from 1,242 in 2006 to 1,267 in 2007. But anecdotally, that number is much higher, according to lawyers, who said they don't even bother contacting the AG's office anymore since they rarely get a response.

The number of offering plans submitted to the AG's office, an indication of the growth in the condo sector, has grown by more than 300 percent over the past five years, rising from 299 in 2002 to 929 in 2006, said the agency.

There is no record of how many condo owners the current AG's administration has actually assisted since coming into office a little over a year ago. Amy Karp, assistant counsel for the AG's office, wrote in her FOIL reply that the office "did a diligent search and does not possess" records of any parties for which the AG's office had negotiated settlements or required litigation on behalf of condo owners.

Repeated phone calls to the office to clarify were not returned.

Impossible burden

In the Bridge Street case, the court pointed to the inadequacy of New York State law that places the burden on the attorney general to address all problems with new condos.

To expect the government agency to have "exclusive responsibility to litigate private claims of all aggrieved condominium purchasers within the State of New York would be to place an impossible burden upon a public official and was surely not the legislative intent," wrote Judge Carolyn Demarest in her decision.

Also, some offering plans are worded so vaguely as to give the developer a way out if finishes and other promised aesthetics haven't been provided, said [REDACTED], a partner at [REDACTED]. In other words, a number of common complaints, such as the developer changing the brand of appliances, don't even qualify for review by the AG's office.

Instead, many of those complaints have become private matters handled by lawyers hired by condo owners for anywhere from \$1,000 (for individuals) to \$40,000 (for entire boards) to negotiate finishing touches, corrections or additional upkeep where it is needed, said [REDACTED].

When the negotiation process doesn't work, some condo owners are taking the next step of suing the developer and anyone else included in the project, which can cost more than \$100,000, said **Bailey**.

Since "before the start of the Spitzer administration, the attorney general's office generally has not used its power to sue developers under the Martin Act, and has filed less than a handful of cases," said **Bailey**.

The AG's office is also hamstrung by some restrictions. Only those cases that have the backing of the entire condo board will even be reviewed by Cuomo's office, said lawyers.

One reason, lawyers said, is that the office would never have the time to review the thousands of cases it would receive otherwise. If the AG's office does get involved, it can only do so on behalf of buyers, because the basis of any action would be the offering plan, and that is only presented to the owner in a purchase.

As complaints about shoddy construction have skyrocketed, lawyers have said they're tired of dealing with them. "I am almost at the point where I am going to tell clients not to buy new construction," said attorney [REDACTED], who reads blogs like Curbed.com that track deficient buildings so that she can stay abreast of the problem buildings.

But New Yorkers' appetite for buying condominiums hasn't slowed. Despite the national housing slowdown, Manhattan condo sales were up 24.7 percent in the fourth quarter of 2007, at 1,232 units compared with 988 in the fourth quarter of 2006, according to Radar Logic, a Manhattan appraisal firm.

The amount of money being spent on condos in Manhattan hasn't dropped either, making rotten apples that much more expensive. Prices hit record levels in 2007's fourth quarter, with an average sale price of \$1.75 million — a 17.8 percent increase over the average \$1.486 million for the same quarter of 2006.

Overpromised and underdeveloped

Lawyers said they're surprised by how New Yorkers will put up with poor construction.

[REDACTED] said one client with a new \$1.8 million apartment found out the hard way that a drainpipe had not been connected to his bathtub: About five minutes after the client started his bath, his downstairs neighbor started pounding on the door, soaked to the bone. "Probably because the foreman was not walking around the job site, and there was a kid installing the plumbing," said [REDACTED].

One building at the center of a battle is 125 Central Park North. The condo owners filed a complaint in New York State Supreme Court on Nov. 2, 2007, against the developers QJL Associates; CPN Associates; 125 Parkway North; Sara Olsen, one of the developers; and others associated with the project, citing deficiencies in construction throughout the building. The complaint cited five causes of action against the developers, with claims of over \$31 million in damages, and additional causes of action and damages totaling another \$58 million against the project's engineers and builder.

Owners of the condos, who paid between \$383,800 for apartment CF-2 and \$1.675 million for a penthouse apartment on 110th Street and Fifth Avenue facing Central Park, said that the apartments were not built as promised in the original offering plans, nor up to the city's building code, according to court documents.

The complaint also alleged that among other things, the bathroom ventilation systems, kitchen exhaust systems, washer-dryer systems, interior doors and frames, exterior wall brickwork, and cleaning and repairing of the façade were deficient, or below industry standards.

"My sense is that this is really a battle with the developer over various finishes" and does not include structural defects, said [REDACTED] of [REDACTED], who represents Steven Kaplan, a structural engineer on the project.

Sara Olsen and her attorney, [REDACTED], declined to comment, as did the owners and their legal counsel, [REDACTED] of [REDACTED]. Calls to Norman Horowitz, the Halstead Property broker representing the property, were also not answered.

Attorneys also said many complaints are surfacing in Brooklyn, where the pace of development has accelerated, especially in newly rezoned areas.

One such conversion, the Williamsburg Savings Bank at One Hanson Place, a \$165 million joint venture by developers the Dermot Co. and Canyon Johnson Urban Fund (a REIT that specializes in inner-city developments and is partially controlled by basketball player Magic Johnson), has had its own share of issues.

The much-touted project is converting the 512-foot, 34-story Brooklyn office building with its iconic clock tower into mostly residential condos — approximately 260 units. The project will include 33,000 square feet of retail and offices on the ground floor.

Two doctors and eight dentists who took up professional offices on the ground floor and were promised new office space in the conversion have had nothing but problems, they said. Their lawyer is **Bailey**, who said that most of the complaints have been resolved through a negotiation process with the sponsor, who is their landlord.

But the doctors, some of whom have been leasing space in the building for more than 30 years, said there continue to be problems, including inoperable heat and cooling systems, persistent leaks, poorly glued carpets, unsightly and poorly accessible entryways, and sporadic elevator service. The problems that have plagued their tenure at the offices have caused them to lose about 10 percent of their clients, some estimated.

"A conversion of a space with ongoing tenancy certainly has complications that are very different than new ground-up construction," said Kristin Neil, project director for the Dermot Co. "Communication with the tenants becomes a key piece of working through that aspect of a project."

The doctors are now in negotiation with the owners to buy their floor for between \$10 and \$14 million.

How owners protect themselves

Many attorneys and brokers recommend that condo buyers, whether dealing with conversions or new developments, do more upfront work before signing on the dotted line.

Many condos are still in the process of being constructed while buyers are told they need to make 10 percent deposits. At Manhattan's average sales price of \$1.75 million, that deposit of \$175,000 is a lot of money to lose if you back out on a sale.

Mindy Diane Feldman, senior vice president at Halstead Property LLC, recommends hiring a good real estate lawyer to help identify what the obligations and responsibility of the sponsor and developer are in an apartment that hasn't yet been completed.

"Every transaction that is done has a pre-closing inspection," said attorney [REDACTED], a partner at [REDACTED]. "The buyer is entitled to do a walk-through and do a pre-closing inspection sheet."

Items that need to be considered are whether the apartment is habitable or not, and which improvements will make it habitable. Important items that have been promised, such as washers and dryers, should be itemized on the punch list, [REDACTED] said.

All items that aren't there need to be noted and attached to the closing documents, with a sign-off from the sponsor.

So despite the impression that once a buyer hands over the deposit, he or she is a goner, there is still some hope, she said.