

Sellers Beware: Caveat Emptor Under Fire in New York

Recent jurisprudence in New Jersey threatening to abrogate entirely the common-law doctrine of caveat emptor in that state as it applies to the sale of real estate (though the Legislature effected a limited rescue of the doctrine), has raised concerns among builders and sellers of real estate in New York. (For details see box at p. ____). However, a review of recent jurisprudence in New York suggests that courts here are unlikely to go as far in eroding the doctrine as it applies to real estate transactions. On the other hand, a bill that Governor Pataki vetoed in December,¹ (“NY Bill”) would have caused substantial confusion about the respective rights and duties of sellers and purchasers, and a potentially significant erosion of the doctrine. Though the NY Bill was vetoed last year (on the last possible day), similar legislation has been proposed in prior years and is likely to come up again.

This article will discuss recent jurisprudence in New York to evaluate whether New York courts are as prepared as the New Jersey courts (absent legislative intervention) to impose new disclosure obligations and do away with purchasers’ independent duties to investigate. Next, because a version of the NY Bill is likely to be proposed again, this article will discuss the possibility that the bill would have effected a similar erosion of caveat emptor as the *Strawn* decision did in New Jersey (before the Legislature intervened). Finally, this article will discuss protective steps to be taken by sellers in light of this still-unfolding history.

NY Courts Still Adhere to Caveat Emptor

New York Courts, like those in New Jersey, have in past decades been re-examining the application of caveat emptor to real estate transactions. However, while recognizing the need for

the common law to evolve, New York courts, in sharp contrast to the courts of New Jersey, emphasize their continued adherence to the doctrine. Indeed, the reasoning they employ in adopting new interpretations in particular cases proceeds directly from the core logic of the doctrine itself: the duty of purchasers to exercise reasonable intelligence and use the means available to assess for themselves the nature of the deal. Still, recent decisions suggest the New York courts are prepared to recognize duties of disclosure on the part of sellers previously thought to be precluded by the doctrine. At the same time, unlike in New Jersey, even when recognizing new disclosure duties on the part of sellers, New York courts adhere unambiguously and steadfastly to the principle that regardless of a seller's duties, purchasers cannot claim they were induced into a transaction by a seller's misrepresentation or non-disclosure, where they themselves could have discovered the nature of the deal by conducting reasonable inquiry. However, while this threshold seems plainly greater than the condition recognized by the New Jersey courts (prior to legislative intervention), simply that the relevant facts not be "readily observable" by the purchaser (see box at p. ____), New York courts also find in some cases that the question whether the threshold is met involves questions for the trier of fact. Thus, sellers in many cases are not likely to be spared the expense, delay and risk of a jury trial.

New York decisions recognizing the principle that claims can be brought against sellers for "active concealment," in reality reinforce and rely on the fundamental logic of caveat emptor. For example, in *London v. Courduff*, the Appellate Division, Second Department, stated that in order to successfully show active concealment, "the plaintiffs must show in effect that the defendants had thwarted their efforts to fulfill their responsibilities fixed by the doctrine of caveat emptor."² The court cited the well-settled principle that sellers of real property who deal at arms length are under no duty to speak, absent some act or conduct which deceives the purchaser, and that rather "[the

buyer has the duty to satisfy himself as to the quality of his bargain under the doctrine <sic> caveat emptor, which in New York State still applies to real estate transactions.”³ Courts continue to apply the rule that a claim for active concealment requires a showing that the seller affirmatively thwarted the purchaser’s efforts to fulfill her or his duty of investigation.⁴ However, it should be noted that “active concealment” includes not only physically covering up a defect, but also making “a representation good as far as it goes, but accompanied with such a suppression of facts as to make it convey a misleading impression.”⁵

Similar reliance on the basic logic of caveat emptor is apparent in the most recent Court of Appeals decision to address the continued viability of the doctrine, wherein the Court recognized an implied, common-law “Housing Merchant” warranty of habitability (now superseded by statute).⁶ While emphasizing the need for evolution in the doctrine, the Court in *Caceci v. DiCanio* nonetheless limited its holding to cases where the purchaser contracts for the construction and sale of a new home. Crucially, the reason for such limitation is that in such cases, as opposed to cases where the contract is made after the house is constructed, the purchaser has no opportunity to inspect the house for him or herself, because it has yet to be constructed, and so can only rely on the builder-vendor to deliver what was bargained for.⁷ Thus, while recognizing a modification or departure from the traditional rule of caveat emptor, the Court of Appeals did so only to the extent that purchasers could not, by any reasonable degree of diligence, discover the defects for themselves (because the house is yet to be constructed). Once again, the exception proves the rule that where purchasers have the means available to discover facts material to their bargain, it is their duty to do so.

The same principle is again reinforced in a recently developed “exception” to caveat emptor which finds support in the decision in *Stambovsky v. Ackley*.⁸ According to the purchaser’s allegations in that case, the seller publicized her assertion in the local community that the subject

Nyack house was haunted by poltergeists, but failed to disclose the same to the purchaser. The Appellate Division held that the lower court improperly granted the seller's motion to dismiss the cause of action for rescission, observing:

The doctrine of caveat emptor requires that a buyer act prudently to assess the fitness and value of his purchase and operates to bar the purchaser who fails to exercise due care from seeking the equitable remedy of rescission...It should be apparent, however, that the most meticulous inspection and the search would not reveal the presence of poltergeists at the premises or unearth the property's ghoulish reputation in the community.⁹

However, the court emphasized also the fact that the seller had herself created the condition in question (the house's local reputation for being haunted).¹⁰

The *Stambovsky* decision continues to be law in New York. Subsequent stigmatized property legislation only bars causes of action for non-disclosure of two limited sorts of stigmas: (1) that an existing or prior owner or occupant is or was ever suspected to be infected with the HIV virus or other disease highly unlikely to be transmitted through subsequent occupancy, or (2) that the property is suspected to have been the site of a homicide, suicide or other death or felony.¹¹ Moreover, recent decisions have not only reaffirmed the holding in *Stambovsky*, but have not required that the seller herself created the condition complained of. Instead, they have simply emphasized the requirement that the relevant condition be peculiarly within the seller's knowledge and not likely to be discovered by a reasonable inquiry by the purchaser.¹² The lower court in *Haberman v. Greenspan*, decided before *Stambovsky*, had likewise found that a duty to speak arises "where there are circumstances peculiarly or exclusively within the knowledge of one party, materially affecting the property, and he is or should be aware that the other party is dealing with him in ignorance of such factors or on the assumption of some other state of facts."¹³

In a departure from the traditional doctrine of caveat emptor, these decisions recognize a duty

to speak on the part of a seller even absent any affirmative and deceptive act on the seller's part. However, as with the decisions on active concealment and warranty of habitability, they proceed from and thereby reinforce the core logic of caveat emptor: the duty of purchasers to conduct reasonable inquiry to satisfy themselves as to the nature of the transaction. They impose a duty to speak on sellers and their brokers/agents only where such reasonable inquiry by purchasers could not reveal material facts of which the seller has knowledge.

Moreover, even in situations where the courts now recognize a duty of disclosure on the part of sellers, they continue to hold that the purchaser's failure to carry out its separate duty under caveat emptor bars an action based on non-disclosure. It has long been the rule in New York:

...that if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth, or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations.¹⁴

This basic principle applies to bar actions based on alleged misrepresentations by a seller, as well as where the seller is otherwise under a duty to disclose but allegedly has not done so. It also applies to conditions beyond those "readily observable", such as zoning restrictions, non-exemption from rent-stabilization laws, and cracks hidden behind paneling.¹⁵ Thus, even while the courts continue to recognize expanded duties of disclosure, sellers in New York are still protected from *Strawn*-like claims, at least in situations where purchases could, by reasonable inquiry, discover the relevant condition themselves prior to signing a purchase contract.

Unfortunately for sellers, in some cases they may not be spared the expense, delay and risk of a full trial, even where it seems apparent the purchasers could have discovered the defects by simply calling a state or federal environmental agency. Courts in many cases have dismissed claims on motions for summary judgment or motions to dismiss for failure to state a cause of action, based

on failure of the purchasers to exercise due diligence.¹⁶ However, in a number of other cases, even one where the information in question is apparently a matter of public record, courts have found that whether a purchaser could have discovered a condition by reasonable inquiry is a question of fact, precluding summary judgment.¹⁷

Thus, in addition to the well-recognized exceptions to the traditional caveat emptor rule (e.g. in cases of active concealment), the New York courts now recognize a duty of sellers to disclose any material condition (including off-site conditions) that is exclusively within their knowledge and that cannot be discovered by a reasonably diligent purchaser. Conversely, where the material fact in question is not peculiarly within the seller's knowledge or is discoverable by reasonable inspection or inquiry, purchasers are unlikely to prevail on claims for non-disclosure even where there is some other basis for a duty to disclose. Finally, whether a seller in a particular case can, on this basis, obtain summary dismissal of a claim for non-disclosure will depend on the particular court's judgment as to whether the evidence presented creates an issue of fact as to the ability of a reasonably diligent purchaser to discover the condition for him or herself.

Potential Legislative Departure From Caveat Emptor

The New York Disclosure Bill (the "NY Bill"),¹⁸ vetoed in December by Governor Pataki, could have signaled a much more significant erosion of a seller's protections under caveat emptor. Similar legislation is certain to be proposed again in the near future. It is therefore useful to examine the bill in order to understand the potentially far-reaching effects it would have had.

It is important to note that unlike the NJ Act discussed in the sidebar (p. __), which applies only to builder-developers of newly-constructed housing and their agents, the NY Bill would have applied only to the resale of previously or currently occupied housing.¹⁹ Also, it would have

obligated sellers to disclose specific information, unlike the NJ Act which only requires sellers to disclose the availability of registries of such information from municipal clerks. Further, unlike the NJ Act that focuses exclusively on disclosure of off-site conditions, the NY Bill focuses principally on physical conditions of the subject property, mechanical systems, legal issues like objections to title or the existence of a valid certificate of occupancy for the property, and environmental conditions on or emitted from the property itself.²⁰ However, ambiguities in the NY Bill would have left open the possibility of a broader interpretation of a seller's disclosure obligations, including duties to disclose information about off-site environmental conditions. Further, while purporting to leave existing obligations and remedies of sellers and purchasers as they are, the NY Bill could have been interpreted as imposing liability on sellers for non-disclosure, regardless of the purchaser's failure to exercise due diligence as still otherwise required under caveat emptor.

The NY Bill would have established a uniform disclosure statement that sellers would be obligated to provide to prospective purchasers prior to accepting a contract for purchase. Sellers would have been required to answer 46 enumerated questions, to the best of their knowledge, about the history and present condition of the subject property and the structures and mechanical systems it contains. However, sellers would also have been instructed to "report all known conditions affecting the property."²¹ Moreover, the 46 enumerated questions include, among other things, whether the seller is aware of "other environmental defects," and if so, the seller would have been required to explain them.²² Each of these provisions could arguably be interpreted as requiring disclosure of off-site conditions, even though the bill otherwise appears intended to require disclosure only of specific conditions directly connected with the subject property. Thus, rather than clarifying the extent of a seller's disclosure obligations and protections, the NY Bill would have created new ambiguities.

The NY Bill would not have obligated owner/sellers to provide for any investigation or inspection, and would only have imposed on the seller's agent/broker the obligation of advising the seller of his or her obligations under the statute and transmitting the disclosure statement provided by the seller to the purchaser or the purchaser's agent.²³ However, it would have provided that "[any person who provides a property condition disclosure statement and willfully fails to perform the duty prescribed in this article shall, in addition to any existing equitable and statutory remedy, be liable in the amount of actual damages suffered by a buyer as a result of a violation of this article."²⁴ The limits of a seller's liability under this provision are far from clear. For example, while sellers would only have been obligated to disclose conditions of which they have knowledge, "knowledge" is defined to include both actual and constructive knowledge.²⁵ The question of whether this inclusion of "constructive knowledge" would have made a seller liable for a failure to become aware of, (perhaps, by failing to engage in some pre-contract "due diligence" investigatory activities) and disclose a particular condition, would certainly give rise to divergent judicial interpretations.

Perhaps more significantly, it is unclear whether this provision would be consistent with, or override, the purchaser's duty to conduct a reasonable inquiry into the nature of the transaction, and discover relevant facts for him or herself. Legislative findings enunciated in the bill included:

This act is not intended to and does not diminish the responsibility of buyers to carefully examine property which they intend to purchase and, in fact, highlights the importance of professional inspections and environmental tests. This act is not intended to and does not limit existing responsibilities by a seller, buyer or agent concerning the condition of the property or potential liabilities or remedies at law, statute or in equity.²⁶

However, despite these express intentions, the above-quoted language would have provided liability, "*in addition to any existing equitable and statutory remedy,*" (emphasis added) for damages resulting from any willful violation of the seller's duties under the statute. Courts might have interpreted this

language as imposing liability not subject to a common-law defense based on caveat emptor. Unlike common law duties of disclosure, which give rise to claims only where the purchaser also carries out his or her duties under caveat emptor, this proposed statutory duty might have been read to create claims even where purchasers fail to do so.

Therefore despite the legislative intent expressed in the bill, the language chosen by its drafters could potentially have accomplished, in New York, a similar erosion of a seller's protections under caveat emptor as that accomplished judicially in New Jersey before the New Jersey Legislature intervened to limit the seller's duties. Recall, however, that the NY Bill would have applied to the resale of previously occupied housing, whereas the NJ Act applies to newly-constructed housing. Thus, even if liberally interpreted, the NY Bill would not have supported claims in New York by plaintiffs positioned as those in the New Jersey *Strawn* case (purchasers of new housing from a builder-developer). Instead, the NY Bill would have given rise to similar claims against sellers of previously owned housing. Regardless, it would have amounted to a substantial departure from caveat emptor.

Wisely, the Governor vetoed the NY Bill this time around. However, legislators are not likely to drop the issue. Thus, while the core of the doctrine of caveat emptor (the purchaser's duty to conduct reasonable inspection and inquiry, and discover the nature of the transaction to the extent that such reasonable inquiry allows) remains intact in New York for the moment, prudent sellers--both builder-developers and owners of previously-occupied housing--will now anticipate a likelihood not only of further judicial re-interpretations of the traditional doctrine, but also of possible legislation substantially departing from the doctrine. They should therefore continue taking steps to protect themselves from such new claims.

Recommended Steps

New York courts continue to enforce detailed, specific and comprehensive merger and disclaimer clauses, in most circumstances, as a bar against a claim by a purchaser that he or she was induced into transaction by a seller's misrepresentations or failure to disclose material facts. However, even a specific disclaimer will not act as a bar where the facts not disclosed are peculiarly within the knowledge of the party invoking it, and not discoverable by reasonable means.²⁷ Accordingly, in the precise circumstances held by *Stambovsky* and its progeny, which give rise to a duty to speak, such disclaimer clauses will not protect sellers.

Furthermore, it is not entirely clear that such disclaimers would have been effective against claims based on violation of the NY Bill, or similar legislation likely to be proposed again in coming years. After all, the NY Bill would have affirmatively obligated sellers to disclose information about which they have actual and constructive knowledge, and imposed liability for damage caused to purchasers by sellers' willful failure to do so. The courts may have found that sellers could not avoid liability under the statute, simply by including a disavowal of reliance on such disclosures in the contract. However, given the expressed legislative intent of preserving and highlighting purchasers' duties to conduct their own investigation, courts would likely instead have found that such statements that purchasers are not relying on such representations or omissions by sellers are enforceable, and thereby undermine the claim that any violation of the sellers' duties under the NY Bill *caused* damages to the purchasers, at least in cases where the relevant facts could have been discovered by reasonable diligence on the part of the purchasers (such as by calling the EPA to inquire whether there are any superfund sites near the property or the Town Clerk to see if a valid Certificate of Occupancy exists). Moreover, in circumstances not covered by the NY Bill, and except where the relevant facts are within the seller's exclusive knowledge and not otherwise

reasonably discoverable, the effectiveness of such comprehensive and specific merger and disclaimer clauses would have remained unaffected. Thus, in anticipation of possible future legislation similar to the NY Bill that was just vetoed, and in defense of existing common-law claims, sellers are well advised to include comprehensive and specific merger and disclaimer clauses in their contracts.

To be effective, the merger and disclaimer clause must be “specific.” Such clauses are given effect only where they contain a disclaimer of reliance as to the specific representation or omission which the purchaser later claims induced her or him into the transaction.²⁸

The contract should contain an explicit representation by the purchaser that the purchaser has examined the subject premises, has had ample opportunity to perform tests, has consulted independent professionals concerning the property and surrounding area, has made necessary inquiries with city, state and federal agencies about environmental conditions on the property and in the surrounding area, and has the opportunity to thoroughly investigate all zoning issues, certificates of occupancy and other matters that might affect the value, reputation or use of the property. The disclaimer should also contain a representation that the buyer is therefore completely familiar and fully satisfied with the subject of the purchase and enters into the contract on the basis of having conducted a full investigation, and a statement that the seller has relied on such representation.

The contract should also state that any and all representations about the physical condition of the property and surrounding area, the structures and mechanical systems thereon, environmental issues, zoning issues, certificates of occupancy, taxes, assessments, and any other matter that might affect the value, reputation or use of the property has been explicitly included in the written contract. There should also be a statement in the contract that the purchaser has not relied on any representation as to any of these matters not contained in the contract, which therefore represents the

full and complete understanding between the parties. It should further state that with respect to all such matters the purchaser has relied exclusively on his or her own investigation.

It is crucial that the merger and disclaimer clause be carefully worded so as to meet the definition of a “specific” disclaimer established in *Dannan* and its progeny. In most cases, where such a specific disclaimer is included, the reasoning employed by the *Dannan* court still applies:

[P]laintiff has in the plainest language announced and stipulated that it is not relying on any representations as to the very matter as to which it now claims it was defrauded. Such a specific disclaimer destroys the allegations in plaintiff’s complaint that the agreement was executed in reliance on these contrary oral representations.²⁹

Conclusion

The protection provided sellers by the doctrine of caveat emptor is not as extensive as it once was. Sellers in New York may be held liable, not only in cases where they engage in affirmative misrepresentation, active concealment, or partial disclosure so misleading as to amount to a misrepresentation, but also in cases where there are no accessible public records or other means readily available to purchasers to discover the facts omitted. However, in circumstances where purchasers can by reasonable investigation discover the facts omitted or allegedly misrepresented, and where sellers do not actively thwart such discovery, the doctrine of caveat emptor still applies in New York to bar such claims. Under such circumstances, well-crafted merger and disclaimer clauses continue to provide significant, additional protection. Governor Pataki’s veto of the New York Disclosure Bill prevented, for the moment, a substantial legislative erosion of the common-law doctrine of caveat emptor and a possible erosion of the effectiveness of such merger and disclaimer clauses. However, the likelihood that the Legislature will continue to consider and pass legislation similar to the recently-vetoed bill, leaves room for substantial uncertainty about the future. But given that courts continue to enforce specific merger and disclaimer clauses, and given at least the

substantial possibility that they will enforce such clauses, even against statutory claims that may be created by legislation in coming years, sellers of previously occupied housing (i.e., those covered by the proposed NY Bill) should continue including such clauses in their contracts as should builders/developers of new housing.

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1. PROPERTY CONDITION DISCLOSURE ACT, N.Y. A.B. 1173, 222d Ann. Leg. Sess. (1999) (vetoed on December 8, 2000, after being sent to the Governor on November 27, 2000).
 2. *London v. Courduff*, 141 A.D.2d 803, 804, 529 N.Y.S.2d 874, 875 (N.Y. App. Div., 2d Dept. 1988), *leave denied*, 73 N.Y.2d 809, 537 N.Y.S.2d 494 (N.Y. 1988).
 3. *Id.*
 4. *See Jee Foo Realty Corp. v. Lemmle*, 259 A.D.2d 401, 402, 687 N.Y.S.2d 103, 104 (N.Y. App. Div., 1st Dept. 1999).
 5. *Haberman v. Greenspan*, 82 Misc.2d 263, 265, 368 N.Y.S.2d 717, 720 (N.Y. Sup. Ct., Richmond Co. 1975). *See Striker v. Graham Pest Control Co., Inc.*, 179 A.D.2d 984, 984-85, 578 N.Y.S.2d 719, 720-21 (N.Y. App. Div., 3d Dept. 1992), *lv. dismissed*, 79 N.Y.2d 1040, 584 N.Y.S.2d 449 (N.Y. 1992).
 6. *Caceci v. Di Canio Construction Corp.*, 72 N.Y.2d 52, 530 N.Y.S.2d 771 (N.Y. 1988). *See Fumarelli v. Marsam Development, Inc.*, 92 N.Y.2d 298, 302, 680 N.Y.S.2d 440, 442 (N.Y. 1998).
 7. *Caceci*, 72 N.Y.2d at 58-59, 530 N.Y.S.2d at 774 (N.Y. 1988).
 8. 169 A.D.2d 254, 572 N.Y.S.2d 672 (N.Y. App. Div., 1st Dept. 1991).
 9. *Id.*, 169 A.D.2d at 258-59, 572 N.Y.S.2d at 676 (N.Y. App. Div., 1st Dept. 1991).
 10. *Id.*, 169 A.D.2d at 259, 572 N.Y.S.2d at 676 (N.Y. App. Div., 1st Dept. 1991).
 11. N.Y. REAL PROPERTY LAW § 443-A (1995 N.Y. LAWS CH. 606).

12. *See Trustco Bank, N.A. v. Cannon Building of Troy Assoc.*, 246 A.D.2d 797, 799, 668 N.Y.S.2d 251, 253 (N.Y. App. Div., 3d Dept. 1998).
13. *Haberman v. Greenspan*, 82 Misc.2d at 265, 368 N.Y.S.2d at 720 (N.Y. Sup. Ct., Richmond Co. 1975).
14. *Dannan Realty Corp. v. Harris*, 5 N.Y.2d 317, 322, 184 N.Y.S.2d 599, 603 (N.Y. 1959).
15. *See Howard v. Weaver*, 224 A.D.2d 225, 225, 664 N.Y.S.2d 49, 50 (N.Y. App. Div., 1st Dept. 1997); *Trustco Bank, N.A., Supra*, 246 A.D.2d at 800, 668 N.Y.S.2d at 254 (N.Y. App. Div., 3d Dept. 1998); *George v. Lumbrazo*, 184 A.D.2d 1050, 1051, 584 N.Y.S.2d 704, 705 (N.Y. App. Div., 4th Dept. 1992), *lv. dismissed*, 81 N.Y.2d 759, 594 N.Y.S.2d 719 (N.Y. 1992), *rearg. denied*, 81 N.Y.2d 835, 595 N.Y.S.2d 397 (N.Y. 1993); *East 15360 Corp. v. Provident Loan Society of New York*, 177 A.D.2d 280, 281, 575 N.Y.S.2d 856 (N.Y. App. Div., 1st Dept. 1991); *Di Filippo v. Hidden Ponds Associates*, 146 A.D.2d 737, 738, 537 N.Y.S.2d 222, 224 (N.Y. App. Div., 2d Dept. 1989).
16. *East 15360 Corp., Supra*, 177 A.D.2d at 281, 575 N.Y.S.2d at 857 (N.Y. App. Div., 1st Dept. 1991); *Di Filippo, Supra*, 146 A.D.2d at 738, 537 N.Y.S.2d at 224 (N.Y. App. Div., 2d Dept. 1989); *Vandervort v. Higginbotham*, 222 A.D.2d 831, 832, 634 N.Y.S.2d 800, 801 (N.Y. App. Div., 3d Dept. 1995); *Trustco Bank, N.A., Supra*, 246 A.D.2d at 799, 668 N.Y.S.2d at 253 (N.Y. App. Div., 3d Dept. 1998).
17. *Bethka v. Jensen*, 250 A.D.2d 887, 888, 672 N.Y.S.2d 494, 495 (N.Y. App. Div., 3d Dept. 1998); *Tahini Investments, Ltd. v. Bobrowsky*, 99 A.D.2d 489, 490, 470 N.Y.S.2d 431, 433 (N.Y. App. Div., 2d Dept. 1984).
18. PROPERTY CONDITION DISCLOSURE ACT, N.Y. A.B. 1173, 222d Ann. Leg. Sess. (1999) (vetoed on December 8, 2000).
19. *Id.*, proposed Real Property Law § 463[12].
20. *Id.*, proposed Real Property Law § 462.
21. *Id.*
22. *Id.*, question 18.
23. *Id.*, proposed Real Property Law § 462[3] and § 466.
24. *Id.*, proposed Real Property Law § 465.
25. *Id.*, proposed Real Property Law § 461[5].
26. *Id.*, Section 1.

27. See *Stambovsky v. Ackley*, *Supra*, 169 A.D.2d at 259, 572 N.Y.S.2d at 677 (N.Y. App. Div., 1st Dept. 1991); *East 15360 Corp.*, *Supra*, 177 A.D.2d at 281, 575 N.Y.S.2d at 857 (N.Y. App. Div., 1st Dept. 1991); *Tahini Investments, Ltd. v. Bobrowsky*, *Supra*, 99 A.D.2d at 490, 470 N.Y.S.2d at 433 (N.Y. App. Div., 2d Dept. 1984).

28. See *Dannan Realty Corp. v. Harris*, *Supra*, 5 N.Y.2d at 321, 184 N.Y.S.2d at 602 (N.Y. 1959); *Di Filippo v. Hidden Ponds Associates*, *Supra*, 146 A.D.2d at 737-38, 537 N.Y.S.2d at 223-24 (N.Y. App. Div., 2d Dept. 1989).

29. 5 N.Y.2d at 320-21, 184 N.Y.S. 2nd at 602 (N.Y. 1959) (citations omitted). See *East 15360 Corp.*, *Supra*, 177 A.D.2d at 281, 575 N.Y.S.2d at 857 (N.Y. App. Div., 1st Dept. 1991); *London v. Courduff*, *Supra*, 141 A.D.2d at 804-805, 529 N.Y.S.2d at 875-76 (N.Y. App. Div., 2d Dept. 1988).