

CLIENT ADVISORY

APRIL 2002

PANEL DISCUSSION ON MOLD AND RELATED ISSUES

Ganfer & Shore, LLP will be hosting another seminar in our series of breakfast panel discussions addressing mold and related issues that, we believe, are of significant interest to cooperatives, condominiums and real estate owners. This discussion will be held on Wednesday, May 15, 2002, from 8:00 A.M. to 9:30 A.M., in the Broadway Room located on the Conference Floor of the New York Grand Hyatt Hotel, at the corner of 42nd Street and Lexington Avenue. The panelists will be Steven R. Ganfer, Esq. of Ganfer & Shore, LLP; Arnold Fleming of Alee, King, Rosen & Fleming; and Jim Heller of LZA Technology. If you plan to attend, please either call Amarilys Garcia of our office at 212-922-9250, ext. 262, or send a confirming e-mail to her at agarcia@ganshore.com on or before May 5, 2002.

LEAD PAINT LAW UPHELD

As discussed in the November 2000 issue of our newsletter, Justice York of the New York State Supreme Court had held that Local Law 38 of 1999, which set forth the then recently enacted revisions to New York City's Lead Paint Law (Local Law 1 of 1982), was unenforceable. On appeal, the Appellate Division, First Department, has now reversed the decision and determined that Local Law 38 is valid (New York City Coalition to End Lead Poisoning, Inc. v. Vallone, NYLJ, 3/28/02, p. 17, col. 2).

Local Law 38 of 1999, which is now effective, was passed in an effort by the City Council to reconcile the various competing interests of landlords, tenants, children and others, and to address findings that the removal of lead-based paint was itself creating increased health hazards. Local Law 1, the predecessor statute, had required that landlords remove all lead-based paint in any apartment in which a child under the age of 7 was living. Under Local Law 38, children under the age of 6 are protected, but, to mitigate the health effects caused by the removal of lead-based paints, Local Law 38 requires that landlords leave intact lead-based paint alone, and requires that peeling, chipped, cracking or deteriorated lead-based paint in any apartment in which a child under the age of 6 is living be repaired in accordance with strict guidelines. Briefly, if a building has three (3) or more apartments and was built before 1960, landlords must (i) upon the signing of the initial lease, a renewal or move into the apartment, ask each tenant if a child under the age of 6 resides in the apartment, and maintain records relating thereto; (ii) send a notice to each tenant once each year asking if a child under the age of 6 resides in the apartment; (iii) visually inspect each apartment once each year if a child under the age of 6 resides in the apartment; (iv) correct any peeling, chipped, cracking or deteriorated lead-based paint, lead-based paint on a deteriorating sub-surface, or violation issued by the Department of Housing Preservation and Development following the safe work practices described in Section 173.14 of the N.Y.C. Health Code; and (v) adjust any windows or doors so that they do not stick and cause paint to peel or chip when opened or closed. If you have any questions regarding your rights or obligations under Local Law 38 of 1999, please do not hesitate to contact us.

COOP'S \$500 PER DAY RENOVATION FEE UNENFORCEABLE

The owners of a cooperative apartment at 1080 Fifth Avenue, New York, New York (the "Unit Owners") sought the consent of Ten Eighty Apartment Corporation (the "Corporation") to renovate their apartment. As a condition of granting consent, the Corporation required that the Unit Owners sign an Alteration Agreement (the "Agreement"). The Agreement required that the Unit Owners pay a fee of \$100 for each day from the commencement of their renovations until completion. The Agreement also imposed an automatic fee of \$500 per day for each day of delay in completing renovations "until the renovations are completed, to compensate the Corporation for the costs and inconveniences caused by prolonging the alterations, unless the Corporation determines, in its sole discretion, that such delay was beyond the shareholder's or the shareholder's contractor's control". A dispute arose when the Corporation imposed a fee of \$32,000 upon the Unit Owners when their renovations went well past the target completion date in the Agreement. The Unit Owners objected, refused to pay the additional fee, and commenced an action to challenge the fee.

In Behler v. Ten Eighty Apartment Corp., (NYLJ 4/11/01, pg. 18, col. 4), the Unit Owners took the position that (i) the Corporation did not consider whether the delays were beyond the Unit Owners' control; (ii) no renovation work could be performed during the delay which the Unit Owners claimed was the result of water leaks resulting from construction in the apartment above them; and (iii) there was no reasonable relationship between the delay and any expenses or costs incurred by the Corporation. The Corporation argued that the \$500 per day fee was not a penalty, but rather was intended to cover the costs, expenses and extra use of the building's facilities by the Unit Owners' contractors, and to make up for the extra inconvenience to the other owners resulting from the extended renovations. In evaluating the enforceability of the provision, the Court identified the \$500 per day fee as a "liquidated damages" clause, which has been defined by the New York State Court of Appeals as the compensation that the parties have agreed should be paid for any loss or damage arising from the breach of an agreement provided that the amount agreed upon is a reasonable measure of the probable actual loss; and (ii) the actual loss suffered is difficult to determine precisely. However, the presiding judge also noted that where liquidated damages are plainly disproportionate to the loss actually sustained as a result of the breach, the sum constitutes a penalty and will not be enforced.

In this case, the Corporation had not presented any proof of damages actually suffered as a result of the Unit Owners' delayed construction. Thus, the Court declared that the \$32,000 fee sought to be imposed by the Corporation for the Unit Owners' delayed construction was a penalty, and as a penalty, was null and void. The Court set the matter down for a trial to determine what actual damages, if any, were suffered by the Corporation as a result of the Unit Owner's renovation delays.

In order to survive a challenge, Boards seeking to keep a tight reign upon unit owners' renovations through the imposition of fees need to support their fee structure by reasonably categorizing and approximating additional costs which may be incurred as a result of extended periods of construction, including, without limitation, labor and management time and expense required to manage contractors and workmen. Without the ability to demonstrate the reasonable basis for the fee structure and its relationship to the actual loss or damage that may be incurred as a result of prolonged renovations, courts may consider the fee an unenforceable penalty.