

CLIENT ADVISORY

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FAILURE TO OBJECT TO UNLAWFUL USE DOES NOT BAR COOPERATIVE FROM SUBSEQUENTLY STOPPING SUCH USAGE.

In 360 East 72nd Street Owners, Inc. v. Rutter (Index Number 603850/02, Sup. Ct. N.Y. Co. March 11, 2004), the Cooperative sought to enjoin Shareholders from playing ball on their terrace. The Shareholders argued that that officers, directors and employees of the Cooperative were long aware of the ball-playing; that there was no evidence of injury or an unsafe condition; and that the New York City Building Code, § 27-334, which requires that recreational ball-playing facilities above the first story level must have both vertical and overhead enclosure, did not apply to their terrace. The Shareholders had sought a Building Department ruling that the Code section did not apply to private terraces on setbacks, but in its response to such request the Department of Buildings, while waiving the overhead enclosure requirement, stated that a ten foot exterior fence with an overhang was required and that Section 27-334 of the Code was applicable to the subject terrace. In the course of discovery, the Cooperative, while disputing that it had had knowledge of the ball-playing activities, established that the fence that was on the terrace did not meet with the requirements of the letter ruling issued by the Department of Buildings.

After considering the lengthy submissions made by the parties, including extensive deposition transcripts, the Court granted summary judgment in the Cooperative's favor and permanently enjoined the Shareholders from engaging in ball-playing activities on the terrace. The Court rejected the Shareholders' arguments, holding that they could not negate the non-compliance of the terrace with the Code.

The Cooperative was represented by our firm in this litigation.

SPONSOR'S VOTE FOR CONDOMINIUM BOARD MEMBERS UPHELD

The By-Laws of the condominium in Mishkin v. 155 Condominium, NYLJ March 3, 2004, p. 18, col. 1 (Sup. Ct. N.Y. Co.), provided for a nine member board of managers to be elected by a plurality of the unit owners, subject to the right of the Sponsor to elect two board members, so long as it owned between 15 and 35 per cent of the common interests attributable to the units. The By-Laws also provided that no more than three members were permitted to serve "by reason of the votes cast by the Sponsor." The board interpreted these provisions to permit the Sponsor to designate two members as of right and to vote for the remaining seven slots based on its percentage of common interest, with the caveat that its vote could not be the vote that put more than three of them "over the top."

A unit owner challenged this procedure and sought nullification of an election in which the Sponsor designated two board members and also provided the margin of victory in the election of another two. The petitioner argued that the By-Laws permitted the Sponsor to vote for only one member in addition to its two designees. The Court rejected this construction, however, upholding the Sponsor's right to vote for all the board slots in combination with other unit owners, so long as its votes provided the margin of victory for no more than three board positions (in addition to its designees as of right).

Relying in part on prior cases decided in the context of cooperative corporations, the Court observed that the issue of dilution of residential voting rights was of concern in both cooperatives and condominiums. It also stated that absent advance notice of a change, the board was correct in adhering to its long-standing procedure.

OWNER'S LIABILITY FOR "OPEN AND OBVIOUS" CONDITIONS

An owner of real property may be sued for personal injuries arising from its failure to warn potential victims of an unsafe condition existing on the property, as well as from its failure to maintain the premises in a reasonably safe condition. A recent appellate decision reflects the prevailing modern view that where the dangerous condition is "open and obvious," it may provide a defense to the "duty to warn" theory, but not necessarily to the owner's duty to maintain safe premises.

In Westbrook v. WR Activities - Cabrera Markets, NYLJ March 15, 2004 (App. Div. 1st Dep't), the plaintiff had been injured after tripping over a box in a supermarket aisle. The lower court granted summary judgment dismissing the case, ruling that the box in the aisle was readily observable by the plaintiff and was not inherently dangerous. The Appellate Division reversed, however, holding first that there were triable issues of fact as to whether the unsafe condition was "open and obvious." It then went on to hold that even if the condition was "open and obvious," the defendant would only be relieved of its duty to warn, not its duty to maintain the premises in a safe condition. To rule otherwise, the Court said, would permit a landlord to leave unrepaired a dangerous but correctible condition, simply because it is obvious. Such a result was found unacceptable by a majority of the Court

GANFER & SHORE'S UPCOMING BREAKFAST SEMINAR

Our firm will be hosting a breakfast seminar on the do's and don'ts when doing construction on Thursday, April 29, 2004, at 8 a.m. at the Harmonie Club, 4 East 60th Street, New York, N.Y. The panelists will be our partner Alan Fried; Jeffrey Bliss, President of KB Companies; Neil Davidowitz, President of Orsid Realty, Inc., and Stephen B. Jacobs, president of the Stephen B. Jacobs Group. Please call Amarilys Garcia at our office, (212) 922-9250, if you are interested in attending.