

CLIENT ADVISORY

AUGUST 2001

THE BATTLE OF THE BOROUGHES CONTINUES

Whether tenants who rent from sponsors of cooperatives after the conversion to a cooperative corporation are protected from eviction by the Martin Act upon the expiration of their lease remains in dispute between the appellate courts reviewing landlord and tenant matters within the City of New York.

On July 16, 2001, the Appellate Term, Second Department, which hears appeals from the housing courts serving the boroughs of Queens, Brooklyn and Staten Island, took the opportunity in Geiser v. Maran (NYLJ, 7/18/01), to reiterate its position that the protections extended to tenants under the Martin Act also protect those tenants who rent from a co-op sponsor after the closing date of the cooperative conversion and until the co-op sponsor has sold all of its unsold shares. Thus, in Brooklyn, Queens and Staten Island, these tenants cannot be evicted upon the expiration of their lease except for cause such as non-payment of rent or illegal use of the apartment. At the same time, since issuing its ruling in Park West Village v. Nishioka, 187 Misc.2d 243 (2000), the Appellate Term, First Department, which handles appeals from the housing courts in the boroughs of Manhattan and the Bronx, has held that the only tenants protected by the Martin Act who rent from a cooperative sponsor after the closing date of the cooperative conversion are those non-purchasing tenants who rented from the sponsor before the closing of the cooperative offering plan.

Thus, cooperative sponsors in Manhattan and the Bronx are currently not required to offer renewal leases to new tenants who signed their lease after the closing of the cooperative conversion. Cooperative sponsors in Brooklyn, Queens and Staten Island currently must still offer renewal leases to all rental tenants until all of the unsold shares have been sold.

The split rulings referred to in this issue are and will be the subject of further review by appellate courts of greater jurisdiction and authority. We will follow this matter and attempt to keep you informed of developments as they are reported.

APPEARANCES MATTER

Into the continually growing body of case law surrounding co-op boards and conflicts of interest, arrives the lesson of Murray Hill Owners Corp. v. El Grande Restaurant (N.Y.L.J. July 13, 2001). This case involved a dispute between a Manhattan co-op and its restaurant tenant and whether restaurant patrons should be allowed to drink at a table-less outside bar in an adjacent plaza. The merits, however, played a back seat to the tenant's claims that one of the co-op board's members, alleged to be taking an "active" role in the prosecution of the co-op's claims against the restaurant, was a New York supreme court justice sitting in Brooklyn. The tenant alleged that the judge's active involvement in litigation pending in the Supreme Court, although a different borough, violated New York State's Code of Judicial Conduct. Justice Marilyn Shafer did not address the merit or lack of merit of the tenant's allegation of judicial misconduct. Instead, Justice Shafer found that the only way

to avoid even the appearance of impropriety by this judge/board member was to transfer the case outside the borders of the City of New York.

The lesson here is again to remind co-op boards to adopt and institute safeguards to ensure that there is not even the appearance of impropriety in their decision-making processes, let alone an actual conflict. By its mere allegation of a conflict of interest, this tenant was able to delay the co-op board's action and ultimately raise the cost of the action to the board, perhaps resulting in a willingness on the board's part to now settle the matter on terms not previously acceptable. Courts in the past have held that when a board member has a personal interest in a matter, the board's decision making may be questioned. For example, where a board member was the real estate agent, seller, or simply wished to purchase the subject apartment, courts have ruled that a conflict existed. Accordingly, when any potential conflict may be raised, co-op boards should consider requesting that a conflicted board member abstain from involvement in the consideration of the subject matter.

WASTE NO MORE

Lenox, LLC owns a building in upper Manhattan in which "someone" is operating a grocery store. We are unable to describe them because apparently even the landlord didn't know who was doing business in its building, just that they wanted them out. Thus came about the case of Lenox, LLC v. "John Doe" & "Jane Doe" (N.Y.L.J. 07/11/01). In response to this landlord's attempt to regain its space, "John Doe" and "Jane Doe" (as they are named in this case), who we are reasonably certain never had a lease, sought to have the Civil Court of the City of New York enjoin their landlord from "failing to provide heat or hot water and permitting the building and its mechanical, electrical, gas and boiler systems to deteriorate and cease to function", notwithstanding the fact that the landlord claimed they had no business being there at all. Without a lease, Mr. and Mrs. Doe relied solely upon two statutes, Section 209(b)(2) of the New York City Civil Court Act and Section 211 of the Real Property Actions and Proceedings Law. Judge Ling-Cohan, noting that neither the court nor the parties were able to locate any published decisions on this issue, reviewed the statutes relied upon and ruled that, while a proceeding is pending to determine the use and occupancy of property, the Civil Court of the City of New York does have the power to enjoin a commercial landlord from committing acts of "waste", the legal term of art for "activities which cause lasting, material and/or permanent injury to property". Notwithstanding the court's finding, Judge Ling-Cohan instructed Mr. & Mrs. Doe, as well as future landlords and tenants, that in order to obtain this type of relief, parties must be prepared to make specific allegations of destructive actions rather than those only generally alleged, including, without limitation, (i) the submission of an affidavit by someone with personal knowledge describing the alleged damage and harm; (ii) the submission of an affidavit of an expert attesting to the current condition of the building's mechanical, electrical, and gas systems; and (iii) reference to relevant portions of a lease or a statute which creates the obligation to provide and maintain the building and building-wide systems.

WINDOW GUARD REMINDER

When the heat of summer recedes, many apartment dwellers will open their windows to let in the fresh air. An annual inspection of all window guards should be made by the building superintendent to ensure compliance with the Window Guard Law, including the windows in first floor apartments. We suggest that this annual inspection be completed before the air-conditioning season is over.