GANFER & SHORE, LLP

CLIENT ADVISORY

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DOWN PAYMENT NEED NOT BE RETURNED AFTER 9/11

In Uzan v. 845 UN Limited Partnership, **NYLJ June 21, 2004, p. 18, col. 1 (App. Div. 1st Dep't)**, the plaintiffs had contracted in 1999 to purchase four condominium units on high floors in the Trump World Tower, then to be constructed. Each contract provided for a nonrefundable down payment of 25 percent: 10 percent at contract, 7½ percent twelve months later and 7½ percent eighteen months after the contract was executed. These payments had all been made when the terrorist attack on the World Trade Center occurred on September 11, 2001. Expressing grave concern that the top floors of such a "trophy" building would be an attractive terrorist target, the plaintiffs refused to close and sued to recover their down payments.

The Supreme Court granted the defendants partial summary judgment, finding that the plaintiffs had forfeited that part of their down payment equivalent to 10 percent of the purchase price. However, it held that the remainder of the down payment was subject to a "liquidated damages" analysis to determine whether it "bore a reasonable relation to the sponsor's actual or probable loss." The court relied on a 1986 decision by the New York Court of Appeals, Maxton Builders, Inc. v. Lo Galbo, **68 N.Y.2d 373, 509 N.Y.S.2d 506 (1986)**, which had enforced a down payment provision for the "traditional" 10 percent, but had expressed no view on installment payments beyond 10 percent.

On appeal, the Appellate Division reversed and dismissed the plaintiff's claims entirely. It held that real estate down payments should only be refunded "upon a showing of disparity of bargaining power between the parties, duress, fraud, illegality or mutual mistake." There was evidence that the down payment clause was specifically negotiated by sophisticated business people and experienced counsel, that a 25 percent down payment was customary in pre-construction luxury condominiums and that the plaintiffs had negotiated the payments in installments to spread their risk over time. The down payments were therefore not refundable.

IMPROPER FILING OF NOTICE OF PENDENCY BRINGS PENALTIES

Civil Practice Law and Rules ("CPLR"), §§ 6501 *et seq.*, permits a "notice of pendency" (formerly known as a "*lis pendens*," which is Latin for "suit pending") to be filed in any action in which "the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property," other than summary proceedings for eviction. Such a notice has the effect, when indexed against the property or the name of the defendant, of putting a subsequent purchaser or incumbrancer on notice of the suit. A purchaser or incumbrancer that records its interest after the notice of pendency is filed is bound by all

proceedings and judgments in the action.

A notice of pendency is intended to protect litigants who claim an interest in real property from winning their case, only to find the property has been conveyed or mortgaged to a third party. However, the powerful impact it has on the marketability of property, together with the ease with which it may be filed, "calls for its narrow application to only those lawsuits directly affecting title to, or the possession, use or enjoyment of, real property." **5303 Realty Corp. v. O & Y Equity Corp., 64 N.Y.2d 313, 315-16, 486 N.Y.S.2d 877, 879 (1984)**. Moreover, the courts are not at all averse to imposing penalties on litigants who abuse the notice of pendency procedure, as demonstrated by several recent decisions obtained by our firm.

In **Yenom Corp. v. 155 Wooster Street, Inc., Index No. 108563 (Sup. Ct. N.Y. Co. July 14, 2004)**, the plaintiff claimed to have an agreement to purchase the stock of the corporate owner of property. It further alleged that the owner's shareholders had violated their agreement by contracting to sell their shares and the property to someone else. Plaintiff sued the corporate owner, the shareholders and the net lessee, and filed a notice of pendency against the property before the sale closed. The Court found, however, that the documentary evidence showed no agreement with plaintiff had ever been reached or signed, and dismissed the complaint. Key documentation included (1) our cover letter with the draft agreement that stated that it was "not to be deemed an offer and until such time as there is a contract executed by [the principal of our client], there will be no contract. . ." and (2) a clause in the draft that the contract would not be binding until executed by the seller. The Court also held that the notice of pendency was invalid in any event because the suit was for specific performance of a sale of stock, not real property. Finding the notice was frivolous and was filed with knowledge of the defendants' imminent closing, the Court imposed sanctions against the plaintiff and in favor of our client in the form of costs and attorneys' fees, pursuant to the **Rules of the Chief Administrator, § 130-1.1** (which authorizes the award of such costs for frivolous conduct in civil litigation), as well as **CPLR § 6514(c)** (which specifically provides for such sanctions in cases of canceled notices of pendency).

In **Tribeca Equities, Ltd. v. 19-21 Leonard St. Condominium, Index No. 109406/03 (Sup. Ct. N.Y. Co. Sept. 12, 2003)**, the Court canceled a notice of pendency that had been filed against all the condominium units in a building in a dispute over rights to common space that had nothing to do with the individual units. The Court found that the plaintiff's filing of the notice was "retaliatory in nature and done with an apparent intent to harass the defendants." It awarded our client costs and expenses pursuant to **CPLR §6514(c)**.

The lesson of the **Yenom** and **Tribeca** cases is that the improper filing of a notice of pendency will no longer be tolerated by the courts. Where in the past Courts simply cancelled such notices, there is now an apparent willingness to cancel improperly filed notices and also to impose sanctions.

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