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# CLIENT ADVISORY

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AUGUST 2008

## **ANOTHER APPELLATE COURT PERMITS CONDOMINIUM PURCHASERS TO BRING FRAUD AND CONTRACT CLAIMS AGAINST SPONSOR**

The Martin Act, which authorizes the Attorney General to regulate securities transactions, including cooperative and condominium sales by sponsors, does not preclude private individuals from bringing common-law fraud or breach of contract claims arising from such sales. **Caboara v. Babylon Cove Development, LLC, 2008 WL 2747188, 2008 N.Y. Slip Op. 6281 (App. Div. 2d Dep't July 15, 2008).**

This case arose when several purchasers of units in a townhouse condominium sued the Sponsor for fraud and breach of contract, based on an alleged misrepresentation in the offering plan. The Sponsor argued that plaintiffs' allegations, if true, would establish a Martin Act violation within the Attorney General's jurisdiction and therefore the claims were pre-empted. A lower court accepted this argument and dismissed the case, but the Appellate Division reversed this ruling and reinstated the claims. It reasoned that while the Martin Act was designed to deter fraudulent practices in the sale of securities and authorizes the Attorney General to redress such practices, nothing in the statute abridged private rights of action for common-law fraud or breach of contract.

The rule that private plaintiffs may bring fraud and breach of contract claims arising from cooperative or condominium offerings, so long as they satisfy the traditional elements for pleading these claims, was previously recognized by the Appellate Division, First Department, whose jurisdiction includes Manhattan and the Bronx. (Please see the November 2007 issue of this *Client Advisory*.) This new decision by the Appellate Division, Second Department, which covers Brooklyn, Queens, Staten Island, and several other counties, brings uniformity to this area of the law.

## **SURROGATE DIRECTS SALE OF COOPERATIVE APARTMENT AFTER BOARD REFUSES TO PERMIT TRANSFER TO TRUST**

Stock in a cooperative apartment is personal property which the owner may bequeath to anyone of his or her choosing under the owner's will. However, most proprietary leases require board approval before a new resident (other than some immediate family members) may occupy the unit. What happens when an owner bequeaths a cooperative apartment to someone that the board is not willing to approve? This question was addressed by the Surrogate's Court in **Matter of Carniol, 2008 WL 2746853, 2008 N.Y. Slip Op. 28253 (Surr. Ct. Nassau Co. June 26, 2008).**

In this case, the owner of a cooperative apartment died leaving a will which bequeathed the apartment to a trust, "for use by my granddaughter . . . if and for as long as she wishes to reside there." Carrying costs on the apartment were to be borne by the granddaughter, and the trustee was authorized to sell the apartment only with the granddaughter's consent.

When the trustee contacted the Cooperative to discuss the procedures for obtaining board approval, the board's counsel advised him that the Cooperative would not approve a transfer to a trust. Additionally, the trustee concluded that based on the granddaughter's financial circumstances and background, the board was unlikely ever to approve her as a resident, even apart from the policy concerning ownership by trusts. Meanwhile, the granddaughter was refusing to pay the expenses of maintaining the apartment, but had refused to consent to its sale. As a result, the estate was being forced to pay maintenance on an unoccupied apartment that was providing no benefit to anyone.

Under these circumstances, the Surrogate invoked the doctrine of "equitable deviation" from the literal terms of the will, and authorized the trustee to sell the apartment and to use the proceeds to acquire a new residence for the granddaughter. From the point of view of cooperative boards, the case recognizes the board's right to enforce proprietary lease restrictions on who may own and occupy units, even where an owner bequeaths the stock ownership and the proprietary lease by will.

**BOARD'S DISCRETION TO REJECT OCCUPANCY  
OF COOPERATIVE BY TRUST'S DESIGNEE UPHOLD**

Another recent case reaffirming a cooperative board's right to disapprove occupancy by an individual designated to reside in an apartment under a trust is **Gleckel v. 49 West 12 Tenants Corp.**, 52 A.D.3d 469, 859 N.Y.S.2d 712 (2d Dep't June 3, 2008). Here, the deceased owner of a cooperative apartment bequeathed it to a trust for the benefit of several relatives. The proprietary lease provided that the Cooperative could not "unreasonably" withhold consent to an assignment of the lease to "a financially responsible member of [the owner's] family." The beneficiaries agreed among themselves that the owner's nephew would purchase and occupy the apartment. However, the board concluded that the nephew was not financially responsible and withheld its consent.

A lower court held that issues of fact existed regarding the reasonableness of the board's conclusion that the nephew was not financially responsible. This was consistent with cases holding that where a board agrees to act "reasonably" in making a particular decision, the level of deference accorded the board's decision may be reduced. (Please see the August 2006 issue of this *Client Advisory*.) However, on appeal, the appellate court held that the board had sufficiently established that the nephew "failed to show that he was financially responsible." The court concluded that "[a]ccordingly, the board's withholding of consent had a legitimate relationship to the welfare of the cooperative, and therefore was reasonable."

**UNDER PROPRIETARY LEASES, OWNER OF  
ADJOINING UNIT HAS SOLE RIGHT TO USE TERRACE**

A dispute concerning the right to use a terrace was the subject of **Vale v. Isaacs**, 2008 WL 2727251, 2008 N.Y. Slip Op. 6275 (App. Div. 1st Dep't July 15, 2008). Identical proprietary leases for two neighboring apartments provided that a "lessee of an apartment having direct access to a terrace shall have and enjoy the exclusive use of the portion of such terrace which immediately adjoins the apartment." The court concluded that the plaintiff had failed to show that her apartment had direct access to the terrace, while the defendant's apartment had a door directly adjoining the terrace. Unsurprisingly, the court held that defendant and not plaintiff was entitled to exclusive use of the terrace. The court added that even if the proprietary leases had been ambiguous, defendant still would have had the exclusive right to use the terrace based upon "evidence from his predecessors that they had exclusive use of the terrace."