
CLIENT ADVISORY

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CONDOMINIUM SPONSOR PREVAILS IN AIR RIGHTS DISPUTE

A contract dispute over air rights to a parcel, which resulted in litigation by a condominium unit owner against the condominium's sponsor, was recently resolved in the sponsor's favor. **RM Realty Holdings Corp. v. Moore**, 2009 WL 1918872, 2009 N.Y. Slip Op. 05682 (App. Div. 1st Dep't July 7, 2009).

The plaintiff in this case owned the penthouse unit of a condominium building. When plaintiff closed on the purchase of the penthouse, it also entered into a "Development Rights Agreement" (DRA) with the Sponsor and its managing member. Under the DRA, the Sponsor transferred to plaintiff 2,000 square feet of air rights "immediately adjacent to the terrace on the same level of" plaintiff's unit. In another paragraph of the DRA, the Sponsor agreed that it would not sell to anyone else any air rights that would involve building in the area "immediately adjacent" to plaintiff's terrace.

Six months later, defendants sold certain air rights to a third-party developer, which was planning to construct a high-rise hotel on property located to the west of the condominium building, some 96 feet away from plaintiff's terrace. Plaintiff alleged that defendants violated the DRA by failing to obtain plaintiff's authorization before selling such air rights to the hotel developer. A lower court dismissed the plaintiff's claim, holding that the proposed hotel would not be built in "the area immediately adjacent to [plaintiff's] unit." (The lower court's decision is discussed in the July 2007 issue of this *Client Advisory*.)

The unit owner appealed, contending that the applicable clause of the DRA was ambiguous and therefore a trial was necessary to determine its meaning. The Appellate Division disagreed, holding that a written agreement is ambiguous only if it is *reasonably* susceptible of more than one interpretation in light of the text of the entire contract and the circumstances under which it was executed. Here, the Appellate Division observed that "[t]he plain purpose of the DRA was to ensure that plaintiff would have an unfettered right to expand the penthouse." The court concluded that defendants' interpretation best promoted that purpose, and that in light of that purpose, it would be "unreasonable to interpret [the DRA] as creating an obligation that has nothing to do with plaintiff's plan to expand its living space." Ganfer & Shore, LLP represented the defendants in this case.

THREE-MONTH DELAY IN LANDLORD'S ENFORCEMENT OF "NO PETS" POLICY CONSTITUTES WAIVER; KNOWLEDGE OF COOPERATIVE'S AGENT IS IMPUTED TO APARTMENT OWNERS

A landlord's attempt to take possession of an apartment in a cooperative because the tenants had a dog in their apartment, in violation of the proprietary lease, failed because building personnel were aware of the dog's presence for more than three months before the landlord took any legal

action. 1725 York Venture v. Block, 2009 WL 2225210, 2009 N.Y. Slip Op 05983 (1st Dep't July 28, 2009).

The apartment was owned by a holder of unsold shares and leased to tenants, who were bound by the terms of the cooperative's proprietary lease. The proprietary lease provided that tenants may not have pets except with the cooperative's consent. Without obtaining such consent, the tenants had previously kept a terrier in their apartment from 1995 until the dog died in 2005. Two months later, the tenants acquired another dog, this one a "mixed breed pit bull." They again did not seek permission to have the dog in their apartment. However, it was undisputed that for several months, the building's doormen, who are employees of the cooperative's managing agent, would see the tenants walking the dog two or three times each day. In October 2005, the dog clawed and wounded a resident of the building. The landlord then sent the dog's owners a 10-day notice to cure, followed by a 10-day notice of termination, and then brought a legal proceeding to oust the dog owners from their apartment.

The court held that the landlord had waived its right to enforce the "no pets" clause of the proprietary lease against these tenants. The case was governed by a section of the New York City Administrative Code commonly referred to as the "Pet Law." Under this law, when a tenant "openly and notoriously" harbors a household pet for a period of three months, and the landlord or the landlord's agent has knowledge of this fact without commencing a legal proceeding within the three-month period, the lease provision is deemed waived. In applying this section, the Appellate Division noted that failure to enforce the provision against the same tenants' having a previous pet did not constitute a waiver of the right to enforce the no-pets clause against the new pet. However, because the doormen employed by the managing agent knew of the tenant-shareholders' new dog for more than three months and the cooperative had taken no action, the cooperative was no longer permitted to enforce its no-pets clause against these tenant-shareholders.

In reaching this conclusion, the court emphasized that knowledge held by employees of the managing agent was to be treated the same as knowledge of the landlord itself. The landlord, which was the owner of unsold shares pertaining to several apartments in the building rather than the cooperative itself, argued that the building employees were not its agents for purposes of the Pet Law, even if they were agents of the cooperative. However, the landlord admitted that it relied on building employees for some information, and that it had first learned of the incident in which the dog had attacked a resident through a report from one of these employees. The court concluded that "the building employees were the ones best situated to acquire knowledge of whether a tenant was harboring a pet, and [the landlord] should not be able to defeat the remedial purposes of the Pet Law by pointing to its own failure to instruct or request the employees to report the presence of animals." Thus, the landlord had waived the right to terminate the tenants' lease based simply on the presence of the dog in the apartment. The litigation was allowed to go forward in the lower court on the basis of a claim by the landlord that the dog in question has "vicious propensities," which will put the landlord to a higher burden of proof than merely establishing the dog's presence on the premises.

This case is a reminder to all landlords – including cooperatives and the owners of individual apartments within cooperatives – that they should work closely with their building employees and managing agents to ensure that responsible personnel within the landlord's organization are apprised of all facts that they need to make appropriate decisions regarding the operation of the building, including but not limited to sightings of pets who may be present in violation of a lease clause or of the building's house rules.