

CLIENT ADVISORY

DECEMBER 2003

IN THE PINK WITH THE BUSINESS JUDGMENT RULE

The New York Court of Appeals attracted much attention a few months ago when it upheld the right of a cooperative corporation to terminate the tenancy of an obstreperous tenant-shareholder. **40 West 67th Street Corp. v. Pullman**, 100 N.Y.2d 1147, 760 N.Y.S.2d 745 (2003) (discussed in our June 2003 Client Advisory). However, the “business judgment rule” invoked by the Court in Pullman may also be applied in more mundane situations to make a cooperative or condominium owner’s individuality yield to the judgment of the board of directors.

In **Captain’s Walk Homeowners Association v. Czeczil**, NYLJ November 19, 2003, p. 22, col. 1 (Sup. Ct. Suffolk Co.), the condominium homeowners had painted the walkway leading to their front door pink without the board’s approval, arguing that the painting was neither a structural, landscaping nor exterior alteration that required such approval. The Supreme Court, however, granted summary judgment declaring that the pink walkway was in violation of the Declaration and by-laws of the homeowners association. It held that in the absence of any evidence that these owners had been singled out, the board’s action was a good faith exercise of the business judgment rule for the benefit of the residents collectively, within the scope of the board’s authority, and was therefore not subject to judicial review. The concept of cooperative living, the Court said, “entails a utilitarianism which is in tension with the libertarian feeling of ownership of a residence....[T]hose involved in such community living must understand what is involved and what must be given up.”

DEFAMATION IN THE PULLMAN SAGA

Meanwhile, the Pullman litigation itself continues. Although New York’s highest court had permitted his cooperative to terminate his tenancy (see our Client Advisory for June 2003), David Pullman has now defeated the attempt of the former President of the cooperative’s board of directors to sue him for defamation.

The warfare between Mr. Pullman and his building had arisen from his numerous complaints about the management of the building and especially about his upstairs neighbors, an elderly couple that he accused of playing their stereo and television at excessively high volume and of operating a noisy and unlawful bookbinding business in their apartment. In **Pusch v. Pullman**, NYLJ November 5, 2003, p. 18, col. 1 (Sup. Ct. N.Y. Co.), the Board’s President sued for allegedly defamatory statements made by Mr. Pullman in communications to other shareholders, in which he blamed the board and its President for its failure to address his complaints.

The Supreme Court in **Pusch** made short shrift of the defamation claims, ultimately holding that Mr. Pullman and the other shareholders had a common interest in the subject matter of his communications and that those communications were therefore “privileged” (i.e. protected from suit), absent evidence of actual malice or ill will. Although the President argued that Mr. Pullman’s statements showed malice by their extravagant and vituperative character, the Court found the general

tenor of the statements to be rather that the plaintiff was not properly performing his functions as President and that they were not apparently malicious.

Moreover, the Court found that none of the statements alleged were defamatory, in that they would not tend to subject the plaintiff to “public contempt, ridicule, aversion or disgrace” or cause “right-thinking persons” to have an “evil opinion” of him.” Further, some of the accusations (that he showed insensitivity, controlled the Managing Agent and had conflicts of interest) were held to be privileged expressions of opinion. Other statements were found incapable of being proven true or false, although deprecatory and insensitive, and therefore were not defamatory. The Court also found that even if the acrimonious litigation had made apartments in the building hard to sell (which the plaintiff argued to support his damage claim), it was a matter of opinion whose fault it was. The Court ruled that Mr. Pullman’s allegations of criminal activity in his neighbors’ apartment would more properly be actionable by those neighbors, if at all.

THE APARTMENT AS B & B

For various economic and personal reasons, tenants in New York often have unrelated persons sharing their apartments. **Real Property Law, § 235-f (“ the Roommate Law”)** affords some protection to these arrangements. However, that does not mean that a tenant can turn his or her home into a hotel without risking eviction.

In **Peck v. Lodge**, NYLJ November 12, 2003, p. 18, col. 1 (Sup. Ct. N.Y. Co.), the rent-controlled subtenant of a cooperative apartment was found to be operating a Bed and Breakfast in violation of the proprietary lease. “Guests” were referred by a professional service that booked accommodations for out-of-town visitors, who were provided with keys, a room, bath and limited use of the apartment’s kitchen for \$100 per night, plus sales tax, with a “check-out” time of 11 a.m.

The owner of the apartment served a notice terminating the lease and thereafter commenced a proceeding to eject the subtenant, who argued that she had merely taken in roommates to help her pay her “steep” rent, that no law prohibited her from charging even excessive rent to a “roommate” and that the owner should have given her a chance to cure any default (i.e., to stop taking in “roommates”) before moving to evict her. The Court rejected each of these arguments, finding that guests that were numerous, short-term and restricted in their use of the space were not “roommates;” that the subtenant’s use of the apartment materially diverged from the character of a residential building; and that by charging sums that in the aggregate exceeded the legal rent, she was commercializing the apartment and defrauding her landlord. Holding that profiteering in the context of rent control or rent stabilization was an “incurable” ground for eviction, the Court ruled that the owner was not required to serve a notice to cure before his termination of her tenancy.