

CLIENT ADVISORY

DECEMBER 2001

CHILDREN? NOT ON MY FLOOR

Although the Courts have generally given great deference to the decisions of a cooperative corporation's Board of Directors, board members should not mistakenly presume that the Court's deference is unlimited. When a director acts in a manner that is contrary to the duty to act fairly, impartially, and in the best interests of the corporation, courts will review claims of misconduct. In addition, if a board member's breach of fiduciary duty is found to be sufficiently egregious, punitive damages may be recoverable over and above damages calculated to compensate a Plaintiff for his or her proven loss.

In Axelrod v. 400 Owners Corp., (NYLJ, November 14, 2001, p. 18, col. 5), a sales process allegedly made difficult, resulted in a lawsuit for damages against a cooperative Board of Directors (the "Board"), and each of its members. This Plaintiff had put her cooperative apartment on the market and had located several possible buyers. In July 1998, the Board rejected her first applicant, a married couple in their early thirties. In December 1998, Plaintiff found another young married couple, but the broker was informed by the Board that they would not be approved either. In February 1999, Plaintiff found a single man, about to be married, and the Board rejected his application. Finally, in October 1999, the Board finally approved a buyer. This buyer was a 59 year-old divorced woman with no minor children. As a result of the several rejections, it took Plaintiff 18 months to sell her apartment. Even though Plaintiff ultimately sold the unit for \$20,000 more than the purchase price offered by her first rejected buyer, Plaintiff felt sufficiently wronged by the process to sue the Board and its members after the sale, seeking damages that included the costs of carrying the unit for the 18-month period, and attorney's fees.

The Court rejected the Board's attempt to dismiss all of Plaintiff's claims, permitting her the opportunity to prove her claim that the Board had breached its fiduciary duty by rejecting three (3) previous potential purchasers on the basis of their age and familial status in violation of Section 296(5) of New York State's Executive Law and the New York City Administrative Code. Plaintiff alleged that the President, who happened to live on the Plaintiff's floor, breached his fiduciary duty by determining the suitability of potential buyers based upon his own personal self-interest rather than the best interests of the cooperative corporation. Plaintiff alleged that the President wanted to keep his floor free of children.

Interestingly, none of the rejected buyers actually had children. However, the Court held that if Plaintiff could prove that the Board had rejected all relatively young applicants because it was anticipated that they would either have children or because children may reside with them, a viable claim under the Executive Law could be made. It was also not necessary that the Plaintiff allege that the Board's alleged discriminatory acts be directed at her. The Court relied upon several cases that

allowed discrimination claims to be brought by persons who were not themselves members of the protected class, but who were personally affected, even indirectly, by the alleged discrimination.

BUDDY NEEDS A NEW HOME

The need for a policy regarding household pets in residential buildings was again highlighted in ATM One, LLC v. Albano (NYLJ, November 7, 2001, p.22, col.2). ATM One, LLC (the "Landlord") brought a holdover proceeding in Nassau County against the tenant claiming that the tenant had a dog in her apartment in violation of the building's "no dogs" policy. The Landlord's case was based solely upon "Buddy's" presence. No allegations were made that Buddy was a safety risk, created any other type of nuisance, or was in violation of any building or health code. However, this Landlord made its policy "crystal clear" by placing a statement of its policy in bold print at the very top of the lease, as well as in a section within the body of the document. The clear lease language, coupled with the lease's "non-waiver clause", a clause which stated that the terms of the lease could only be changed in a writing signed by and delivered to each party, resulted in the Court's enforcement of the "no dogs" policy, even over the tenant's claims that the Landlord offered her renewal leases even though the Landlord's agents knew of the dog's presence well before the renewal periods.

Significantly, had this property been located in the City of New York, the Tenant's claim of waiver, if proven at trial, would be sufficient to dismiss this Landlord's case based upon Section 27-2009 of the Administrative Code of the City of New York ("Section 27-2009"). Section 27-2009 states, in pertinent part, that should a tenant openly and notoriously harbor household pets, and the owner or its agent has knowledge of this act, and such owner then fails to commence an action to enforce lease provisions prohibiting household pets within three (3) months from first acquiring such knowledge, such lease provisions shall be deemed waived. The three-month time limitation in Section 27-2009 is not imposed upon actions brought against the harboring of household pets if the harboring is otherwise prohibited by the Multiple Dwelling Law, the Housing Maintenance or Health Codes of the City of New York, or any other applicable law.

If a building within the City of New York chooses to have a stated policy against household pets, that policy must be made clear to all tenants and owners in writing. In addition, even with "crystal clear" written policies against household pets, owners, boards and managing agents need to be focused on the limitations imposed upon the enforceability of those policies by Section 27-2009, and know that the policy is only as enforceable as your diligence in each instance.

BRIEFS

Ganfer & Shore, LLP will be hosting a seminar in our series of breakfast panel discussions addressing topics that, we believe, will be of significant interest to cooperatives, condominiums and real estate owners. This discussion will focus on security issues, and will be held on Wednesday, January 23, 2002 from 8:00 A.M. to 9:30 A.M. Please save this date.

Everyone at Ganfer & Shore, LLP extends their best regards for a healthy and happy holiday season and New Year.