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# CLIENT ADVISORY

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JANUARY 2009

HAPPY NEW YEAR

Ganfer & Shore, LLP wishes all of our clients and friends a very happy and healthy 2009.

**TENANTS WHOSE UNREGULATED LEASES HAVE EXPIRED HELD NOT TO BE “TENANTS IN OCCUPANCY” PROTECTED FROM CONVERSION**

Residential “tenants in occupancy” of a building being converted to cooperative or condominium ownership enjoy valuable rights under the General Business Law. These have been construed to include in many instances the right to remain in their apartments as renters even if they choose not to purchase. Tenants who are rent-controlled or rent-stabilized also enjoy an automatic right to continue their statutory tenancies, and therefore cannot be forced to leave their units during or after a conversion. However, where a tenant’s tenancy is unregulated (not subject to rent control or rent stabilization) and is not subject to a renewal option, and expires before the “black book” offering plan is accepted for filing, may the Sponsor simply wait until the tenant’s lease expires and then bring a holdover eviction proceeding? Yes, says the court in MH Residential 1, LLC v. Barrett, 2008 WL 5054737, 2008 N.Y. Slip Op. 28471 (App. Term 1st Dep’t Nov. 26, 2008).

In this case, on February 1, 2006, the landlord, acting as Sponsor, submitted a proposed cooperative offering plan (a so-called “red herring”) for review by the Attorney General. Shortly thereafter, the landlord brought summary holdover proceedings against 29 unregulated tenants whose leases had expired. The tenants moved to dismiss the proceedings on the ground that they were entitled to protection from eviction under the General Business Law (Martin Act) provisions governing cooperative conversions. The lower court denied these motions, opining that the statutory protection of tenants from eviction does not apply to those whose leases expired before the “black book” offering plan has been accepted for filing. Soon thereafter, the Attorney General accepted the black book plan for filing. The tenants now asserted that they could not be evicted since the offering plan was now in effect. This time, the lower court agreed and dismissed the proceedings.

The appellate court disagreed, finding that the tenants are not to be considered “tenants in occupancy” as of the time the offering plan was accepted for filing by the Attorney General. Although these individuals still physically occupied their respective apartments, they had no legal right to do so because their leases had already expired and there was no remaining landlord-tenant relationship in effect. The court reasoned that “[t]he purpose of [the statute] is to protect tenancies extant during the cooperative or condominium conversion process” and that “non-purchasing tenant status is conferred only on a tenant who is entitled to possession at the time the plan is declared effective.” Here, there was no such entitlement because the tenants’ leases had already expired.

The court also rejected the tenants’ defense based on the anti-harassment provisions of the Martin Act, finding that no instances of “specific conduct interfering with their occupancy” in violation of the statute had been proved.

**BREACH OF DEVELOPER'S PROMISE THAT PURCHASER'S UNIT WOULD OVERLOOK GOLF COURSE CREATES CLAIM FOR FRAUD**

Statements or promises made in the course of negotiating a real estate contract must usually be incorporated into the final, signed agreement in order to be enforceable, but this rule is not invariable. A developer's promise to a purchaser was held to be enforceable in **Lieberman v. Greens at Half Hollow, LLC, 54 A.D.3d 908, 864 N.Y.S.2d 539 (2d Dep't Sept. 23, 2008)**.

In this case, a condominium developer allegedly promised a purchasing couple that their unit would be constructed "overlooking a golf course" in the development. The purchasers paid a \$75,000 "lot location premium" for their "golf villa unit." The purchasers later sued the developer, alleging that when construction was completed, "the unit was located with a view overlooking an off-premises sandpit or drainage basin." The developer moved to dismiss the case, contending that "there was no contractual obligation that the unit in question would overlook the golf course."

The court allowed the purchasers' claims to proceed. Although the contract of sale contained a general "merger clause" providing that prior representations were merged into the contract, "the general language of the merger clause in the purchase agreement did not preclude the plaintiffs' claim of fraud in the inducement or the plaintiffs' use of parol evidence [that is, evidence outside the contract itself] to establish their reliance upon [the developer's] representations." More specifically, the court noted that as is common in condominium sales, "the offering plan was incorporated into the purchase agreement and stated that the representations in the offering plan would survive delivery of the deed." The offering plan's representations regarding a "lot location premium" and the location of the unit were held to survive the closing and provide a viable basis for the purchaser's claims.

**NEW TENANT LACKS STANDING TO CHALLENGE PRIOR CONVERSION OF BUILDING TO COOPERATIVE OWNERSHIP**

A tenant who moves into premises already being operated as a Cooperative lacks standing to challenge the validity of the building's conversion to cooperative ownership, a court held in **55th St. Mark's Place Real Estate Holding Co. v. Martin, 2008 WL 5244843, 2008 N.Y. Slip Op. 52517(U) (App. Term 1st Dep't Dec. 16, 2008)**. In this case, the Cooperative sought to evict a tenant. The tenant responded by alleging that the Cooperative did not validly exist, because it had never obtained the Attorney General's approval when the building was converted to cooperative ownership. The court's response was that even if this was true, the shareholders had "occupied and maintained the subject premises since 1973, well before the tenant took possession, as a *de facto* cooperative." Accordingly, the tenant "lack[ed] standing to challenge the cooperative conversion of the subject building premises because he did not live there at the time of the conversion."

**REMINDER: CLIENT ADVISORIES NOW AVAILABLE VIA E-MAIL**

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