
CLIENT ADVISORY

DECEMBER 2008

INJUNCTION AGAINST CLOSING OF COOPERATIVE PURCHASE DENIED; PURCHASER MUST PROCEED TO CLOSE OR FORFEIT DOWN PAYMENT

Upon receiving notice that a closing date had been set, the purchaser of a new-construction cooperative apartment disputed whether his apartment was sufficiently finished to be ready for occupancy. He sought a temporary and preliminary injunction enjoining the closing until the court resolved the issue. However, the court denied that request in **Hirtenstein v. One York Property LLC, Index No. 112972/2008 (Sup. Ct. Nov. 7, 2008)**.

In this case, the purchaser and the Sponsor had contracted that the closing would be scheduled once the New York City Department of Buildings (DOB) issued a temporary certificate of occupancy (TCO) for the premises. The DOB issued the TCO on July 25, 2008, and the Sponsor scheduled the closing for one month later. The purchaser did not wish to go forward with the closing, for the stated reason that he believed the DOB had been mistaken in issuing the TCO, but also did not wish to risk forfeiting his down payment for breach of contract by refusing to close. Accordingly, the purchaser sought an injunction to preclude the closing.

In its decision, the court relied on the rule that a preliminary injunction will be denied where money damages would provide an adequate remedy if the plaintiff's claim is ultimately sustained. The court also observed that the contract of sale provided for a closing to be scheduled once the DOB issued a TCO, and did not provide for the purchaser to second-guess whether the DOB's decision to grant the TCO was correct. Accordingly, the court denied the requested injunction and allowed the closing to proceed. Ganfer & Shore, LLP represented the Sponsor in this case.

SELLERS OF COOPERATIVE APARTMENT ALLOWED TO RETAIN DOWN PAYMENT FOLLOWING PURCHASER'S DEATH

In another recent case involving a cooperative closing, a woman entered into a contract to purchase a cooperative apartment, making a 10% down payment, and obtained board approval for the purchase. However, she died before the transaction closed. Who is entitled to the down payment? The sellers are entitled to keep it, according to the court's ruling in **Warner v. Kaplan, 2008 WL 4874378, 2008 N.Y. Slip Op. 28444 (Sup. Ct. N.Y. Co. Oct. 28, 2008)**.

The parties entered into a contract of sale in May 2005, with the closing scheduled for September 15, 2005. After the purchaser submitted the required documentation and attended a personal interview with the board, the board approved her application on August 18, 2005. The parties disputed whether the purchaser had been notified of the approval before she died unexpectedly on September 1, 2005. The purchaser's executors decided not to go through with the transaction and demanded the return of the down payment. The sellers refused and litigation resulted.

The court's analysis focused on the contract provision requiring the board's approval as a precondition to a sale. The court found that following the purchaser's death, no one ever asked the board whether it would approve a transfer to her estate. The estate contended that it was unlikely that the board would have permitted an apartment to be acquired by an estate, because the board would not know who would actually occupy the apartment. The court agreed that if the estate had requested confirmation from the board that it would be approved to buy the apartment and its application had been rejected, then the estate would have been entitled to recover the down payment. However, because the estate had never asked the board to approve a purchase, "the Board was never given a chance to make a determination and the parties now can only speculate as to what that decision would have been." The court concluded that by having failed to seek board approval, the estate had breached the contract of sale, so the sellers were entitled to retain the down payment.

To avoid uncertainty as to the effect of a purchaser's death on the sale of a cooperative unit, the parties and their counsel may wish to address this issue expressly in their agreement. The current version of the most commonly used standard form contract of sale for a cooperative apartment provides that if the purchaser dies before closing, the contract will automatically become void. On the other hand, in at least one instance the parties negotiated a provision that if the named purchaser died before closing, another purchaser would be substituted and the sale would proceed.

TITLE INSURANCE ALERT: BANKRUPTCY OF LANDAMERICA FINANCIAL GROUP, INC.

Just about all purchasers of single family homes and condominium units, and many owners of cooperative apartments, obtain title insurance at the time of their closings. In addition, cooperative apartment corporations obtain title insurance covering the corporation's land and building at the time the cooperative is created. For a one-time premium paid at the time of acquisition, the insurance company stands behind the purchaser's right to own the property, free and clear of claims that others might have to some interest in it. Thus, the carrier insures that ownership was properly transferred to the owner and that, excluding any specifically listed exceptions, there exist no mortgages, liens, easements, or other encumbrances against the property. The coverage includes not only damages that might be suffered from an adverse claim or undisclosed liability, but also in many circumstances the legal fees and other costs of defending against a claim.

Many owners might have been concerned to learn of the recent bankruptcy filing by one of the biggest names in title insurance, LandAmerica Financial Group, Inc. LandAmerica is the parent of two large title insurance companies, Commonwealth Land Title Insurance Company and Lawyers Title Insurance Corporation, which have issued thousands of policies over many years. For policyholders concerned about the effect of LandAmerica's bankruptcy on their coverage, however, the information available as of this writing suggests good news. Only LandAmerica, the holding company, has filed for bankruptcy – not the actual title insurers, Commonwealth and Lawyers Title. The purpose of LandAmerica's filing apparently was in part to allow Commonwealth and Lawyers Title to remain in business as active companies with their regulated reserves and surpluses intact, and, subject to court approval, to facilitate their acquisition by one of the country's largest title insurers, Fidelity National Financial.

The upshot is that as of this writing, insurance policies purchased by people who were insured by Commonwealth or Lawyers Title remain in place without any action being required by the policyholders. It should be borne in mind that title insurance companies, like all other insurance companies, are licensed by the states in which they operate and are subject to detailed regulation on matters including reserves and governance of insurance operations.