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# CLIENT ADVISORY

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## **COURT OF APPEALS RULING IN STUVESANT TOWN CASE MAY HAVE IMPLICATIONS FOR MANY PROPERTY OWNERS**

In the highly publicized case of **Roberts v. Tishman Speyer Properties, L.P.**, 2009 WL 3378513, 2009 N.Y. Slip Op. 7480 (N.Y. Oct. 22, 2009), New York's highest court held that the owners of Stuyvesant Town and Peter Cooper Village in Manhattan could not increase the rents on certain apartments that had become vacant from rent-stabilized to market rates, because they previously accepted tax benefits for major rehabilitation and capital improvements under New York City's J-51 program. While the Court of Appeals noted that numerous issues concerning the impact of its decision will need to be addressed in future litigations, there has already been widespread coverage and speculation concerning the ruling's likely effects on the New York real estate market. Thousands of tenants are now likely to file rent overcharge claims against their landlords, covering current and future rents as well as alleged overcharges for the past several years.

Among the property owners who may be affected by this decision are sponsors of offering plans that own rent-regulated units in buildings for which J-51 benefits have been accepted. As stated in the Court of Appeals' opinion, it is unclear how far-reaching the decision will ultimately be. In fact, questions have been raised as to whether the decision will affect owners of unsold apartments in cooperatives and condominiums, and the Attorney General's office has said that it is considering whether any particular form of disclosure will be required in affected offering plans. However, to the extent that offering plans and financial projections have been based on revenue streams founded on the assumption that formerly rent-stabilized apartments could be rented at market rates, this assumption may need to be reevaluated with the assistance of counsel and other advisors. Where applicable, it may be necessary to update or modify business plans and to prepare corrective disclosures to investors, lenders, or others.

## **PARTIES DISCUSSING REAL ESTATE TRANSACTIONS SHOULD AVOID AMBIGUITY AS TO WHETHER THEY INTEND A BINDING AGREEMENT**

Disputes sometimes arise as to when parties discussing a proposed transaction are simply engaged in preliminary discussions or negotiations, and when they have reached the point of entering into a binding agreement. In the real estate context, a legal doctrine known as the Statute of Frauds requires that any contract for the purchase or sale of an interest in real property must be contained in a writing containing the essential terms of the deal and signed by the party to be bound. In **Pollak v. Moore**, Index No. 650281/08 (Sup. Ct. N.Y. Co. Nov. 16, 2009), the absence of a sufficient signed writing led the court to hold that an alleged contract to purchase a building was not enforceable.

The case originated with a deal involving the purchase of four buildings. One of the buildings was allegedly to be resold to the plaintiff, as documented in a draft contract that one of the proposed sellers sent to the plaintiff via e-mail. Plaintiff then "marked up" a copy of the draft agreement, but

he never signed it, nor was it signed by certain sellers. The sellers then decided not to sell the building and contended that there was no agreement requiring them to do so.

The court dismissed plaintiff's ensuing lawsuit based largely on the Statute of Frauds. It was undisputed that there was no single document signed by both sides that could be enforced as a contract of sale. The court rejected plaintiff's claim that it should be allowed to conduct discovery seeking to establish an agreement by piecing together various documents. Among other things, the court noted that the parties "had an opportunity to execute" the draft contract of resale of the subject building at the original closing if they wished to do so. Instead, plaintiff initialed the marked-up changes, but he did not sign the contract. The court concluded that although the parties "contemplated selling the [building], they did not enter into a binding contract to do so."

The plaintiff relied on the transmittal e-mail accompanying the draft agreement as evidence that it was intended to be binding. However, the court found that the "e-mail merely served the function of a cover letter" and did not demonstrate the existence of a contract. This case is a reminder that parties should be clear regarding the status of their negotiations and agreements in order to avoid potential ambiguities and resulting litigation. Ganfer & Shore, LLP represented the defendants in this case.

**BOARD OF MANAGERS GRANTED INJUNCTION PROVIDING ACCESS ALLOWING IT TO ASSESS MOLD AND WATER CONDITIONS**

A Condominium Board of Managers may obtain access to units within the building as necessary to assess and remedy mold contamination, water infiltration, and other harmful conditions, according to the decision in **Board of Managers of Essex House Condominium v. Manhattan L.B. Living Trust**, 2009 WL 3853853, 2990 N.Y. Slip Op. 52325(U) (Sup. Ct. N.Y. Co. Nov. 17, 2009).

The unit owners purchased their apartment in 2007, but never moved in because of the mold and related problems. Both the unit owners and the Condominium performed a series of tests, and the parties agreed that there was mold contamination in the apartment that required remediation. However, the parties became embroiled in a series of disputes after which the unit owners refused to allow representatives of the Board of Managers access to their apartment for further inspections. In essence, the court found, it was being asked to referee a dispute between the Board and the unit owners concerning whose remediation plan was more reasonable and who should pay for the repairs.

The court found that its analysis must be governed by the business judgment rule, under which the decision of a board of directors or board of managers "must prevail, even if it is not necessarily the wisest one, as long as there is no breach of fiduciary responsibilities, such as a fraud or bad faith, and it is within the scope of [the board's] authority." Thus, the court concluded that ultimately, the Board of Managers was likely to prevail in having its remediation plan implemented, particularly given that the situation also involved common areas such as hallways as well as air conditioning and ventilation units. Because both parties would suffer irreparable harm if the current impasse persisted, the court directed the unit owners to permit entry into their unit for purposes of examination and testing, to be conducted between the hours of 10:00 a.m. and 4:00 p.m. unless otherwise agreed. The issue of financial responsibility for the repairs was left for future proceedings.