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# CLIENT ADVISORY

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DECEMBER 2007

## COURT DISMISSES CONDOMINIUM UNIT OWNER'S CLAIM AGAINST BOARD OF MANAGERS FOR ALLOWING UNAUTHORIZED RENOVATION IN UPSTAIRS UNIT

Following allegedly unauthorized renovation work in a third-floor condominium unit (Unit 3), floods occurred that caused damage to the second-floor unit (Unit 2). The owners of Unit 2 sued the owner of Unit 3 and the Condominium Board of Managers, seeking monetary damages as well as an injunction compelling restoration of Unit 3 to its condition before the renovations. Plaintiffs' claims against the Board of Managers were dismissed in **Barth v. Board of Managers of CBJE Condominium**, 17 Misc. 3d 1121(A), 2007 WL 3167524 (Sup. Ct. N.Y. Co. Oct. 1, 2007).

According to plaintiffs, the owner of Unit 3 purchased that unit in 2000 and made various renovations to it, including installation of new plumbing systems. The owner of Unit 3 represented that the renovations were minor and non-structural. Plaintiffs, however, contended that the repairs were of sufficient scope to require both Board approval and a building permit, neither of which was obtained. In 2004, the New York City Department of Buildings (DOB) inspected the unit, and issued a violation for work performed without a permit. The unit owner then applied for a permit, in an application containing an Owners Certificate signed by the Board of Managers, and DOB granted the permit. Plaintiffs alleged that the permit was issued fraudulently based on disclosure of only a small portion of the renovation work that had actually been performed. The permit was later revoked.

Plaintiffs demanded that the Board of Managers take action against the Unit 3 owner for having made renovations without board approval. In an attempt to put the matter to rest, a majority of Board members and Unit Owners submitted proxies in favor of a motion to retroactively approve the work performed – a procedure that plaintiffs claimed violated the Condominium's By-Laws. Thereafter, two floods occurred in Unit 2, causing substantial damage. Plaintiffs contended that these floods resulted from the improper installation of drainage pipes in Unit 3 and that the Board had done nothing to remedy the situation. Plaintiffs then sued both the Board and the owner of Unit 3.

In its decision, the court dismissed plaintiff's claims against the Board, holding that the Board's actions in signing an application for a building permit and deciding whether or not to take action against a Unit Owner were protected by the business judgment and entitled to deference. Although whether the renovations to Unit 3 were structural or non-structural remained in dispute, the Board submitted the statement of a licensed architect attesting that the renovations were non-structural, which was a sufficient basis for the Board's actions and decisions. The court held that it was not necessary to decide whether the proxy vote to approve the renovations was valid, because even if it was not, the Board's decision not to take any action against the owner of Unit 3 would still be protected under the business judgment rule. Finally, the claim that the Board committed fraud by signing the DOB application was dismissed because any representations in the application were made to a third party, the DOB, and not to plaintiffs.

**CLAIMS BY CONTRACT VENDEE OF COOPERATIVE APARTMENT  
UPHELD AGAINST SELLER, BUT DISMISSED AS AGAINST COOPERATIVE**

The shareholder-tenant of a commercial cooperative, who was also a director of the Cooperative, entered into a contract to sell the unit, subject to Board approval. Subsequently, the Board “rejected plaintiff’s application to purchase the unit and contemporaneously amended the cooperative’s by-laws to provide for the possibility of a residential conversion that would increase the market value of the unit.” On these facts, a claim by the disappointed purchaser against the seller was sustained by the Appellate Division in **85 Fifth Ave. 4th Floor, LLC v. La Selig, LLC, 2007 WL 3342708 (App. Div. 1st Dep’t Nov. 13, 2007)**.

In its decision, the Appellate Division applied the doctrine of “an implied covenant of good faith and fair dealing” that is deemed to exist as part of every contract and provides that a party to a contract may not deliberately destroy or injure the right of the other party to enjoy the benefits of the contract. In essence, the court held that a shareholder-tenant may not contract to sell a cooperative unit and then block the sale by inducing the Board to withhold its approval. However, the court rejected the purchaser’s attempt to impose liability on the Cooperative itself, reaffirming that contractual claims for the wrongful withholding of consent may be brought only by the seller (who is an existing shareholder of the Cooperative and thus has a contractual relationship with it), rather than by a purchaser having no direct relationship with the Cooperative.

**CLAIM FOR MISSTATING NUMBER OF LEGAL ROOMS IN UNIT  
DISMISSED WHERE PURCHASER COULD HAVE ASCERTAINED FACTS**

In the September 2007 issue of this Client Advisory, we reported on a case in which plaintiffs purchased a condominium apartment that was allegedly represented as having three bedrooms, but which plaintiffs later discovered actually had only one legal bedroom. At that time, an appellate court held that if the facts pleaded by the purchasers were correct, they might have claims against the seller, the seller’s broker, and some brokerage employees for fraud and misrepresentation. The court held that the litigation should continue, particularly because there had been no discovery proceedings to allow plaintiffs to explore the facts. After discovery was completed, the broker and its employees moved again for summary judgment, and this time, the court granted the motion and dismissed the claims. **Joseph v. NRT Inc., 2007 WL 3407745 (Civ. Ct. N.Y. Co. Nov. 9, 2007)**.

The key fact that plaintiffs claimed was withheld from them was that windows had unlawfully been placed on the lot line in two of the three bedrooms, which therefore were not legal bedrooms. Reviewing the record before it, the court found that plaintiffs could have discovered this fact for themselves by the exercise of ordinary diligence. The court noted, among other things, that before entering into their contract of sale, they were provided with the offering plan for the condominium, the original floor plan for the apartment, and the certificate of occupancy, all of which showed that the apartment was originally designated as having one bedroom. The plaintiffs also viewed the apartment six or seven times before entering into their contract. By that point, the court held, “plaintiffs had as much information as the [broker] did about the fact that there were two extra bedrooms in the apartment which were not shown on the offering plan for the condominium.”

The court also noted that plaintiffs could have hired an architect or engineer to advise them whether the additional bedrooms were permissible, particularly where the brokerage listing contained a statement advising prospective purchasers to hire their own architect or engineer. Under all the circumstances, the purchasers were not justified in placing reliance on any statement that the broker or its employees might have made as to the number of bedrooms in the apartment.