
CLIENT ADVISORY

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CONDOMINIUM BOARD MEMBERS NOT LIABLE WHERE BOARD MADE REASONABLE EFFORTS TO ACCOMMODATE RESIDENT WITH DISABILITY

Under federal, state, and city laws and regulations, owners and managers of housing accommodations must provide reasonable accommodations to residents with disabilities. Claims by persons with disabilities raising accessibility issues against cooperatives, condominiums, and landlords are a frequent subject of litigation. (For prior examples, see the March 2005 and September 2006 issues of this Client Advisory.)

The Appellate Division's recent decision in **Pelton v. 77 Park Ave. Condominium, 2006 NY Slip Op. 08674, 2006 WL 3365473 (1st Dep't Nov. 21, 2006)**, provides further guidance in this area. In Pelton, the owner of a condominium apartment suffered from muscular dystrophy making it increasingly difficult for him to climb stairs in front of the building and stairs needed to access his storage space and the laundry room. The shareholder asked the Board of Managers to undertake building renovations to make the building more accessible to him. The board retained two architects to assess the possibility of installing a ramp into the building lobby. After receiving the architects' reports, the Board advised the shareholder that based upon "both physical impracticability and cost," it was not practicable to install a ramp. The Board also noted that the condition of the lobby was the same as it had been when the shareholder had bought his apartment and, in fact, there had been no significant alteration since the building was built in 1924. The shareholder and the Board continued to discuss possible alternative accommodations, such as installation of a chairlift, relocating the shareholder's basement storage area to a more accessible location, and allowing the shareholder to install a washing machine in his apartment so he would not need to use the building's laundry room. The Board installed the lift, at a cost to the Condominium of \$13,000, but the parties continued to disagree over other accessibility issues.

The shareholder then brought suit against the Condominium, each of the nine individual members of the Board of Managers, and the Managing Agent. The board members moved for summary judgment, arguing that they had acted in good faith and exercised their business judgment in addressing the accessibility issues in light of, among other things, the advice the Board had received from its architects and legal counsel. The trial court denied the board members' motion for summary judgment, holding that the business judgment rule provided no protection for board members when a board decision is alleged to have been made on an unlawful discriminatory basis.

The Appellate Division reversed this ruling and dismissed all claims against the board members. The court's opinion strongly reaffirmed the protection afforded to board members under the business judgment rule and noted that under controlling case law (including cases discussed in the February 2005 and June 2006 issues of this Client Advisory), courts are required "to exercise restraint and defer to good faith decisions made by boards of directors in business settings." Thus, Board decisions may only be challenged where a board acted either outside its authority, in a manner not legitimately furthering the condominium's purpose, or in bad faith. Reviewing the record before it, the court concluded that the Board had offered accommodations to the shareholder and that the Board's "reliance upon the professional advice of its architects and counsel, satisfied the business

judgment rule's requirement of taking action in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of the condominium's purposes."

The court further noted that the plaintiff had failed "to plead with specificity independent tortious acts by each individual defendant [board member] in order to overcome the public policy that supports the business judgment rule." Reaffirming that "the common elements of a condominium are solely under the control of the board of managers," the court emphasized that claims against individual board members should be held to "the requirement of pleading with specificity claims of discriminatory conduct or wrongdoing," lest "the threat of baseless litigation, with its attendant serious financial and personal burdens" deter qualified individuals from serving on boards. The court was particularly critical of the plaintiff's "outrageous" demand for \$23.5 million in damages against the individual board members and noted that board members could face negative consequences even from the pendency of such an inflated claim against them.

Finally, the Appellate Division dismissed the shareholder's claims against the managing agent, noting that the managing agent had no authority to undertake renovations to the building and holding that it could not be liable to plaintiff for failing to advise the Board to do so.

APPELLATE DIVISION UPHOLDS DEVELOPER'S RIGHT TO TEAR DOWN FORMER PARTY WALL

A property owner's rights under a "party wall" agreement with an adjoining owner do not survive the demolition of one of the buildings, according to the Appellate Division decision in **441 East 57th Street, LLC v. 447 East 57th Street Corp., 2006 NY Slip Op. 08883, 2006 WL 3438281 (1st Dep't November 30, 2006)**.

The predecessors-in-interest of the two owners in this case entered into a party wall agreement in 1867, providing that each owner could use the common wall for structural support of its building. However, the predecessor to defendant demolished the former building on its lot in the 1920's, and for the past 80 years, there had been no building along defendant's side of the lot line straddled by the party wall. In 2006, plaintiff real estate developer contracted to demolish the existing building on its property and to construct a new building. The neighboring cooperative objected, claiming that demolition of plaintiff's wall on the lot line would violate its rights under the party wall agreement. Plaintiff sued for a declaratory judgment that it did not require defendant's consent to demolish its own building, including the party wall.

The Supreme Court, in a decision affirmed by the Appellate Division, agreed with the developer and held it "has the right and does not need defendant's consent to demolish its building, including the eastern party wall thereof." The Appellate Division held that because "defendant has not used the wall to support a building on its lot in nearly 80 years, plaintiff is entitled to demolish its building and the entire party wall and put a definitive end to the party wall easement created under the 1867 agreement." The court rejected defendant's claims that it was entitled to have the wall remain standing because it provided amenities to defendant's property such as "privacy" and "an ornamental background to its garden," holding that these were not necessary uses of the wall and that "mere convenience or advantage" was not a basis for continuing to enforce the easement created under the 1867 agreement. Ganfer & Shore, LLP represents the plaintiff developer in this case.