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# CLIENT ADVISORY

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DECEMBER 2005

## DISMISSAL AND SANCTIONS AFFIRMED FOR ATTEMPT TO FORCE SALE OF REALTY DESPITE ABSENCE OF CONTRACT

A lawsuit brought by a disappointed would-be purchaser of a building, in an attempt to compel the owners to sell the building to the plaintiff even though the parties never agreed on contract terms or entered into a contract of sale, resulted not only in dismissal of the litigation, but also monetary sanctions awarding defendants more than \$34,000 in attorneys' fees. **Yenom Corp. v. 155 Wooster Street, Inc.**, 2005 WL 3072690 (App. Div. 1st Dep't Nov. 17, 2005).

In this case, the owners of a single-purpose entity, whose sole asset was a piece of real property, discussed a potential sale of the stock in the corporation to a bidder. The parties exchanged comments on a series of drafts of a purchase contract, but no agreement on terms of the sale was reached and no written contract was finalized and signed. Instead, the owners contracted to sell the stock to another purchaser. The disappointed bidder then sued for specific performance of an alleged promise to sell the stock to it. The bidder also filed a notice of pendency against the realty, effectively blocking the upcoming closing of the sale to the successful purchaser.

The owners' urgent application to dismiss the litigation and vacate the notice of pendency was granted. The trial court found it clear that no enforceable contract existed, relying on, among other things, statements in the draft contract as well as in covering letters that no contract would be created except in a formal, signed writing. The court also noted the fundamental principle that under the statute of frauds, any contract for the sale of an interest in real estate, or of stock in a corporation whose sole asset is real estate, must generally be in writing to be enforceable.

On appeal, the Appellate Division affirmed the trial court's conclusion that no contract existed, as well as its vacating of the notice of pendency. The Appellate Division also upheld the trial court's decision to award sanctions against plaintiff and plaintiff's counsel, consisting of the \$34,000 in attorneys' fees that defendants had incurred in defending the case, because the lawsuit and the notice of pendency were "completely without merit in law." Ganfer & Shore, LLP represented one of the defendants in this case.

## COOPERATIVE'S BYLAWS MAY REQUIRE THAT ALL BOARD MEMBERS BE SHAREHOLDERS AND RESIDENTS

A cooperative corporation's bylaws may require that all members of the Board of Directors must be shareholders of the corporation and residents of the building, according to the decision in **The Realty Enterprise LLC v. Hyde Park Owners Corp.**, N.Y.L.J., Nov. 23, 2005, p. 26, col. 3 (Sup. Ct. Queens Co.).

In this case, the cooperative board amended the bylaws to require that all directors must be shareholders of the corporation. Three years later, the board adopted a second amendment requiring that all directors reside in the building. A shareholder that owned 54 of the 746 units in the complex sued to void these bylaws, contending that they "deprived shareholders who are non-

residents of the cooperative from participating in its affairs.” The Cooperative defended the bylaws by arguing that they were adopted “in order to ensure that the cooperative was run by people committed to the long-term maintenance of the property, and not by investors looking for quick profits.”

The court sided with the Cooperative, relying on New York Business Corporation Law (BCL) § 701, which provides that a corporation’s certificate of incorporation or bylaws may establish qualifications for directors, as well as the business judgment rule, which shields most board decisions from judicial second-guessing. The court rejected the shareholder’s argument that the bylaws violated BCL § 501(c), which requires equal treatment for all shares in the same class of stock, because stock ownership does not create a vested right to become a director.

The court also addressed a claim that the board had delayed too long in convening an annual shareholder meeting for the election of directors. The court found that while the board had failed to call an annual meeting for almost two years, the plaintiff shareholder’s attempt to schedule a special meeting was invalid based upon insufficient notice. In any event, the board had recently scheduled a shareholder meeting to be held in the near future, thus rendering the shareholder’s demand for a meeting moot.

However, the court found greater merit in the shareholder’s complaint that a plan for the Cooperative to borrow \$8,000,000 was being considered by a board whose members had held office for far longer than the one-year term for which they were elected. Recognizing an inequity in this situation, the court granted a preliminary injunction prohibiting the board from undertaking any new financings until the overdue election for board members was held.

### **NEW YORK CITY LAND OWNERS LIABLE TO MAINTAIN AND REPAIR ADJOINING SIDEWALKS**

Under **New York City Administrative Code § 7-210**, adopted in 2003, “it shall be the duty of the owner of real property abutting any sidewalk to maintain such sidewalk in a reasonably safe condition.” The code also makes the owner liable to anyone injured by the owner’s failure to comply with this duty, and requires that appropriate insurance be obtained. Certain properties, such as owner-occupied single-family homes, are exempted. (For further information, please see the November 2003 issue of this Client Advisory.)

This code provision was recently at issue in **Padob v. 127 E. 23rd Street LLC, N.Y.L.J. Sept. 30, 2005, p. 18, col. 1 (Sup. Ct. N.Y. Co.)**. The court held that under the new provision, certain landowners have “an affirmative duty” to maintain their adjacent sidewalks in a safe condition. However, this did not mean that the landowner was automatically liable when someone was injured by a sidewalk defect. To recover, the plaintiff would still have to prove that the owner was negligent, such as by showing that the owner knew or should have known of a specific defect in the sidewalk, but failed to repair it. The court granted a declaration that the property owner had a duty to maintain the sidewalk in a safe condition, but ordered that further proceedings be conducted on whether such duty had been breached in this case.