
CLIENT ADVISORY

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AFTER OWNER SERVES NOTICE OF TERMINATION, ACCEPTING TENANT'S RENT PAYMENT VOIDS NOTICE

When a tenant, including a proprietary lessee in a cooperative, violates a material obligation of the tenancy, the owner's remedies include service of a termination notice, followed by commencement of a summary proceeding in the New York City Civil Court (or equivalent local court in counties outside New York City) if the lessee does not vacate the premises by the termination date. Once a termination notice has been served, it is important that the landlord not accept payments of rent from the tenant or proprietary lessee. Acceptance of rent may be held to vitiate the notice of termination, resulting in dismissal of the summary proceeding and thwarting the landlord's effort to regain possession of the premises.

This rule was recently reaffirmed by the Civil Court in Mushlam Inc. v. Nazor, 2007 WL 142848, 2007 N.Y. Slip Op. 50089(U) (Civil Ct. N.Y. Co. Jan. 31, 2007). In this case, the landlord sent a notice of termination advising the tenant that its lease would be terminated effective July 31, 2006. The tenant then tendered rent for the month of August, which the landlord accepted and deposited on August 10, 2006. A holdover proceeding was commenced on August 15, 2006. The court dismissed the proceeding, reaffirming that "[a]cceptance of rent after the date set for termination in the termination notice but prior to the commencement of the holdover proceeding reinstates the tenancy and waives the notice to terminate."

The case is a reminder that when termination of a tenancy is contemplated, a board or landlord must be cautious in accepting and depositing any rent payments from the tenant, because doing so may have the effect of reinstating a tenancy that could otherwise be terminated. Legal counsel should be consulted in all such situations. It is also important that managing agents be aware when termination notices are served and that they be instructed not to deposit rent checks received after that time, unless the landlord or board has made a conscious decision to accept the payment and not to go forward with the proceeding.

BOARD'S FRAUD CLAIM AGAINST SPONSOR DISMISSED, BUT BREACH OF CONTRACT CLAIM ALLEGING MISREPRESENTATIONS ALLOWED

A Condominium Board of Managers was permitted to assert claims for breach of contract, but not for fraud, against the sponsor of the Condominium in Board of Managers of Chelsea Quarter Condominium v. 129 W. Residential Partners, LLC, 2007 WL 15956, 2007 N.Y. Slip Op. 50007(U) (Sup. Ct. N.Y. Co. Jan. 3, 2007).

In this case, the Board of Managers sued the sponsor on behalf of all the Unit Owners of the Condominium. The Board's first claim was for fraud, alleging that in the offering plan, the sponsor had failed to disclose certain facts and had made misrepresentations as to other facts. At the outset, the court rejected the sponsor's argument that the fraud claim was untimely under the six-year statute of limitations. Although the offering plan itself became effective more than six years before the

litigation was filed, the court held, subsequent amendments incorporated the contents of the offering plan by reference, thereby re-starting the clock.

However, the court dismissed the Board's fraud claim on other grounds. To the extent that the Board alleged that the offering plan had failed to disclose construction defects, the court held, such allegations would state a valid claim under the Martin Act. Only the Attorney General has jurisdiction to bring claims under that statute. Private individuals may bring fraud claims arising from an offering plan only where they allege "a unique set of circumstances whose remedy is not already available to the Attorney General," such as where the fraud goes "far beyond the mere breach of the offering plan, and enriches individuals." The court held that this case did not satisfy this standard. Additionally, insofar as the Board sought to rely upon alleged misrepresentations in purchase agreements with individual Unit Owners, the court held that this fraud claim was merely a duplication of the Board's claim for breach of contract. Accordingly, this claim was dismissed.

The court reached the opposite result, however, with respect to the breach of contract claim, which was based upon the sponsor's alleged breach of the offering plan as reaffirmed in individual purchase agreements. This claim was founded upon alleged defects in the roof of the building, a common element. Because any sale of a Unit in the building, under the Condominium's By-laws, included the sale of an undivided interest in the common elements, the court held that the Unit Owners represented by the Board had standing to pursue this claim. In those instances where units had been re-sold, there was no basis for concluding that the new owners had not succeeded to the rights of their predecessors. The court also rejected the sponsor's argument that the claim must be dismissed under a "sunset" provision contained in the purchase agreement, finding that the sponsor appeared to have had adequate notice of the alleged defects within the specified time period, including disclosure contained in a survey prepared by the building's architects.

UNIT OWNERS' CONSENT WAS NOT REQUIRED FOR RESTORATION AND REPAIRS OF EXISTING FACILITIES

The By-laws and other organizational documents of many cooperatives and condominiums provide that approval of the Shareholders or Unit Owners is required before certain capital improvement projects are undertaken. Construing such a provision was the Appellate Division's task in **Gennis v. Pomona Park Board of Managers, 2007 N.Y. Slip Op. 00269, 2007 WL 102594 (App. Div. 2d Dep't Jan. 16, 2007).**

In this case, the Board of Managers of a multi-building residential condominium complex undertook a \$1.5 million restoration project for purposes such as removing and replacing existing roofs, gutters and leaders, doors, and decks. Plaintiffs, several unit owners, sought to enjoin the work, based on a By-law provision requiring the Unit Owners' consent for alterations, additions, and improvements to the premises. The court held that this requirement was "not applicable to the project at bar, which essentially constituted the replacement of existing building components that had fallen into a state of disrepair." Therefore, the Board properly undertook this project based on its own authority under the By-laws to perform "maintenance, repairs and replacements in or to the Common Elements." An injunction against going ahead with the project without unit owner approval, which had been granted by the lower court, was reversed.