
CLIENT ADVISORY

JANUARY, 2003

Ganfer & Shore, LLP will be hosting another in our series of breakfast panel discussions addressing topics that, we believe, are of significant interest to cooperatives, condominiums and real estate owners. The topic of our next seminar will be how to protect against discrimination claims in the applicant approval process. This discussion will be held on Wednesday, January 22, 2003 from 8:00 A.M. to 10:00 A.M. in the New Harmonie Room of the Harmonie Club, 4 East 60th Street, New York, New York. If you plan to attend, please either call Amarilys Garcia of our office at 212-922-9250, ext. 262, or send a confirming e-mail to her at agarcia@ganshore.com by January 17, 2003.

WHAT DID THE JUDGE CALL MY MOTHER-IN-LAW?

The Proprietary Lease is a key document in determining the parameters of a shareholder's use of his or her apartment. The courts have been called upon numerous times to interpret and apply provisions of a Proprietary Lease when shareholders and board members are unable to agree upon the meaning of a specific provision. In *445/86 Owners Corp. v. Haydon*, (NYLJ, 12/16/02, p. 18, col.6), the Cooperative Corporation (the "Coop") sought to impose a sublet fee upon a shareholder who had permitted his or her mother-in-law to live in the apartment while the shareholder lived elsewhere. The Supreme Court, New York County, had granted the Coop summary judgment on the issue of whether there had been an illegal sublet, and then imposed sublet fees on the shareholder in the principal amount of \$25,294.71. The Appellate Division of the Supreme Court, First Department, reviewed the Coop's Proprietary Lease and reversed portions of the lower court's decision.

The Coop's Proprietary Lease stated that the apartment may not be used for any purpose "other than as a private dwelling for the Lessee and Lessee's wife, their children, grandparents, parents, brothers and sisters and domestic employees". The Appellate Division upheld the lower court's ruling that this language permitted occupancy of the apartment by the listed persons other than the Lessee only if the Lessee also simultaneously resided in the apartment. The Appellate Division also upheld the right of the Coop's Board of Directors under this Proprietary Lease to impose and collect a sublet fee without the approval of a majority of the shareholders. However, the Appellate Division refused to grant the Coop summary judgment on the issue of whether the mother-in-law's occupancy was an illegal sublet. Noting that the mother-in-law was permitted to live in the apartment by the shareholder at the shareholder's will, rather than by right created by an agreement, the Appellate Division refused to call the mother-in-law's occupancy an illegal sublet as a matter of law, or permit the Coop to recover sublet fees in the principal amount of \$25,594.71, remanding the matter for a trial on this issue.

NO ZIP CODE- NO DEFAULT

Judge Siegal of the Civil Court of the City of New York, County of Queens, was faced with an application to enter a default judgment in New York State based upon a New Jersey judgment previously entered against the Defendant. The Plaintiff had alleged that the Defendant worked in New York City and owned property in New York State. When serving the Summons and Complaint in the New York Action, the Plaintiff's process server chose to use New York's "nail and mail" provision to accomplish service. The "nail and mail" provision under Section 308(4) of the Civil Practice Law and Rules ("CPLR") is a method of service of last resort, which may only be used after the process server can demonstrate that he

or she has been unable to otherwise serve the Defendant personally or by other specified substituted methods. Apparently, the affidavit of service filed by the process server listed the Defendant's last known address to which the Summons had been mailed, but failed to include the zip code. Citing to the Domestic Mail Manual 47 of the United State Postal Service dated April 10, 1994, Judge Siegal described the following requirements of the United States Postal Service: (i) that the address of the intended recipient be legible, visible and complete; and (ii) contain the zip code. Service upon an incomplete or incorrect address deprives the court of jurisdiction over the Defendant. The failure to put the Defendant's zip code on any of its papers caused the Plaintiff substantial delay and expense in its efforts to enforce and collect upon its judgment.

THE HEALTH AND SAFETY OF OTHER TENANTS AND OWNERS MUST COME FIRST

Building and unit owners in the City of New York are occasionally faced with the difficult task of having to evict a building occupant who is clearly in need of assistance, yet refuses all offered aid. Sometimes the decision to proceed against the tenant is made necessary due to conditions in the tenant's apartment that potentially endanger the health and safety not only of the tenant but all other tenants and owners residing in the building. Actions against tenants based upon a nuisance condition allegedly created and maintained by such a tenant are difficult cases to win, but documenting the nuisance conditions, and their impact upon other tenants and owners in the building, will have a significant impact upon the outcome. This was the case in Kast Realty, LLC v. Houston (NYLJ 11/12/2002, page 19 col. 1). In Kast, the owner of a residential apartment (the "Owner") alleged that the tenant had committed and permitted to exist a nuisance condition in the tenant's apartment. The Owner alleged that the tenant had accumulated garbage, clothing, books, newspapers, magazines, furniture, iron bars, cans of paint, old windows, and the hood of a car, all in the apartment in such number as to overfill the apartment. The articles accumulated by this tenant allegedly reduced the width of the entrance to the apartment to 9 inches, which the Owner alleged created a danger to the life and property not only of the tenant, but to everyone in the building.

The Owner's action was first heard in New York City Housing Court in December 2001. The case was adjourned several times to allow the tenant to correct the conditions in the apartment. Three months after the case was first heard, a housing court judge visited the apartment and confirmed its condition. When the case next appeared on the Housing Court's calendar three months later, the parties entered into an agreement whereby the tenant was given an additional 30 days to clean up the apartment. Forty-five days later, the Judge inspected the apartment again and found the apartment was "literally overcome with thousands of books, magazines, cans, bottles, pictures, rags, and other assorted items. There was barely any room to walk and a health and fire hazard clearly existed." The Judge then entered an order granting the Owner a final judgment of eviction, but stayed its execution until August 31, 2002, giving the tenant another 90 days in the apartment.

After the entry of the Court's order, the tenant's attorneys made a motion to dismiss the case on procedural grounds. First noting that the procedural claims then made by the tenant's attorneys had long before been waived, the Judge focused on the numerous opportunities given to the tenant to clean up the apartment. The Judge, noting that the nuisance condition began long before the Owner commenced the case and expressing his sympathy for the tenant, recognized that the Court's sympathies must be balanced against the rights of other tenants and owners whose health and safety are at risk. The Court dismissed the tenant's challenge to the Court's eviction order, but gave the tenant another 60 days to vacate the apartment.