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# CLIENT ADVISORY

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JANUARY 2007

## HAPPY NEW YEAR

Ganfer & Shore, LLP wishes all of our clients and friends a very happy and healthy 2007

### **COOPERATIVE'S CLAIMS FOR ALLEGEDLY UNFAIR REFINANCING ALLOWED TO PROCEED AGAINST BOARD MEMBER, SPONSOR, AND LENDER**

Claims asserted by a Cooperative against a board member and the Cooperative's sponsor, lender, and former law firm were allowed to proceed in the recent case of Kew Gardens Hills Apartment Owners, Inc. v. Horing Welikson & Rosen, P.C., 2006 NY Slip Op. 09180, 2005 WL 02804 (App. Div. 2d Dep't Dec. 5, 2006).

This case arose from a dispute concerning the terms of a restructuring of the Cooperative's finances. The Cooperative contended that certain terms of the refinancing were highly beneficial to the lender and sponsor but detrimental to the Cooperative and its shareholders. The Cooperative also asserted that shareholder approval of the financing was required and had not been obtained.

In response, the defendant board member argued that he had acted in good faith and in furtherance of corporate purposes, so that his approval of the refinancing was protected by the business judgment rule and not subject to judicial scrutiny. However, the court held that the documents before it raised issues of fact as to whether the board member had acted in the Cooperative's interests. The Appellate Division noted the board member's contention that he had relied upon advice of the Cooperative's counsel, but held that whether such reliance was reasonable was a fact issue as well.

The Appellate Division similarly upheld the Cooperative's pleading of claims against its sponsor for breach of fiduciary duty, and against the lender for assisting the sponsor in breaching its fiduciary duty. Finally, the Appellate Division sustained the pleading of a legal malpractice claim against the Cooperative's former law firm, because plaintiffs had submitted documents raising specific issues concerning the legality of the refinancing.

### **IMPROPER NOTICE COSTS COOPERATIVE RIGHT TO CANCEL LEASE AND TAKE POSSESSION OF PROPERTY**

A Cooperative's attempt to cancel a proprietary lease and take possession of the property based on a shareholders' default under the lease was denied where the Cooperative did not fully comply with the lease's notice requirements, according to the Appellate Division decision in Dune Deck Owners Corp. v. Liggett, 2006 N.Y. Slip Op. 8203, 2006 WL 3307357 (App. Div. 2d Dep't Nov. 14, 2006).

In this case, the trial court found that the shareholders owed the Cooperative past-due maintenance fees and late fees. Based on the monetary default, the court entered a money judgment in favor of the Cooperative and also allowed the Cooperative to terminate the shareholders' proprietary lease and take possession of the property. On appeal, the Appellate Division upheld the

money judgment, finding that the maintenance and late fees were owed to the Cooperative and that the proprietary lease prohibited any attempt by the shareholders to use any claims they allegedly had against the Cooperative as an offset to their maintenance obligations.

However, the Appellate Division reversed with respect to the termination of the proprietary lease, because the Cooperative had not submitted evidence that it had complied with the proprietary lease's requirement that notices must be sent in writing via certified or registered mail, return receipt requested. The case is a reminder that legal notices should always be sent in strict compliance with the notice requirement of the applicable lease, contract, or other document and that documentary proof of such compliance should be retained.

**COURT HOLDS THAT ATTORNEYS' FEES MAY NOT BE DEBITED FROM TENANT ACCOUNT WITHOUT PERMISSION**

When a proprietary lessee or other tenant authorizes debits from his or her bank account to pay monthly rent or maintenance charges, other fees may not be deducted from the account without the tenant's specific approval. Hodes v. Vermeer Owners, Inc., 2006 N.Y. Slip Op. 26450, 2006 WL 3231958 (Civil Ct. N.Y. Co. Nov. 1, 2006).

The proprietary lessee in this case had signed an Authorization Agreement for Direct Deposits authorizing electronic debits of his bank account for monthly maintenance payments. Subsequently, the Cooperative billed the lessee for certain legal fees that it had incurred as the result of a dispute between the lessee and another resident, pursuant to a provision of the proprietary lease obligating the lessee to reimburse the Cooperative for reasonable attorneys' fees arising from any breach of the lease. Although the lessee disputed the legal fee, the Cooperative nonetheless debited the lessee's account in the amount of the fee along with the next regular maintenance payment.

The court held that the Cooperative's action violated the Federal Consumer Credit Protection Act, because the lessee had not been given notice of the specific date and amount by which his account would be debited and had not been given an opportunity to object or stop payment. This decision was rendered in a Small Claims case and therefore does not establish a legally binding precedent. However, boards, landlords, and managing agents should still be mindful of the decision before using an electronic debit authorization to collect any amounts other than regular monthly maintenance or rent and other recurring amounts that have been specifically authorized in advance.

**OWNER'S TRANSFERRING CONDOMINIUM UNIT TO AFFILIATE WAS NOT A SALE TRIGGERING RIGHT OF FIRST REFUSAL**

Many condominium declarations and bylaws give the Condominium a right of first refusal when a unit owner wishes to sell the unit. In Board of Managers of the York River House Condominium v. Kinney York Avenue, Inc., 2006 N.Y. Slip Op. 09039, 2006 WL 3489119 (App. Div. 1st Dep't Dec. 5, 2006), the court held that a corporation's transfer of a unit to an affiliate as part of a merger did not constitute a "sale" triggering such a right of first refusal. Under the Condominium's bylaws, only a unit owner's acceptance of an "outside offer" for a unit gave the Condominium the right to match the offer. A corporate merger resulting in the transfer of title automatically by operation of law, the court held, was not an outside offer to purchase the unit.