

CLIENT ADVISORY

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DEFAMATORY STATEMENTS IN COOPERATIVES

In Yates v. Ramos, NYLJ, June 18, 2003, p. 19, col. 2 (Civil Ct. N.Y. Co.), the former treasurer of a residential cooperative, who had been removed from office, circulated a letter to the other shareholders defending his own conduct in office and also accusing two directors of (a) writing checks without invoices for work done in the building, and (b) submitting false information about the status of the building. Alleging that these statements in effect accused them of embezzlement and falsifying a loan application, the directors sued, claiming they had been libeled.

The Court found that the writing of checks without invoices was at most a charge of mismanagement and not defamatory, but that the accusation of submitting false information, if false, could be construed as defamatory in the context of the recent loan application. Since issuing false financial statements is a crime, those statements could be actionable "per se," even if the plaintiffs could prove no actual harm they suffered.

Nevertheless, the Court dismissed the entire case, holding that even though the statements would otherwise be defamatory, they were protected by the qualified privilege that New York law recognizes for communications made by one person to another upon a subject in which they both have an interest. As the Court said, "[c]ommunications between shareholders concerning the finances of a cooperative corporation are important matters of common interest and concern that require shielding to encourage open debate without the fear of retribution." To overcome the "common interest" privilege, the plaintiffs would have had to establish that the defendant was motivated by spite or ill will, actual malice or reckless disregard of whether his statements were true. The Court found no such evidence. The "common interest" defense therefore prevailed.

SELF-DEALING BY BOARD MEMBERS

In Michaelson v. Albora, NYLJ June 18, 2003, p. 24, col. 5 (Sup. Ct. Suffolk Co.), the owners and developers of adjoining property offered to buy an uncompleted portion of a commercial condominium complex. They wrote to each unit owner, whose consent they needed, offering between \$10,000 and \$12,000 each for the transfer of the unit owners' common interest. Two of the owners, however, who were also on the condominium's Board of Managers, refused the offer and negotiated their own compensation, eventually receiving \$52,000 and \$50,000 respectively. Other unit owners sued, claiming that those Board members had violated their duties in their capacity as Board members and as unit owners and that they and the adjoining landowner had fraudulently misrepresented their negotiations to the other owners.

Although finding no statute or by-law dealing explicitly with the sale of common interests, the Court found that various provisions of the Real Property Law and the condominium's by-laws suggested that upon the loss of the common interest appurtenant to their unit, unit owners should be compensated in proportion to the *pro rata* value of their unit. Moreover, it found that the defendants had tried to conceal the larger payments they received. It therefore refused to dismiss the fiduciary duty and fraud claims, observing that "any board member must be especially careful not to gear his or her conduct to benefit his or her self-interest or that of the sponsor." It held that the two members of the Board had "a fiduciary duty to act in a manner which would benefit the unit owners as a group with regard to the sale of their common interest...." On the other hand, it dismissed a claim based on the alleged duty of unit owners to each other, holding that "there is no legal or fiduciary duty that one unit owner account to another unit owner."

THE LIMITS OF "HOME OCCUPATION"

In re Mason v. Department of Buildings of the City of New York, NYLJ May 30, 2003, p. 18, col. 1 (App. Div. 1st Dep't), involved a long and litigious dispute arising from a landlord's effort to convert its loft building to condominiums. The one holdout was a resident who also operated in his loft a "fully functioning professional music recording studio in which musicians record their material for a fee" payable to the tenant's corporation. On the landlord's complaint, the Department of Buildings did not pursue its original position that the tenant's commercial use exceeded the 49% of the total floor area that was permitted in the district involved, but determined that the tenant's use of the premises violated the "home occupation" regulations of the New York City Zoning Resolution ("ZR") and was not permitted in that neighborhood. The tenant's challenge of that ruling ultimately came before the Appellate Division, which held that the tenant's use was neither a valid home occupation under the Zoning Resolution nor an exempt use permitted to artists under New York State's Loft Law.

ZR §12-10 defines "home occupation" as "an accessory use which... is clearly incidental to the residential use of the dwelling unit." The definition of "accessory use" includes not only its incidental character but also that it must be "customarily found in connection with" the principal use. To the Appellate Division in the Mason case, this logically limits the exemption to the tenant's own production and would not apply to permitting others to use the space and services for a fee. The goal of the Zoning Resolution is "protecting artistic and professional uses that are incidental to residency, but not general commercial uses." Thus, for example, a tenant's music instruction to others for a fee, as well as the rehearsal of his own works, would be permissible uses, but renting out rooms and equipment to others is not. Ansonia Associates v. Bozza, 180 Misc. 2d 702, 692 N.Y.S.2d 903 (App. Term 1st Dep't 1999); *see also*, Haberman v. Gotbaum, 182 Misc.2d 267, 698 N.Y.S.2d 406 (Civ. Ct. N.Y. Co. 1999) (artist's creation of artwork in residential apartment not a "business" use warranting eviction).

Nor could the tenant in Mason claim relief under the **Multiple Dwelling Law, Articles 7-B and 7-C** (the so-called "Loft Law"), which were intended to allow for mixed use under certain circumstances, particularly by artists. "By no logical definition," the Court held, "may 'artist' be defined to also include one who rents out space and technical equipment and services to those who actually do the musical composition and performance."