

CLIENT ADVISORY

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COURT DECLINES TO ENJOIN BOARD FROM TERMINATING LEASES FOR OBJECTIONABLE CONDUCT

In West Gate House, Inc. v. 860-870 Realty LLC, NYLJ May 24, 2004, p. 26, col. 5 (App. Div. 1st Dep't), a cooperative corporation sued the successor of the sponsor of a non-eviction conversion plan for a declaration that it had violated its statutory and contractual obligations by retaining and seeking to rent a majority of the building's shares and apartments. The five members of the corporation's board of directors that were not designated by the defendant then unanimously voted to terminate the defendant's leases and a notice of termination was issued. The defendant moved for a preliminary injunction preventing such termination during the lawsuit.

The Supreme Court denied the preliminary injunction. Among other grounds for its decision were its findings that (1) the termination of the leases was validly adopted by the disinterested directors, as permitted in Business Corporation Law, § 713(a)(1); (2) in not defining "objectionable conduct," the proprietary leases did not clearly foreclose the board's action; (3) the defendant's rental of the unsold apartments with no intention of selling them for cooperative ownership was actionable, under the authority of 511 West 232nd Owners Corp v. Jennifer Realty Co., 98 N.Y.2d 144, 746 N.Y.S.2d 131 (2002), in which the New York Court of Appeals had held such a claim stated a cause of action; and (4) the damage to defendant from the termination of its leases could be adequately remedied by a money award if it ultimately prevailed. The Court held a preliminary injunction to be unwarranted.

In a brief opinion, the Appellate Division affirmed, citing the Jennifer case. Although not relying on it by name, the Court's decision appears to recognize the power of a cooperative board to terminate proprietary leases for conduct it deems objectionable that was described by the Court of Appeals in 40 West 67th Street Corp. v. Pullman, 100 N.Y.2d 147, 760 N.Y.S.2d 745 (2003).

FORMER BUILDING MANAGER MUST PAY SIX YEARS ARREARS IN MAINTENANCE AFTER NINETEEN-YEAR DECEPTION

In 1045 Anderson Avenue HDFC v. Mack, NYLJ May 27, 2004, p. 19, col. 3 (Civil Ct. Bronx Co.), one of the cooperative's shareholders, Mack, served as the building manager from 1985 through 2003, while residing in the building. In his capacity as manager, he created and maintained the corporation's records and collected maintenance payments. When a new board of directors elected in 2003 discharged Mack as manager, it discovered that he had made no maintenance payments on his apartment since 1985. In the corporation's proceeding to evict him and recover \$85,000 in past due charges, Mack contended that all his

maintenance charges had been waived by the board in exchange for his additional services as building superintendent.

Based on the trial testimony, the Court found that Mack had not been the superintendent, but only the building manager, for which he had been paid; that he had no written or oral agreement waiving his maintenance, and that he had engaged in a "pattern of deception and deceit" calculated to defraud the corporation and its shareholders. The Court held that under **Business Corporation Law, § 501(a)**, a board is not permitted to create preferences among shareholders of the same class of stock, and that under **§ 501(c)**, changes in maintenance charges are to be fixed and determined on an equal per-share or per-room basis or as an equal percentage of the maintenance charges. Accordingly, the Court ruled, Mack was required to pay the same maintenance as the other shareholders in the same apartment line. In addition, the Court applied the "Statute of Frauds," **General Obligations Law, § 5-703[2]**, in holding that any amendment of Mack's proprietary lease had to be in writing. The Court reduced the \$85,000 that he owed in arrears to \$34,280, however, on the ground that the corporation's claim for damages beyond six years was barred by the applicable Statute of Limitations.

LIABILITY INSURANCE POLICY HELD NOT TO COVER COSTS OF REPAIR TO CORRECT VIOLATION AND PREVENT FUTURE DAMAGE

In R&D Maidman Family, L.P. v. Scottsdale Insurance Co., NYLJ May 24, 2004, p. 18, col. 1 (Sup. Ct. N.Y. Co.), a brick or piece of masonry dislodged from the plaintiff's building and fell twenty stories, penetrating the roof of an adjacent building. The accident resulted in (a) a lawsuit from the neighboring owner, which was defended and settled by the plaintiff's insurance carrier, and (b) Department of Buildings inspections and Environmental Control Board Notices of Violation that, among other things, ordered the protection of the neighboring property and immediate repairs. The plaintiff sought reimbursement under its liability insurance policy for the cost of erecting the sidewalk bridge, scaffolding and net meshing necessary to comply with the Notices of Violation and to prevent further damage to the plaintiff's building, the neighboring property and others. The policy obligated the insurer to pay sums that the insured was "legally obligated to pay because of personal injury or property damage," if the injury or damage was caused by an accident, was not "expected or intended" by the insured and was not suffered by the insured's own property.

In the plaintiff's action on the policy, the Court granted the insurer summary judgment dismissing the case, finding that the prescribed penalty for a failure to remedy the violations was not the cost of the remedial work, but rather a fine of \$2,500 for each violation. Since the plaintiff could not be compelled to bear the costs of repair, it was not "legally obligated" to pay them. The Court also found that the Notices of Violation did not arise from the damage to the neighbor's property, but rather from (1) the condition of the plaintiff's building and (2) the possibility of future harm to third parties. Thus, the Court held that the insurer was not obligated to indemnify the plaintiff for its remedial costs.