

CLIENT ADVISORY

JUNE 2001

SUIT BY BOARD OF MANAGERS BARRED

The bylaws of a portion of the Lincoln Square Condominium, like many New York condominium buildings, prohibits residents from harboring dogs in their apartment units. Apparently, one of units in the Condominium was leased to a tenant named Errico, who kept a dog in his apartment, in violation of both his lease with the unit owner and the Condominium bylaws. The Board of Managers, on behalf of the unit owners, commenced a summary holdover proceeding against Errico entitled, Board of Managers of the Low and Mid Rise Section of the Lincoln Square Condominium v. Errico (N.Y.L.J. 5/16/01). Errico sought to dismiss this proceeding, alleging that the Board had no authority to maintain a summary holdover proceeding because the Board is not included in the list of persons authorized under §721 of the New York Real Property Law to maintain a holdover proceeding. The Board argued that the Condominium's By-Laws authorized the Board to bring this proceeding on behalf of the unit owners. The Board further argued that all of the unit owners had authorized the Board to act on their behalf, by having given the Board a Power of Attorney at the closing of each such unit. The Court, however, held that the language of the Board's Power of Attorney was limited in scope and did not authorize the Board to commence the summary proceeding.

The form of Power of Attorney, which the unit owners had signed, like many such condominium powers of attorney, provided, in part, that the Board had the power “. . . to commence, pursue, appeal, settle and/or terminate administrative and certiorari proceedings to obtain reduced real estate tax assessments . . . including retaining counsel and taking any other action which the Low and Mid Rise Board deems necessary or appropriate . . .”, but did not specifically empower the Board to bring holdover proceedings. The Court concluded that the Power of Attorney was limited in its scope, and that the language was insufficient to grant to the Board the power to initiate the proceeding.

IS THERE AN ILLUSORY TENANT IN THE HOUSE?

The owner of a building located at 294 Convent Avenue commenced a holdover proceeding against Debra Clark, who was not the legal tenant of record, entitled Skeeter v. Clark (NYLJ 5/23/2001 p20 col 3). The apartment had been leased to Maxine and Vashon Smith, who apparently had sublet the apartment to Debra Clark. Clark defended the proceeding, arguing that since the Smiths had illegally sublet the apartment to her, they had effectively forfeited their tenancy rights, and that Clark should be deemed to be the legal tenant of the apartment. Clark argued that the Smiths had not physically occupied the premises for several years, and that they charged and received rent from her in excess of the lawful rent.

The Court, in analyzing the law, observed that the rule is that “[a]n illusory tenancy exists where the rent laws have been violated in a way that has permitted the prime tenant to rent the apartment for the purpose of subleasing for profit or to otherwise deprive the subtenant of rights under the Rent Stabilization Law.” To prove an illusory tenancy, a party must show that: (1) the subject apartment is not the prime tenant’s primary residence; (2) the prime tenant is reaping profit or using the apartment for a purpose that violates the rent laws; and (3) the owner knew or should have known about the subletting. There is no requirement that the owner benefited from the illusory tenancy.

At trial, the Court found that the prime tenants did not occupy the apartment as their primary residence and they profited from the sublet to Clark by charging her more than \$300 over the legal registered rent. The record contained evidence proving that the owner had knowledge of the sublet and over-charge because the owner conceded that Clark advised her that the Prime Tenants’ rent was less than the rent paid by Clark to the Prime Tenants. The owner also admitted that Clark’s name had been posted on the apartment’s mailbox since in or about October 1998. Accordingly, the petition was dismissed and Clark was declared the lawful tenant of the apartment.

RIGHT TO CANCEL LOAN UPHELD

When Emigrant Savings refused to fund a loan for Stephen DeMaria (“DeMaria”), a prospective borrower, he wanted his \$8,400 commitment fee back. DeMaria had sought to refinance a mortgage, which was secured by his home, located at 219 East 31st Street in New York. Emigrant informed DeMaria that it would only issue a mortgage commitment if DeMaria agreed to pledge his one-half interest in property he owned jointly with his father in Staten Island. Despite Emigrant’s issuance of a commitment letter to DeMaria in August 1999, the bank nonetheless refused to fund the loan unless DeMaria’s father also pledged his interest in the Property. As a result, DeMaria notified Emigrant that he was canceling the loan. However, the bank refused to refund the commitment fee and DeMaria commenced this case entitled, DeMaria v. Emigrant Mortgage Company, Inc. (N.Y.L.J. 5/23/01), alleging that Emigrant breached the terms of the commitment because it initially agreed that DeMaria’s father would not have to pledge his share of the Property.

In determining whether DeMaria had a right to cancel the transaction, the Court looked to the application of Regulation Z, a regulation promulgated by the Board of Governors of the Federal Reserve System to implement the Federal Truth in Lending Act. The Regulation provides, in part, that: “In a credit transaction in which a security interest is or will be retained or acquired in a consumer’s principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction . . .” Under this regulation, such right to cancel allows a borrower to cancel for any reason or no reason at all. Regulation Z also provides that a consumer has a right to cancel up until “midnight of the third business night following consummation, when proper notice of the right to rescind is given.” Without notice, the time period is “three years from the date the transaction is consummated.” As Emigrant did not provide DeMaria with any such notice, the Court awarded him the full commitment fee plus interest from the date of his rescission.