GANFER & SHORE, LLP

CLIENT ADVISORY

JUNE 2004

BUSINESS JUDGMENT RULE CANNOT TRUMP CONTRACTUAL OBLIGATIONS

In Rouette v. One West 126th Street Housing Development Fund Corp., **NYLJ May 12, 2004, p. 21, col. 1 (Sup. Ct. N.Y. Co.),** a tenant-shareholder agreed to sell his apartment to the cooperative corporation, which simultaneously agreed to sell him another apartment on the same floor. The cooperative refused to close, however, and the tenant-shareholder sued for specific performance. In response to his motion for a preliminary injunction barring the cooperative from selling or transferring the apartment he was to buy or from terminating his rights to his current residence, the cooperative argued (1) that he had violated the agreement by failing to allow the premises to be inspected prior to the sale, and (2) that under the "business judgment rule," the actions of the board were not reviewable by the court if taken within the scope of its authority and in good faith. **40 West 67th Street v. Pullman, 100 N.Y. 2d 147, 760 N.Y.S.2d 745 (2003); Levandusky v. One Fifth Avenue Apt. Corp., 75 N.Y.2d 530, 554 N.Y.S.2d 807 (1990).**

The Court rejected both arguments and granted the tenant-shareholder a preliminary injunction. It found that the cooperative's representatives had appeared at his apartment for inspection without warning on the day before the closing and that although he was not then at home, the tenant-shareholder made reasonable offers to make his apartment available that evening or the next day. As for the business judgment rule, the court held that the rule "does not protect a cooperative corporation from liability for breach of contract." By entering into the purchase and sale agreement, the Court said, the cooperative had subjected itself to standard contract principles, to which the business judgment rule is inapplicable.

SUBCONTRACTOR'S CLAIMS DISMISSED AGAINST BOTH SPONSOR AND CONDOMINIUM BOARD

In Northeast Restoration Corp. v. K&J Construction Co. L.P., NYLJ May 19, 2004, p. 18, col. 1 (Sup. Ct. N.Y. Co.), the Sponsor contracted with a general contractor for the conversion of a warehouse building into residential use. The general contractor then entered into subcontracts with the plaintiff to perform roofing, parapet and exterior masonry work. During the construction, the building was converted to condominium ownership and, by March 2000, the elected unit owners assumed control of the condominium Board of Managers from the Sponsor. The plaintiff claimed that it had finished its work by that time and was owed approximately $168,000.

The plaintiff' s initial attempt to foreclose its mechanics' lien was dismissed in 2003 because it had filed its lien against the former lot number of the entire building instead of the individual tax lots created by the condominium declaration. See, **Northeast Restoration Corp. v. K&J Construction Co., 304 A.D. 2d 306, 757 N.Y.S. 2d 542 (1st Dep' t 2003)**. Plaintiff then started a new action against the Sponsor and the Board pursuant to § **339-l, Real Property Law**, which prohibits a lien for labor performed or materials furnished for a condominium' s common elements, but also provides that all common charges received or to be received by the Board shall constitute trust funds, to be devoted first to paying the cost of any such labor and materials performed at " the express request or with the consent" of the board, manager or managing agent.

The Court recognized that although the Board had not expressly requested the plaintiff' s work – indeed, it was not even in existence when the original contracts were signed - it had consented to the work as it progressed. The present Board would normally be bound by that consent, even though the membership of the Board had since changed from the Sponsor' s nominees to those elected by the unit owners. A literal reading of § **339-l** would thus impose liability on the Board to pay for the improvements out of common charges collected from unit owners who had already paid the Sponsor for a completely renovated unit pursuant to an offering plan. The Court found such an inequitable result would not be in accord with the intent of the statute. It ruled that the liability of the Board should be limited to work performed or materials supplied at the " express request or consent" of a board selected by the unit holders. It also rejected the plaintiff' s argument that the Board had assumed liability from the Sponsor, since the Sponsor had no contractual obligation to the subcontractor in the first place.

The plaintiff' s claim against the Sponsor itself under § **339-l** also failed. The Court held that since the Sponsor was in no position to collect common charges from unit owners, it could not be liable for failing to turn them over to the plaintiff. In fact, the Sponsor had paid common charges to the Board on its unsold units. Its control of the Board prior to March 2000 resulted in no liability, since its nominees had no authority to collect common charges to pay for improvements that were required to be performed by the Sponsor itself. The Court therefore dismissed the case against both the Board and the Sponsor.

CONSTRUCTION DO' S AND DONT' S DISCUSSED AT GANFER & SHORE SEMINAR

At the breakfast seminar hosted by this firm at the Harmonie Club on April 29, a highly qualified panel of experts presented a lively and informative discussion of the problems that arise in construction projects, as seen from the differing points of view of owners and their representatives, managing agents, architects and lawyers. Enclosed with this issue of the Client Advisory is a reprint of an article about the seminar that appeared in the May 5, 2004 issue of *Real Estate Weekly*.

IMPORTANT NOTE: The material in this newsletter is provided for information purposes only and should not be construed as legal advice. Because the particular facts and circumstances of every situation differs, you should not act or refrain from acting on the basis of this information without consulting an attorney.

THE ONLY WEEKLY REAL ESTATE NEWSPAPER IN THE U.S.
SERVING AMERICA'S #1 MARKET

REAL ESTATE WEEKLY

Vol. 50, No. 39 WEDNESDAY, MAY 5, 2004

Builders warn owners: You have got to stay connected

By Barbara Nelson

Coop and condo owners need to keep an eye on the construction details when repairing or renovating their buildings, according to experts at a Ganfer & Shore, LLP breakfast seminar last week.

From the beginning of the planning process and the selection of the construction team, to the day construction ends, the owner or his agent has to be involved in every aspect of the project, said Jeffery Bliss, partner KB companies, at the Construction Do's and Don'ts seminar held at The Harmonie Club.

"The most important thing in the construction process is the owner," Bliss said. "The owner has to drive the car. The owner's role is to make quick decisions to keep the project rolling."

To make decisions, the owner needs to appoint members of the coop or condo board or a construction agent that will follow the project to its completion, he said.

Dealing with the same person or persons saves contractors and building owners time and prevents miscommunication, said Stephen B. Jacobs, president of The Stephen B. Jacobs Group.

"Getting too many personalities involved creates problems," added Jacobs, who recommended creating a construction sub-committee. That committee should determine the cost and the goals of the project, define the legal roles of the architect and or engineer, and create a bid scope, said Neil Davidowitz, president of Orsid Realty, Inc.

Written documentation at every stage of the process was highly recommended by all speakers.

However, before a project can begin, an extensive investigation into the possible issues or unforeseen problems that could occur during construction must be performed.

Davidowitz recommended sealed bids from a multitude of bidders, whereas Jacobs recommended pre-qualifying contractors before the bidding process, which would lessen the companies eligible to bid on the project.

Once a company is selected, a construction contract is signed. "Some people forget you can negotiate a contract," said Davidowitz. "Negotiate, negotiate, negotiate, if you spend the time and the energy you can save hard dollars."

If your project is $250,000 or more, the state construction contract law passed last year comes into play, said Alan C. Fried, Esq., Ganfer & Shore.

"Certain concepts are plugged into the contract whether or not you want them there," said Fried. "Under this statute an obsessive-compulsive disorder becomes an asset not a disability."

The new law, passed January 2003, forbids withholding payments to contractors in bad faith. Although payments can be withheld until defective work, late work, disputed work, failure to comply with the contract and failure to pay bills, wages, benefits or taxes. It requires a written statement describing disputed items when funds are withheld.

In addition, if you are to make a late payment, the contractor must pay one percent a month on late payments.

Therefore once construction begins, the same diligence that went into planning; the construction should be utilized until the projects completion.

Reprinted with permission from *Real Estate Weekly*. ©2004, all rights reserved.
Reprinted by Scoop ReprintSource 1-800-767-3263

GANFER & SHORE LLP