
CLIENT ADVISORY

JANUARY 2006

HAPPY NEW YEAR

Ganfer & Shore, LLP wishes a very happy and healthy 2006 to all of our clients and friends.

INDIVIDUAL CONDOMINIUM UNIT OWNERS NOT LIABLE FOR PERSONAL INJURY RESULTING FROM COMMON AREA DEFECT

Individual condominium unit owners are not liable for personal injuries resulting from a defect in a common element of a condominium, according to the decision in Pekelnaya v. Allyn, 802 N.Y.S.2d 669 (App. Div. 1st Dep't Oct. 25, 2005).

The plaintiffs in this case were walking along the sidewalk adjoining a condominium when they were struck on the head by a section of chain-length fence that had fallen from the roof. Plaintiffs, who suffered severe injuries, alleged that their damages would exceed the building's \$2 million in insurance coverage. Therefore, in addition to suing the board of managers, plaintiffs sued the individual unit owners. Plaintiffs relied on a provision of the New York State Multiple Dwelling Law making "owners" of premises liable for failing to maintain them in a safe condition. It was undisputed that the roof and fence were part of the common elements of the condominium.

The court held that despite the unit holders' collective ownership of the roof area as a common element, individual unit holders lacked sufficient control over this area to be liable for plaintiffs' injuries. Recognizing "[t]he realities of cooperative and condominium governance," including precedent according wide discretion to condominium and cooperative boards in managing their buildings' affairs, the court found that the board of managers, not individual unit holders, controlled the common elements. In reaching its conclusion, the court observed that the condominium had obtained a reasonable amount of liability insurance to cover claims against the condominium, and urged the Legislature to amend the statute to require all condominiums to do so.

BOARD'S WITHDRAWAL OF PURCHASE APPROVAL FOLLOWING PURCHASER'S ACCOMMODATION REQUEST LIKELY DISCRIMINATORY

After a cooperative board approved an application to purchase an apartment, the purchaser told the managing agent on the day of the closing that he would like to install a washer-dryer in the apartment, because his clothes frequently became soiled as a result of a serious medical condition. The managing agent called one of the board members, who became upset that the purchaser had not mentioned this request at the interview. The purchaser's attorney immediately indicated that the request was withdrawn. The board nevertheless voted to revoke the purchase approval it had previously given. The would-be purchaser then sued the board under the federal and state disability laws, and sought an injunction requiring the board to reinstate its approval. Hirschmann v. Hassapoyannes, 2005 WL 3355722 (Sup. Ct. N.Y. Co. Dec. 1, 2005).

The court found that the purchaser was "likely to establish a prima facie case of housing discrimination." While the board claimed that the purchaser had misled it by failing to mention his disability or the potential need to accommodate it at the board interview, the court observed

that federal regulations specifically prohibit any inquiry into whether an application for housing has any disabling condition. The court interpreted the regulations as also barring inquiring at the interview into whether an applicant will require accommodation of a disabling condition. The court reasoned that a board could not lawfully base withdrawal of its approval on the fact that the applicant did not disclose the very matters that the board could not lawfully have asked him about.

The court found that the board's action in blocking the sale could subject the plaintiff to irreparable harm because, among other things, the building's location was near the hospital where plaintiff received specialized medical care. Thus, the court held that this fact scenario could constitute "the extraordinary and very rare situation where a mandatory preliminary injunction should be granted" compelling board approval of a sale. While the court declined to enter an immediate injunction, it suggested that it might do so later in the case. This case confirms that boards must tread carefully when residents or applicants request disability accommodations.

**ONLY BOARD, NOT PRESIDENT OR SUPERINTENDENT,
MAY GIVE APPROVAL REQUIRED UNDER PROPRIETARY LEASE**

Many proprietary leases provide that installation of certain equipment in a shareholder-tenant's apartment requires board approval. In Levin v. 40 Fifth Avenue Corp., 2005 WL 3435034 (App. Div. 1st Dep't Dec. 15, 2005), a tenant installed a washer/dryer and a garbage disposal unit without obtaining board approval as required under his proprietary lease. When the board demanded that the appliances be removed, the tenant contended that he should not have to remove them because they had been installed by the Cooperative's own superintendent. The tenant also relied on a letter from the board president, written after a leak was detected a year later, indicating that the Cooperative would take responsibility for repairing the leak. The court rejected both arguments, observing that the tenant, "a well-credentialed attorney," was on notice from the proprietary lease and a signed acknowledgement that only the board could approve installations. Moreover, the tenant could not have relied in making the installations on a letter received one year after the installations were completed. Finally, the court held, the board could not be deemed to have ratified the installations through silence because it was unaware that they were unauthorized.

**COOPERATIVE BOARD MEMBER DENIED BROKERAGE
COMMISSION FOR LEASING SPACE IN THE BUILDING**

A cooperative director, who was also an attorney, was denied a real estate commission for her efforts in procuring a tenant to lease commercial space in the building, in a split decision in Strax v. Murray Hill Mews Owners Corp., 2005 WL 3358440 (App. Term 1st Dep't Dec. 8, 2005). Although the director had undisputedly been instrumental in bringing the tenant to the building, a majority of the court affirmed the trial court's findings that without a commission agreement ratified by the full board or by the shareholders, plaintiff's efforts were undertaken in her volunteer capacity as a director. A dissenting judge would have granted plaintiff her commission, based on evidence that the board president had signed a commission agreement with the director, whose terms were fair and reasonable. The case is a reminder of the perils of a board member's entering into a business relationship with the building and that complete board review and formal board approval of any such proposed relationship are essential.