
CLIENT ADVISORY

JANUARY 2012

HAPPY NEW YEAR

Ganfer & Shore, LLP wishes all of our clients and friends a very happy and healthy 2012.

NEW YORK'S HIGHEST COURT CLARIFIES LAW REGARDING MARTIN ACT PREEMPTION

An issue of importance in the area of New York cooperative, condominium, and securities litigation is the extent to which New York's securities-fraud statute, the Martin Act provisions of the General Business Law, preempts or supersedes the ability to bring common-law claims arising from offerings. There is no private right of action under the Martin Act itself; the Attorney General of the State of New York has exclusive jurisdiction to enforce the statute. Thus, in the April 2009 issue of this *Client Advisory*, we discussed the Court of Appeals' *Kerusa* decision, which held that "a purchaser of a condominium apartment may not bring a claim for common-law fraud against the building's sponsor when the fraud is predicated solely on alleged material omissions from the offering plan amendments mandated by the Martin Act . . . and the Attorney General's implementing regulations."

In December 2010, we discussed the Appellate Division's decision in the *Assured Guaranty* case. In that case, the court reaffirmed the longstanding rule that there is no private right of action under the Martin Act itself, nor may a claim be "drafted in such a way as to cast what is clearly an obligation under the Martin Act as a common-law cause of action." On the other hand, the Appellate Division held that the Martin Act does not preempt causes of action by private parties involving securities fraud in cases where the cause of action would exist independent of the Martin Act and does not rely exclusively on breaches of Martin Act obligations.

On December 20, 2011, New York's highest court, the Court of Appeals, affirmed the Appellate Division's decision in *Assured Guaranty*. **Assured Guaranty (UK) Ltd. v. J.P. Morgan Investment Mgmt. Inc.**, 2011 WL 6338898, 2011 N.Y. Slip Op. 9162. The Court of Appeals held that "an injured investor may bring a common-law claim (for fraud or otherwise) that is not entirely dependent on the Martin Act for its viability. Mere overlap between the common law and the Martin Act is not enough to extinguish common-law remedies."

COURT DECISION FINDS COOPERATIVE POTENTIALLY LIABLE FOR FAILURE TO ALLEVIATE SECONDHAND SMOKE

An increasing source of disputes in multi-unit buildings, and of litigation, is residents' claims that they are affected by second-hand tobacco smoke from adjoining units. (For prior discussions of court decisions involving this issue, please see the February 2010 and August 2011 issues of this *Client Advisory*.) A recent decision suggests that in some circumstances, a tenant-shareholder may bring a claim against her Cooperative for failure to remedy conditions in the building that allegedly caused her unit to be plagued by the smell of cigarette or cigar smoke. **Reinhard v. Connaught Tower Corporation**, 2011 WL 6119800 (Sup. Ct. N.Y. Co. Nov. 30, 2011).

The plaintiff in this case sued her Cooperative Board and its President for failure to remediate conditions that permitted secondhand smoke to seep into her apartment, making her ill. Plaintiff contended the problems continued even after she recaulked the surfaces of her apartment as the building superintendent suggested. Plaintiff complained to the Cooperative's Board of Directors, which acknowledged that the managing agent had detected "a slight smell reminiscent of cigarette smoke" in an inspection of the apartment, but concluded that the odors did not render the apartment uninhabitable and refused to take any action.

Plaintiff then hired her own hygienic engineer, who detected "a 'strong' and 'distinctive odor of cigars'" in the apartment. Further tests suggested that there was "an air communication" in the wall space adjacent to plaintiff's apartment, which a contractor recommended should be sealed. The Board responded that the construction of the building was typical for the era in which the building was constructed (the late 1970s), that sealing the walls could cause other problems, and that it acknowledged no responsibility for any of the matters of which plaintiff was complaining, and reminded plaintiff that board approval was required for any alterations to plaintiff's unit or the walls that she might undertake. Plaintiff then sued the Cooperative and the Board President on causes of action including breach of the warranty of habitability, breach of the proprietary lease, breach of fiduciary duty, constructive eviction, and negligence.

Addressing the cause of action for constructive eviction, the court observed that to establish this claim, a tenant must prove wrongful acts by the landlord that substantially and materially deprived her of the beneficial use and enjoyment of the premises, leading to the tenant's abandonment of possession. The court held that secondhand smoke can give rise to a breach of the warranty of habitability and constructive eviction under some circumstances. Here, plaintiff testified that as a result of the smoke, she had not slept in her apartment since 2007. The court concluded that "there are issues of fact as to whether the secondhand smoke within [plaintiff's] apartment was so pervasive as to breach the implied warranty of habitability and cause a constructive eviction."

The court also addressed plaintiff's negligence claim, which was founded on an alleged violation of Multiple Dwelling Law § 78, under which "a landlord [has a] duty to persons on its premises to maintain them in a reasonably safe condition." The Cooperative contended that it did not breach any duty to plaintiff and did not cause or create the smoke or odor. The court concluded that the Cooperative was aware of plaintiff's complaints and that there remained "issues of fact as to whether the Cooperative Corporation acted reasonably under the circumstances in failing to remedy the smoke condition."

With respect to plaintiff's claim that the Cooperative had breached the proprietary lease by failing to keep common areas of the building in "good repair," the Cooperative asserted that under the proprietary lease, decisions about how to maintain the building were within the Board's discretion, and that plaintiff was responsible for making minor repairs in her own apartment. The court found factual issues regarding whether the Cooperative had maintained the building in good repair, as required. The court also found that fact issues precluded summary disposition of plaintiff's claim that the Board unreasonably withheld consent for alterations that she sought to make to her unit.

However, the court granted the Board's motion for summary judgment on plaintiff's breach of fiduciary duty claim, because a corporation does not owe fiduciary duties to its members or shareholders. Finally, the Court granted the Board President's motion to dismiss plaintiff's claims insofar as they were asserted against him individually, as there was no evidence that the President had personally engaged in any wrongful conduct that would render him liable for the Board's actions.