
CLIENT ADVISORY

JULY 2008

APPELLATE DIVISION DECISION REAFFIRMS NEED TO PROPERLY ADOPT AND DOCUMENT FLIP TAX POLICIES

Under the New York Business Corporation Law, a cooperative may impose a transfer fee, or “flip tax,” on the sale of shares pertaining to a cooperative unit. However, such a flip tax must be adopted in accordance with proper procedures and incorporated in the Proprietary Lease for the cooperative units. If a flip tax is not properly adopted and incorporated into the cooperative’s governing documents, it is invalid. (Please see the June 2008 issue of this *Client Advisory* for a case in which collection of an improper flip tax was enjoined.)

The court in **Carling v. 205-67 Apartments, Inc., 2008 WL 2340356, 2008 N.Y. Slip Op. 5308 (1st Dep’t June 10, 2008)**, found that a cooperative’s flip tax “was not incorporated into a proprietary lease, occupancy agreement, offering plan, or properly approved amendment thereto,” and was therefore invalid. The court did not immediately enjoin the flip tax, holding that further proceedings were necessary on procedural grounds, but its decision suggests that the Cooperative will be ordered to refund the flip tax that the plaintiff paid under protest when he purchased his unit.

CONDOMINIUM COULD NOT AVOID COMPLYING WITH COURT-ORDERED STIPULATION BY AMENDING BY-LAWS

The owner of a condominium unit sued the Condominium for an injunction against the Condominium’s “accessing his unit and hanging scaffolding from his wraparound terrace to facilitate washing the building’s exterior windows, on the ground that such action was not authorized by [the Condominium’s] declaration and bylaws.” The litigation was resolved by a “so ordered” stipulation in which the Condominium agreed not to take these actions. Thereafter, the Condominium amended its By-Laws to require all unit owners to provide access to their units, including the terraces, for purposes of window washing.

The owner went back to court and obtained an injunction, barring the Condominium from enforcing the amended By-Law against him. The appellate court held that “the unambiguous stipulation is valid and enforceable according to its plain meaning, and consequently ... surviv[es]” the subsequent By-Law amendment. **Luzzi v. Bridge Tower Place Condominium, 2008 WL 2344718, 2008 N.Y. Slip Op. 5330 (1st Dep’t June 10, 2008)**. The case is a reminder that in deciding whether and on what terms to settle litigation, boards must bear in mind not only the desirability of resolving the current dispute, but also how the proposed settlement terms could impact their freedom of action in the future.

**OWNER'S AGREEMENT TO PAY PORTION OF
SALE PROCEEDS TO CONDOMINIUM HELD VALID**

In many condominiums, the Declaration and By-Laws require that if an owner wishes to sell his or her unit, the Condominium has a right of first refusal to acquire the unit on the same terms offered by the purchaser. In a recent case, a Condominium Board and an owner entered into a contract under which the Board agreed to surrender its right of first refusal in return for the owner's agreement to turn over 7.5% of the purchase price to the Condominium. The owner's later attempt to have this agreement declared invalid was rejected in **Raimondi v. Board of Managers of Olympic Tower Condominium, 2008 WL 2369745, 2008 N.Y. Slip Op. 5378 (1st Dep't June 12, 2008)**. The court held that entering into such an agreement was well within the Condominium Board's authority under the By-Laws and the business judgment rule. The contract "did not constitute an unreasonable restraint on [the owner's] ability to sell the unit," and "the record [was] devoid of evidence ... to support his allegation that he was compelled" to sign it.

**COURT DECISION ORDERING COOPERATIVE BOARD TO
APPROVE SALE OF APARTMENT TO DISABLED PERSON AFFIRMED**

We previously reported on an unusual case in which a Manhattan judge directed a cooperative board to approve the sale of an apartment. (Please see the January 2006 and July 2007 issues of this *Client Advisory*.) The board had initially approved the sale, but rescinded its approval after the would-be purchaser requested permission to install a washer-dryer in the unit as an accommodation to the purchaser's disabling illness. The trial court found that the rescission of the approval for this reason violated federal, state, and city anti-discrimination laws and ordered that the Board reinstate its approval of the sale.

On appeal, the Appellate Division affirmed the trial court's decision. **Hirschmann v. Hassapoyannes, 2008 WL 2246141, 2008 N.Y. Slip Op. 4927 (1st Dep't June 3, 2008)**. The appeals court held that "by law, buyer was not required to disclose, and the co-op was not permitted to inquire into, buyer's disability, and consequent need for a reasonable accommodation, at the interview, or indeed at any time prior to its decision on the application." Therefore, there was no merit to the Board's contention that the buyer had sought to mislead it by requesting permission to install the washer-dryer only after the sale had been approved. The appeals court concluded that "[w]hile a cooperative board has the responsibility to protect shareholders from potential or existing shareholders who might harm the shareholders' and the co-op's interests, here, the co-op entirely failed to present a nondiscriminatory reason for revoking its approval of the buyer."

**PROPERTY OWNERS AND MANAGERS SHOULD ENSURE
THAT ALL OPEN FIRE CODE VIOLATIONS ARE RESOLVED**

The New York City Fire Department is engaged in a campaign to address outstanding Fire Code violations against buildings throughout the City. There have been press reports of property owners and managers suddenly being arrested and taken into custody on criminal charges for failure to respond to Fire Code violations, some more than ten years old. Those who own or manage real property should ensure that there are no open Fire Code violations against their buildings, or if there are, that they are addressed immediately.