

CLIENT ADVISORY

JULY 2009

TENANT-SHAREHOLDERS ORDERED TO REMOVE ALTERATIONS THAT WERE NOT DULY AUTHORIZED BY COOPERATIVE BOARD

A tenant-shareholder couple who made alterations in their cooperative unit without obtaining approval from the Board of Directors was required by court order to remove the alterations, as affirmed by the Appellate Division in **Meadow Lane Equities Corp. v. Hill**, 2009 WL 1563591, 2009 N.Y. Slip Op. 4397 (App. Div. 2d Dep't June 2, 2009).

The tenant-shareholders wished to make a series of alterations in their unit, and requested approval from the Board of Directors, as required under the proprietary lease. The Board consented to some of the proposed alterations, but not others. The tenant-shareholders, however, went ahead and "made not only the permitted alterations, but also, some they had agreed not to make, as well as certain others for which permission was never requested." The Board demanded that the tenant-shareholders remove the unauthorized alterations, but they refused.

The Board then sued the tenant-shareholders for an injunction compelling them to remove the unauthorized alterations. The court found that that the disputed alterations were not authorized, and that the Board's decision not to approve them was made in good faith and in the legitimate interests of the Cooperative. Accordingly, the court required the tenant-shareholders to remove the unauthorized alterations and to restore the affected portions of the unit to their prior condition.

COURT ALLOWS TENANT-SHAREHOLDER TO RESUME CONSTRUCTION PURSUANT TO SETTLEMENT STIPULATION, BUT UPHOLDS ALTERATION AGREEMENT'S FEE PROVISION

The Appellate Division addressed another dispute between a cooperative and one of its tenant-shareholders concerning alterations of a unit in **Batsidis v. Wallack Management Co.**, 2009 WL 1885924, 2009 N.Y. Slip Op. 5645 (App. Div. 1st Dep't July 2, 2009).

In this case, a shareholder-tenant entered into a standard form of alteration agreement with a Cooperative Board, in connection with renovations of the unit's kitchen and bathroom. Among other things, the agreement entitled the Cooperative to reimbursement of all fees and expenses that it might incur in connection with the alterations. While the construction was underway, the Cooperative's superintendent visited the apartment and determined that the work being done exceeded the scope of what had been approved, including cutting into a structural column of the building. An order from the Cooperative suspending the work resulted in a lawsuit by the tenant-shareholder and counterclaims by the Cooperative. Both were settled in a so-ordered stipulation allowing the work to resume on specified conditions, such as selection of a new contractor for portions of the work.

After the tenant-shareholder satisfied the stipulated conditions, he sought to resume the construction, but the Cooperative would not allow him to do so until after it was reimbursed for the legal fees and engineering fees it had incurred during the prior dispute. Further litigation ensued.

The Appellate Division sided with the Cooperative insofar as it sought a determination that it was entitled to be reimbursed for the legal and engineering fees it had occurred in its prior dispute with the tenant-shareholder. The tenant-shareholder's position was that he would be liable to reimburse the Cooperative's fees only if the Cooperative had been the prevailing party in the prior litigation, which it was not because the matter had been settled. The court held that this would be true if the cost-shifting provision had related specifically to litigation arising from a default by the tenant-shareholder tenant, such as is found in many proprietary leases.

The provision of the alteration agreement here, however, involved completely different concerns. This provision was intended to safeguard the rights of the Cooperative and its other tenant-shareholders by "ensur[ing] that the co-op and its other shareholders are not burdened with any expenses resulting from renovations to a shareholder's individual unit." Therefore, limiting the Cooperative's entitlement to reimbursement of these fees only to cases in which it prevailed in litigation "would be senseless; frequently in such circumstances, there will not be a clear prevailing party, or even any litigation." Nor was the Cooperative required to first demonstrate that the amount of its fees was reasonable, although the tenant-shareholder would have the right to bring an action challenging the amount of the fees if he wished.

However, the court held that in this case, the Cooperative could not condition its allowing the renovations to resume upon prior reimbursement of the legal and engineering fees. The court found that the parties' so-ordered stipulation provided that work could resume when certain stated conditions were satisfied, and that reimbursement of the Cooperative's fees was not among these conditions. The court stressed that the Cooperative could collect the moneys owed to it by any other appropriate means, including billing them to the tenant-shareholder as "additional rent" pursuant to the alteration agreement or suing the tenant-shareholder directly for the amount of the fees.

CONDOMINIUM'S FAILURE TO FILE LIEN LEADS TO LOSS OF RIGHT TO COLLECT MAINTENANCE ARREARS FROM FORECLOSURE SALE

The New York Real Property Law provides that if a condominium unit owner falls behind on the payment of his or her common charges, the Condominium may place a lien on the unit for the unpaid amount. This allows the Condominium to obtain payment of the arrears when the unit is eventually sold or foreclosed upon. However, in order to protect its priority position as against other creditors, the Condominium must actually file a notice of the lien with the appropriate recording authority (City Register or County Clerk). Should it fail to do so, its claim will not be secured and the Condominium will not be protected.

In Mortgage Electronic Registration Systems, Inc. v. Levin, 2009 WL 1696090, 2009 N.Y. Slip Op. 5095 (App. Div. 2d Dep't June 16, 2009), the Condominium claimed that a unit owner owed it \$16,000 for unpaid common charges. After the unit was sold at a foreclosure sale, the referee handling the foreclosure recommended that the \$16,000 be paid to the Condominium from surplus proceeds of the sale. The Appellate Division found, however, that the Condominium had never perfected its lien by filing it with the appropriate recording officer. Therefore, the Condominium had no right to distribution of any surplus funds from the foreclosure, and since the bank had been paid in full, the surplus funds were to be turned over to the unit owner.

The Condominium should still have the right to bring an independent action against the unit owner, but given the legal fees and collection costs involved, doing so might be cost-prohibitive. This case is a reminder to Condominium Boards of Managers to keep abreast of arrears in unit owners' payment of their common charges and to take appropriate action when unit owners fall delinquent, especially if it is known that the unit may be in the process of foreclosure.