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# CLIENT ADVISORY

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JULY 2006

## GANFER & SHORE, LLP WELCOMES RICHARD A. KRAUSS

Ganfer & Shore, LLP is pleased to announce that **Richard A. Krauss**, formerly senior partner of Friedman, Krauss & Zlotolow, has become a member of the Firm effective July 1, 2006 and will continue his practice of real estate, cooperative, and condominium law.

Mr. Krauss has more than forty years of experience as a real estate lawyer handling both residential and commercial transactions and development. He has extensive experience in cooperative and condominium law, including the representation of developers, boards, shareholders, tenants, and homeowners associations. He has lectured regularly on cooperative and condominium law throughout New York State, including for the New York State Bar Association and the Federation of New York Housing Cooperatives. Mr. Krauss also enjoys extensive experience in numerous other aspects of real estate law. He has negotiated many complex commercial leases and has represented builders in connection with projects ranging from single-family homes to large condominium developments. Mr. Krauss also has a wide range of experience representing clients in the fields of land acquisition, site development and in joint ventures. He is joining Ganfer & Shore, LLP with four other former Friedman, Krauss & Zlotolow, LLP professionals and we are pleased to welcome them.

## PARTY CLAIMING ATTORNEYS' FEES UNDER LEASE PROVISION MUST ASSERT CLAIM IN INITIAL LITIGATION OR RISK LOSING IT

Many leases, including proprietary leases of cooperative apartments, contain provisions concerning attorneys' fees. For example, many leases provide that in the event of litigation between the parties, the successful party will be entitled to recover reasonable attorneys' fees. Similarly, proprietary leases typically provide for the Cooperative to recover attorneys' fees incurred in litigation caused by a shareholder's default of obligations under the lease.

In two recent cases, the Appellate Division has held that a claim for attorneys' fees under this type of "prevailing party" clause must be asserted in the initial litigation between the parties, rather than in a later litigation. In 67-25 Dartmouth Street Corp. v. Syllman, 2006 WL 1413556, 2006 N.Y. Slip Op. 4068 (App. Div. 2d Dep't May 23, 2006), a cooperative shareholder-tenant sued the Cooperative for allegedly acting in bad faith in refusing to approve a sublet. The earlier proceeding was dismissed because the shareholder failed to establish that she had suffered any damages as a result of the refusal. The Cooperative then brought a second litigation, suing the shareholder to recover the legal fees it had incurred in the first case. The Appellate Division held that this was impermissible and dismissed the Cooperative's claim, on the ground that determining whether the shareholder was in default under the proprietary lease would require the court to revisit the same issues that had been raised in the prior litigation. The court's view was that if the Board wanted to raise a claim for attorneys' fees, it should have done so as a Counterclaim in the original suit.

A converse situation, but with the same result, was reached in O'Connell v. 1205-15 First Avenue Assocs., LLC, 28 A.D.3d 233, 813 N.Y.S.2d 378 (1st Dep't Apr. 6, 2006). In that case, a landlord sued a tenant on various causes of action. The landlord later withdrew some of its causes of action and the court dismissed the rest. The tenant then brought a new lawsuit demanding

reimbursement of his attorneys' fees, pursuant to the lease. The Appellate Division affirmed a decision dismissing this claim, because "the prohibition against the splitting of causes of action required plaintiff to seek attorneys' fees within the action in which they were incurred, not a subsequent action."

It should be noted that in other cases, the courts have entertained claims for attorneys' fees incurred in prior litigation, so the scope of the rule discussed above is not completely clear. Nonetheless, prudence dictates that a party to litigation that might entitle that party to recover attorneys' fees under a clause in the applicable lease, should assert a claim or counterclaim to preserve its right to recover such fees at the earliest possible time.

### **BOARD PRESIDENT LACKS AUTHORITY TO BORROW MONEY FOR BUILDING WITHOUT BOARD APPROVAL**

Although the position of Board President of a cooperative or condominium is an important one, a President's authority did not extend to borrowing money or entering into a loan transaction on his Cooperative's behalf, according to the Appellate Division's decision in **56 East 87th Street Units Corp. v. Kingsland Group, 815 N.Y.S.2d 576 (App. Div. 1st Dep't June 6, 2006)**.

In this case, the President of a cooperative board borrowed money from a commercial lender, purportedly on behalf of the Cooperative, but diverted the funds to a corporation owned by the President's wife. The court determined that the Cooperative was not liable for the funds, because the Cooperative's "President lacked authority to enter into the . . . loan transaction with [the lenders] on [the Cooperative's] behalf. The bylaws, and [the Cooperative's] own past practice, make it clear that the president required board authorization to enter into such transactions. There was no such authorization for this transaction." The court also found that the lenders had not pointed to any action or statement by the Cooperative that could have conferred borrowing authority on the President. This case illustrates the importance of well-written Bylaws setting forth the scope of the officers' authority to act in the absence of formal Board action or approval.

### **BOARD'S FINE OF UNIT OWNER FOR HOLDING GARAGE SALE VOIDED AS UNAUTHORIZED BY CONDOMINIUM BYLAWS**

In another case illustrating the importance of anticipating potential problems in a condominium's or cooperative's bylaws, a fine levied by a homeowners' association board on a unit owner for holding a two-day garage sale was set aside by the court in **Blumberg v. Albococco, 2006 WL 1622485, 2006 N.Y. Slip Op. 26228 (Sup. Ct. Nassau Co. June 13, 2006)**. The court held that there was no evidence that the garage sale violated provisions of the Condominium Declaration and Bylaws that generally prohibited any activities constituting a "nuisance" or "annoyance" to the other unit owners, because there was no showing that the garage sale "substantially inconvenienced" other residents or caused them economic damage.

The court opined that if the Condominium had adopted a bylaw or house rule prohibiting garage sales and authorizing the Board to fine violators, this restriction would be valid under the business-judgment rule and would be enforceable. However, no such Bylaw was in effect at the time of the garage sale in question. The court therefore set aside the fine imposed on the unit owner and enjoined the Board from trying to collect it.