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# CLIENT ADVISORY

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JUNE 2008

## GANFER & SHORE, LLP WELCOMES DAVID M. PERLMUTTER

Ganfer & Shore, LLP is pleased to announce that David M. Perlmutter, Esq. has joined the Firm as a partner effective June 1, 2008. Mr. Perlmutter brings to Ganfer & Shore more than forty years of experience in commercial transactions and corporate work and litigation for private and public companies. Among others, he has represented real estate lessors, lenders, factors, depositors and investors in mutual savings banks, wine and spirit makers and promoters, and individuals employed in selling and trading credit derivatives. He is also long-time general counsel for the New York Design Center. He is a 1964 graduate of Columbia Law School and has an undergraduate degree in accounting from Hunter College. We welcome David and his clients to the Firm.

## FLIP TAX ADOPTED WITHOUT REQUIRED SHAREHOLDER APPROVAL HELD INVALID

Many cooperatives charge their shareholders a fee, known as a "flip tax," on any sale of cooperative shares. These fees can be substantial and contribute significantly to the revenues of many cooperatives. It is well-settled that flip taxes are valid, but only when they are enacted pursuant to the legal requirements of a cooperative's governing documents. Failure to follow the required procedures led to the invalidation of a 2.5% flip tax in Pello v. 425 E. 50 Owners Corp., 19 Misc. 3d 1125(A), 2008 WL 1869651, 2008 N.Y. Slip Op. 50849(U) (Sup. Ct. N.Y. Co. Mar. 31, 2008).

In this case, a shareholder sued to invalidate her cooperative's flip tax, contending that it had not been validly adopted. At the outset, the court noted that flip taxes are valid where they are duly adopted in accordance with a cooperative's governing documents. Here, nothing in the original offering plan, by-laws, or proprietary lease authorized the Board to impose a flip tax. While the By-Laws authorized the Board to charge a fee on transfers "to cover actual expenses and attorneys' fees of the Corporation, a service fee of the Corporation and such other conditions as it may determine," the court held that this did not authorize the Cooperative to charge a flip tax, as opposed to requiring reimbursement for its expenses relating to the transfer.

The Cooperative contended that it had amended its By-Laws in 2005 to provide for a flip tax, but the court found that no such amendment had been validly adopted. The By-Laws required that all amendments must be approved by a two-thirds shareholder vote, yet the court found that the shareholders had not adopted any amendment by any vote. No meeting of the shareholders had taken place at which an amendment was voted upon, nor was notice of the meeting waived by written consent. The Cooperative next contended that the Board President had spoken with all shareholders in the seven-unit building when the amendment was being considered and all of the shareholders, including plaintiff, had stated they supported the amendment. Plaintiff disputed whether this had occurred, but the court held that even if it had, such a procedure was insufficient. Although many

small buildings are run informally, the court opined that this is not acceptable in the context of a flip tax. Rather, “[w]hen notice to the shareholders is required, failure to provide such notice to all shareholders, even in a small building such as the one at issue here, will nullify a vote to institute a flip tax even when it was approved by more than the requisite number of shares.”

The court also rejected an alternative argument that the Board had validly amended the By-Laws itself, without shareholder action. The Court found insufficient evidence that such an amendment had actually been adopted by the Board at a meeting. But even if the Board had amended the By-Laws without a shareholder vote so as to authorize a flip tax, the court held that this would be invalid because an amendment to the proprietary lease could only be amended by vote of two-thirds of the shares. Although the provisions governing amendments to the various documents contained an “apparent contradiction” as to what approvals were required to institute a flip tax, the court concluded that “[w]here, as here, the threshold set by the proprietary lease is higher than that set by the bylaws, the board cannot by mere resolution . . . vest itself with the authority to impose a flip tax.”

The court rejected an argument that plaintiff had acquiesced in the flip tax by never raising any questions about it in the two years since it had allegedly been adopted. Instead, the court held that the invalid flip tax was void *ab initio*, directed that the Cooperative not charge plaintiff the flip tax, and observed that the Board would be liable for any damages plaintiff might have suffered because his sale of his apartment had been disapproved when she refused to pay the tax. In light of this and other precedents construing the requirements for adopting flip taxes strictly, cooperatives should review their governing documents and minutes to ensure that their flip tax policies were properly adopted and that full documentation is available in the event of a challenge to the tax.

### **LANDLORD MAY HAVE ASSUMED ENHANCED DUTY TO PROTECT TENANTS BY INSTALLING SECURITY CAMERAS**

Many property owners have installed security cameras in an effort to combat crime and vandalism. However, by installing cameras, owners may induce their tenants to rely on the cameras to provide enhanced security, increasing the likelihood that a court will hold the owner liable should a tenant be victimized by crime. **Benitez v. Whitehall Apartments Co.**, 19 Misc. 3d 1120(A), 2008 WL 1744268, 2008 N.Y. Slip Op. 50779(U) (Sup. Ct. N.Y. Co. Apr. 15, 2008).

The plaintiff in this case was a residential tenant who was sexually assaulted by an intruder in the elevator of her apartment building. She sued the landlord and the managing agent for negligence. The court dismissed the suit insofar as it was based upon traditional theories of negligence, because the door locks were fully operational and the landlord had provided at least “minimal security measures for the premises.” However, the opposite conclusion was reached with respect to plaintiff’s claim based upon allegedly non-functional security cameras. Several years earlier, the landlord had installed cameras throughout the building, including a camera in the elevator, which the landlord explained was installed for the purpose of determining who had been vandalizing the elevator. Based on the limited history of criminal activity in the building, the court held that the assault in the elevator was unforeseeable and that the landlord would have had no liability had it never installed security cameras at all. However, the tenant argued that the landlord did provide the cameras and that building personnel had assured her that someone would always be monitoring them, thereby “lull[ing her] into a false sense of security.” The court held that this allegation was sufficient to raise an issue of fact as to whether the landlord had assumed an obligation to maintain and monitor the security cameras because tenants would rely upon them to provide enhanced security in the building.