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# CLIENT ADVISORY

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## **CONDOMINIUM BOARD LACKS STANDING TO OPPOSE FORECLOSURE ON INDIVIDUAL UNITS, COURT HOLDS**

A Condominium Board of Managers lacks standing to oppose a lender's foreclosing on individual units within the Condominium, according to Deutsche Bank National Trust Co. v. Ezagui, 2009 WL 1332743, 2009 N.Y. Slip Op. 50931 (Sup. Ct. Kings Co. May 8, 2009).

In this case, the plaintiff bank moved to foreclose on several units in a condominium building. The bank named the Board of Managers of the Condominium as a defendant in the foreclosure action, for the purpose of establishing that the bank's mortgage would be paid before any maintenance or common charges levied by the Condominium. The Board of Managers then moved to dismiss the foreclosure action, purportedly acting on behalf of the owners of the equity in the individual units that were being foreclosed upon.

The court held that the Condominium had no standing to oppose foreclosure on behalf of its unit owners. Under the Real Property Law, a condominium board of managers is empowered to pursue litigation on behalf of unit owners only "with respect to common areas or more than one unit." Here, "[a]lthough more than one unit [was] in foreclosure, each foreclosure is a unique action against a specific unit for a discrete sum. . . . Each unit will be sold as a distinct parcel at auction and not as part of a group of units. Consequently, each foreclosure action does not involve more than one unit."

## **CONDOMINIUM OWNERS MUST ALLOW ACCESS FOR BOARD OF MANAGERS TO REPLACE TERRACE WINDOWS**

An injunction requiring the owners of a penthouse condominium unit to allow employees of the Board of Managers access to their apartment for the purpose of replacing the windows has been upheld on appeal. Board of Managers of Bond Parc Condominium v. Broxmeyer, 2009 WL 1478491, 2009 N.Y. Slip Op. 4177 (App. Div. 2d Dep't May 26, 2009).

The sponsor of the Condominium had installed windows on the "terrace walls" of four terraces appurtenant to the penthouse units, for the purpose of protecting those units and the units below them from water damage and bird droppings. In 2006, the Board of Managers undertook a façade restoration and renovation project. This project necessitated removing the existing terrace windows while the work was conducted and installing new windows once the project was finished. The owners of the penthouse units allowed access for the purpose of removing the windows, but the owners of one unit stated that they preferred to leave their terrace "open" and would not allow access so the replacement windows could be installed.

The court granted an injunction compelling the owners to grant access so that the new windows could be installed. The governing documents defined the terraces as common elements of the Condominium, even though their use was irrevocably restricted to the owners of the adjoining units. As such, the terraces were subject to the Board of Managers' right under the Condominium Declaration to enter the area for purposes of maintenance, repair, or improvement.

**LANDLORD BITTEN: TENANT RECOVERS DAMAGES FOR BEDBUG INFESTATION**

In a series of cases, New York courts have granted relief to tenants whose apartments have suffered from bedbug infestation. Some tenants have been awarded rent abatements based on a conclusion that the landlord's failure to resolve bedbug problems violated the warranty of habitability that forms a part of every residential lease. More recently, a court has awarded a tenant-shareholder of a cooperative monetary damages for out-of-pocket expenses caused by bedbugs in her apartment. **Zayas v. Franklin Plaza**, 23 Misc. 3d 1104, 2009 WL 909664 (Civil Ct. N.Y. Co. Apr. 6, 2009).

The tenant-shareholder in this case alleged that in 2007, she notified the building management that the building and her apartment were plagued by bedbugs, but that an employee told her there was nothing the building could do. The tenant then hired her own exterminators who used their best efforts to address the problem in the apartment, but the bedbugs kept returning from neighboring apartments. As a result, she had to discard some of her personal property and required medical treatment. The Cooperative's position was that tenant-shareholders were responsible for remedying bedbug problems in their individual apartments and that a letter from the Department of Housing Preservation and Development confirmed that this was the tenant-shareholders' responsibility.

The court found the Cooperative liable. It noted that "[g]enerally, a shareholder of a cooperative is responsible for maintaining the apartment in good repair and would be responsible for extermination within the apartment." However, in this case, there was "credible and undisputed testimony that there was building-wide bedbug infestation." That condition constituted a violation of the Cooperative's duty, as landlord, to maintain the premises in good repair, rendering the Cooperative liable for the damages caused by the bedbug infestation.

**COURT ORDERS TRIAL ON WHETHER COOPERATIVE OR SHAREHOLDER IS RESPONSIBLE FOR ROOF LEAKS**

Whether a cooperative or the tenant-shareholders of one of the cooperative units is responsible for a series of water leaks causing damage to the unit will be decided at a trial, as directed by the decision in **Loss v. 407-413 Owners Corp.**, N.Y.L.J. Apr. 1, 2009, p. 30, col. 3 (Sup. Ct. N.Y. Co. Mar. 24, 2009).

The tenant-shareholders of a unit on the top floor of the building allege that they experienced leaks over a long period of time, which sometimes were so severe that "industrial-size trash cans" were needed to catch the falling water. Architects brought in to inspect the premises were unable to isolate the cause of the leaks, which they suggested might be caused by the skylight in the unit's bathroom or by decking on the adjoining penthouse. Various tests and repairs made in 2006 failed to stop the leaks, which the shareholders alleged were leading to mold contamination in the unit. The shareholders then sued the Cooperative on various theories including breach of the proprietary lease, breach of fiduciary duty, nuisance, trespass, and breach of the warranty of habitability.

Plaintiffs moved for summary judgment holding the Cooperative and its individual board members liable, but the court held that it could not determine the source of the leaks based on the record before it. This issue needed to be resolved before the Court could determine whether making repairs to stop the leaks was the responsibility of the Cooperative or that of the tenant-shareholders. The court's decision also suggested that the claims against the individual board members would fail, because there was no showing of self-dealing, fraud, or other acts that would overcome the protections of the business judgment rule.