
CLIENT ADVISORY

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COURT UPHOLDS SHAREHOLDER'S EJECTION FROM COOPERATIVE FOR OBJECTIONABLE CONDUCT BASED PRIMARILY ON HISTORY OF LITIGATION

In 40 West 67th Street Corp. v. Pullman 100 N.Y.2d 147 (2003), New York's highest court upheld a cooperative's right to oust a shareholder from a cooperative apartment for "objectionable conduct," and held that such a decision is entitled to the favorable presumption of the business judgment rule. Since Pullman was decided, we have reported on a number of cases in which cooperatives' decisions to take such action have been upheld. (Please see the June 2003, February 2005, and September 2005 issues of this Client Advisory.)

The most recent in this line of cases is 1050 Tenants Corp. v. Lapidus, N.Y.L.J. May 15, 2006, p. 18, col. 1 (Sup. Ct. N.Y. Co.), upholding the termination of a shareholder's proprietary lease as the "culmination of almost twelve years of constant litigation" between the shareholder and the cooperative. The prior litigation included at least six non-payment proceedings brought after the shareholder repeatedly withheld maintenance, in which the cooperative generally prevailed. Another prior litigation involved the shareholder's improper installation of an air conditioning system that caused damage to another apartment, resulting in the shareholder's being held in contempt of court for failing to comply with a stipulation to disconnect the air conditioners. The courts in these cases opined that the shareholder had acted with "obduracy" and had engaged in excessive and unnecessary motion practice, causing the cooperative to incur hundreds of thousands of dollars in legal fees.

The board of directors and the shareholders voted to terminate the shareholder's proprietary lease for "objectionable and undesirable conduct," pursuant to a bylaw provision authorizing such action to be taken by the affirmative vote of at least four-fifths of the directors and the holders of at least two-thirds of the shares. The shareholder's attorney appeared before both the board and the shareholders. When the shareholder refused to vacate, the board brought an ejection proceeding that put the validity of the termination into issue.

The court upheld the termination and rejected all of the shareholder's challenges to it. First, the shareholder argued that the termination was unauthorized because his conduct was "not the type of undesirable conduct" specified as grounds for terminating a tenancy under the proprietary lease. The court held that nothing in the bylaws or the proprietary lease limited the types of objectionable conduct that could be considered. The types of misconduct described in the lease were only examples of objectionable conduct rather than a definition of it.

Second, rejecting defendants' argument based on the public policy favoring access to the courts to redress uninhabitable conditions, the court found that "defendants have not cited any authority which suggests it is against public policy for a coop to determine that a shareholder's tenancy should be terminated as undesirable where, over a twelve-year period, the shareholder refused to remove a nuisance, repeatedly withheld rent without legal justification, and caused the coop to engage in almost constant litigation." Third, the court held that a board vote to indemnify shareholders voting in favor of the termination in any resulting litigation was permissible and did not violate the statutory prohibition against "selling votes." Finally, the court found no evidence that the cooperative had acted in bad faith. Accordingly, the court sustained and enforced the termination.

TWO RECENT DECISIONS LIMIT INDIVIDUAL OWNER'S OR TENANT'S RIGHT TO SUE TO ENFORCE BYLAWS

Every condominium unit owner or cooperative shareholder should be familiar with the bylaws that govern his or her building. In addition to providing for the building's governance and finances, the bylaws often impose certain obligations on the unit owners or shareholders.

However, the recent appellate decision in Golub v. Simon, 814 N.Y.S.2d 61 (App. Div. 1st Dep't Apr. 20, 2006), rejected a condominium unit owner's attempt to sue another unit owner for an alleged bylaw violation. The court held that "[p]laintiff's perception that the condominium's bylaws had been violated by defendants, owners of a condominium unit neighboring that of plaintiff, was insufficient to give rise to a private right of action."

A related issue was addressed in Magno Sound, Inc. v. 729 Acquisition LLC, 2006 WL 1320620 (Sup. Ct. N.Y. Co. Apr. 20, 2006), in which a tenant occupying a condominium unit contended that construction in the building's other unit violated bylaws prohibiting nuisances in the building or interference with the peaceful possession and use of another unit. The court observed that "[t]he problem with plaintiff's reliance on these provisions is that under the by-laws and under the real property law, it lacks standing to invoke or enforce them. Under ... the by-laws, only a unit owner is given the right to bring a legal proceeding to enjoin a violation of any by-law.... Since plaintiff is only a tenant of a unit owner, it is unable to enforce these provisions."

Although Magno Sound rejected a *tenant's* attempt to sue to enforce a bylaw provision, this decision, unlike Golub, suggests that an aggrieved unit *owner* would have standing to sue under that building's bylaws. The Magno Sound court cited N.Y. Real Property Law § 339-j, which provides that an action to enforce bylaws or rules made under them may be maintained "by the board of managers on behalf of the unit owners or, in a proper case, by an aggrieved unit owner." The statute does not explain what is "a proper case" in which an individual owner will be allowed to sue to enjoin a bylaw violation. Provisions of the bylaws themselves regarding how and by whom the bylaws are to be enforced would receive great weight in this determination.

NAMING INCORRECT ENTITY ON INSURANCE POLICY CAN FORFEIT COVERAGE

In our litigious age, almost all property and business owners are aware of the need for a comprehensive insurance coverage program. However, in addition to providing sufficient coverage, the insurance policy must also name the correct business entity as the insured or as an additional insured. An error in this regard can lead to a loss of the insurance coverage, as occurred in Pendill v. Furry Paws, Inc., 2006 WL 1390451 (App. Div. 1st Dep't May 23, 2006). In that case, a store's insurance carrier denied coverage on a claim. The court agreed with the carrier that the claim had been filed too late, but added that "[i]n any event, ... there would be no coverage because the store's lease was held and the store was operated by a corporation not listed in the policy as an insured or additional insured. It makes no difference ... that all of this corporation's stock is owned by the same individual who owns all of the stock of the corporations that are so listed." The case is a reminder to make sure that all insurance policies are issued in the name of the correct insureds or at least list them as additional insureds.