GANFER & SHORE, LLP
CLIENT ADVISORY
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ALL SHAREHOLDERS ARE ENTITLED TO NOTICE

In Seif v. 72 Horatio Street Owners Corp. (NYLJ, 2/6/02, p. 17, col. 2), the cooperative corporation ("Cooperative") attempted to adopt a flip tax upon the sale of apartments by deceased shareholders. A shareholder had passed away on February 1, 2000. The Cooperative held a special meeting of shareholders on March 31, 2000, and adopted the flip tax. When the deceased shareholder's estate sold the apartment for $1,700,000, the Cooperative sought a flip tax of $51,000. The executor paid the flip tax under protest and commenced an action challenging the flip tax.

Justice Herman Cahn examined the Cooperative's by-laws to determine whether the special meeting had been properly called. The by-laws required that notice be served on each shareholder, either personally or by mail. The parties acknowledged that notice had merely been posted on the building's bulletin board, where, according to the Cooperative, residents were certain to see it. No separate notice was sent to shareholders. As a result, the court held that the Cooperative had violated its own by-laws. The court recognized that, as a practical matter, notice of a meeting placed on a bulletin board may normally be sufficient to give resident shareholders actual notice of a meeting. However, where the Cooperative knew that the executor of the deceased shareholder's estate did not reside in the building, they also should have known that the executor would not receive notice by its mere posting. The proper practice would have been for the Cooperative to give the executor either a formal notice of the meeting and have the executor acknowledge its receipt, or have the executor receive an informal notice and waive any objection to formal notice under the by-laws. The court overturned the flip tax and required the Cooperative to refund $51,000 to the Estate.

The Cooperative also claimed that even if the executor had been personally served with notice and voted the Estate's shares against the flip tax, sufficient votes had been cast at the meeting to pass the measure. Justice Cahn rejected that argument stating that all shareholders, whether in the majority or minority, have the right to appear at meetings and be heard before there is a vote on vital issues such as flip taxes. The court also strongly reminded the board of its fiduciary duty to all shareholders to require that all shareholders be treated equally and that the corporate affairs be managed fairly. The timing of the special meeting in relation to the shareholder's death, coupled with the Cooperative' admission that the flip tax was aimed at the deceased shareholder's estate, may have demonstrated a violation by this board of its legal obligations, notwithstanding the fact that the measure applied to all shareholders.

DISCOVERY SEEMS INEVITABLE

In Steele v. 400 East 77th Street Corp. (NYLJ, 1/30/02, p. 17, col. 2), a cooperative corporation rejected a purchase application from a husband and wife (the "Plaintiffs"). The wife was Hispanic and the husband was African American. Plaintiffs claimed that the board of directors of 400 East 77th

Street Corp. (the "Board") rejected their application based upon their race and national origin in violation of various statutes including the Civil Rights Law, 42 U.S.C. 1982 and the Fair Housing Act, 42 U.S.C. 3604. The Board responded with specific details regarding Plaintiffs' rejection including their insufficient combined income, the lack of clarity of their applications, their credit card history and debt, and outstanding student loan debt. Believing that it had sufficiently demonstrated lawful reasons for the rejection, the Board moved to dismiss the Plaintiffs' complaint before depositions of the board members had been taken. Notwithstanding that the Board had set forth (a) its procedures for review of applications; (b) the standards applied when considering applications; (c) details of the review and consideration given to these Plaintiffs' application; and (d) legitimate non-discriminatory reasons for rejecting Plaintiffs' application, the court refused to dismiss the Plaintiffs' claims. The court held that whether the Board's stated reasons for rejecting the Plaintiffs were valid, or just a pretext for prohibited discriminatory conduct, was a question of fact for a jury requiring the parties to proceed with further discovery including depositions, permitting the Board's counsel leave to renew its motion after the completion of all discovery.

The Plaintiffs merely alleged that this Board had acted unlawfully based solely upon their race, without alleging any overt act, statement or even gesture to support their allegations. Despite the significant efforts of this Board to demonstrate the lawful basis for its rejection, the court effectively held that the mere allegation of discriminatory conduct was sufficient to permit the Plaintiffs to conduct discovery. Thus, boards should be prepared for lengthy battles in discrimination cases.

A QUICK CAUTIONARY TALE REGARDING INSURANCE POLICIES

In light of a position recently taken by a client's insurance carrier, we recommend that our clients determine whether their present hazard insurance policy is either a "claims made" policy or a "claims made and reported" policy. A claim was made near the expiration date of a "claims made and reported" policy. The insured reported the claim to its insurance broker. However, the broker reported the claim to the carrier after the policy had expired. The insurer is now trying to disclaim coverage claiming that reporting a claim to an insurance broker, as opposed to an insurance agent, is insufficient notice to a carrier. Thus, to be prudent, report your claim directly to the carrier. Delay or failure by your broker in reporting a claim may jeopardize your insurance coverage.

THE NEW RESIDENTIAL PROPERTY CONDITION DISCLOSURE STATEMENT

Effective March 1, 2002, sellers of one-to-four family residential homes in New York State must cause a Property Condition Disclosure Statement ("PCDS") to be delivered to the buyer or buyer's agent prior to the signing of a contract. **The new statute does not apply to transactions involving cooperatives, condominiums, vacant land or property in homeowner's associations.** In the event that a Seller fails to provide the PCDS to the buyer, the Buyer is entitled to a $500 credit from the Seller at closing. The PCDS is intended to inform buyer of conditions concerning the home that are within the actual knowledge of the Seller. The PCDS contains questions regarding environmental, structural, and mechanical aspects of the home. If you would like a copy of the form, please do not hesitate to contact us.