

CLIENT ADVISORY

MARCH 2005

TRIAL REQUIRED ON WHETHER BOARD MUST ALLOW SHAREHOLDER WITH A DISABILITY TO INSTALL MODIFIED WINDOWS

Proprietary leases and cooperative or condominium bylaws in many residential buildings require board approval before a shareholder may make alterations in his or her apartment. Board decisions on these issues are generally entitled to deference under the business judgment rule, meaning that a board's decision to reject a proposed alteration will stand if it is made for purposes of the cooperative or condominium, in good faith, and not contrary to an express provision of the proprietary lease or bylaws. However, when a disabled resident seeks approval of an alteration for the purpose of adapting the premises to the resident's handicapping condition, the board must also ensure that it complies with its obligations under federal, state, and city anti-discrimination and human rights laws.

In Dominus v. 250 Tenants' Corp., Index No. 102853/2003 (Sup. Ct., N.Y. Co. July 9, 2004), the plaintiff shareholder-resident suffered from multiple sclerosis (MS). The condition seriously affected her strength and balance, and was medically projected to worsen in the future. Asserting that her MS made it impossible for her to open and close the existing double-hung windows in her apartment, the shareholder requested board approval to install, at her own expense, crank-operated casement windows in their place. The board denied the request on the ground that casement windows "were not in keeping with the style of windows presently in the building and were not recommended by the Co-op's engineers." Instead, the board suggested certain adaptive devices that could be fitted to the existing double-hung windows to make them easier to operate. Plaintiff contended that these devices were unsuited to her needs for various reasons, including that they could not easily be used near radiators, were incompatible with air conditioning units already installed in the windows, would allow the window to be opened only part-way and restrict ventilation, and would violate fire safety regulations.

After the shareholder was unable to resolve the issue with the board, she sued the cooperative and its management company, asserting claims under the federal Fair Housing Act and the New York State and New York City Human Rights Laws. As described by the court, under these statutes "it is unlawful for co-ops and managing agents to refuse to make reasonable accommodations to afford a handicapped person equal opportunity to use and enjoy a dwelling unit." The shareholder also claimed that the cooperative had breached the proprietary lease's requirement that consent to alterations must not be unreasonably withheld, and that the board had breached the implied obligation of good faith and fair dealing under the lease. The shareholder sought, among other things, a court order permitting her to install the casement windows.

The cooperative moved for summary judgment dismissing the shareholder's complaint, contending that it had met its obligations under the disability laws by suggesting "reasonable accommodations" for the plaintiff's disability and that allowing plaintiff to install casement

windows would be an "undue hardship" on the cooperative. In denying the cooperative's motion, the court found that issues of fact existed concerning whether the casement windows proposed by plaintiff would reasonably accommodate plaintiff's disability without imposing any undue hardship on the cooperative. While not resolving the issue, the court's decision appears skeptical of the board's undue hardship claim, noting that the building's existing windows were already of non-uniform appearance, and that the board's argument that casement windows were expensive was unsupported where the shareholder had offered to purchase and install the windows at her own expense. The court also found that factual issues existed concerning whether the alternatives proposed by the board were a reasonable accommodation of the shareholder's disabling condition and whether the board had violated a "not unreasonably withheld" provision contained in this particular proprietary lease (a provision that many other leases do not contain).

The court's denial of the cooperative's motion for summary judgment means that the case will go to trial concerning the reasonableness of the board's actions. The court also denied the cooperative's motion to dismiss claims by the disabled shareholder's husband, holding that even though the husband was not himself disabled, he had standing to sue under the disability laws because he was adversely affected by the alleged denial of reasonable accommodation to his wife, with whom he shared the apartment. The court did, however, grant a motion to dismiss the managing agent from the case, finding that it had played no significant role in denying the shareholder's request to install the casement windows.

DISMISSAL OF CHALLENGES TO CITY'S NEW LEAD PAINT LAW UPHELD

We previously reported the enactment of the New York City Childhood Lead Paint Poisoning Prevention Act, Local Law 1 of 2004, which took effect on August 2, 2004, and on the applicability of its provisions to cooperatives and condominiums under certain circumstances. We also previously reported that a New York trial court had dismissed an action challenging the validity of the new local law based on its allegedly failing to comply with state environmental statutes. Please see our March 2004 and October 2004 issues of this Client Advisory.

On February 3, 2005, the Appellate Division, First Department, affirmed the dismissal of two litigations seeking to set aside the Lead Paint Law. **Matter of Rent Stabilization Association of New York City v. Miller, 2005 NY Slip Op 00657, 2005 WL 249405 (1st Dep't Feb. 3, 2005); Matter of Community Preservation Corp. v. Miller, 2005 NY Slip Op 00656, 788 N.Y.S.2d 609 (1st Dep't Feb. 3, 2005).** The appellate court held that both petitioner organizations lacked standing to challenge the local law, that the claim that their members would suffer environmental harm from the lead paint regulations was speculative, and that a presumption contained in the local law that pre-1960 buildings contain lead-based paint was rational and therefore permissible.