

CLIENT ADVISORY

MAY 2001

COOPERATIVE PENALTY FOUND UNREASONABLE

Albert and Zeynep Behler are shareholders in a Manhattan Cooperative who had undertaken some renovations to their apartment, subject to the terms of a signed alteration agreement between them and the Cooperative. As a result of delays in the completion of the renovations, the Behlers were assessed penalties by the Cooperative totaling approximately \$32,000. The Behlers sued the Cooperative seeking a declaration that the penalty was unlawful, null and void. In a decision entitled Behler v. Ten Eighty Apartment Corp. (NYLJ 4/11/01), the New York County Supreme Court held the penalty to be excessive. The Cooperative assessed a penalty on the Behlers because they did not have all of their apartment renovations completed by the completion date stipulated in the alteration agreement. The Behlers claimed, among other things, that the delay in the renovations was due in large measure to damage done to their apartment by water flooding from the apartment above theirs. Furthermore, they claimed that "there was no reasonable relationship between the delay and any costs or expenses incurred by the Cooperative Corporation." In response, the Cooperative asserted that "the fee was not created to be a penalty, but rather covers both the extra expenses and extra use of the building's facilities, as well as the extra inconveniences to the other tenants." The Court, however, ruled that the penalty provision was unenforceable because it was unreasonable and "plainly disproportionate to any real loss or expenses incurred by the Cooperative Corporation." The Court held that the Cooperative would be entitled to recover any actual damages it may have suffered as a result of the Behlers' construction delays.

SUBLESSEE CANNOT ASSIGN OPTION AFTER CONTRACT IS CANCELLED

Henry Jarecki and Shung Moo Louie had entered into a three-year sublease of a cooperative apartment. The sublease contained a provision that granted the subtenant an option to purchase the apartment for \$600,000, subject to the Cooperative Board's approval. Jarecki exercised his option to purchase and the parties entered into a contract of sale in 1998, which contained a provision prohibiting the assignment of the contract to a third party (a standard clause), and a merger clause that provided, in part: "all prior oral or written representations, understandings and agreements had between the Parties with respect to the subject matter of this Contract . . . are merged into this Contract, which alone

fully and completely expresses their agreement.” When the Board rejected Jarecki’s purchase application, Louie cancelled the contract. Jarecki, however, claimed that he had a right to assign his purchase option to a third party and commenced his litigation, alleging breach of contract, and tortious interference with prospective business and contractual relations. The court held that “none of the documents granted any continuing right to plaintiff to purchase the apartment after the cooperative board’s rejection,” nor did they establish “plaintiff’s beneficial interest in defendants’ shares.”

The Appellate Division reversed the decision, holding that “the failure of the board to grant its approval vitiated the contract of sale, which was non-assignable, but did not invalidate the option contract which remained in effect.” However, in Jarecki v. Louie, N.Y. slip op. 01479, 745 N.E.2d 1006, 722 N.Y.S.2d 784 (2001), the Court of Appeals disagreed with the Appellate Division, and held that “because the terms of the purchase agreement were merged and integrated into the written contract of sale, the bilateral contract to purchase the apartment was terminated when the contract of sale was cancelled.” Thus, once the option was turned into a binding contract of sale, the option was “merged” into the contract, and as the contract was terminated, the option did not survive.

SERVICE OF PROCESS ON DEAD TENANT HELD VOID

A landlord, who thought it was legal to serve an eviction notice on a deceased tenant, found out he was wrong. In April 2000, 1111 Realty Associates (“Landlord”) apparently attempted to serve process under that misapprehension when he commenced eviction proceedings to recover possession of an apartment owned by the Estate of Ben Gotbetter, a deceased tenant, in a proceeding entitled, 1111 Realty Assoc. v. “Doe”. The Landlord served the notices via the “nail and mail” method, claiming that such service of process was appropriate because the apartment was vacant and there was no evidence that anyone had been occupying it. The Landlord then rented the apartment to another party. The Estate moved to vacate the eviction judgement, alleging that the tenant of record, Gotbetter, was dead and that the Landlord and its counsel were aware of that and knew the identity and address of the Estate’s representative and counsel, Howard Gotbetter. In opposition, the Landlord claimed that “the Estate failed to join a necessary party, i.e. the current occupant of the apartment” and waited too long to make the motion.

The Court stated that the law provides that a “decendent’s estate is a necessary party to any summary proceeding to recover a deceased tenant’s premises.” Furthermore, it explained that any unexpired leasehold interest of a deceased tenant belongs to the estate and does not automatically belong to the lessor, because “the estate, not the landlord, is the sole party entitled to possession of the premises for the balance of the lease.” Here, the Court observed that the Landlord knew that the tenant, upon whom the eviction papers were served, could not respond. As such, the Court decided in favor of the Estate and granted its motion to vacate the eviction.