

CLIENT ADVISORY

MAY 2002

PANEL DISCUSSION ON MOLD AND RELATED ISSUES

Ganfer & Shore, LLP will be hosting another seminar in our series of breakfast panel discussions addressing mold and related issues that, we believe, are of significant interest to cooperatives, condominiums and real estate owners. This discussion will be held on Wednesday, May 15, 2002, from 8:00 A.M. to 9:30 A.M., on the Conference Floor of the New York Grand Hyatt Hotel, at the corner of 42nd Street and Lexington Avenue. The panelists will be Steven R. Ganfer, Esq. of Ganfer & Shore, LLP; Arnold Fleming of Allee King Rosen & Fleming, Inc.; and James Hiller of LZA Technology. If you plan to attend, please either call Amarilys Garcia of our office at 212-922-9250, ext. 262, or send a confirming e-mail to her at agarcia@ganshore.com on or before May 13, 2002. **Please note that, at the hotel's request, the room for our seminar has been changed to the Alvin Carnegie Room, also on the Conference Floor of the New York Grand Hyatt Hotel.**

REVIEW YOUR MANAGEMENT AGREEMENT

The financial exposure of building owners, including cooperative corporations and condominiums (collectively "Owners"), is minimized by Workers' Compensation Insurance in the event that an employee is injured in the performance of their duties. The recent decision by the Appellate Division, First Department in Tushaj v. Elm Management Associates Inc., (NYLJ, 4/12/02, P. 17, col. 4), may, however, compromise the effectiveness of the limitations afforded by the Workers Compensation Law, thereby exposing Owners to a new type of financial liability.

In Tushaj, an employee of a cooperative corporation (the "Co-op"), a superintendent (the "Super"), was injured in a fall from a defective makeshift scaffold while attempting to repair a building leak. The Super sued the Co-op's managing agent (the "Agent") alleging that the Agent was negligent in failing to make repairs to the scaffold that would have prevented his injury. The Agent took the position that, in order for it to be responsible to the Co-op's employee, it would have had to have been in complete and exclusive control of the building. Since the testimony demonstrated that the Agent's authority was limited to repairs costing less than \$500, the lower court dismissed the Super's claims, finding that the Agent was not in complete and exclusive control of the building. Thus, according to the lower court, the Agent could not then be liable in negligence to the Co-op's employee for its "mere nonfeasance". The Appellate Division disagreed and reinstated the jury's verdict against the Agent. The Appellate Division found that, in addition to the fact that the Agent had complete and unfettered authority to make repairs costing under \$500 (which included the \$12 scaffold repair), the Agent had a contractual duty to inspect the property and to ensure that the building was maintained in good repair; the Super was among the limited individuals whose safety came within the scope of the Agent's contractual obligations; and the risk of the Super in this case being injured in a fall from the scaffold was foreseeable by the Agent.

The risk to Owners lies in the fact that management agreements between Owners and managing agents in the City of New York typically contain indemnification provisions that could require an Owner

to reimburse the managing agent for an award of damages to the Owner's own employee if found to arise out of the managing agent's negligence. Thus, the indemnification provisions could ultimately make the Owner responsible for a damage award to its own employee that is far in excess of a limited award available to an Owner's employee under the Workers Compensation Laws. While the application of the Tushaj case is subject to appeal, it would be prudent at this time for both Owners and managing agents to review their agreements for "control" as well as indemnification provisions, and contact us to discuss whether amendment to the agreement would be appropriate.

THE PROPRIETARY LEASE CONTROLS

It is imperative that parties review the terms of their proprietary lease (the "Lease") for direction on the resolution of disputes, since the Lease governs the rights and responsibilities of shareholders of a cooperative corporation. On May 1, 2002, the case of Mariaux v. Turtle Bay Towers Corp. (NYLJ, 5/1/02, p. 20, col. 3) reinforced the importance of consulting the Lease as it related to which shareholders ("Unit Owners") would be responsible for the cost of repairing greenhouses and terraces. There were nine (9) terraces at the building, and the costs of the repairs sought by the cooperative corporation (the "Co-op") was \$500,000, resulting in assessments against the Unit Owners of those nine (9) units ranging from \$4,633.10 to \$122,204.51. In light of the large expense, it is not surprising that the Unit Owners brought suit seeking to stop the repairs and the assessments, or alternatively, to require that the Co-op spread the cost of the repairs over the other 337 apartments in the Co-op.

The court's examination immediately focused upon the written language of the Lease. This particular Lease provided that the Co-op had the authority, at its expense, to keep in good repair all of the building except those portions the maintenance and repair of which were expressly stated in the Lease to be a unit owner's responsibility. Section 18 of this Lease specifically burdened the Unit Owners with the responsibility for maintaining and repairing any roof area, terrace, or greenhouse which was exclusively or substantially exclusively for the Unit Owners' use. The Co-op submitted an affidavit from the attorney who drafted the Lease, which stated that the particular language in Section 18 was inserted to address concerns that purchasers who did not benefit from the terraces and greenhouses would not want to pay for them. The attorney even submitted portions of the original offering plan that summarized the terms of the Lease and specifically repeated that the shareholder who had the exclusive or substantially exclusive use of a roof area, terrace or greenhouse was responsible for their maintenance and repair. The court adopted the position of the Co-op.

The question then remaining for the court was whether \$500,000 of repairs was necessary. The Unit Owners challenged the determination made by Co-op's board of directors (the "Board"), submitting estimates from other companies that were substantially cheaper. The court reviewed the evidence submitted by the Board of its proceedings and investigations, including Board minutes, cost estimates, records of ongoing work and several affidavits from the architect upon whose opinion the Board relied. The court determined that the appropriate standard of judicial review of the Board's repair decision was the "business judgment" rule, which placed the burden upon the challenger to demonstrate that the Board breached its fiduciary duty to its shareholders. The Unit Owners had alleged that the Board's repair decision was unreasonable, which allegation was insufficient to overcome the standard imposed by the business judgment rule. Thus, the court rejected the Unit Owners' challenge and granted the Co-op a judgment dismissing those portions of the Unit Owners' complaint challenging the repair decision of the Board.