
CLIENT ADVISORY

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DISCOVERY DISALLOWED IN SUMMARY PROCEEDINGS EVEN WHEN VALIDITY OF COOPERATIVE ASSESSMENT IS DISPUTED

When a tenant, including the proprietary lessee of a cooperative apartment, fails to pay rent as required, the landlord or cooperative board may commence a summary nonpayment proceeding, seeking eviction if the rent is not ultimately paid. Such proceedings are brought in the Housing Part of the New York City Civil Court, or equivalent local courts elsewhere in the State. Because summary proceedings are intended to result in a prompt adjudication and to enable a prevailing landlord to regain possession of the premises quickly and inexpensively, the ordinary disclosure devices used in other types of litigation, such as document production and depositions, are available only with permission of the court. Such permission will be granted only where a party demonstrates "special circumstances" creating "ample need" need for the requested disclosure.

When a summary proceeding is used to enforce a special assessment against a cooperative shareholder, the shareholder/lessee will sometimes seek to defend by challenging the validity or amount of the assessment. In **38-50 West 9th Street Corp. v. Cohen, Index No. 54920/05 (Civ. Ct., N.Y. Co., Housing Part, Apr. 2005)**, a cooperative brought a nonpayment proceeding against proprietary lessees who were disputing assessments billed to them. Contending that the Board had misallocated the assessments and had improperly utilized the funds raised, the lessees sought discovery regarding how the assessments had been calculated and expended, as well as concerning the calculation of interest and late charges.

The court denied the lessees' request for discovery, holding that they had failed to make the required showing of need for disclosure "inasmuch as this is not, without more, the forum to challenge the business judgment of the Coop's Board" in levying assessments. Similarly, the court held that discovery was not necessary as to the interest and late charges because the amount of such charges was also a business matter for the Board and the mathematical calculation of the charges had been set forth in the petition. While framed as a denial of leave to conduct discovery, this decision stands for the broader proposition that a summary nonpayment proceeding is not the appropriate forum for a shareholder/lessee to litigate objections to financial assessments voted by the board of directors. Ganfer & Shore, LLP represented the Cooperative in this case.

BUILDING SALE MAY BE LOST BY FAILURE TO ENSURE THAT ALL VIOLATIONS AGAINST BUILDING ARE RESOLVED

Various governmental agencies have the authority to assess violations against real property. It is the property owner's responsibility to correct the condition constituting a violation, as well as to pay any fine or assessment levied in connection with the violation. The property owner also must follow up to ensure that any necessary filings are made to document the correction, and that the official records reflect that the violation has been corrected.

Failure to file the appropriate documents in connection with correcting a violation can come back to haunt the property owner years later when it attempts to sell the property, as

occurred in Holm v. Bavis Realty Corp., 791 N.Y.S.2d 23 (App. Div. 1st Dep't Mar. 3, 2005). In this case, after entering into a contract to acquire a residential multiple dwelling, the would-be purchaser learned that the building records maintained by the Department of Housing Preservation and Development (HPD) reflected a violation for a defective fire escape, dating back to 1990. The purchaser asserted that this "rent-impairing" violation gave it the right to void the purchase contract. The owner claimed that the violation had long since been corrected and that HPD's records reflected the correction.

However, the Appellate Division noted that the owner had never filed a certificate of compliance to establish that the violation had been corrected or paid the fee required to remove the violation from HPD's records. The court found that HPD's records were ambiguous as to whether the violation was still of record, and hence that an issue remained as to whether the purchaser was excused from acquiring the building. The case reemphasizes the importance of property owners' monitoring their buildings' records and ensuring that all the appropriate steps are taken to resolve any open issues, especially before an important transaction such as a sale takes place.

BOARD MUST ESTABLISH THAT SHAREHOLDER BREACHED OBLIGATIONS BEFORE RECOVERING ITS ATTORNEYS' FEES

The bylaws of many cooperatives and condominiums provide that the Board of Directors is entitled to recover expenses it incurs as the result of a shareholder or unit-holder's violation, breach, or default of his or her obligations. Typically, these clauses authorize an award of attorneys' fees and other litigation expenses to the Board if it prevails in litigation with an owner.

In Board of Managers of the Amherst Condominium v. CC Ming (USA) Ltd Partnership, 2005 WL 851125 (App. Div. 1st Dep't Apr. 14, 2005), the Appellate Division reaffirmed that before being entitled to recover attorneys' fees, the Board must prove that the owner actually violated an obligation to the cooperative or condominium. In that case, the court held that the Board was entitled to recover legal fees it incurred in its successful suit to compel a unit-holder to pay its assessed share of renovations to the building's façade. (The court also noted that the unit-holder had waived the right to have the dispute concerning the façade arbitrated pursuant to the condominium's bylaws, by waiting more than three years after litigation was brought before invoking the arbitration clause.)

However, the court held that the Condominium had not established its right to recover additional legal fees for an earlier round of litigation with the same unit-holder. Because the earlier lawsuit had not been litigated to a final judgment, there had been no judicial finding that the unit-holder had breached any obligation to the Condominium in that case. The Appellate Division directed the lower court to determine whether such a breach had in fact occurred. The court noted that the Board had the right to impose an assessment against the unit-holder for legal fees based on the Board's own conclusion that the unit-holder was in breach, but that a court could not proceed to enforce such assessment until the unit-holder's breach was demonstrated to the court.