
CLIENT ADVISORY

MARCH 2008

**ATTORNEYS' FEE PROVISION IN PROPRIETARY LEASE NOT
APPLICABLE TO SUBLEASE ABSENT SUBLESSEE'S AGREEMENT**

Most residential leases, including proprietary leases used by cooperatives, provide for the Cooperative to recover legal fees in the event it prevails in litigation with a shareholder-tenant. When the shareholder-tenant subleases an apartment, such a provision will not automatically apply in litigation between the sublessor and sublessee, according to the decision in **Matter of Windsor Park Nursing Home (Gustaitis)**, 850 N.Y.S.2d 342 (Sup. Ct. Queens Co. Jan. 10, 2008).

In this case, the shareholder-tenant sublet his cooperative apartment to a subtenant, who failed to vacate the apartment when the sublease expired. The sublessee eventually vacated, but only after causing the sublessor to incur \$20,000 in legal fees, which he sought to recoup. The sublease contained no clause providing for the prevailing party to recover any legal fees, but the sublessor asserted that the sublessee was bound by a legal-fee clause in the proprietary lease. The sublessor's position was based on a sublease provision that "[t]his lease and [sub]lessee's leaseholder interest herein are and shall be subject, subordinate, and inferior to any liens or encumbrances, [or] the interest payable on any such extensions of such liens or encumbrances."

The court held this language to be insufficient to require the sublessee to pay legal fees because any obligation to pay legal fees under the proprietary lease was simply a contact right relating to the property, not a "lien or encumbrance." As the decision observes, "[c]ourts historically have refused to allow for recovery of attorneys' fees absent specific language requiring such payment." Here, "[t]here [was] nothing in the sub-lease that subjects [the sublessee] to the peripheral contract rights that do not run with the property."

Apart from any issue that may arise between a subleasing shareholder-tenant and the sublessee, Cooperative boards may wish to ensure that the Cooperative itself is protected from any potential liability for any attorneys' fees or other expenses arising from sublets. For example, the legal-fee clause in most proprietary leases does not cover situations where the Cooperative incurs legal expenses to respond to supplemental proceedings involving a judgment against a sublessee or as the result of the sublessee's misconduct in the building. Therefore, where a Cooperative's approval is required before a shareholder-tenant may sublet, the Cooperative may wish to require a shareholder-tenant to agree to reimburse any legal fees or expenses incurred by the Cooperative as a result of the subtenancy, as a condition of approving the sublease. More generally, Cooperatives may wish to amend their proprietary leases or take other appropriate action to broaden their rights to recover legal fees that they incur in disputes involving shareholder-tenants, because most proprietary leases include only fees arising from the shareholder-tenant's breach of the proprietary lease itself.

CONDOMINIUM UNIT OWNERS COULD SUE ENGINEER WHERE REPRESENTATIONS WERE MADE FOR BENEFIT OF FUTURE OWNERS

Alleged construction defects in condominium or cooperative buildings often lead to litigation against the architects or engineers who certified the drawings or prepared the inspection reports contained in the Offering Plan. Claims on behalf of Unit Owners against an engineer were allowed to proceed in **Bridge Street Homeowners Ass'n v. Brick Condominium Developers, LLC**, 18 Misc.3d 1128(A), 2008 WL 344136, 2008 N.Y. Slip Op. 5022 (Sup. Ct. Kings Co. Feb. 7, 2008).

In this case, the Unit Owners alleged that after they moved in, they discovered design and construction defects causing them to incur remediation expenses of more than \$18 million. Plaintiffs sued the engineering firm that had prepared the building plans and specifications and inspected the work. The court allowed a breach of contract claim against the engineer to proceed even though the engineer's contractual relationship was with the Sponsor, not with the future Unit Owners directly. It reasoned that the future Unit Owners were express third-party beneficiaries of the agreement between the Sponsor and the engineer, because the certification report stated that "[t]his certification is made for the benefit of all persons [to] whom this offer is made."

The court also upheld the pleading of a professional malpractice claim against the engineer. Finally, the court allowed a claim for fraud and misrepresentation to proceed, because the alleged misrepresentations were incorporated by reference in each Unit Owner's Purchase Agreement and all the elements of common-law fraud were pleaded.

COOPERATIVE BARRED FROM ENFORCING \$3,500 JUDGMENT BY EXECUTING ON SHAREHOLDER-TENANT'S APARTMENT

A court, addressing "a novel issue," has prohibited a Cooperative from enforcing a money judgment for attorneys' fees against a shareholder-tenant by executing against the Cooperative shares corresponding to the shareholder's apartment. **Travis v. 29-33 Convent Avenue HDFC**, N.Y.L.J. Feb. 27, 2008, p. 26, col. 1 (Sup. Ct. N.Y. Co. Jan. 31, 2008).

The Cooperative held an unpaid \$3,500 money judgment against the shareholder-tenant for attorneys' fees in a nonpayment proceeding. The judgment did not characterize the \$3,500 as "additional rent" as permitted by many leases, meaning that the lease provisions providing for remedies in the event of a shareholder-tenant's non-payment of rent were unavailable. The judgment also did not provide for an award of possession if the judgment was not paid.

The Cooperative served a notice of a non-judicial foreclosure and sale of the cooperative shares. The court granted an injunction against the sale, because the shares were protected from foreclosure by New York's property exemption statute, which exempts up to \$50,000 in the value of a debtor's residence, including cooperative shares, from execution. The Cooperative had failed to show that the debtor's equity in her unit exceeded \$50,000.

The court noted that the Cooperative retained its judgment and a lien against the apartment, implying that the Cooperative could still collect its judgment when the apartment was eventually sold, or could seek to execute against the shareholder tenant's other, non-exempt assets. The court also opined that the Cooperative should have filed a petition in court before seeking to proceed with a non-judicial sale of the shares, even if the value of the unit had exceeded \$50,000.