
CLIENT ADVISORY

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CONDOMINIUM BOARD'S AUTHORITY TO ENTER INTO CONSTRUCTION CONTRACT UPHOLD

A Condominium Board of Managers was authorized to contract for repairs and maintenance of the Condominium's property without a Unit Owner vote, according to the court decision in **Helmer v. Comito, 2009 WL 943940, 2009 N.Y. Slip Op. 2749 (App. Div. 2d Dep't Apr. 7, 2009).**

In this case, the Condominium's buildings had suffered leaks over the years, and testing revealed that toxic mold was present in one-third of the units. Inspections by architects and engineers revealed that the roofs had incurred moisture damage and were near the end of their life expectancies. The Board of Managers contracted for construction work to address these and other deficiencies. Its right to do so was challenged by some Unit Owners, who contended that the work constituted "alterations" or "improvements" and, under the By-Laws, required approval by a vote of the Unit Owners. The Board replied that the construction work did not constitute alterations or improvements, but simply "repairs" and "maintenance," for which Unit Owner approval was not required.

In siding with the Board of Managers, the court applied the business judgment rule, under which "the court's inquiry is limited to whether the Board acted within the scope of its authority under the bylaws . . . and whether the action was taken in good faith to further a legitimate interest of the condominium." The court found that the Board's decision satisfied this test. The court also noted that the Board's categorization of the work as repairs and maintenance, rather than as improvements, was supported by the local Building and Zoning Inspector's determination that the proposed scope of work was in the nature of repairs and maintenance and did not require a building permit.

PURCHASER ENTITLED TO RETURN OF DOWN PAYMENT WHERE TOWN DISALLOWED CONDOMINIUM OWNERSHIP OF PROPERTY

A purchaser contracted to acquire commercial premises located on a parcel of real property in a contract that provided that the agreement was "subject to and conditioned upon the approval of Seller's application for the construction of residential condominium units" on the remainder of the parcel. The Town Board approved the construction of seven townhouse units, "with ownership by a Homeowners' Association," but required that "the project will not be owned as a condominium or cooperative development." Was the purchaser entitled to cancel the contract and recover its down payment? Yes, answered the court in **Emanuel Development Corp. v. Spring Road LJR/NIBA Associates, LLC, 876 N.Y.S.2d 167, 2009 N.Y. Slip Op. 2746 (App Div. 2d Dep't Apr. 7, 2009).**

The purchaser contended that the condition that the seller must obtain governmental approval for the construction of "condominium units" was not satisfied by an approval that expressly precluded ownership of the units in condominium form. In response, the seller urged that "the word 'condominium' was used in the contract 'in its generic sense to describe attached housing units.'" The court disagreed, and adopted the purchaser's position that "the term 'condominium' has a legal meaning, which is defined in Article 9-B of the Real Property Law, and that there is nothing ambiguous about the use of the term."

**ELECTION OF DIRECTOR WITH SPONSOR'S SUPPORT
DID NOT GIVE SPONSOR IMPROPER VOTING CONTROL**

The Attorney General's Regulations provide that in a cooperative conversion under a non-eviction plan, the Sponsor and other owners of unsold shares are "not to exercise voting control of the Board of Directors for more than five years from closing, or whenever the unsold shares constitute less than 50% of the shares, whichever is sooner." This provision was interpreted by the court in **Kensington Terrace Apartments, LLC v. 160 Ocean Parkway Owners Corp., 2009 WL 939934, 2009 N.Y. Slip Op. 50602 (Sup. Ct. Kings Co. Apr. 6, 2009).**

The case involved a dispute concerning the composition of a Board of Directors of a Cooperative. Because the conversion had occurred more than five years earlier and a majority of the shares had been sold, the Sponsor was limited to designating three of the seven directors. In the election for the remaining four board seats, one of the successful candidates, David Edrich, was a holder of unsold shares in the Cooperative. Some board members objected to seating Edrich, arguing that the Attorney General's regulations "prohibit a class, which consists of Sponsor, its designees, and other holders of unsold shares, from collectively controlling the Board."

The court disagreed. It accepted the Sponsor's evidence that although Edrich was a holder of unsold shares and he would not have been elected to the Board without the Sponsor's votes, he had no business affiliation with the Sponsor. The court pointed to prior cases in which the term "voting control" was construed to mean the power to nominate or designate a majority of board members who "are on the sponsor's payroll or otherwise receive remuneration from the sponsor." Because Edrich did not fall into this category, he was properly elected to the Board of Directors, and the Sponsor was entitled to an injunction against actions taken by a Board that improperly excluded him.

**BUSINESS ENTITIES MUST PROVIDE UPDATED ADDRESS INFORMATION
TO SECRETARY OF STATE TO AVOID RISKING INSURANCE COVERAGE**

Most business entities in New York, including corporations, limited partnerships, limited liability partnerships, and limited liability companies, are formed by filing a certificate with the New York State Department of State. The certificate provides that in any litigation against the entity, process may be served on the Secretary of State in Albany, who then mails the papers to the address the entity designates for that purpose. This can be the address of an owner or officer, legal counsel, or another responsible person who should know what to do upon receiving litigation papers.

During a company's life, the name and address of the appropriate person to receive legal documents may change. The company may come under new ownership, elect new officers, or change its address. However, the Department of State will not know of any such changes unless it is notified. If the Department of State is not notified of changes, legal documents will be sent to the old address and may not reach the entity in a timely fashion or at all. The result can be catastrophic.

In **Briggs Avenue LLC v. Insurance Corporation of Hannover, 11 N.Y.3d 377, 870 N.Y.S.2d 841 (2008)**, the Court of Appeals addressed a situation where an LLC was sued, but the owner had moved, and the Secretary of State forwarded the summons and complaint to an outdated address. The LLC did not learn of the lawsuit until after a default judgment had already been entered. At that point, the LLC asked its insurance company to provide a defense, but the carrier successfully disclaimed coverage because it had not received timely notice. (Recent legislation, which allows somewhat greater leeway in disputes involving timeliness of notification to carriers, did not apply in this older case.) The case is a strong reminder that business owners should make sure that the contact information on file in Albany for all of their entities is current and correct.