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# CLIENT ADVISORY

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MAY 2010

## COOPERATIVE DOCUMENTS HELD AMBIGUOUS REGARDING COOPERATIVE'S ENTITLEMENT TO MAINTAIN GARDEN ON ROOF

A dispute between a tenant-shareholder and a Cooperative concerning roof rights could not be resolved based only on the Cooperative's governing documents, and will require a trial to determine the parties' intent regarding permissible uses of the roof. **Baker v. 16 Sutton Place Apartment Corp., 2010 WL 1439298, 2010 N.Y. Slip Op. 2990 (App. Div. 1st Dep't Apr. 13, 2010).**

The plaintiffs in this case were the tenant-shareholders of a penthouse apartment in the Cooperative. The apartment is located on the building's "lower roof," while the upper roof overlooks a wraparound terrace that wraps around the penthouse apartment. Plaintiffs contended that the Cooperative's maintaining a garden on the upper roof violated a provision of the Proprietary Lease, which provides that the Cooperative may erect equipment such as radio and television antennas on the roof and may have access to the roof for that purpose. Plaintiffs argued that because the Proprietary Lease granted the Cooperative only those two specific rights concerning the roof, it could be inferred that the Cooperative had no other rights to use it. Plaintiffs further argued that even if the Proprietary Lease were deemed to be ambiguous on this issue, it should be construed against the Cooperative because the Cooperative or its counsel drafted the lease.

The court held that the provision was sufficiently ambiguous that extrinsic evidence, meaning evidence of the parties' intent from outside the Proprietary Lease itself, should be considered to determine its meaning. On the one hand, the court held that a proposed interpretation by the Cooperative, under which the disputed section did not apply to the roof at all, should not be adopted because it would render the disputed section of the Proprietary Lease meaningless. The Cooperative would have had the right to use the roof for radio and TV equipment even if the Proprietary Lease did not mention the subject, the court added. On the other hand, plaintiffs' proposed interpretation also was not established by the documents. The court found that the parties "may have intended the [Proprietary Lease section] to play the limited office of emphasizing the specified rights" of the Cooperative concerning the roof, rather than to represent an exclusive listing of these rights.

The court further noted that the Cooperative might attempt to amend the Proprietary Lease to eliminate any dispute concerning use of the roof as a garden, but stated that it was expressing no opinion on whether such an amendment would be permissible.

## COURT HOLDS THAT DISPUTED ISSUES EXIST REGARDING OWNER'S USE OF CONDOMINIUM UNIT

A case arising from a dispute between a unit owner and a Condominium concerning whether a condominium unit owner was using the unit for permissible residential purposes will also require further proceedings before it can be resolved. **25A Place 57, LLC v. Board of Managers of Place 57 Condominium, 2010 WL 1644878, 2010 N.Y. Slip Op. 50723(U) (Sup. Ct. Apr. 9, 2010).**

Plaintiff, a limited liability company, owns a unit in the Condominium. When it applied to purchase the unit, plaintiff listed its “occupation” as “real estate investment fund” and stated that it would be using the unit as a “corporate apartment for partners, employees and associates to use.” According to the court, “since the closing, various individuals have used the unit for short stays, usually lasting no more than a week.”

The Condominium contended that the plaintiff was using the unit as a “vacation or destination club,” in violation of By-Laws contained in the Offering Plan, which require that the residential units may be used for residential purposes only, and in the case of a unit owned by various types of entity, may be occupied only by specified types of persons connected with the entity. Plaintiff contended that the individuals who have occupied the apartment are equity investors in plaintiff and therefore were entitled to use it. The Cooperative challenged whether these individuals were “members” of the LLC and urged that they should be allowed to “occupy the unit . . . only on a more long term, not transient basis.”

The court found that without further documents and evidence, it could not evaluate plaintiff’s use of the unit. Moreover, although there was no evidence that the Condominium was currently precluding plaintiff’s guests from using the unit, it had not promised to refrain from doing so in the future, so that a live controversy regarding the parties’ rights remained for resolution by the court.

**CONDOMINIUM’S “PETS ALLOWED” POLICY DOES NOT BIND UNIT OWNER TO ALLOW TENANT TO KEEP CAT**

A provision of the New York City Administrative Code, commonly referred to as the “Pet Law,” provides that a residential landlord may not enforce a “no pets” restriction in a lease if the landlord knows that the tenant has a pet, but fails to take any action for three months. The courts have held that this provision does not apply to condominiums. However, if a unit owner in a condominium leases his or her apartment to a tenant, then the Pet Law will apply to that landlord-tenant relationship, even if the apartment is located in a condominium building. **Backman v. Kleidman, 2010 WL 1712245, 2010 N.Y. Slip Op. 50756(U) (Civ. Ct. N.Y. Co. Apr. 26, 2010).**

In this case, the tenant had a cat in the apartment and refused to remove it, even after receiving a notice to cure and a notice of termination. The lease contained a “no pets” provision, but the tenant contended that he was protected by the Pet Law because the Condominium’s “on-site building supervisor/superintendent” had known for more than three months that the tenant was keeping a cat in the unit. The court held that the superintendent’s knowledge of the cat would not automatically be imputed to the unit owner/landlord, because the superintendent was employed by the Condominium Board of Managers, not the individual unit owner. However, the court held that it could not determine from the parties’ written submissions whether the superintendent might have had some form of principal-agent relationship with the unit owner. A trial was scheduled on this issue.

The tenant also argued that the apartment was located in a “pet friendly” building in which the Condominium Rules and Regulations expressly permitted residents to keep dogs, caged birds, cats, and fish in the residential units. The court disagreed with this contention, and held that the Rules and Regulations conferred rights on the unit owners, but could not be enforced against a unit owner by a tenant. The court also rejected the tenant’s argument that the unit owner’s real estate agent had promised that the tenant could have a cat, finding that such claim was contradicted by the lease, which unambiguously advised the tenant that “you may not keep any pets in the Apartment.”