
CLIENT ADVISORY

MAY 2007

APPELLATE DIVISION AFFIRMS TERMINATION OF PROPRIETARY LEASE FOR OFFENSIVE CONDUCT INCLUDING LONG HISTORY OF LITIGATION

The Appellate Division, First Department, recently affirmed a lower court's determination upholding a Cooperative Board's authority to evict a shareholder-tenant couple for objectionable conduct due to "their chronic withholding of maintenance and other payments, the nuisance of installing and refusing to dismantle a water-cooled air conditioning system that caused damage to their downstairs neighbor, and [a history of] protracted litigation in which [their] arguments were repeatedly found to be meritless and in bad faith." **1050 Tenants Corp. v. Lapidus**, 2007 WL 1991028, 2007 N.Y. Slip Op. 3558 (App. Div. 1st Dep't Apr. 24, 2007).

In this case, the history of disputes between the defendant shareholders and the Cooperative spanned 15 years. Among other things, defendants litigated a series of cases against the Cooperative in which they were repeatedly unsuccessful, violated court-ordered stipulations that the parties entered into to resolve the litigations, refused to pay maintenance and other expenses, and installed the unauthorized air conditioning system and then refused to remove it. Eventually, the exasperated Board of Directors convened a special meeting of shareholders to consider termination of defendants' proprietary lease. After defendants threatened to sue any shareholder who voted to terminate their lease, the Board voted to indemnify any shareholders named in such a lawsuit. At the shareholder meeting, defendants' counsel was permitted to appear to present defendants' position. A shareholder vote was then held at which 98% of the shareholders voted to terminate defendants' proprietary lease. Defendants refused to move out of their apartment, and the Board brought an ejectment proceeding to force them to leave. The lower court ruled in favor of the Board (see discussion in the June 2006 issue of this **Client Advisory**).

In affirming the lower court's decision, the Appellate Division reemphasized that "[d]ecisions of residential cooperative corporations, including termination of a shareholder's tenancy for objectionable conduct, are assessed under the business judgment rule. The courts will not substitute their judgment for that of a cooperative's board of directors and shareholders, so long as the corporate action is authorized, in furtherance of the cooperative's legitimate interests, and taken in good faith." In finding that this standard was satisfied, the court rejected, among other things, defendants' argument that examples of "objectionable and undesirable conduct" set forth in the proprietary lease were meant to be an exclusive list, finding that the list was merely illustrative. The court also rejected defendants' argument that the term "objectionable and undesirable conduct" was so vague that it could not be used as a basis for terminating the lease. Also rejected was defendants' argument that termination under the proprietary lease would "violate public policy by restricting access to the courts." In the Appellate Division's words, "[t]here is no public policy favoring the repeated assertion of unsustainable arguments, a pattern of delaying tactics designed to inflict extensive costs on the adversary, dishonesty or disingenuousness with the court, disregard of so-ordered stipulations, or contempt of court orders."

The court also rejected defendants' argument that the Board had improperly "bought" the shareholders' votes by promising to indemnify any shareholders who were sued. The court found that this was merely a response to defendants' own, arguably unlawful threat to sue all shareholders who voted against them. The court went on to hold that there was no evidence of bad faith or discrimination, and that the Cooperative was entitled to have the litigation resolved without further discovery proceedings.

COURT HOLDS COOPERATIVE SHAREHOLDER WHO ACQUIRED UNIT AT A FORECLOSURE SALE IS NOT A HOLDER OF UNSOLD SHARES

Owners of shares appurtenant to a cooperative apartment acquired at a foreclosure sale were not "holders of unsold shares" entitled to sell the apartment without Board approval, according to the recent decision in Sassi-Lehner v. Charlton Tenants Corp., 15 Misc. 3d 1112(A), 2007 WL 926221 (Sup. Ct. N.Y. Co. Mar. 28, 2007).

The shares in question were originally transferred by the sponsor of the cooperative conversion to an individual who undisputedly was a holder of unsold shares. That person failed to pay his maintenance, and the shares were sold at a foreclosure auction to the parents of the current shareholders, who transferred them to their daughters, the current shareholders. None of the shareholders ever resided in the apartment, which was occupied by an unrelated rent-regulated tenant. When the shareholder-plaintiffs sought to sell their apartment, they claimed the status of holder of unsold shares, which would give them the right to sell without Board approval. The Board denied that they enjoyed such status and insisted that its approval was required.

In reviewing the Offering Plan and the proprietary lease to resolve this issue, the court found that the documents were not completely clear. On the one hand, the proprietary lease provided that "Unsold Shares retain their character as such (regardless of transfer)" until the holder of the shares occupies the apartment. On the other hand, the Offering Plan defined a holder of unsold shares as someone "*designated* by [the sponsor]" as a holder. (Emphasis added.) The court observed that the sponsor had a legitimate interest in limiting holders of unsold shares to persons it had designated, because the sponsor was required to guarantee any such holder's financial obligations to the Cooperative. The court held that the Offering Plan controlled and that plaintiffs, who had never been designated or approved by the sponsor, were not holders of unsold shares.

CONDOMINIUM NOT REQUIRED TO EMPLOY A RESIDENT JANITOR

The New York City Housing Maintenance Code and New York State Multiple Dwelling Law do not require a condominium apartment building to employ a resident janitor, as interpreted by the Appellate Division in Hatcher v. Board of Managers of 420 West 23rd Street Condominium, 2007 WL 1217884, 2007 N.Y. Slip Op. 3750 (App. Div. 1st Dept Apr. 26, 2007), affirming 12 Misc. 3d 78, 819 N.Y.S.2d 374 (App. Term 1st Dep't 2006).

The Multiple Dwelling Law provides that in a building containing 13 or more families, where the owner of the building does not reside there, a janitor must be employed who resides in the building or within 200 feet. The Housing Court ruled that a condominium was required to hire a resident janitor under this provision. The Appellate Term of Supreme Court reversed, holding that in a condominium, the Board of Managers qualifies as a "resident owner" of the premises, so that the statutory requirement of employing a resident janitor does not apply. The court also found that the janitor that the condominium did employ was competent and did not service more than the legal maximum number of units.

A Real Estate Litigation Niche

Ganfer & Shore, LLP

Ganfer & Shore, LLP is a thriving real estate boutique law firm with twenty lawyers representing diverse clientele including real estate owners and developers, public companies and banks, family-owned real estate partnerships, and high net worth individuals.

The firm litigates against some of the largest law firms in the world at a far lower price point and is proud to say that it does so both efficiently and with the same quality as that of the big law firms. Ganfer & Shore prides itself on its creativity, whether in structuring deals or in representing its clients in court. When a company or individual is in a difficult situation, that is when Ganfer & Shore excels.

Steven R. Ganfer, who heads the firm's real estate practice, has over thirty years of experience in negotiating all types of real estate transactions. Recently, Richard A. Krauss, a well-known real estate attorney, and other lawyers from his former firm joined Ganfer & Shore, further augmenting the firm's full-service real estate practice. Along with real estate partner Sandra Jacobus, the firm is regularly involved in the purchase and sale of anything from multiple buildings to individual units, and negotiates and structures, among other things, financing transactions and workouts.

The firm is also general counsel to more than 100 cooperatives and condominiums throughout New York City, providing them, as well as their managing agents, with advice concerning the proper operation of their buildings and the IRS 80/20 tax rule. The firm drafts virtually every conceivable type of agreement or contract that a building would need in today's changing business and legal environment. In addition, Ganfer & Shore provides its cooperative, condominium, and managing agent clients with litigation advice and representation when necessary. The firm also keeps its clients on top of significant court rulings and changes in the law as it relates to the New York real estate market by publishing a monthly newsletter.

Our founding partner, Steven J. Shore, previously practiced with the United States Securities and Exchange Commission and Weil Gotshal & Manges, and litigates all aspects of commercial litigation with an emphasis on real estate and securities disputes. He is one of the premier arbitration attorneys in New York City. Rounding out the firm's litigation department are partners Thomas J. Curran, who regularly appears on television and in newsprint and who specializes in white-collar defense and internal investigations; as well as commercial litigators Mark A. Berman and Ira B. Matetsky, both formerly with Skadden, Arps, Slate Meagher & Flom. Berman is also one of the preeminent authorities in New York on electronic discovery and is a columnist for the New York Law Journal. Finally, Ganfer & Shore partner Allen L. Finkelstein handles litigation and matrimonial matters, and the firm is proud that he is national chairperson of the Amyotrophic Lateral Association (Lou Gehrig's Disease).



Back row:

Thomas J. Curran, Ira B. Matetsky, Mark A. Berman, Richard Krauss, and Steven R. Ganfer.

Front row:

Allen L. Finkelstein, Sandra L. Jacobus, and Steven J. Shore.

In New York City, someone will always be trying to interfere with the purchase or development of a real estate project. Ganfer and Shore has recently made precedent in a variety of decisions addressing the use of notices of pendency (notice of a claim having been filed against real property), including obtaining sanctions and the payment of attorneys' fees for the improper use of this device. Ganfer & Shore has also recently successfully defeated an attempt by a neighboring building to stop the development of a real estate project based on a handwritten party wall agreement from the 1860's. Ganfer & Shore litigators, after nine days of hearings, also recently won a major arbitration in favor a court-appointed assignee for the benefit of creditors, in which the recovery will be utilized to help compensate defrauded shareholders. The firm's attorneys are frequently litigating issues relating to virtually every part and aspect of a building and have frequently been at the cutting edge of the law in real estate and securities litigation.

Ganfer & Shore, LLP
 360 Lexington Avenue, 14th Floor
 New York, New York 10017
 Tel: 212-922-9250
 Fax: 212-922-9335
 sshore@ganshore.com
 www.ganshore.com

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