

CLIENT ADVISORY

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WHILE PROTECTING INDIVIDUAL BOARD MEMBERS, BYLAW PROVISION DID NOT INSULATE THE BOARD FROM BREACH OF CONTRACT CLAIM

In Board of Managers of Lido Beach Towers Condominium v. Gamiel, NYLJ September 29, 2004, p. 19, col. 3 (City Ct. Long Beach), a unit owner responded to the board's suit for unpaid common charges with counterclaims for damages arising from a water leakage problem. The board moved to dismiss the counterclaim, arguing that the bylaws immunized the "members of the board" from liability, except for individual misconduct or bad faith, and required the unit owners to indemnify each of the board members against contractual liability incurred by the board on behalf of the condominium.

The Court denied the motion, holding that although the individual board members were immunized, the condominium would be liable on contractual obligations that the board failed to fulfill and that the board as an entity could be sued for any failure to act in good faith for the best interests of the condominium.

LANDMARKS COMMISSION'S ORDER TO RESTORE WALL SCULPTURE HELD CONSTITUTIONAL

In Board of Managers of Soho International Arts Condominium v. City of New York, NYLJ September 14, 2004, p. 20, col. 1 (U.S.D.C., S.D.N.Y.), an aluminum sculpture had been affixed to the northern wall of a loft building in Soho since 1972. In 1973, the New York City Landmarks Preservation Commission designated the Soho-Cast Iron Historic District on the basis of its historic structures, stressing the neighborhood's growing status as a center for creative contemporary art. By 1997, the building was a condominium and its board of managers sought leave to remove the work permanently. After a hearing that included testimony by engineers, gallery owners, artists, art critics, celebrities and elected officials, the Commission denied the application, finding that the work "contributes to the special architectural and historic character of the historic district...." The board sued, contending that its rights under the United States and New York Constitutions had been violated.

In a lengthy opinion, the Court granted the City summary judgment dismissing the claims asserted under the "free speech" provisions of the First Amendment. It held that the City's Landmarks Preservation Law was enacted for societal objectives distinct and apart from speech or expressive activity – that is, the protection of buildings of special historic or aesthetic interest – and its restrictions on freedom of speech were merely incidental. The Commission's decision was not based on approval or disapproval of the work's content, the Court held, and the board's freedom of speech was thus not improperly curtailed. Nor was

the requirement that it retain the sculpture unconstitutional “compelled speech,” the Court said, because it did not force the board to express “discrete and ideological messages.” The Court found that the Commission action furthered a substantial state interest and did not burden the board’s rights any more than was necessary.

The Court also dismissed the board’s claim that other buildings in Soho had been permitted to remove painted murals on outer walls and it had therefore been denied “equal protection of the laws.” The Court found that the other buildings named were not comparable and that the Commission had a rational basis for treating this case differently. In addition, it struck the board’s claim that it had been denied “due process of law” because the Commission had no standards for regulating advertising signs on buildings, the Court having found that this argument had not been properly made to the Commission.

On the other hand, the Court let stand the board’s claim that the Commission’s decision had taken the condominium’s property without just compensation, in violation of the Fifth Amendment, since the retention of the sculpture would entail a physical occupation of a portion of the wall. However, it found that there was an issue of fact to be tried as to who owned the sculpture (the artist or the board). The parties were directed to proceed to trial on this “takings” claim under both the Federal and New York State Constitutions, as well as on the dispute over ownership.

BY SIGNING OFFERING PLAN INDIVIDUALLY, AS REQUIRED BY ATTORNEY GENERAL, PRINCIPAL OF SPONSOR SUBJECTS HIMSELF TO POTENTIAL LIABILITY

The office of New York’s Attorney General requires offering plans in condominium conversions to be certified as true and correct by the principals of the sponsor, both individually on behalf of the sponsoring entity. A recent case illustrates the consequences of that requirement.

In Chrysiopoulos v. Soho Greene Associates, LLC, NYLJ September 29, 2004, p. 18, col. 1 (Sup.Ct. N.Y. Co.), the initial purchaser of a condominium unit sued the sponsor and its principal, as well as the managing and selling agents, contractors and architects, for their alleged failure to complete renovations to the unit and the building that had been promised in the Offering Plan. On the motion by the sponsor, its agents and its principal to dismiss the complaint, the Court held that the construction and renovation obligations of the sponsor survived the closing, despite a recitation in the purchase agreement that the purchaser’s acceptance of the deed would constitute recognition of the sponsor’s satisfactory performance. Moreover, the court refused to dismiss the claim against the principal of the sponsor, holding that he had subjected himself to personal liability for the uncompleted renovations by signing the Offering Plan twice, once as “Managing Member” of the sponsor and again individually, as required by the Attorney General. The court did dismiss a cause of action for false advertising under **General Business Law § 350**, however, ruling that the New York Attorney General has the exclusive right to prosecute sponsors who violate that section.