GANFER & SHORE, LLP

CLIENT ADVISORY

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COURT OF APPEALS HOLDS THAT MARRIED COUPLE MAY HAVE TWO SEPARATE PRIMARY RESIDENCES

In many contexts, New York residential tenants enjoy rights only so long as they maintain the leased premises as their "primary residence." For example, a tenant loses protection under New York City's rent-control or rent-stabilization law if a court determines that the tenant's primary residence is elsewhere. Under certain circumstances, the location of an owner's primary residence can be relevant to cooperatives and condominiums as well. Thus, it can be critical to determine which of an individual's multiple residences is deemed his or her *primary* residence. Litigation on this issue is often fact-intensive and protracted. No single factor is dispositive and courts will consider all available facts and circumstances before determining where the tenant's primary residence is located.

A primary residence issue arose in **Glenbriar Co. v. Lipsman, 2005 WL 2663960 (N.Y. Oct. 20, 2005)**, a decision of New York's highest court, the Court of Appeals. In this case, the tenants, a married couple, leased an apartment in the Bronx in 1959, which later became rent-stabilized. In 1995, the couple purchased an apartment in Florida and began spending more of their time each year in that state. Between 1995 and 2005, the husband asserted that his Florida residence was his primary residence, and obtained tax benefits available only to Florida primary residents under the laws of that state. At the same time, the wife asserted that she maintained her primary residence in the Bronx apartment and therefore was still entitled to rent stabilization.

The Court of Appeals was troubled by this scenario, under which one spouse claimed primary residence in New York and the other in Florida, even though it was undisputed that the couple lived together and were rarely physically separated for any significant period of time. Nonetheless, the court held that this result was not legally impossible, and affirmed the lower court's conclusion that the landlord failed to meet its burden of disproving the wife's primary residence in the couple's Bronx apartment. The case serves as a reminder that whenever a landlord or board wishes to pursue a claim that a tenant's primary residence is not in the leased apartment, counsel should be consulted as early as possible to help assemble a strong record that the tenant's primary residence has changed.

COURT REFUSES TO BLOCK SALE OF COOPERATIVE WHILE DISCRIMINATION LITIGATION IS PENDING

In our litigious age, a cooperative board's refusal to approve the transfer of an apartment is sometimes followed by protracted litigation. The claims asserted in such litigations often include claims that the board's determination resulted from unlawful discrimination on the basis of an improper factor such as race, religion, age, marital status, or disability.

Sinesky v. Rokowsky, 2005 WL 2520620 (App. Div. 2d Dep't Oct. 11, 2005), is such a case. A shareholder contracted to sell his apartment, subject to the cooperative board's approval, but the board failed to grant approval. The disappointed purchaser sued the Cooperative and all

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the members of its board of directors, claiming that the board voted down the sale only after learning that one of the individuals who would reside in the apartment had Parkinson's disease, was wheelchair-bound, and would require special accommodations – an alleged violation of the federal, state, and city anti-discrimination laws. The board, on the other hand, asserted that it had legitimate, non-discriminatory business reasons for rejecting the application. The lower court found that the board had legitimately justified its rejection and dismissed the discrimination claim. The appellate court reversed, finding enough disputed facts for plaintiff to proceed with discovery.

Plaintiff was also allowed to proceed with a claim that the board members "tortiously interfered" with his contract to purchase the unit. The court upheld the pleading of this claim based on plaintiff's allegation that after the board denied his application to purchase the apartment, the board engaged in self-dealing by approving a sale of the same apartment to one of its own members. Plaintiff's final claim, for breach of fiduciary duty, was dismissed, however, because the board did not owe a fiduciary duty to an applicant.

At the outset of the litigation, the plaintiff sought a preliminary injunction against the shareholder's selling the subject apartment to anyone other than himself. The court denied the injunction, holding that based on the sharply disputed facts before it, the plaintiff had not established his likelihood of ultimately on his claims, as is required for an injunction. If the injunction had been granted, it would have provided the would-be purchaser with enormous leverage by effectively taking the apartment off the market for as long as the litigation was pending, which might be years. Instead, the court allowed the litigation to continue but as an action for money damages only.

MORE GUIDANCE ON RIGHTS OF HOLDERS OF UNSOLD SHARES

In its June 2005 decision in **Kralik v. 239 East 79th Street Owners Corp., 5 N.Y.3d 59,** the Court of Appeals ruled that a cooperative shareholder's status as a "holder of unsold shares" must be determined based on the contractual documents between the Cooperative and the shareholder, such as the offering plan, plan amendments, and proprietary lease. Overturning lower court decisions, the court held that where the shareholder has not offered shares to the public, the Attorney General's regulations defining holders of unsold shares are not applicable. (For further discussion of the Kralik decision, please see the July 2005 issue of this Client Advisory.)

The Appellate Division applied this rule in **Yatter v. Continental Owners Corp., 2005 WL 2517403 (App. Div. 2d Dep't Oct. 11, 2005)**. Interpreting the governing documents, the court determined that the plaintiff shareholder was a "holder of unsold shares" and therefore entitled to sublet his apartment without obtaining board approval or paying sublet fees. The court rejected two arguments offered by the Cooperative in opposing plaintiff's status as a "holder of unsold shares." First, the court held that the "equal shares" requirement of Section 501 of the Business Corporation Law does not prohibit a Cooperative from according holders of unsold shares, but not other shareholders, the right to sublet without obtaining board approval or paying fees. Second, the court held that a holder of unsold shares is not required to sell the shares to a purchaser who will occupy the apartment within any given time frame.

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