
CLIENT ADVISORY

OCT. 2002

A BOARD TRIES AN "END RUN" RATHER THAN A "DOG RUN"

The Board of Directors of 930 Fifth Corp. (the "Co-op") required prospective unit purchasers ("Purchaser") to sign a letter as part of their purchase application. The letter attempted to require the Purchaser to make eight affirmative representations, including: (1) that the Purchaser acknowledged being aware that "permission would not be granted for the keeping of any animals"; and (2) "I do not plan to make any alterations to the apartment other than minor decorating and painting" (the "Letter"). A Purchaser signed the Letter, was approved by the Board, and then moved into the building with a small dog. The Co-op brought suit for a breach of the proprietary lease but their first action was dismissed as late because it was determined by the court to have been commenced more than 3 months after the Co-op or its agents had knowledge that the Purchaser had been openly keeping a dog, a violation of Section 27-2009.1(b) of the Administrative Code of the City of the New York, commonly known as the "Pet Law". The dismissal was upheld on appeal. Not willing to so blatantly thwarted, the Co-op commenced a second action relying upon their Letter, this time alleging that the Purchaser had fraudulently misrepresented in the signed Letter that they would not keep animals in their unit. The Co-op sought to rescind the Purchaser's proprietary lease, and asked for compensatory damages and attorney's fees.

In the matter of 930 Fifth Corp. v. Miller (NYLJ, August 14, 2002, p. ___, col. ___), Judge Diamond of the Supreme Court, New York County, disagreed with the Co-op's position that its Letter, which they had drafted, contained a representation by the Purchaser that they would never harbor a pet. Judge Diamond found that, at best, the Letter was a mere acknowledgement that the Board would not grant permission for the keeping of animals. The foregoing notwithstanding, Judge Diamond ruled that even if the Purchaser's representation in the Letter were to be construed as the Co-op had pleaded in their Complaint, the Pet Law provides that "[I]t shall be unlawful for an owner or his or her agent, by express terms or otherwise, to restrict a tenant's rights as provided in the Pet Law. Any restriction shall be unenforceable and deemed void as against public policy". The Co-op's effort to restrict pets in this manner was ruled an attempt to circumvent the 3-month rule under the Pet Law and the rights of tenants, and was held to be unenforceable.

NO SECOND CHANCE

A shareholder borrowed monies for his business secured by his stock and proprietary lease. Unfortunately, the shareholder defaulted on his business loan and his bank took possession of the shareholder's stock certificate and proprietary lease in accordance with the terms of the shareholder's collateral pledge. New stock certificates and a new proprietary lease were issued to the bank's nominee. The Shareholder then approached the bank about settlement and agreed to pay the entire outstanding balance of the business loan. The settlement between the bank and shareholder was subject to the Cooperative's consent to the assignment of the shares and lease back to the former shareholder. Having a history of failing to make maintenance payments, the Cooperative refused to consent to the bank's proposed assignment to the former shareholder, resulting in an action by the former shareholder against the Cooperative.

In Hochman et al. v. 35 Park West Corp., (NYLJ 4/29/02, page 27, col. 2), the former shareholder alleged that the Board of Directors of the Cooperative (the "Board") engaged in misconduct and self-dealing. With burden of proof placed on the challenger of a Board's actions, the former shareholder failed to produce any evidence to support his allegations other than his conclusory assertions. In contrast, the Board presented the Court with substantial evidence that board members acted in good faith and within the scope of their authority in denying the former shareholder's request for the assignment. Relying upon the application of the Business Judgment Rule, the Court granted the Cooperative's motion for summary judgment and dismissed the former shareholder's action.

DO YOU BILL TENANTS FOR ELECTRICITY ?

A recent decision of the New York State Tax Tribunal could have costly implications for property owners throughout New York State including cooperatives and condominiums. In the Petition of Mutual Redevelopment Houses, Inc., DTA No. 817075 (06/06/02), the New York State Tax Tribunal held that the Mutual Redevelopment Houses, Inc. (the "Corporation"), owner of a housing cooperative consisting of 2,820 apartments, together with 30 retail stores, was responsible for approximately \$185,000 in sales taxes imposed upon electricity provided to its tenants during a prior 3 year period. The Tax Tribunal held that while it may be an unintended consequence of simply installing meters, when the Corporation began to separately meter its tenants' actual electric usage, and separately bill for electric usage based on its tenants' actual consumption, the payments made to the Corporation for electricity became taxable. The Corporation had previously billed its tenants separately for electricity based on a negotiated charge per square foot. The Tax Tribunal unanimously agreed that separate electric charges based upon a negotiated formula would not be taxable. Thinking that separate meters would result in more accurate billing to its tenants, the Corporation installed meters, resulting in this very costly and unintended consequence. This rule as applied by the Tax Tribunal makes no distinction between commercial or residential tenants. Therefore, property owners who charge residential or commercial tenants for electricity are encouraged to consider negotiating leases to permit tenants to either pay metered bills directly to the utility or to continue billing practices based upon a negotiated formula rather than meter readings.