

---

# CLIENT ADVISORY

---

OCTOBER 2005

## **COOPERATIVE BOARD'S RULE HELD TO DISCRIMINATE AGAINST UNMARRIED COUPLES**

A Cooperative's rule that treats a purchase application presented by two unmarried, cohabiting persons differently from one presented by a married couple may violate New York anti-discrimination law, according to the court in Latoni v. Sherman Square Realty Corp., NYLJ, Sept. 9, 2005, p. 19, col. 1 (Sup. Ct. N.Y. Co.).

In this case, an unmarried couple sought board approval to purchase an apartment together. The board found that one of the two applicants satisfied the board's financial criteria, while the other did not. Approval for the purchase was therefore granted to only one of the two applicants, while the other was not permitted to join in the purchase and to also become a shareholder. It was undisputed, however, that if the two applicants had been married, the couple would have been considered a "single economic unit" and that, when a married couple's purchase was approved, both spouses were permitted to purchase even if only one had assets or income.

The court held that these facts set forth a viable claim that the Cooperative had discriminated against the rejected applicant on the basis of his marital status, in violation of the New York State and New York City Human Rights Laws. The Court also allowed discovery to go forward against the President of the Cooperative's board, and refused to dismiss the plaintiff's request for punitive damages. Although the issue raised by this case has not yet been finally resolved, or considered by an appellate court, Cooperatives would be well-advised to review their approval criteria for purchasers in light of this decision.

## **APPELLATE DECISION REAFFIRM'S BOARD'S RIGHT TO ENFORCE LEASE PROVISION ON SUBLETTING**

A proprietary lease provision requiring board approval for any subletting of shareholder-tenants' cooperative apartments was enforced in DeSoignies v. Cornasek House Tenants Corp., 2005 WL 2099821 (App. Div. 1st Dep't Sept. 1, 2005).

In this case, between 1972 and 1980 the shareholder acquired three apartments in her cooperative building. She never lived in any of the apartments and continuously sublet them for more than 25 years, always seeking and obtaining board approval as required by the terms of her proprietary leases. In 2002, however, the board adopted new rules that restricted the subletting of any apartment to two years out of any four-year period and imposed a 10% surcharge on any sublease. After the new rules took effect, the shareholder continued to sublet, but no longer sought board approval to do so.

The Cooperative served the shareholder with 10-day notices to cure her unauthorized subletting. She responded by bringing a court action seeking a declaration that the board's new rules were unenforceable and that she had the unrestricted right to sublet. In support of this claim, the shareholder relied on a 1972 letter from the then-President of the board, which expressly stated

that shareholders “are allowed to sublet unconditionally their apartment(s) for the duration of their ownership” and upon which she had allegedly relied in purchasing her apartments. The shareholder also argued that, after the Cooperative had approved her subleases without question for upwards of 25 years, it was too late to impose new rules now.

The trial court initially sustained each side’s position in part. It held that the Board’s new rules improperly changed the terms of the proprietary lease and the Cooperative’s by-laws, because these documents contained no restrictions on the duration of sublets and did not provide for any surcharge. However, the shareholder’s reliance on the former President’s letter was rejected, because the promise contained in the letter could not change the terms of the proprietary lease, which required board approval of all sublets, and could result in shareholders’ being treated unequally in violation of the Business Corporation Law. Accordingly, the shareholder still needed board approval for subletting and was in violation of the proprietary lease for having sublet without requesting or obtaining it. The shareholder then moved for reargument, arguing that it would have been “futile” for her to seek permission to sublet in light of the new rules. The trial court accepted this new argument, held that the 2002 sublets did not violate the proprietary lease, and awarded the shareholder attorneys’ fees.

The Appellate Division reversed. The court emphasized that the proprietary lease granted the board authority to withhold consent to a sublease for any reason or for no reason at all. This language accorded the board unfettered discretion in considering sublet applications, so that the court would not intervene unless a breach of the board’s fiduciary duty was shown. The court held that because the shareholder had not sought or obtained the required board approval, her sublets violated the proprietary lease. The shareholder’s “futility” argument was rejected because the proprietary lease allowed a shareholder whose sublet application was disapproved by the board to obtain consent to sublet from 65% of the shareholders. Accordingly, the appellate court reinstated the trial court’s original determination that the sublets were improper, and awarded attorneys’ fees to the Cooperative.

The Appellate Division did not directly address the validity of the rules imposing time limits on sublets or the surcharge. Before adopting any such rules, a Cooperative should consult with its counsel regarding the consistency of the proposed rules with the building’s proprietary lease and by-laws. On the whole, however, this decision suggests that courts will continue to enforce a Cooperative’s right to scrutinize and to approve or disapprove any proposed sublet.

**BUILDINGS SHOULD REVIEW INSURANCE COVERAGE FOR FLOODING, WATER DAMAGE, AND RELATED PERILS**

Recent court rulings addressing the continuing issue of a landlord’s responsibility for mold contamination of apartments, as well as natural disasters elsewhere in the country, provide a reminder that all Cooperatives, Condominiums, landlords, and homeowners should review the adequacy of their insurance coverage for water-related perils. In particular, standard insurance policies may exclude coverage for hazards such as mold, flooding, and sewer back-up. Buildings should, therefore, explore obtaining supplemental coverage in these areas.