

# CLIENT ADVISORY

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## TO SELL OR NOT TO SELL

Must a Sponsor sell its unsold apartments in a cooperative or condominium? If the Appellate Division's ruling in 511 West 232<sup>nd</sup> Street Owners Corp. v. Jennifer Realty Co. (A.D., 1<sup>st</sup> Dept., 8/9/2001) stands, the question would become simply when must they be sold. On August 9, 2001, a unanimous panel for the Appellate Division, First Department, held that implied in the conversion of a building to a cooperative is a promise by its sponsor to sell all of its unsold units within a reasonable time. That no one may have wanted to buy the units for years because of poor market conditions only delayed this Sponsor's ability to actually sell them but not its obligation to diligently market them for sale when circumstances allowed.

The building in question had been converted to cooperative ownership in 1988. The ability of this Sponsor to sell all of the 66 apartments in the building had been affected by the significant downturn in the real estate market back in the early 1990's, and so it had been renting the 62% of the building it still owned. Despite a turnaround of the real estate market, the Sponsor continued to rent the unsold units. In 1988, the tenant-shareholders learned that their Sponsor had then rejected an offer to sell one of the units. They brought suit against the Sponsor and its principals alleging that the Sponsor's renting of the unsold units breached its contract (the offering plan) with them. The appellate court agreed, stating that when the offering plan was initially presented in 1988, it was the generally understood to be the practice of sponsors to diligently market and dispose of their unsold units as soon as circumstances permitted, and that it was the intention of purchasers to reap the benefits of cooperative ownership, which could only be accomplished by the sale of apartments as opposed to rentals. The court also found that the Sponsor's renting of the unsold units had resulted in the purchasers being unable to sell or refinance their units, required them to subsidize repairs for the Sponsor's rental apartments, forced them to live in a building populated by transient tenants rather than owners, and denied them the bliss and benefits of the cooperative promise of "greater stability in tenant vacancy and enhanced communal ownership". As a result, the court sent the matter back to the trial court for a determination of whether this Sponsor had diligently marketed and attempted to sell its unsold units in a reasonable time.

The court's ruling raises many unanswered questions on related issues such as (i) will Sponsors be required to sell occupied apartments as well as vacant apartments, and what impact will tenant's lease renewal rights have on both the Sponsor's obligation and its ability to sell those occupied apartments; (ii) may all shareholders and/or the cooperative or condominium bring suit or do only those shareholders who were the initial purchasers from the Sponsor have the right to sue; and (iii) is a "holder of unsold shares" under the same sale obligations as a Sponsor. This decision, if upheld, may open the flood gates to a myriad of claims by cooperative and condominium apartment owners in buildings throughout New York in which sponsor-owned apartments still make up a significant percentage of the apartments in the building. At a minimum, such lawsuits might be used to force a Sponsor to defend its marketing practices and demonstrate that it has been diligently pursuing the sale of its unsold units, and that these units would be sold (rather than rented) but for circumstances such as market conditions preventing their sale. Conceivably, if a Sponsor were

unable to satisfy the court that it had been diligently marketing and attempting to sell its unsold units, such actions might conceptually result in damage awards against Sponsors and perhaps affirmative injunctive relief requiring Sponsors to either make diligent efforts to sell their unsold units within some stated period of time or possibly prohibit their further rental.

This case will most certainly be the subject of further appeals. We will continue to follow this matter and attempt to keep you informed of developments as they are reported.

### **SECURITY MUST BE THE HIGHEST PRIORITY**

Regrettably, a tenant in an apartment building in Greenwich Village was brutally attacked in her third floor apartment by a man who entered through the wide open front doors of her building. The front doors had been propped open by a kick-stop which the superintendent had installed years earlier. Apparently, it was the habit of the superintendent to leave the building's front double doors open when he was going in and out of the building or cleaning the floors. Several tenants, including the injured tenant, had complained on numerous prior occasions to the managing agent and the superintendent about this practice. As a result of her severe injuries from the assault, the tenant was awarded a judgment against both the landlord and the managing agent for \$1,100,000.00. The landlord and the managing agent sought to avoid paying half of the judgment by claiming that they were only partially responsible for the attack and that the man who actually attacked the tenant should be responsible for the other half of the judgment. In Chianese v. Meier (A.D., 1<sup>st</sup> Dept., 8/7/2001), the Appellate Division, First Department, refused to apportion the liability and held that the landlord and the managing agent were required to pay the entire judgment without apportioning any percentage to the man who actually committed the crime. Though landlords are generally permitted to try to apportion liability with other parties, the court relied upon an exception to that general rule which prohibits a landlord from seeking to apportion liability against a tortfeasor for "actions requiring proof of intent" [CPLR Section 1602(5)]. The court held that the intentional crime of assault upon the tenant fit within this exception and held both the landlord and managing agent responsible for the entire award.

While it may seem unfair to hold a landlord and managing agent responsible for the money damages resulting from the intentional and criminal acts of another, the court noted that the jury had found that that the landlord and managing agent had negligently maintained the entrance to the building. This finding was based upon testimony that the managing agent had received numerous prior complaints of the superintendent's conduct, that there was no other access control at the building when the double doors were left open, the testimony of the criminal himself that he entered through the open lobby doors, and that the landlord and managing agent had reason to believe that this was a "high crime location" due to their knowledge of the occurrence of one knife-point robbery and seven burglaries in the building two years prior to the assault.

The safety and security of tenants must continue to be a landlord's and managing agent's highest priority, and complaints by tenants of actions of building staff which compromises security must be promptly and reasonably addressed. The failure to take, and reasonably maintain, these safety precautions can not only regrettably result in someone getting hurt, but may also result in landlords and managing agents being financially responsible for all of the resulting damages, regardless of the fact that they were caused by the intentional and criminal acts of another.