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# CLIENT ADVISORY

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## **ANOTHER DECISION UPHOLDING BOARD'S AUTHORITY TO TERMINATE DISRUPTIVE SHAREHOLDER'S PROPRIETARY LEASE**

We have previously reported on a series of court decisions, including the Court of Appeals' decision in 40 West 67th Street Corp. v. Pullman, upholding a Cooperative's right to terminate a shareholder/tenant's proprietary lease for objectionable conduct, by vote of the board of directors or the shareholders. (For prior discussions of this subject, please see the June 2003 and February 2005 issues of this Client Advisory.)

Another decision upholding a Cooperative's rights in this area was issued in Carnegie Hill 87th Corp. v. Heller, N.Y.L.J., Aug. 17, 2005 (Sup. Ct. N.Y. Co.). In this case, the board voted to terminate a shareholder's proprietary lease for a pattern of misconduct, including yelling obscenities at tenants and employees, slamming doors, banging on walls, and ringing neighbors' doorbells for no reason. After the board voted to terminate the shareholder's proprietary lease (by a three-fourths vote as required by the bylaws and the lease), the Cooperative sued to evict the shareholder from the building and require her to sell her shares. The shareholder's motion to dismiss the suit against her was denied, because the court held that these facts set forth a valid basis for the Cooperative's filing the action.

The Cooperative then moved for summary judgment. The shareholder failed to respond, and the Cooperative was awarded a default judgment granting both an order of eviction and a money judgment for unpaid maintenance. One year later, the shareholder, who claimed she had been out of the country and unaware of the Cooperative's summary judgment motion, moved to vacate the default judgment and recover possession of her apartment. The court denied the shareholder's motion, holding that she had no reasonable excuse for having defaulted, and also finding that the shareholder had no meritorious defense against the Cooperative's lawsuit. The shareholder argued that the Cooperative had not given her a full opportunity to be heard before the board voted to terminate her lease. The court's response was that under the Bylaws and the proprietary lease, there was no requirement that the board of directors provide a shareholder with any notice of a meeting at which her allegedly objectionable conduct was to be considered.

This decision represents a broad interpretation of a board's authority. The more prudent course would generally be to provide a shareholder with notice and an opportunity to respond to allegations of objectionable conduct before voting to terminate a proprietary lease, thus avoiding arguments of procedural unfairness or lack of due process. Nonetheless, this decision illustrates the deference many courts are now willing to extend to Cooperatives in their dealings with residents in the post-Pullman era.

## **COOPERATIVE SHOULD BE CAREFUL NOT TO WAIVE RIGHTS IF AUTHORIZED CO-OCCUPANT REMAINS WHILE OWNER DEPARTS**

Standard forms of Cooperative proprietary lease include a list of individuals, other than the shareholder/tenant(s), who may occupy the apartment in addition to the owners, such as "the

Lessee and Lessee's spouse, their children, grandchildren, parents, grandparents, brothers and sisters and domestic employees." Such a clause may avoid any dispute as to who may reside in the apartment when the owners themselves are present. It can be less clear, however, whether an individual in this category may remain in residence when the owner(s) are no longer in residence.

The Appellate Division, First Department, has construed this clause to mean that one or more of these additional, permissible occupants may reside in a Cooperative apartment only when the holder(s) of the proprietary lease are themselves also residing in the apartment. **445/86 Owners Corp. v. Haydon**, 300 A.D.2d 87, 751 N.Y.S.2d 456 (1st Dep't 2002). Thus, shareholders may not (without obtaining permission from the board) permit a relative to occupy their apartment indefinitely while the shareholders themselves live elsewhere.

However, if the Cooperative is aware that a shareholder's family member is occupying the apartment in the shareholder's absence, and continues to accept maintenance payments without objection, these circumstances may constitute a waiver of the Cooperative's right to later oust the family member. For example, in **201 East 37 Corp. v. Cass**, 2004 WL 1094804 (Civil Ct. N.Y. Co. April 23, 2004), a shareholder's son was the sole occupant of a Manhattan cooperative apartment for more than 11 years. Throughout this time, the Cooperative and its managing agent were fully aware that the shareholder's son was occupying the apartment alone, while the shareholder resided on Long Island. The court held that after 11 years, it was too late for the Cooperative to unilaterally terminate the son's right to reside in the apartment.

To avoid a finding of waiver, a Cooperative should monitor who is residing in apartments in the building and, where appropriate, consider consulting with counsel to ensure that if an occupant is permitted to remain in residence despite the absence of the shareholder/tenant, an appropriate record is created that the non-tenant's occupancy is being permitted as a temporary accommodation, rather than a permanent waiver of the Cooperative's rights.

### **BOARD-APPROVED BUILDING-WIDE RENOVATIONS DO NOT BREACH WARRANTY OF HABITABILITY**

A building-wide renovation project approved by a Cooperative's board of directors did not breach the warranty of habitability despite inconveniencing shareholders while major construction work was underway, according to the Civil Court in **315-321 Eastern Parkway Development Fund Corp. v. Wint-Howell**, 2005 WL 1967452 (Civil Ct. Kings Co. Aug. 15, 2005).

The case arose from nonpayment proceedings brought by a Cooperative against two shareholders who withheld maintenance after the renovation work began, claiming that their warranty of habitability had been breached. The court ruled that a Board-approved renovation plan adopted for the benefit of all residents did not violate the warranty of habitability, even if the construction work significantly disrupted the residents' daily lives. The court held that determining when such renovations are needed in the best interests of all residents was a matter for the board to decide. Pursuant to the business judgment rule, the board's decision should not be second-guessed by allowing a rent abatement to just two of the many affected shareholders.