
CLIENT ADVISORY

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COOPERATIVE'S FAILURE TO GIVE PROPER NOTICE OF TENANT'S OBJECTIONABLE CONDUCT THWARTS TERMINATION OF LEASE

A cooperative's attempt to terminate a tenant-shareholder's proprietary lease for objectionable conduct was rejected because the court found that it had not provided proper notice to the tenant-shareholder. **F.T. Apartments Corp. v. Barbara L.**, 24 Misc. 3d 1209(A), 2009 WL 1886891 (Civ. Ct. N.Y. Co. June 17, 2009).

The Cooperative sought to enforce its termination of a tenant-shareholder's proprietary lease based on her "erratic behavior," allowing water to overflow, and making excessive noise. The record established that in response to complaints from neighbors, the Cooperative usually did not communicate directly with the tenant-shareholder, apparently in the belief that doing so would be ineffective based on her mental condition. Instead, after a single communication directly with the tenant-shareholder, the Cooperative communicated with members of her family, but this did not improve the situation. Ultimately, the Cooperative voted to terminate the tenant-shareholder's proprietary lease, and then brought a holdover proceeding to enforce its decision.

The court held that although a cooperative generally has the right to terminate a tenant-shareholder's proprietary lease for objectionable conduct, in this case the only direct notice to the tenant-shareholder that her conduct was objectionable had been given more than three years before the notice of termination. This, the court held, rendered the notice "stale" and insufficient to warrant the tenant-shareholder's loss of the apartment where she had lived since 1984. In addition, the court ruled that the tenant-shareholder had been deprived of minimally acceptable "notice and an opportunity to be heard" before the Board of Directors voted to terminate her proprietary lease.

The case is a reminder that cooperatives and their counsel must be careful to provide appropriate and timely notice and an opportunity to be heard before issuing a notice of termination. Other steps to address problematic conduct, such as communicating with a shareholder's family, may be appropriate, but they should be taken in addition to, not instead of, laying the proper record of providing notice and attempting to resolve problems directly with the tenant-shareholder.

CONDOMINIUM AWARDED LEGAL FEES IN LITIGATION TO COMPEL UNIT OWNER TO MAKE NEEDED REPAIRS

A provision contained in many condominium by-laws provides that each unit owner is responsible for paying "[a]ll sums expended and all costs and expenses incurred in connection with the making of any [necessary] maintenance, repair or replacement" of the unit or a limited common element pertaining to it. Such a provision was held to require the unit owner also to reimburse the condominium for attorneys' fees and expenses incurred in seeking judicial relief necessary to complete the repairs. **Residential Board of Managers of the Vanderbilt Condominium v. Goldberg**, N.Y.L.J. Sept. 8, 2009, p. 18, col. 1 (Sup. Ct. N.Y. Co. Aug. 28, 2009).

In this case, the Board of Managers contracted for exterior repair and reconstruction work, including repairs to terraces. Under the offering plan, the terraces were not part of any unit, but were defined as “limited common elements” each reserved for exclusive use by the owners of the adjoining unit. The Condominium Declaration and the By-Laws required unit owners to provide access to their unit and any appurtenant limited common elements for purposes including repairs.

The Condominium completed the repair work on every terrace except the one appurtenant to defendants’ unit, but defendants refused to allow the Condominium or its contractor access to their terrace, forcing the Condominium to initiate a court proceeding to gain access. In a previous decision, the court ordered that defendants allow the repairs to be performed and pay for them.

The Condominium completed the repair work and charged the unit owners for the cost of the repairs, including the Condominium’s attorneys’ fees and expenses incurred in the litigation. When the unit owners refused to pay, the Condominium placed a lien against their unit. The unit owners sought to disallow the amounts charged by the Condominium for attorneys’ fees, because the By-laws did not expressly authorize awarding attorneys’ fees under these circumstances.

The court held that defendants were liable for the attorneys’ fees. It was the unit owners’ refusal to allow access to the terrace to complete the repair work, the court found, that forced the Board of Managers to file a lawsuit to obtain access. Therefore, the Condominium’s attorneys’ fees were an expense “incurred in connection with the making of” the repair work. This ruling should significantly aid condominium boards that are called upon to address access issues involving recalcitrant unit owners. Ganfer & Shore, LLP represented the Board of Managers in this case.

TENANT-SHAREHOLDER MAY NOT SUE FOR PROPERTY DAMAGE CAUSED BY HIS OWN REFUSAL TO PERMIT ACCESS TO APARTMENT

In another dispute over access, a tenant-shareholder demanded that a Cooperative make repairs in his unit. However, he then repeatedly denied the Cooperative’s personnel access to the unit, which it needed to make the repairs. Later, he sued the Cooperative for failing to make the repairs he had demanded. In a victory for common sense, the court determined that the Cooperative was not liable, concluding that “if a tenant complains and then refuses to allow the landlord to make repairs, he will not be entitled to damages and his claim will be dismissed.” **Leschins v. 3777 Independence Corp., N.Y.L.J. Aug. 17, 2009, p. 19, col. 1 (Sup. Ct. Bronx Co. July 15, 2009).**

NEW STATUTE GOVERNING POWERS OF ATTORNEY NOW IN EFFECT

In the March 2009 issue of this *Client Advisory*, we reported on new New York State legislation governing powers of attorney, including those used in connection with real estate transactions. The new legislation took effect on September 1, 2009. Powers of attorney executed prior to September 1 remain valid, but those executed subsequently must comply with the new law.

As one example, virtually all condominium documents require unit owners to execute powers of attorney for certain purposes in favor of the Board of Managers. While it appears as of now that powers of attorney that were valid when given prior to September 1 will not have to be changed, the new law affects the form of powers of attorney for new unit owners. We will soon circulate a more detailed alert for clients on this issue. In a condominium where a unit is in the process of being sold, the Board or management should consult with counsel to ensure that the power of attorney form complies with the new law. Anyone else affected by or relying on a power of attorney, whether as principal, agent, or a third party, should also review the new legislation or discuss it with counsel.