GANFER SHORE LEEDS & ZAUDERER LLP

CLIENT ADVISORY

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APPELLATE COURT DECISION DISCUSSES RIGHTS OF UNSOLD SHARES

Holders of unsold shares in cooperatives, or unsold units in condominiums, typically enjoy greater rights than other tenant-shareholders or unit owners. For example, a holder of unsold shares or units is often exempted from board approval requirements for sales or sublets in a cooperative or the board's right of first refusal in a condominium. From time to time, disputes and litigations arise when an owner and a board disagree as to whether the owner is an owner of unsold shares or units, or how broadly such an owner's special rights are to be interpreted.

In **Pastena v. 61 W. 62 Owners Corp., 169 A.D.3d 600 (1st Dep't Feb. 26, 2019)**, the Appellate Division sitting in Manhattan surprised many lawyers by issuing a decision holding that paragraph 38 of the proprietary lease was void as a matter of law. Paragraph 38 in many proprietary leases, including the one at issue in this case, is the provision bestowing special rights on holders of unsold shares. A court decision invalidating that provision would have broad significance.

However, upon looking more closely at the arguments in the case, it appears the provision actually at issue was paragraph 39 (not 38) of the proprietary lease in question. That paragraph deals with the payment of administrative fees on a transfer, and arguably provides special rights to original purchasers in the cooperative, as opposed to subsequent purchasers. A series of prior court decisions have held that proprietary lease provisions or cooperative board policies providing special rights to original or "grandfathered" purchasers, as opposed to subsequent or more recent purchasers, are invalid because they effectively create two classes of stock in the cooperative, in violation of the Business Corporation Law. This is a completely separate issue from the rights of holders of unsold shares, which were not actually involved in the case that the court decided.

Thus, while the court's decision exists, if a future plaintiff tries to rely on it for a broad proposition that a proprietary lease cannot confer special rights on a holder of unsold shares, counsel will be able to seek to distinguish the case and urge that the court did not actually intend, or have a basis, to address that issue. In the two months since this case was decided, it has not been discussed or relied upon in any subsequently reported court decision. We will report on any future developments in this *Client Advisory*.

FOUR-MONTH "ARTICLE 78" STATUTE OF LIMITATIONS BARS SHAREHOLDER'S CHALLENGE TO PROPRIETARY LEASE AMENDMENTS

In the latest chapter in the protracted litigation between the entertainer Madonna and her cooperative, Madonna challenged the cooperative's adoption of amendments to the proprietary lease and asserted that the cooperative adopted the amendments in bad faith. The Appellate Division affirmed a decision dismissing the challenge on the grounds that it was governed by the four-month statute of limitations applicable to "Article 78 proceedings" against a body or officer, such as a cooperative board. Because the case was filed after the four-month period had expired, it was dismissed as untimely, without reaching the merits of the dispute. **Ciccone v. One W. 64th St., Inc., 2019 N.Y. App. Div. LEXIS 2648, 2019 N.Y. Slip Op. 2636 (1st Dep't Apr. 4, 2019)**.

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It often is not clear whether a given claim will be treated as in the nature of an Article 78 proceeding, subject to the short four-month statute of limitations, or as a declaratory judgment proceeding, which is subject to a much more generous six-year limitations period. To avoid any dispute and the possibility of dismissal, tenant-shareholders with claims arising from lease amendments, house rules, or similar actions by the board or shareholders should consult counsel and bring their claims as promptly as possible.

COURT UPHOLDS BOARD'S REJECTION OF PURCHASE APPLICATION

A tenant-shareholder in a cooperative sought to purchase the shares appurtenant to an additional unit in the building, but the Board denied the application. The tenant-shareholder filed a lawsuit asserting a series of claims against the members of the Board of Directors. In **Jarmuth v. Leonard, 2019 N.Y. Misc. LEXIS 1545, 2019 N.Y. Slip Op. 30846(U) (Sup. Ct. N.Y. Co. Apr. 4, 2019)**, the court dismissed all of the plaintiff's claims.

Among other claims, the plaintiff sued the members of the Board of Directors for breach of fiduciary duty. However, plaintiff failed to plead that the individual board members had "acted tortiously other than in their capacity as board members." As a result, the claim was dismissed. Another ground for dismissing this claim was that "[t]he courts are generally prohibited by the business judgment rule from inquiring into the propriety of actions taken by the directors on [the Cooperative's] behalf." Judicial review is only permitted of "'improper' decisions, such as 'when the challenger demonstrates that the board's decision has no legitimate relationship to the welfare of the cooperative, deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board's authority.'"

As to the remaining claims, the plaintiff asserted that the Board denied her application in bad faith because she had filed previous lawsuits against the cooperative. The court nonetheless held that there still was "no allegation in the complaint that provides a basis to overcome the business judgment rule, which precludes judicial review of the board's decision. None of the allegations in the complaint amount to the level of bad faith." Moreover, the proprietary lease expressly recognized the Board's authority to reject a transfer of shares "for any reason or for no reason."

CITY LAW NOW PROHIBITS DISCRIMINATION BASED ON HAIR STYLE

All employers and housing providers should be familiar with the federal, state, and city laws prohibiting discrimination in employment or housing accommodation on the basis of protected categories such as race, religion, sex, age, and other protected characteristics. The New York City Human Rights Commission recently issued a legal enforcement guidance memorandum interpreting the New York City Human Rights Law to prohibit discrimination based on an individual's hair style, including but not limited to maintaining natural hair, a treated or untreated hairstyle, and/or the right to keep hair in an uncut or untrimmed state. Discrimination based on hair is prohibited in all fields covered by the Human Rights Law including employment, housing, and public accommodations.

The guidance memorandum further states that "[w]here an employer does have a legitimate health or safety concern, it must consider alternative ways to meet that concern prior to imposing a ban or restriction on employees' hairstyles." However, "[a]lternative options may not be offered or imposed to address concerns unrelated to actual and legitimate health or safety concerns." The Human Rights Commission "encourages employers and other covered entities to evaluate any existing grooming or appearance policies, standards, or norms relating to professionalism to ensure that they are inclusive of the racial, ethnic, and cultural identities and practices associated with Black and historically marginalized communities."