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CLIENT ADVISORY

AUGUST 2021

COURT DISCUSSES PROPER PROCEDURE FOR SUING AND SERVING CONDOMINIUM

A recent court decision addresses how a condominium is to be sued and served with process. The condominium in this case, like most condominiums in New York, is an unincorporated association. Applying the New York General Associations Law, the court held that "[a]n unincorporated association may not be sued directly as an entity. Rather, a plaintiff who wishes to raise claims against an association must instead bring an action against the association's president or treasurer in that officer's representative capacity." Service of process must then be made upon the president or treasurer. Here, plaintiff named the condominium's board of managers as the defendant and served the summons and complaint on the condominium's managing agent. The court held that this did not satisfy the applicable service requirements. While naming the board of managers as the defendant might be considered a "correctable irregularity," the failure to make proper service was not and required dismissal of the action. The court did not discuss Real Property Law § 339-n(7), which provides for service on a condominium through the Secretary of State.

This is one of several recent decisions involving condominiums in which courts have held that the proper party to be named is the president and/or treasurer. Typically, the board of managers is named as the plaintiff or defendant and no one disputes that the Board is the correct party. New York's appellate courts, which are likely to have the last word, have not yet addressed this issue.

Plaintiff's claims against the managing agent were also dismissed. As an agent for a disclosed principal, the managing agent could be liable only if it either committed "affirmative acts of negligence" or was in exclusive control of the premises. Plaintiff's allegations did not satisfy either of these conditions. Plaintiff's claim for breach of fiduciary duty was dismissed, because the managing agent owes a fiduciary duty only to the board of managers, not to an individual unit owner. Plaintiff's claim for breach of contract was dismissed because there was no contract between plaintiff (or any other unit owner) and the managing agent. **Makhnevich v. Board of Managers of 2900 Ocean Condominium, 2021 N.Y. Misc. LEXIS 4082, 2021 N.Y. Slip Op. 50679(U) (Sup. Ct. N.Y. Co. July 21, 2021).**

CONDOMINIUM COULD NOT RECOVER COMMON CHARGE ARREARS FROM OCCUPANT WHO HAD NO RELATIONSHIP WITH THE CONDOMINIUM

The owner of a residential condominium unit allowed a relative to occupy the unit. For several years, the common charges on the unit went unpaid. The Condominium filed an action against the occupant seeking to recover the past-due common charges, amounting to more than $153,000. The occupant did not respond to the summons and complaint and was declared in default. Nonetheless, the court denied the condominium's motion for a default judgment and dismissed the action, holding that the occupant had no liability to the condominium for the unpaid common charges.

The Condominium asserted two claims against the occupant, one for "unjust enrichment" and one for "account stated." The theory of the unjust enrichment claim was that the occupant had enjoyed the benefits of residing in the Condominium without paying the common charges necessary to maintain the building. The court held, however, that "the Board has not alleged or otherwise provided facts demonstrating that [the occupant] had an obligation to pay those common charges in the first place." The Board sought to rely upon

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the By-Laws, which provide that they are binding on occupants of units, as well as unit owners and lessees. However, the By-Laws imposed the obligation to pay the common charges only upon unit owners and did not provide that occupants were liable for common charges.

The account stated claim also failed. A plaintiff can sue on an "account stated" where it rendered invoices to the defendant, which were retained without objection. There was no evidence here that the invoices were sent to the occupant. The court observed that it had previously granted a judgment against another occupant of the unit, who had acknowledged an obligation to pay common charges, made partial payments of the common charges, and requested that invoices be addressed to him. The occupant who was the subject of this motion had done none of these things.

The court further held that even if the Board had pleaded a valid cause of action against the occupant, its proof of the amount owed was insufficient. The Board had submitted a copy of the "arrears ledger" reflecting unpaid common charges, but it did not submit an affidavit from the managing agent to authenticate the ledger and attest to its accuracy. The ledger page was not "sufficiently clear and self-explanatory to support awarding a six-figure default judgment." Accordingly, the Board's complaint against the occupant was dismissed. **Board of Managers of Two Columbus Ave. v. Leschins, 2021 N.Y. Misc. LEXIS 3989, 2021 N.Y. Slip Op. 50658(U) (Sup. Ct. N.Y. Co. July 14, 2021).**

Although the Board was denied the default judgment it had sought, it may be able to recover the past-due common charges by other means, such as by foreclosing on its common charges lien. In addition, where a tenant is paying rent to occupy a unit but the unit owner is not paying common charges, a board may be able to invoke Real Property Law § 339-kk and demand that the tenant make all rental payments directly to the condominium. When a condominium or cooperative unit falls into arrears, the board or the managing agent should discuss collection options with counsel, preferably before a large balance of arrears mounts up.

COURT REJECTS CLAIMS FOR BREACH OF WARRANTY OF HABITABILITY AND BREACH OF PROPRIETARY LEASE RESULTING FROM SUPERSTORM SANDY

Two corporations that owned unsold shares in a cooperative sued the cooperative, asserting a wide variety of claims, but were unsuccessful on almost every claim. **Transus LLC v. Beach View Apartment Corp., 2021 N.Y. Misc. LEXIS 3742, 2021 N.Y. Slip Op. 50615(U) (App. Term 1st Dep't July 1, 2021)**.

One plaintiff asserted it should not have been charged late fees because it had a credit balance on one of its units. However, the arrears on that plaintiff's other units far exceeded the amount of the credit.

Plaintiffs' claim for breach of the warranty of habitability, based on temporary building conditions following Hurricane Sandy, was rejected because the plaintiffs never resided in the units. Plaintiffs' claim that the same conditions entitled them to a rent abatement under the proprietary lease also failed. Paragraph 8 of the proprietary lease provided for an abatement of rent where the unit was so damaged as to be untenantable; however, another paragraph provided that the cooperative would not be liable for lack of services unless it resulted from the cooperative's negligence. Reading the proprietary lease as a whole, the court concluded that paragraph 8 "was not intended to apply to a building-wide shutdown on account of a natural disaster."

The court agreed that one plaintiff had improperly been charged a $50 sublet fee and directed that it be refunded. The court refused, however, to award plaintiffs the attorneys' fees they had incurred in the litigation. Given that plaintiffs had sued on five causes of action totaling more than $25,000 and had been awarded only $50, they could not be considered the "prevailing parties" and therefore entitled to attorneys' fees.