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CLIENT ADVISORY

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COOPERATIVE MAY SEEK TO RESCIND CONVEYANCE TO PURCHASER WHO VIOLATED OCCUPANCY AGREEMENT

A Coop Board approved the sale of a unit to an applicant who represented that he would be the sole occupant and would live in the unit as his primary residence. The Board required the purchaser to enter into an Occupancy Agreement that prohibited using the premises "for any purpose other than a private dwelling apartment for [him] and his family." Based on the purchaser's representations and his signature on the Occupancy Agreement, the Board approved the purchase and did not exercise a right of first refusal it could otherwise have exercised.

After the sale closed, the Board allegedly learned that instead of living in the apartment, the purchaser was subletting it to third parties on a short-term basis as part of a "real estate business." The board sued the purchaser seeking to rescind its approval of the conveyance and to recover damages for fraud.

An appellate court has held that these facts, if proved, provide a basis for the Board's claims against the purchaser. The Board's pleading was sufficiently detailed and contained all the elements of a valid claim for fraud. The purchaser relied on precedents holding that a fraud claim will not be allowed where the only fraud arises from a breach of contract or is based on a misrepresentation of one's intent to perform under the contract. However, here, the fraud claim "allege[d] that the defendant made misrepresentations of fact on his purchase agreement that were collateral to the occupancy agreement, and that those misrepresentations induced the [Board] to approve the defendant's purchase application, resulting in the [Board's] failure to exercise its right of first refusal to purchase the subject apartment." **Trump Village Section 4 v. Vilensky, 202 A.D.3d 865 (2d Dep't Feb. 9, 2022)**.

INDIVIDUALS MAY BE LIABLE ON PERSONAL GUARANTEES DESPITE NEW YORK CITY LAW CONFERRING IMMUNITY

A commercial tenant failed to pay rent for more than two years. The landlord sued two individuals who had signed personal guarantees on the lease. The guarantors moved to dismiss the claims against them based on New York City Administrative Code § 22-1005. This section, which was added by a local law enacted in the early days of the pandemic, provides immunity from the enforcement of certain personal guaranties of commercial leases during the period from March 7, 2020 to June 30, 2021, where the premises were affected by certain pandemic-related executive orders affecting the tenant's business.

A lower court granted the guarantors' motion to dismiss, but the landlord appealed, and the appellate court reinstated the claim. **721 Borrower LLC v. Moha, 2022 N.Y. App. Div. LEXIS 2407, 2022 N.Y. Slip Op. 2504 (1st Dep't Apr. 19, 2022)**. The court gave two reasons for its decision. First, much of the time period during which the rent was not paid was prior to March 2020. Thus, there was no basis for applying the Local Law to rent owed for periods before it took effect. Second, even as to the unpaid rent that accrued during the statutory period, there remains a possibility that this local law, which has been challenged as a taking of landlords' rights without just compensation, will ultimately be declared unconstitutional. The appellate court

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directed that the complaint be reinstated so that the parties can further develop the record on the unresolved constitutional issue.

COURT AGREES THAT DENIAL OF EMOTIONAL SUPPORT DOG CONSTITUTED DISCRIMINATION, BUT REDUCES DAMAGES

Coop and condo boards and landlords have become familiar in recent years with legal requirements governing requests for reasonable accommodations for residents with disabilities, including those who seek to have a service or support animal as an accommodation. The most recent court decision addressing this area of the law is **Matter of Mutual Apartments, Inc. v. New York City Commission on Human Rights, 2022 N.Y. App. Div. LEXIS 2031, 2022 N.Y. Slip Op. 2122 (2d Dep't Mar. 30, 2022)**.

A mother and daughter have resided together in a cooperative apartment for many years. The proprietary lease prohibits tenants from having dogs, but the tenants requested permission to have a dog for emotional support in connection with their mental health disabilities. After receiving this reasonable accommodation request, the cooperative and its managing agent brought a proceeding seeking to evict the tenants for violating the no-dog rule. The tenants then filed a complaint with the New York City Commission on Human Rights, asserting that they had been discriminated against because of their disabilities. The Commission awarded the tenants compensatory damages of $40,000 and $30,000 respectively, imposed a further civil penalty of $55,000, and directed that the cooperative and managing agent must allow the tenants to keep their dog.

The cooperative and managing agent challenged the Commission's decision in court. The court reaffirmed the legal standards for claims of housing discrimination, and emphasized that where the Human Rights Commission has resolved a complaint after an evidentiary hearing, the court will sustain the Commission's decision as long as it is supported by substantial evidence. Here, "the Commission's determination that the [cooperative and managing agent] unlawfully discriminated against the complainants on the basis of a mental health disability by refusing to allow them to keep their emotional support dog as a reasonable accommodation [was] supported by substantial evidence." However, finding the amounts awarded by the Commission to be excessive, the court reduced the damage awards to $20,000 and $15,000 respectively and the civil penalty to $30,000.

CONDO BY-LAW AMENDMENTS REQUIRING ARBITRATION DO NOT APPLY RETROACTIVELY

The By-Laws of a Condominium, as originally issued, required that certain types of disputes be resolved in arbitration rather than in court. A unit owners' meeting was called on a proposal to amend the By-Laws to require arbitration of all claims and disputes. Four days before that meeting was held, the plaintiff unit owner sued the Board of Managers and its members on claims for alleged water damage to plaintiff's unit, lack of proper maintenance, and breach of fiduciary duty by the Board. At the unit owners' meeting, the By-Law amendment was adopted over plaintiff's opposition.

Defendants moved to dismiss the lawsuit and to compel arbitration. The court denied the motion and directed that the litigation would proceed in court. The dispute was not arbitrable under the original By-Laws because it was not within the subject-matters for which those By-Laws required arbitration. The dispute was not arbitrable under the amended By-Laws because the lawsuit was filed before those By-Laws were adopted and took effect. **Menkes v. Board of Managers of 561 5th Street Condominium, 2022 N.Y. Misc. LEXIS 605, 2022 N.Y. Slip Op. 30393(U) (Sup. Ct. Kings Co. Feb. 2, 2022)**.