GANFER SHORE LEEDS & ZAUDERER LLP

CLIENT ADVISORY

OCTOBER 2019

COURT HOLDS FORMER CONDOMINIUM BOARD PRESIDENT MAY BE ENTITLED TO INDEMNIFICATION FOR LEGAL FEES INCURRED IN BOARD'S LAWSUIT AGAINST HER

A New York court held that a Condominium may be required to indemnify its former Board President for legal fees incurred in litigation brought by the Board of Managers, if she acted in good faith in her actions as President. **Board of Managers of 28 Cliff Street Condominium v. Maguire, 2019 N.Y. Slip Op. 29275, 2019 N.Y. Misc. LEXIS 4800 (Sup. Ct. N.Y. Co. Sept. 9, 2019)**.

The Board brought the lawsuit against its former President and three companies, which owned and operated a restaurant in the commercial unit. The complaint alleged that after a fire, the then-President, among other things, "mismanaged and embezzled insurance funds earmarked for building repairs." The court eventually dismissed all of the Board's claims except for one alleging excessive noise. In the interim, the former President counterclaimed for legal fees and moved for indemnification seeking $350,000 in legal fees. She cited Section 722(c) of the New York Business Corporation Law (BCL), which authorizes a corporation to indemnify any person sued by or on behalf of the corporation "by reason of the fact that [s]he ... is or was a director or officer of the corporation," provided she acted in good faith and not in opposition to the corporation's best interests. She also cited Section 724(c), which authorizes a court to direct interim payment of legal fees (sometimes referred to as "advancement") while the litigation is pending.

The Condominium responded that while the BCL applies to cooperatives, it does not apply to unincorporated condominiums, which are organized under the Real Property Law (RPL) rather than the BCL. The court held, however, that where the RPL is silent on an issue, the courts may apply the BCL by analogy. The Condominium also observed that Section 722(c) is permissive, rather than mandatory, and provides that a corporation "may" provide indemnification to its officers or directors who have been sued, not that it "must" do so. The court responded by citing Section 724(a), which provides that "[n]otwithstanding the failure of a corporation to provide indemnification, and despite any contrary resolution of the board …, indemnification shall be awarded by a court … to the extent authorized under Section 722." The court reached this conclusion about the statute without citing any provision of the Condominium Declaration or By-Laws discussing indemnification. In conclusion, the court directed that a hearing be held to "determine if [the former President] executed her duties in good faith following the fire; and if so, what are the reasonable amount of attorneys' fees [she] expended to defend against the ten causes of action the Board brought against her…."

Both cooperatives and condominiums should consider the implications of this decision before commencing any litigation against present or former officers or directors, given the possibility that they may wind up paying for the other side's legal fees and expenses in addition to their own. Boards may also wish to have their counsel review their By-Law provisions relating to indemnification and advancement issues.

TENANTS LOSE CLAIM FOR IMPROVEMENT ALLOWANCES FOR FAILURE TO SUBMIT DOCUMENTATION BY DEADLINE

A landlord signed simultaneous leases with two separate, but related, companies covering different floors in the same building. Each lease provided that the tenant would be entitled to reimbursement from the

360 Lexington Avenue, New York, New York 10017 Tel: (212) 922-9250 Fax: (212) 922-9335 http://www.ganfershore.com

landlord for certain expenditures for improvement of the premises, provided that the improvements were completed and documentation submitted within 18 months of the signing of the leases, or by January 1, 2015.

In August 2014, the parent corporation of both tenants submitted a combined reimbursement request under both leases. The landlord responded the same day that the tenants' documentation was deficient because, among other things, the amounts requested must be allocated and submitted separately for each of the two leases. The tenants did not respond until December 2014, when they submitted revised reimbursement requests that still commingled the expenses and certifications for both tenants. Three days later, the landlord responded that these requests still did not comply with the requirements of the lease. The tenants did nothing further before the deadline expired. In April 2015, the tenants made a third submission for reimbursement. The landlord responded that it no longer owned the building, which had been sold in February, and that in any event, the January 1, 2015 deadline had expired.

The tenants sued both the old and new landlords. The court dismissed the case against the new landlord based on estoppel certificates that the tenants had signed. This court also granted summary judgment in favor of the original landlord. **Aerotek, Inc. v. MEPT 757 Third Avenue, LLC, Index No. 654294/2016 (Sup. Ct. N.Y. Co. Sept. 25, 2019)**.

The court held that the tenants had failed to submit their reimbursement requests, in a form complying with the leases' requirements, by the deadline clearly specified in the leases. The deadline and the documentation requirements for reimbursement were clearly specified in the leases, so there was no basis on which the court could rewrite the terms of the leases. Accordingly, the tenants' claims were dismissed in their entirety, and the landlord was held to be the prevailing party under a legal-fee clause in the leases. Ganfer Shore Leeds & Zauderer LLP represented the successful former landlord in this case.

APPEALS COURT UPHOLDS PLEADING OF FRAUDULENT CONVEYANCE CAUSE OF ACTION IN CONDO BOARD'S ACTION AGAINST SPONSOR

A Condominium Board of Managers sued the Sponsor and two of the Sponsor's principals, alleging defective design and construction. The complaint also asserted claims for fraudulent conveyance under New York Debtor and Creditor Law §§ 273 and 274, claiming that the Sponsor transferred assets to its principals. These sections provide that a transfer of assets will be deemed fraudulent as to creditors, without regard to the transferor's actual intent, if the transfer was made without fair consideration and leaves the transferor either insolvent or with unreasonably small capital.

A lower court dismissed the fraudulent transfer claims, finding that the Board failed to establish that it was a creditor of the Sponsor, but an appeals court has reinstated the claims. The court noted that for purposes of the fraudulent conveyance laws, a "creditor" includes any "person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent." Here, the Board has asserted a claim against the Sponsor for breach of contract and therefore was considered a creditor, "even though said cause of action was unmatured at the time of the alleged conveyances."

In addition, while defendants argued that the claims were pleaded without the level of detail required for a fraud claim, the court held that because "claims of violations of Debtor and Creditor Law §§ 273 and 274 do not require proof of actual intent to defraud, such claims are not required to be pleaded with the particularity" applicable to claims based on an actual intent to defraud. **Board of Managers of East River Tower Condominium v. Empire Holdings Group, LLC, 2019 N.Y. Slip Op. 6587, 2019 N.Y. App. Div. LEXIS 6621 (2d Dep't Sept. 18, 2019)**.