GANFER SHORE LEEDS & ZAUDERER LLP

CLIENT ADVISORY

DECEMBER 2020

CONDOMINIUMS AND COOPERATIVES SHOULD REVIEW SCOPE OF THEIR BY-LAWS GOVERNING INDEMNIFICATION

Condominium and cooperative board members volunteer their time to serve their neighbors. They are not paid for their service, but they have the right to expect that serving should not *cost* them money, especially when they act in good faith and perform their duties to the best of their abilities. For this reason, the By-Laws of most condominiums and cooperatives include a section providing that the condominium or cooperative will indemnify its board members and officers from legal fees and expenses incurred in defending litigation brought against them for their actions on behalf of the condominium or cooperative, absent a court finding that they acted wrongfully or in bad faith.

The New York Business Corporations Law also includes provisions governing indemnification of directors and officers. These provisions apply to cooperatives, which are organized as corporations, but they do not directly apply to unincorporated condominiums, which are governed by the Condominium Act provisions of the Real Property Law. In many cases, where the Condominium Act does not address a specific governance issue, many courts have applied corresponding provisions of the Business Corporation Law by analogy. However, there is nothing in the Condominium Act that specifically authorizes this practice, and a recent appellate court decision calls it into question.

In **Board of Managers of 28 Cliff Street Condominium v. Maguire, 2020 N.Y. App. Div. LEXIS 7062, 2020 N.Y. Slip Op. 6844 (1st Dep't Nov. 19, 2020)**, an action was brought against the President of a Condominium Board of Managers. The court dismissed some of the claims against the Board President while others remained pending. The Board President brought a motion to require the Condominium to indemnify her for the legal fees she incurred in defending against the claims that had been dismissed. A lower court held that the Business Corporation Law's provisions on indemnification would be applied by analogy and directed a hearing on whether the Board President had acted in good faith and was entitled to indemnification.

The appellate court reversed this ruling and held that the Board President was not entitled to indemnification. Because the building was an unincorporated condominium and not a cooperative, "the BCL does not directly control the parties' legal fees dispute." In addition, the By-Laws of the Condominium provide for indemnification of directors and officers in certain limited situations, and the court would not expand the scope of the permitted indemnification beyond those provided in the By-Laws. The By-Laws gave the Condominium authority to indemnify directors and officers in litigations involving contractual liability, but not tort claims. The dismissed claims in this action were for breach of fiduciary duty and misappropriation, which are tort rather than contract claims. Accordingly, the court ruled, the Board President, "alone, is responsible for her legal fees."

In view of this decision, condominiums and their counsel should carefully review their By-Laws to ensure that their By-Laws provide for a broad scope of indemnification for their board members and officers, and review whether there are any other provisions that should also be updated. Although this decision addresses condominiums, cooperatives could benefit from such a review as well. Finally, condominiums and cooperatives should also periodically review their insurance coverage program to make certain that their directors and officers are protected from personal liability to the maximum extent possible.

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

BUSINESS JUDGMENT RULE APPLIES TO BOARD DECISION ON HOW TO PERFORM LOCAL LAW 11 FAÇADE REPAIRS

A New York court has reaffirmed that under the Business Judgment Rule, courts will defer to boards' decisions on issues relating to how repair work in their building is to be performed. **Barbiere v. Board of Managers of 175 West 12th Street Condominium, Index No. 158654/2020, 2020 NYLJ LEXIS 1737 (Sup. Ct. N.Y. Co. Nov. 12, 2020)**. In this case involving a condominium undergoing Local Law 11 repair work, a unit owner couple alleged that the Board improperly refused to give the façade outside their unit the same remediation as other units on the same side of the building. The Board responded that these owners had installed unique windows in their unit, which explained why a different method of repairs might be needed, and submitted an engineer's affidavit explaining that the proposed repair method was safe. The Board also stated that a final decision on the repair method had not yet been made.

The court agreed that the court proceeding was premature in the absence of a final decision by the Board. In any event, the Board's decisions on how to perform repair work were protected by the Business Judgment Rule. There was nothing in the record to suggest that the court should substitute its own judgment for the Board's. To the contrary, the court declared that it "has no interest in becoming a general contractor and telling [the Board] how to complete Local Law 11 work that remains ongoing. That is not the Court's role. Part of living in a condo means having to work with the condo and the recognition that not every owner is going to agree with the decisions made by the board." This was especially true because "there [was] no evidence from an expert suggesting that the type of work petitioners complain about is unsafe or ineffective." Ganfer Shore Leeds & Zauderer LLP represents the successful Condominium Board of Managers in this case.

CONDOMINIUM BOARDS MAY SUE TO FORECLOSE COMMON CHARGES LIENS

The ongoing coronavirus pandemic has given rise to a series of executive orders, local laws, and court rules that temporarily limit various types of residential landlord-tenant proceedings and mortgage foreclosure actions. In **Board of Managers of 243 West 98 Condominium v. Goldberg, Index No. 155924/2020 (Sup. Ct. N.Y. Co. Nov. 17, 2020)**, a Condominium Board of Managers filed a common charges lien against a residential unit owner who had not paid her common charges for several months. The Board then brought an action to foreclose on the common charges lien. The unit owner moved to dismiss the action as barred by the Governor's Executive Orders. The Board responded that the action was not covered by the Executive Orders as it did not seek to evict a tenant or to foreclose on a mortgage, and that in any event, the court papers filed by the Board complied with the notice requirements under the Executive Orders. The court agreed with the Board and ruled that "defendant has failed to show that this action to foreclose on a lien for common charges was filed in violation of Governor Cuomo's Executive Orders…." Ganfer Shore Leeds & Zauderer LLP represents the Condominium Board of Managers in this case.

PROPOSED LOCAL LAW WOULD IMPOSE BURDENSOME SPRINKLER REQUIREMENTS

A proposed local law being considered by the New York City Council, Int. 1146-B, would require that all residential buildings over 40 feet in height, including cooperatives and condominiums, must be retrofitted with automatic sprinklers in all apartments. This mandate, which would have to be satisfied by 2029, would apply regardless of the age of the building and regardless of any other fire safety measures that may already be present. It is anticipated that to comply, the ceiling of every apartment would need to be opened up, at substantial expense. For older premises, opening the ceilings creates other potential hazards such as asbestos exposure, which could themselves require costly remediation. Board members and property owners may wish to contact their City Council members with their views on this proposed legislation.