GANFER SHORE LEEDS & ZAUDERER LLP

CLIENT ADVISORY

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NEW LEGISLATION PROHIBITS LEASE WAIVERS OF DECLARATORY JUDGMENT ACTIONS SEEKING "YELLOWSTONE" INJUNCTIONS FOR COMMERCIAL TENANTS

When a landlord-tenant dispute arises under a commercial lease, the landlord may take the position that if the tenant does not cure the alleged violation of the lease, the landlord will terminate the lease and bring a court proceeding seeking to evict the tenant. Often, the tenant's position will be that it did not commit any violation and is not in default – but that if it were to be held in default, it should be allowed to cure the default rather than have the lease terminated. The tenant often finds itself on the horns of a dilemma: should it spend time and effort curing a default that it claims doesn't exist, or deny that it is in default, risking termination and eviction if the court disagrees?

To address this situation, the New York courts developed the concept of what is called a "Yellowstone" injunction, under which the court will grant the tenant an injunction suspending the running of a cure period allowed under a commercial lease until the merits of the dispute are resolved. **First National Stores, Inc. v. Yellowstone Shopping Center, Inc., 21 N.Y.2d 630 (1968)**. (The doctrine affects primarily commercial leases because for most residential leases, similar protections are contained in the Real Property Actions and Proceedings Law.)

The availability of this important protection for commercial tenants was weakened by the decision of the Court of Appeals, New York's highest court, in **159 MP Corp. v. Redbridge Bedford, LLC, 33 N.Y.3d 353 (2019)**. In that case, discussed in the June 2019 issue of this *Client Advisory*, the Court upheld the validity of a commercial lease provision that allowed the tenant to dispute the landlord's claims of default only in opposition to a lawsuit brought by the landlord – thereby waiving the tenant's right to bring a declaratory judgment action seeking Yellowstone relief. Following this decision, landlords sought to negotiate similar provisions into their leases, thereby shifting the balance of power in the event of future disputes.

The New York State Legislature has sought to put a halt to this trend by enacting **Real Property Law § 235-h**, effective December 20, 2019. This statute provides: "No commercial lease shall contain any provision waiving or prohibiting the right of any tenant to bring a declaratory judgment action with respect to any provision, term or condition of such commercial lease. The inclusion of any such waiver provision in a commercial lease shall be null and void as against public policy." The Legislature's intention in adopting this statute was clearly to preserve Yellowstone injunctions and to overrule the Court of Appeals' decision in 159 MP Corp. However, because the statute does not contain the actual words "Yellowstone injunction," it remains to be seen whether landlords may seek to craft lease language seeking to work around the purpose of the statute.

NEW YORK CORPORATIONS, INCLUDING COOPERATIVES, MUST REPORT THE NUMBER OF WOMEN ON THEIR BOARDS

As part of a nationwide movement to increase the high-level participation of woman in the corporate world, the New York State Legislature has enacted a new law requiring that each corporation must report the number of directors on its board of directors and the number of those directors who are women. This information must be included in the biennial reports that all New York corporations and authorized foreign

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corporations file with the New York State Secretary of State. These reports will be compiled for purposes of a "Women on Corporate Boards Study" by State officials. This law took effect on January 29, 2020 and applies to all New York corporations covered by the Business Corporation Law, including cooperatives.

BUILDING OWNERS ARE NOW REQUIRED TO DELIVER OR POST NOTICES OF CERTAIN BUILDING VIOLATIONS

Another new law applicable in New York City, **Local Law 110**, imposes certain obligations on building owners who receive summonses for violations from the New York City Department of Buildings (DOB). If the summons issued to the owners alleges a violation inside a particular occupied dwelling unit, then a copy of the summons together with an information flyer from the DOB must be delivered to the resident of the affected unit, as well as the residents of occupied units adjacent to the affected unit, within five calendar days after the summons is served. If the summons alleges a violation based on a condition outside an occupied dwelling unit – such as a condition in common areas or affecting the building as a whole – then a copy of the summons together with the DOB information flyer must be posted "in a conspicuous manner" in the lobby of the building. A copy of the required information flyer is available online from the DOB website.

Although the text of the Local Law is somewhat vague, the DOB has reportedly advised that the new requirements apply only to violations that are the subject of summonses issued by the DOB and returnable before the Office of Administrative Trials and Hearings/Environmental Control Board (OATH/ECB), and that they apply only to residential buildings. The DOB has also reportedly advised that violations must remain posted until they are "resolved" (meaning either dismissed or corrected) and that noncompliance with the posting or delivery requirements will be treated as a separate violation that can result in additional fines.

COURT REJECTS PROCEDURAL CHALLENGES TO VALIDITY OF AMENDMENTS TO CONDOMINUM DECLARATION AND BY-LAWS

In 2011 and 2012, the unit owners of a condominium voted to approve amendments to the Condominium Declaration and By-Laws. A court proceeding brought by the one of the unit owners in 2017, challenging the amendments' validity on procedural grounds, has been dismissed. One basis for the challenge was that the Condominium failed to record the amendments with the City Register for several years after they were adopted. In the court's judgment, this was a "technical defect" that was insufficient to invalidate the amendments. It was undisputed that the unit owners had voted on both sets of amendments, that the unit owners' votes were duly counted and reported, that the board president signed the amendments, and they were eventually recorded with the City Register before the court proceeding was commenced.

The court further held that "[t]he process of holding the [unit owners'] meeting open . . . in order to reach a quorum was, at most, a technical defect" that was also insufficient to invalidate the vote. The court observed that holding the meeting open "allowed over 96% of the common interest to cast a vote, including petitioner." In addition, "[p]etitioner waived any challenge to the procedure used to approve the . . . amendment by conceding . . . that a quorum was reached at the meeting." **Matter of Reynolds v. Towers on the Park Condominium, 178 A.D.3d 416 (1st Dep't Dec. 3, 2019).**

CLIMATE CHANGE LAW BRINGS CHALLENGES FOR COOPS AND CONDOS

We have reported in prior issues of this *Client Advisory* on the impact the New York City Climate Mobilization Act will have on all property owners, including cooperatives and condominiums, and the need for boards to begin grappling with the Act's implications now. William D. McCracken, a partner at Ganfer Shore Leeds & Zauderer LLP, recently published an article on this subject on the prominent Law360 website. A copy of this article is enclosed.

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Climate Law Brings Challenges For NYC Co-Ops And Condos

By **William McCracken** (January 17, 2020, 5:16 PM EST)

William McCracken

It has been observed more than once that the reaction in the New York City real estate community to the ambitious emissions reductions goals that New York City has enacted in its Climate Mobilization Act has been reminiscent of the classic five stages of grief:

- Denial — the ones hoping the whole thing will just go away;
- Bargaining — the lawyers of course;
- Anger — the landlords;
- Depression — also the landlords; and
- Acceptance — the energy consultants looking forward to years of full employment.

The joke does not work very well for co-ops and condominiums, because the reality is that many of those buildings have yet to think about the CMA much at all. One reason for this is that co-op and condo board members are volunteers who rarely have building management expertise, and in any event may or may not even plan to be living in the same building 10 years from now. Another concern, though, is that there are many important questions about how the CMA will apply to co-ops and condos that do not yet have a good answer.

For example, what is going to happen to buildings with rent-regulated units? As currently drafted, the CMA expressly exempts any building with even one unit of rent-regulated housing from the carbon emissions limits set for 2024 and 2030. The reason is that when the New York City Council was crafting the CMA, it knew that under existing law, landlords were able to pass along certain major capital improvement costs to rent-regulated tenants.

Tenant advocates were concerned that if this provision were not amended, rent-regulated tenants rather than landlords might bear the brunt of some CMA compliance costs. However, the City Council also had one eye on Albany, where the state Legislature was set to consider an ambitious package of rent control legislation in the June 2019 legislative session. One of the issues before the state Legislature was whether landlords would continue to be able to pass along major capital improvement costs to rent-regulated tenants.

Now that the state Legislature has passed the Housing Stability and Tenant Protection Act, which reduces landlords' ability to pass along these major capital improvement costs, it is widely expected that the City Council will impose an emissions limit on buildings with rent-regulated units on some future date, but no one knows when or how.

The problem is that everyone acknowledges that New York City will not be able to meet its carbon reduction goals if all buildings with rent-regulated housing are exempt from emissions limits. In fact, because co-ops often carry a handful of rent-regulated units left over from when the buildings converted decades ago, the currently exempt buildings include many of the largest residential buildings in the city.

One irony of excluding buildings like this is that these large co-ops generally are professionally run and have comparatively ample financial resources, and so are good candidates to undertake the type of long-term emissions reduction program that the CMA encourages.

A further irony is that if the city later imposes emissions limits on some or all buildings with rent-regulated units, those buildings will have lost any potential first-mover advantages and also will have delayed obtaining any cost savings from energy efficiency measures, meaning that the current reprieve may end up costing those buildings more than if they had been included from the start.

The question of how buildings will pay for the work called for by the CMA is another of the big unanswered questions about the legislation. This uncertainty is especially great for co-ops and condos. A centerpiece of the new legislation is a government program to provide financing for energy efficiency and renewable energy projects. Property-assessed clean energy, or PACE, loans are made by private lenders for prequalified projects, and are repaid as a charge on a building's tax bill, and thus have priority over mortgages or co-op or condo building loans.

However, the very nature of PACE loans seems to preclude their use by condominiums. After all, in a condo, each separate unit owner has a separate tax lot and pays property taxes individually. Absent unanimous consent of all unit owners in the building (an unlikely possibility in the best of circumstances for buildings with more than a handful of units), it is difficult to conceptualize how condominiums could ever take PACE loans for building-wide energy projects.

Even co-ops are likely to have difficulties using PACE, given that so many co-ops have loans and recognition agreements that would give existing lenders a veto over any new financing that would have priority over existing loans.

Although the city is aware of these problems, it is unlikely that the official rules and guidance being developed for PACE lenders, expected in the first part of 2020, will resolve these issues. The upshot is that co-ops and condos probably have fewer options for financing energy improvements than the drafters of the CMA intended.

One final question arises from the fact that the CMA imposes emissions limits (and substantial penalties for noncompliance) on building owners, but not on building users. This is true even though tenants and residents generate a high percentage of the emissions emitted by buildings. In other words, under the CMA, building owners are responsible for reducing emissions that they did not cause or directly control. The theory appears to be that building owners will have the leverage and ability to negotiate appropriate pass-through provisions so that tenants pay their share of compliance costs.

Over the long term, this theory may work for Class A commercial portfolio managers, but relationships in co-ops and condos are governed by proprietary leases, declarations and bylaws — documents which cannot simply be renegotiated, which do not periodically come up for renewal and which require supermajorities for any amendments.

Moreover, to the extent that co-ops or condos have commercial tenants, boards may be at a relative disadvantage negotiating the appropriate lease provisions with sophisticated counterparties. Are co-ops and condos going to be able to properly allocate the costs of compliance with the CMA? It remains to be seen.

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