GANFER SHORE LEEDS & ZAUDERER LLP

CLIENT ADVISORY

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CONTRACT PURCHASER FAILS TO SHOW FRAUD, LOSES DOWN PAYMENT

In a recent decision, a court refused to allow the contract purchaser of a condominium apartment to back out of the deal and recover his down payment, even though he claimed to have been misled about whether the building had a full-time doorman.

The plaintiff entered into a contract to purchase the apartment for $19 million, allegedly relying on the seller's representation that the building had a full-time doorman. Subsequently, plaintiff learned that the building used a "virtual doorman" during certain hours. The defendant seller did not deny this fact, but asserted that plaintiff could have discovered the facts concerning the doorman through the exercise of due diligence. Plaintiff then filed a lawsuit for fraud, seeking to recover his down payment. Defendant responded that plaintiff was in default for failing to close and should forfeit his $1.9 million contract deposit.

The court sided with the defendant seller. To plead and prove a claim for fraud, the plaintiff must show a misrepresentation or material issue of fact, which was false and known by defendant to be false, made for the purpose of inducing the other party to rely, justifiable reliance on the misrepresentation by the other party, and resulting injury. In particular, "the element of justifiable reliance is essential to any fraud claim." Here, the contract of sale provided that the seller was not bound by any oral or written statements made by anyone about the premises, other than statements contained in the contract of sale itself.

The court noted that the contract of sale did not contain any provisions about the doorman and that the condominium's offering plan disclosed that the building sometimes used a virtual doorman. Accordingly, the court dismissed the complaint and directed that the escrow agent deliver the down payment funds to the seller. **Dille v. Zoelle LLC, Index No. 157435/2022, 2023 N.Y.L.J. LEXIS 155 (Sup. Ct. N.Y. Co. Jan. 11, 2023).**

TERMINATION OF PROPRIETARY LEASE FOR "CONSTANTLY HARASSING" NEIGHBORS IS UPHELD

As readers of this newsletter know, a cooperative's decision to terminate a tenant-shareholder's proprietary lease for objectionable conduct will generally be upheld where the board or shareholders have exercised their good-faith business judgment and complied with all the procedural requirements of the proprietary lease. In **Rivercross Tenants' Corp. v. Kovatch, 2023 N.Y. App. Div. LEXIS 264, 2023 N.Y. Slip Op. 00285 (1st Dep't Jan. 24, 2023)**, an appellate court affirmed that a tenant-shareholder could be ejected from the cooperative where the "decision to terminate defendant's proprietary lease for her objectionable conduct of constantly harassing her neighbors was protected by the business judgment rule." In reaching this conclusion, the court observed that "there [was] no indication that [the board] acted outside the scope of its authority or other than for the purposes of the cooperative, and its determination was made in compliance with the required procedure set forth in the lease." While the tenant-shareholder asserted that the decision to terminate her proprietary lease was retaliatory and discriminatory, she offered no evidence to support those allegations.

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E-MAILS DID NOT CREATE BINDING CONTRACT FOR COOPERATIVE TO SELL ROOF SPACE

A cooperative entered into discussions with shareholders who leased three units in the building and wanted to purchase space located on the roof above their units. The board decided not to proceed with the transaction. The plaintiff shareholders sued for breach of contract and sought an order of specific performance requiring the board to complete the sale.

In support of their contention that there was a binding contract, plaintiffs relied on e-mails between one of the plaintiffs and the cooperative's managing agent. Plaintiffs contended that an e-mail from the managing agent constituted an acceptance of plaintiffs' offer to purchase the roof space, creating a contract. The court disagreed, finding that the e-mail "did not contain all material terms of the contract," as required by the Statute of Frauds, which requires contracts for the purchase or sale of real property to be in writing. The parties' e-mails did discuss some of the transaction terms, such as the price and the number of shares to be allocated to plaintiff, but did not address other terms including financing, terms of payment, or a closing date.

Moreover, "communications that followed indicated that the parties were negotiating additional material terms" of the deal, that they anticipated entering into a formal contract later, and that the board would not make a final decision the sale until the annual shareholders' meeting. Therefore, "the totality of the parties' communications thus show that the early emails relied upon by plaintiff did not constitute a binding contract."

In light of this decision, the court did not need to decide whether the managing agent was authorized to act on the cooperative's behalf. The case is **Levinson v. Perry Realty Corp., 2022 N.Y App. Div. LEXIS 173, 2022 N.Y. Slip Op. 00160 (1st Dep't Jan. 12, 2023)**.

COURT INVALIDATES PART OF VOTING AGREEMENT AMONG COOP SHAREHOLDERS

Tenant-shareholders in a cooperative entered into a voting agreement, whose validity was subsequently challenged. One provision of the agreement provided that plaintiff would vote a portion of its shares pro rata to the votes of all the other shareholders. The court held that this voting restriction was invalid "because it indefinitely links together the votes allocated to 2,630 of plaintiff's shares and the votes cast by all other shareholders. In linking the two, the voting agreement effectively (and impermissibly) creates a permanent class of 2,630 nonvoting shares." This restriction violated Business Corporation Law § 501(c), which requires that all shares enjoy equal voting rights. Because the restriction violated the Business Corporation Law, it could not be saved by the business judgment rule.

However, the presence of this one invalid provision did not require striking down the entire agreement. Like many contracts, the agreement contained a "severability" clause, providing that if one provision of the agreement was held invalid, this would not affect the remainder of the agreement. Therefore, the remainder of the agreement, except for the one invalid section, remained enforceable.

Although it did not affect the final decision, the court's opinion contains a statement that may be confusing. The opinion states that "under the Cooperative Corporations Law, Business Corporation Law § 609, which authorizes shareholder proxies, does not apply to cooperative corporations." Because almost all cooperative apartment corporations are organized under the Business Corporations Law, rather than under the Cooperative Corporations Law (which applies primarily to agricultural cooperative organizations), presumably this statement does not apply to most cooperatives. **Oliver 889 LLC v. 889 Realty Inc., 2022 N.Y. App. Div. LEXIS 263, 2022 N.Y. Slip Op. 00271 (1st Dep't Jan. 24, 2023)**.