GANFER SHORE LEEDS & ZAUDERER LLP

CLIENT ADVISORY

JANUARY 2021

HAPPY NEW YEAR

Ganfer Shore Leeds & Zauderer LLP wishes all of our clients and friends a very happy, healthy, and safe 2021.

PAYROLL PROTECTION PROGRAM IS REVIVED, EXPANDS TO COOPS

In the recently enacted federal stimulus bill, Congress has revived the Payroll Protection Program (PPP). This program provides forgivable loans to businesses whose revenues have suffered as a result of the pandemic, for the purpose of allowing them to sustain their operations and retain their employees.

The PPP program is being reopened to new loan applications. An eligible business or non-profit entity may borrow up to 2.5 times its average monthly payroll (3.5 times its average monthly payroll for the restaurant and hospitality industries). The loan will be forgiven if the borrower spends the proceeds on eligible expenses including payroll, rent, utilities, and certain measures to mitigate the coronavirus spread. For full forgiveness, at least 60% of the loan proceeds must be used for payroll and the borrower may not lay off any employees. A borrower must certify that the loan is necessary to maintain operations and meet other eligibility requirements.

Certain borrowers who took a PPP loan in 2020 may be eligible to take a second PPP loan in 2021. To be eligible for a "second draw" loan, a borrower must have suffered a 25% reduction in its revenues between any calendar quarter of 2019 and the corresponding quarter of 2020. The maximum loan for a second draw is $2 million. Public companies and companies with more than 300 employees are not eligible.

During the 2020 loan program, it was uncertain whether housing cooperatives were eligible to participate in the PPP. The new legislation specifically provides that cooperatives are eligible for PPP loans. Unfortunately, there is still no mention of unincorporated condominiums or homeowners associations.

The new law requires the Small Business Administration (SBA) to issue regulations governing the new round of loans. These should be published during the first week of 2021 and will provide additional clarity regarding how the new round of PPP loans will be administered. The law also requires the SBA to simplify the process for smaller borrowers to have their loans forgiven. However, potential borrowers should be aware that based on recent court rulings, the names of all borrowers and the amounts borrowed are public information that is available online and may become the basis for press coverage.

Another important provision of the new law confirms the federal tax deductibility of expenses paid with a forgiven PPP loan. In the original PPP legislation, Congress directed that forgiveness of a PPP loan shall not constitute taxable income. However, the Internal Revenue Service issued a ruling that expenses paid with the forgiven loan monies would not be deductible from gross income, which would have negated the favorable tax treatment that Congress directed. The new legislation overrules the IRS position and restates that a forgiven PPP loan does not give rise to taxable income and that expenses paid with the loan monies are fully deductible.

Potential borrowers under the PPP program, including cooperatives, should consult with their counsel, accountants, and potential lenders regarding their eligibility and the requirements for applying for a loan.

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NEW YORK EXTENDS MORATORIUM ON RESIDENTIAL EVICTIONS

To help protect residential tenants from the economic effects of the coronavirus pandemic, New York State has enacted the **COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020**. This legislation was signed into law on December 28, 2020 and took effect immediately.

The Act places a moratorium on residential evictions until May 1, 2021 for tenants who have experienced financial hardship as a result of the pandemic. Tenants may assert that they have experienced such hardship by submitting a hardship declaration or documentation explaining the source of the hardship. Unlike prior eviction moratoriums, the law contains a carve-out allowing eviction proceedings where the landlord is seeking to evict a tenant who is creating safety or health hazards for other tenants.

Significantly, while a moratorium on eviction proceedings remains in effect, neither the new law nor any of the prior legislation and executive orders affects a tenant's liability to pay the rent. Tenants still owe the full amount of their rent and, in the absence of further legislation, landlords may seek to enforce this liability in eviction proceedings once the moratorium ends.

In addition, the Act also places a moratorium on certain residential foreclosure proceedings until May 1, 2021. This aspect of the legislation protects homeowners and small landlords, but only those owning 10 or fewer residential dwelling units. Eligible borrowers must file a hardship declaration with their mortgage lender or other foreclosing party, or with the court, to stop the foreclosure proceedings from going forward. Again, the legislation does not affect a borrower's ultimate liability to pay all amounts due – only the timing of enforcement proceedings has been delayed in the event of non-payment. Finally, the new law also prevents local governments from engaging in certain tax lien sales or tax foreclosures until May 1, 2021.

The interplay of various laws, executive orders, and court administrative directives on eviction and foreclosure proceedings is complex and anyone affected by these issues should consult with counsel.

CONDO BOARD PROPERLY DIRECTED THAT BALCONY ENCLOSURE BE REMOVED

An appellate court has upheld a Condominium Board of Managers' authority to direct unit owners to remove a balcony enclosure that was interfering with the Condominium's ability to perform façade work. **Board of Managers of Village Mall at Hillcrest Condominium v. Banerjee, 2020 N.Y. App. Div. LEXIS 6670, 2020 N.Y. Slip Op. 6221 (2d Dep't Nov. 12, 2020)**. These unit owners asserted that in 1979, they had obtained written advance permission to install an enclosure on their balcony, as required by the By-Laws. The court stated that, even if this was true, the By-Laws provided that the Board's consent could be revoked at any time. In 2016, the Board of Managers revoked its consent to all balcony enclosures and mandated that such enclosures be removed, "to enable the completion and inspection of building façade and balcony restoration work so that the building could pass municipal inspection and have an architecturally uniform façade." The court reiterated the familiar standard under which "[t]he business judgment rule prohibits judicial inquiry into the actions of a condominium board as long as the board acts for the purpose of the condominium, within its authority, and in good faith." The Board's actions here satisfied these standards.

APPEALS COURT AFFIRMS THAT SECOND LENDER'S MORTGAGE HAD PRIORITY OVER AN EARLIER MORTGAGE THAT WAS DISCHARGED AND LATER REINSTATED

A first recorded mortgage ordinarily has priority over a subsequently recorded one, but exceptional circumstances can occasionally dictate a different result, as occurred in **Bank of New York v. Terrapin Industries LLC, 2020 N.Y. App. Div. LEXIS 7887, 2020 N.Y. Slip Op. 07705 (1st Dep't Dec. 22, 2020).**

Bank of New York (the "Bank") commenced a foreclosure action in 2008. It moved for summary judgment of foreclosure, but withdrew that motion in January 2009 and failed to pursue the action for three years. In March 2012, the Clerk of the Court marked the case as disposed. In March 2014, the borrower brought a new action seeking to discharge the Bank's mortgage because the statute of limitations had expired. The Bank did not respond, and in July 2014, an order discharging its mortgage was entered and recorded.

In February 2015, another lender known as KBS gave a mortgage on the property, believing it had a first mortgage because the Bank's prior mortgage had been discharged by the court. Two months later, the Bank moved to vacate its default in the discharge action. In 2016, the Appellate Division vacated the order discharging the Bank's mortgage, and the Bank moved to restore its foreclosure action. Meanwhile, KBS brought its own foreclosure action and intervened in the Bank's action, with each lender asserting that its mortgage had priority.

The motion court granted summary judgment to KBS, holding that KBS's mortgage had priority. Its holding was based on the doctrine of laches, which is defined as unreasonable, prejudicial delay in asserting one's rights. The Bank appealed, but the appellate court agreed that "the equitable doctrine of laches [applied] to BNY's unreasonable delay in vacating a default judgment discharging its prior mortgage on the same property and in restoring its foreclosure action…. KBS, which closed on its mortgage in February 2015 after investigating and finding no prior valid liens, would be prejudiced by the delay if BNY were deemed to have the superior lien after taking no action, for years, in the foreclosure action or to vacate the default judgment in the [earlier] action."

In addition, KBS was held to be "a bona fide encumbrancer" entitled to protection, because "nothing in the public record created any issues affecting title when KBS entered into its mortgage, notwithstanding BNY's later successful efforts to vacate the default judgment and restore its foreclosure action." Ganfer Shore Leeds & Zauderer represents the successful lender, KBS, in this case.

COURT OF APPEALS HOLDS THAT LENDER IS NOT REQUIRED TO HAVE PHYSICAL POSSESSION OF NOTE BEFORE FORECLOSING

For many years, it has been a precept of New York foreclosure law that to have standing to foreclose, the lender must have physical possession of the note underlying the mortgage debt and be able to produce the original note in order to obtain a judgment of foreclosure. In two cases decided this month, New York's highest court, the Court of Appeals, has relaxed that requirement. The Court explained that a lender must demonstrate that it has standing to foreclose through appropriate evidence, but stressed that "[t]here is no 'checklist' of required proof to establish standing." For example, in one case, the lender established standing by submitting a copy of the endorsed note and "an affidavit of possession based on an employee's review of [the lender's] business records."

The Court specifically stated that "there is no per se rule requiring the court to grant a request for inspection of the original note prior to granting summary judgment in a mortgage foreclosure action." The Court directed that to the extent prior lower-court decisions "have held or suggested otherwise, they should not be followed." This new holding may be particularly significant in cases where a mortgage becomes part of a securitization pool and may change hands from one financial institution to another several times during the lifetime of the loan, and may become lost. The cases are **JPMorgan Chase Bank, N.A. v. Caliguri, 2020 N.Y. LEXIS 2870, N.Y. Slip Op. 07660**, and **US Bank National Association v. Nelson, 2020 N.Y. LEXIS 2869, 2020 N.Y. Slip Op. 07661,** both decided December 17, 2020.

SPONSOR AND INVESTORS MAY BE LIABLE TO CONDO BOARD FOR FAILURE TO OBTAIN CERTIFICATE OF OCCUPANCY AND FOR CONSTRUCTION DEFECTS

A recent appeals court decision sustained claims brought by the Board of Managers of a new-construction condominium after the unit owners took control of the Board. The court ruled that the Sponsor had breached the offering plan by failing to obtain a permanent certificate of occupancy within two years from the first closing of the sale of a unit, as well as by failing to construct certain aspects of the building in accordance with the offering plan. The Sponsor contended that it had been able to obtain temporary certificates of occupancy, demonstrating that the building was in substantial compliance with the Building Code, but the court observed that it did not demonstrate that the construction was consistent with the offering plan. The Sponsor also contended that the defects that the Board had identified were not material; the court directed that this issue will be addressed at a hearing to determine the amount of damages that the Board should be awarded.

The court also upheld the pleading of fraudulent conveyance claims against certain investors in the Sponsor, because the Board had "pleaded and established several 'badges of fraud' surrounding the millions of dollars in unexplained transfers to defendants." **Board of Managers of Be@William Condominium v. 90 William Street Development Group LLC, 2020 N.Y. App. Div. LEXIS 6428, 2020 N.Y. Slip Op. 6621 (1st Dep't Oct. 29, 2020)**.

COURT ENJOINS COOP'S TERMINATION OF PROPRIETARY LEASE

The shares corresponding to a cooperative unit were owned by the estate of a tenant-shareholder who died in 2006. In 2018, the estate asked the Cooperative to transfer the shares to the former tenant-shareholder's son, who had resided in the unit since 1994. The Board denied the application, asserting that the son was not financially qualified. The estate and the son brought a lawsuit seeking to compel the Board to approve the transfer and, in the interim, to prohibit the Board from terminating the proprietary lease or selling the unit while the litigation was pending. A lower court granted a preliminary injunction and an appellate court has affirmed. **Olcott v. 308 Owners Corp., 2020 N.Y. App. Div. LEXIS 8192, 2020 N.Y. Slip Op. 08006 (1st Dep't Dec. 29, 2020).**

The proprietary lease provides that "[i]f the Lessee shall die, [the board's] consent shall not be unreasonably withheld to an assignment of the lease and shares to a financially responsible member of the Lessee's family." The court held that under this provision, "[t]he cooperative board's decision to deny the transfer application is subject to a heightened standard of reasonableness." Here, the son who was seeking to have the unit transferred into his name "had been the building's resident for over 25 years and was current on the maintenance charges. Regardless of whether his income was closer to the lower amount the cooperative claims or the higher amount that plaintiff claims, the lower income appears sufficient to demonstrate that he was able to pay maintenance charges, especially in view of his undisputed history of payment."

BUILDINGS IN HURRICANE EVACUATION ZONES MUST POST NOTICES

New York City Local Law 103/2019 requires that the owners of any multi-family residential building within a designated hurricane evacuation zone must post a notice in a prominent place within the building relating to evacuation. (Please note that these zones are distinct from flood zones, and a building may be in one type of zone but not the other.) The notice must inform occupants of which hurricane evacuation zone the building is in and how to find the closest hurricane evacuation centers. This posting requirement applies to cooperatives and condominiums as well as rental buildings. A search tool and map to determine whether an address is located in a hurricane evacuation zone can be found at http://maps.nyc.gov/hurricane and the posters in many languages can be downloaded at https://www1.nyc.gov/site/em/resources/zoneposters.page