GANFER SHORE LEEDS & ZAUDERER LLP

CLIENT ADVISORY

JANUARY 2023

HAPPY NEW YEAR

Ganfer Shore Leeds & Zauderer LLP wishes all of our clients and friends a very happy, healthy, and safe 2023.

COOPERATIVE BOARD PROPERLY DISAPPROVED SALE OF UNIT WHERE SELLER'S OWNERSHIP OF UNIT WAS UNCLEAR

A cooperative board may disapprove the proposed sale of a unit where the documents are unclear as to whether the would-be seller has full ownership of the unit. **Young v. 101 Old Mamaroneck Road Owners Corp., 2022 N.Y. App. Div. LEXIS 6781, 2022 N.Y. Slip Op. 06955 (2d Dep't Dec. 7, 2022).**

In this case, the plaintiff and her father entered into a contract to purchase shares corresponding to a unit in the cooperative. Plaintiff and her father allegedly stated at the closing that they intended to take title as joint tenants with rights of survivorship, and they so stated on their mortgage application. However, the cooperative issued a stock certificate that named plaintiff and her father without any language reflecting that they were joint tenants with rights of survivorship.

Plaintiff's father died in 1997, survived by plaintiff, his three other children, and plaintiff's stepmother (from whom plaintiff's father was either divorced or estranged). Plaintiff subsequently asked the board to re-issue the shares in her name alone, on the ground that she was the surviving joint tenant, to enable her to obtain a second mortgage. In 2004, the Board issued a replacement stock certificate naming plaintiff as the sole owner of the shares, after plaintiff supplied proof that her siblings waived any interest in the apartment.

In 2017, plaintiff entered into a contract to sell her shares to a third party. The board initially approved the sale, but a week later the board reversed its decision on the grounds, "among other things, that it viewed the 1993 certificate as conveying a tenancy in common, it considered the 2004 certificate to be invalid, and it would not consent to a sale unless a court-appointed representative of the plaintiff's father's estate authorized the transfer of the estate's interest in the shares represented by the 1993 certificate." The plaintiff sought to obtain such authorization from the Surrogate's Court, but dropped that proceeding after learning that the cooperative shares at issue might be encumbered by a Medicaid lien against her stepmother's estate.

In 2019, plaintiff sued the cooperative and its board of directors on claims for conversion, estoppel, breach of fiduciary duty, tortious interference with contract, and negligence. Plaintiff sought a court order directing the board to approve her sale of the apartment, as well as monetary damages. A lower court granted the cooperative's and board's motion to dismiss plaintiff's claims, and an appellate court affirmed. The court observed that "[i]n the context of cooperative dwellings, the business judgment rule provides that a court should defer to a cooperative board's determination so long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith." Here, plaintiff did not furnish any specific facts or documents evidencing that the cooperative acted in bad faith or breached any duty to plaintiff.

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

Plaintiff's lawsuit also asserted claims against the cooperative's former legal counsel, which also acted as the transfer agent. The courts dismissed these claims as well. "Absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties not in privity, or near-privity, for harm caused by [alleged] professional negligence." Here, the plaintiff, as an individual tenant-shareholder, did not have an attorney-client or similar relationship with the cooperative's law firm. Moreover, by the time of the events that took place in 2017, the law firm was no longer involved with the cooperative.

LIMITATION ON SIZE OF CONDO OWNERS' DOGS
REQUIRED AMENDING BY-LAWS, NOT JUST HOUSE RULES

While the protections of the business judgment rule are broad, they are not unlimited. In another recent case, a condominium board passed a house rule limiting the size of unit owners' dogs to 25 pounds. While the house rule was approved by the board, it was not presented to or voted on by the unit owners. One owner sued seeking to invalidate the rule, arguing that the board lacked authority to adopt it and that this type of change could be made only by amending the by-laws, with the approval of two-thirds of the unit owners.

An appeals court agreed with the unit owner and struck down the house rule. The court observed that condominium board actions are generally protected by the business judgment rule. Here, however, the unit owner established that the by-laws did not authorize the board to limit dog ownership by unilaterally adopting a house rule. Rather, "[s]ince neither the condominium bylaws nor the condominium declaration . . . contained any restriction on the size of dogs permitted on the condominium premises, the house rule constituted an amendment of a permitted use of the plaintiff's unit, which, pursuant to Article X of the condominium bylaws, required approval by 66 2/3% of the homeowners at a noticed meeting, and an amendment to the declaration." Accordingly, the court declared the house rule null and void. **Turan v. Meadowbrook Pointe Homeowners Association, 2022 N.Y. App. Div. LEXIS 7087, 2022 N.Y. Slip Op. 07255 (2d Dep't Dec. 21, 2022).**

BUILDINGS MAY NOW "OPT OUT" OF ALLOWING SHORT-TERM RENTALS

Short-term rental services such as AirBnB, VRBO, or Booking.com may be convenient for travelers, but in the context of residential apartment buildings, many coop and condo boards and rental landlords wish to prevent their residents from listing their units with these services. Among other concerns, such transient rentals raise security concerns as building management may have no way to know who may be present in the building and cannot conduct reasonable background checks. Short-term renters may also create a nuisance in an apartment, with no remedy available to the other residents. In many circumstances, short-term rental use of an apartment may also violate the law and government regulations applicable to the premises, as well as the terms of the lease or of applicable by-laws or house rules.

In New York City, **Local Law 18 of 2022** will requires hosts of short-term rental properties to register them with the Mayor's Office of Special Enforcement (OSE). Commercial short-term rental sites are prohibited from processing transactions without first verifying the premises' registration status. Moreover, building owners, including coop and condo board and rental landlords, will be able to sign up on a City list of buildings that prohibit short-term rentals.

The new law is scheduled to take effect on January 9, 2023, although the OSE regulations to implement it have not yet been finalized and will be the subject of a public hearing on January 11, 2023. After a four-month transitional period under the new law, unauthorized short-term rentals will be subject to a civil penalty of up to $5,000 per violation or three times the rental revenue received by the violator.