GANFER SHORE LEEDS & ZAUDERER LLP

CLIENT ADVISORY

JUNE 2022

COURT ORDERS COOPERATIVE TO PROVIDE SHAREHOLDER WITH A COPY OF ITS COMPLETE SHAREHOLDER LIST

Shareholders in New York cooperatives are entitled to access to many of their cooperatives' books and records, under both New York Business Corporation Law § 624 and the common law. Disputes sometimes arise concerning the scope of the records to which shareholders may obtain access and the conditions that may be imposed upon such access. A recent appellate court decision provides some guidance in this area.

In **Matter of O'Donnell v. Fleetwood Park Corp., 203 A.D.3d 1048 (2d Dep't Mar. 23, 2022)**, the petitioner had requested a list of the names and addresses of all of the cooperative's shareholders, so that he could contact them while campaigning for a seat on the Board of Directors at an upcoming annual meeting. The cooperative allowed petitioner to review a shareholder list at the managing agent's office. However, he was not given a copy of the list or allowed to photocopy it. Instead, petitioner was allowed only to copy the information by hand, which was impractical because the cooperative has 478 units. In addition, some shareholders' names and addresses were redacted from the shareholder list. The cooperative asserted that these shareholders had requested that their names and addresses not be shared for privacy reasons.

The shareholder sought a court order requiring the cooperative to provide him with a copy of the complete, unredacted list of shareholder names and addresses. A lower court granted this request and the appellate court agreed with this ruling. The court found no legal authority supporting the cooperative's right to redact some shareholder names and addresses, even if they had requested that their information not be shared. Moreover, petitioner's intended use of the information in connection with running for the Board was a legitimate purpose, and the cooperative had no evidence that he requested the shareholder list in bad faith.

Sometimes shareholders request telephone numbers and e-mail addresses of their fellow shareholders, as well as their names and addresses, which could be considered more invasive of the shareholders' privacy. (See the discussion in the December 2021 issue of this *Client Advisory*.) Here, the shareholder had requested only names and addresses, the disclosure of which is specifically provided for in the statute, so the question of whether telephone numbers or e-mail addresses must also be provided was not decided in this case. We anticipate that the issues of whether telephone numbers and e-mail address must be disclosed will continue to arise in future cases until an appeals court resolves these issues.

Finally, in addition to the shareholder list, the petitioner had also requested access to various financial documents of the cooperative, including monthly financial reports and copies of certain invoices. The lower court denied this aspect of petitioner's request, finding that petitioner "has not made any showing that his request is based on anything other than speculation or made for any reason other than to simply satisfy his own requirements, which are not reasons to grant his petition" for court-ordered access. This portion of the lower court's decision takes a more restrictive view of shareholder access rights than some other recent court decisions. However, because only the cooperative appealed from the lower court's decision and the shareholder did not, the appellate court had no opportunity to consider this aspect of the case.

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

MIXED INITIAL DECISION IN LAWSUIT OVER TERRACE OWNER'S RIGHTS

The tenant-shareholder of a cooperative apartment sued the cooperative and all the individual board members on claims concerning the shareholder's terrace. An appellate court has dismissed several of the plaintiff's claims, while allowing others to proceed. **Dau v. 16 Sutton Place Apartment Corp., 2022 N.Y. App. Div. LEXIS 3250, 2022 N.Y. Slip Op. 03315 (1st Dep't May 19, 2022)**.

Several of the plaintiff's claims sought to challenge an amendment to the proprietary lease that shifted responsibility for maintaining and repairing terraces from the cooperative to individual shareholders whose units include terraces. This amendment was adopted by the board but was not voted on by the shareholders. Plaintiff challenged the amendment arguing that the proprietary lease requires shareholder consent for this type of amendment. The court held that this challenge to the amendment had to be raised in an "Article 78 proceeding," which is subject to a four-month statute of limitations that plaintiff had not met. Although a lower court had ruled that the statute of limitations did not start to run until plaintiff suffered a financial loss as a result of the amendment, the appellate court disagreed and held that time began to run as soon as plaintiff was notified of the amendment. The appellate court also rejected plaintiff's characterization of her claim as one for breach of contract, with a six-year statute of limitations, because "the core of the claims challenge[d] the 2019 amendment as promulgated by the board of directors." However, plaintiff could proceed with her cause of action against the cooperative for a declaration that the amendment can apply only prospectively.

The court also dismissed plaintiff's claims that she had been defrauded into buying her apartment by misstatements contained in the cooperative's Local Law 11 reports to the Department of Buildings, because she had not pleaded that these statements were made to her or that she relied on them. In any event, an inspection of the apartment and building would have revealed the conditions that were allegedly falsified.

Plaintiff had mixed results on a claim for breach of fiduciary duty. This claim was dismissed insofar as it was based on events that occurred more than three years before the lawsuit was filed, and was also dismissed insofar as it was asserted against the cooperative itself, because a corporation does not owe a fiduciary duty to its shareholders. However, the fiduciary duty allegations against the individual directors based on events within the past three years were allowed to proceed, because "the complaint sufficiently alleges, with the requisite specificity, that plaintiff was subject to unequal treatment with respect to her terrace." Although the directors might ultimately prevail on the defense that their actions were protected under the Business Judgment Rule, the court could not reach that conclusion before discovery had taken place.

Plaintiff's claim for breach of the warranty of habitability, based on work the cooperative had done that rendered her terrace unusable, was dismissed because she was not living in the apartment at the time. Plaintiff's warranty of habitability claim was also dismissed to the extent it was based on alleged harassment of plaintiff by another shareholder, as there was no evidence the board controlled that shareholder's actions.

CITY COUNCIL POSTPONES IMPLEMENTATION OF SALARY TRANSPARENCY ACT

We reported in February 2022 that the New York City Council had adopted legislation requiring employers to provide salary information in all job listings. Violations of the law, known as the Salary Transparency Act, will be treated as unlawful discriminatory practices under the New York City Human Rights Law. To allow additional time for employers to become familiar with the new requirements, the effective date of this law has been postponed until November 1, 2022. In addition, the law has been clarified to provide that there will be no civil penalty imposed for a first violation of the law, provided that the violation is cured within 30 days after receipt of a complaint. The Human Rights Commission has also clarified that the new law applies to both salaried and hourly positions where the work will be performed in New York City in whole or part.