

CLIENT ADVISORY

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COOPERATIVE MAY DISAPPROVE PURCHASE OF UNIT AT FORECLOSURE SALE

A Cooperative Board was within its rights in disapproving the proposed sale of a unit to the successful bidder at a foreclosure auction, according to an appellate court's decision in **Plotch v. 435 East 85th Street Tenants Corp.**, 2020 N.Y. App. Div. LEXIS 6230, 2020 N.Y. Slip Op. 6031 (1st Dep't Oct. 22, 2020).

The plaintiff submitted the successful bid in a foreclosure auction conducted by the mortgage lender on shares associated with an apartment in the Cooperative. Under the terms of sale, the purchase was subject to the terms of the proprietary lease and it was the purchaser's responsibility to comply with those terms. The relevant paragraph of the proprietary lease provided that upon a default, the shares associated with the unit could be sold "to a reputable person of good financial standing subject only to the approval of the then managing agent of the [Cooperative], which approval shall not be unreasonably withheld." Similarly, the recognition agreement between the Cooperative and the lender provided that the lender "shall have no right to transfer the apartment upon foreclosure or otherwise either to [itself] or anyone else without [the Cooperative's] approval as required by the lease."

The managing agent initially approved the transfer to plaintiff, but "eventually rescinded its approval before the closing, in light of plaintiff's history of litigation arising from his purchase of cooperative apartments at foreclosure sales." The would-be purchaser sued to compel a transfer of the shares and proprietary lease.

The court dismissed all claims asserted against the Cooperative and the managing agent, "based on the longstanding precedent ... that a contract vendee has no standing to enforce a cooperative proprietary lease provision." The court also dismissed the claims against the lender because "plaintiff did not plead facts demonstrating that [the lender] owed a duty to compel the cooperative or [the managing agent] to accept plaintiff as a purchaser or breached the terms of sale." Further, the court rejected plaintiff's attempt to add a claim for tortious interference with his purchase contract, because "the tortious interferences alleged was merely the denial of plaintiff's purchase application, an option which was contemplated in the terms of sale." Finally, the court rejected plaintiff's argument that the proprietary lease provision restricting transfers of the lease was prohibited under the Uniform Commercial Code.

COURT REJECTS DEMAND FOR BOOKS AND RECORDS RELATING TO COOPERATIVE'S DISAPPROVAL OF PURCHASE APPLICATION

A tenant-shareholder's broad request for access to all of a Cooperative's documents relating to purchase and sublease applications throughout the building was rejected by the court in **Matter of Cayne v. 510 Park Avenue Corp.**, No. 654916/2019 (Sup. Ct. N.Y. Co. 2020).

The facts summarized in the court's decision reflect bad blood between shareholders in the cooperative going back to the 1990s, when two shareholders found themselves in a bidding war to purchase two "maid's rooms" apartments. Twenty years later, one of these shareholders sought to sell his apartment and the other was now the Board President. The petition alleged that the Board President caused the Board to disapprove petitioner's applications to sell or sublet his apartment based upon a "perceived bias and vendetta." Petitioner submitted a demand for books and records seeking access to all records concerning his apartment, transfers

and subleases of other apartments, and appraisals of apartments in the building. The Cooperative denied access to these documents and the petitioning shareholder asked the court to require the Cooperative to provide them.

The court, taking a narrow view of shareholders' inspection rights, rejected the petition. Under Section 624 of the Business Corporation Law, shareholders have a statutory right of access to minutes of shareholder and board meetings, the roster of shareholders, and the corporation's financial statements. The corporation may refuse access when it is "desired for a purpose ... other than the business of the corporation." "A *bona fide* claim of corporate mismanagement supports [a] shareholder's demand for access," but "there is no right to conduct an overly broad inspection supported only by speculation." Here, the requested documents went far beyond those specified in BCL 624 and the court concluded that the request was "not relevant for a proper purpose" because "the petitioner fails to allege that the [Cooperative] is being mismanaged."

The court also stated that "the board's rejection of proposed purchasers does not alone demonstrate a proper purpose justifying the inspection of books and records," because the Board's denial of approval for a purchase is protected by the Business Judgment Rule and generally does not justify litigation. Moreover, the Cooperative's governing documents state that subleasing of units is strongly discouraged and will be approved, in the Board's discretion, only in extraordinary circumstances. The court concluded that petitioner's reasons for seeking access to the records were "speculative and seemingly without factual basis."

Petitioner also claimed the right to inspect the records under the common law. The common-law right of inspection "is qualified and can only be asserted where the shareholder is acting in good faith and has established that the inspection is for a proper purpose." The requesting shareholder has the burden of proving that the request is proper and made in good faith. Here, the petitioner had not made that showing, because the requested documents constituted "an intrusive probe into the confidential records" of other shareholders and of prospective purchasers of units in the Cooperative.

In recent years, the courts have generally seemed receptive to shareholders' and unit owners' demands for access to documents. (For an example, please see the December 2018 issue of this *Client Advisory*.) It remains to be seen whether this decision presages a narrower view of the right of access.

FEDERAL LAWSUIT BASED ON MORTGAGE ASSIGNMENT IS DISMISSED

The U.S. Court of Appeals for the Second Circuit has affirmed the dismissal of a complaint against several financial institutions arising from the assignment of a mortgage. **Levin v. American Document Services, LLC**, 2020 U.S. App. LEXIS 31931 (2d Cir. Oct. 6, 2020). The plaintiffs asserted that the assignment was effectuated by a forgery and was fraudulent. The court ruled that plaintiffs did not have standing to challenge the assignment because it did not affect their underlying debt obligations or the terms of their mortgage. Moreover, even if signatures on the assignment were allegedly unauthorized at the time they were made, under New York law an unauthorized signature on an instrument may be ratified after the fact.

The court also dismissed plaintiffs' claims for fraudulent misrepresentation, because the alleged misrepresentations were made after plaintiffs had entered into the mortgage and therefore plaintiffs could not have relied upon them. Next, the court dismissed plaintiffs' claim for intentional infliction of emotional distress. The court expressed skepticism that fear of a mortgage foreclosure could ever give rise to an emotional distress claim, and held that in any event, the allegedly improper assignment of the mortgage, which did not expose the plaintiffs to any additional liability, did not constitute extreme or outrageous behavior that could give rise to liability. Finally, the court also rejected plaintiffs' request to amend their complaint, holding that the proposed amendments did not cure the deficiencies that the court had already identified. Ganfer Shore Leeds & Zauderer LLP successfully represented four of the defendants in this case.