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CLIENT ADVISORY

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APPEALS COURT UPHOLDS BOARD'S AUTHORITY TO DISAPPROVE INSTALLING FENCE, BUT INVALIDATES FINES ON PROCEDURAL GROUNDS

In a recent split decision resolving a dispute over a fence installed outside a home governed by a homeowners' association, an appellate court has upheld the association's right to require the homeowners to remove the fence, but invalidated thousands of dollars in fines imposed when the homeowners failed to do so. **Ives v. Fieldpoint Community Association, Inc., 2021 N.Y. App. Div. LEXIS 5150, 2021 N.Y. Slip Op. 05028 (2d Dep't Sept. 22, 2021)**.

The plaintiffs were members of a homeowners' association, which comprised two condominium buildings as well as some freestanding homes. In 2014, they installed a six-foot aluminum fence outside their home. Plaintiffs then asked the association's Architectural Review Committee to approve the fence. The committee denied the application, stating that "iron fences" were incompatible with the character and appearance of the neighborhood. Plaintiffs appealed the denial to the association's Board of Directors, which confirmed the decision and directed that plaintiffs remove the fence. When plaintiffs failed to do so, the Board fined plaintiffs an initial $1,000 plus an additional $20 for each day the fence remained in place.

Plaintiffs then filed a lawsuit seeking to overturn the Board's decision, and the Board counterclaimed seeking to collect the fines as well as an injunction requiring plaintiffs to remove the fence. After discovery, both sides moved for summary judgment. In its summary judgment decision, the motion court upheld the Board's decision to disallow the fence, which was within the scope of the Board's authority and taken in good faith. The court ordered plaintiffs to remove the fence and later held them in contempt when they failed to do. The court also awarded the Board a money judgment for approximately $35,000, based in part on the accumulated fines of $20 per day, but held that the initial $1,000 fine imposed on plaintiffs was unauthorized.

Plaintiffs appealed, and the appellate court upheld the lower court's decision sustaining the Board's decision that plaintiffs must remove the fence. The appellate court restated the familiar standard under the Business Judgment Rule, under which a court "should limit its inquiry to whether the action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the association. Accordingly, a court should defer to the actions of a homeowners' association so long as the board acts for the purposes of the homeowners' association, within the scope of its authority, and in good faith." Here, the Board established that its actions in denying approval for the fence were protected by the Business Judgment Rule. In response, plaintiffs failed to show that the Board's actions were outside the scope of its authority, failed to further the association's interests, or were in bad faith.

However, the appeals court reversed the lower court's decision upholding the daily fines, because the association's governing documents had not been properly amended to authorize the imposition of such fines. Under the association's original By-Laws, the Board was authorized to impose a one-time fine of $50 for any breach of the rules, regulations, or By-Laws. Subsequently, the By-Laws were amended to allow the association to impose substantially greater fines, such as the ones imposed on plaintiffs. However, "the purported amendment to the by-laws pursuant to which those fines were assessed was passed as a resolution. There [was] no evidence that this resolution was incorporated in an amended declaration which was thereafter

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duly recorded in accordance with the provisions of Real Property Law § 339-u." That section, which applies to condominiums, provides in relevant part that "[n]o modification of or amendment to the by-laws shall be valid unless set forth in an amendment to the declaration and such amendment is duly recorded."

This decision is a reminder that boards enjoy broad authority under the Business Judgment Rule, but must comply with the applicable legal and procedural requirements before exercising it. In particular, condominiums that have amended their By-Laws should check to ensure that the amendments have been adopted in proper form and publicly recorded where required under the Condominium Act.

PURCHASER'S LAWSUIT FOR FRAUDULENT INDUCEMENT OF SALE CONTRACT IS DISMISSED UNDER THE STATUTE OF LIMITATIONS

In 2011, a purchaser contracted to acquire a cooperative apartment. The contract of sale contained a representation by the sellers that "[s]ellers have not made any material alterations or additions to the Unit … without compliance with all applicable law." Long after the sale closed, the cooperative board discovered in 2018 that the sellers had received a permit for plumbing work in the apartment in 1992, which was still "open." The Board required purchaser to take action to correct the condition and resolve the open permit.

In 2019, the purchaser sued the sellers, alleging that they had made a misrepresentation that fraudulently induced him to purchase the unit. Sellers moved to dismiss the lawsuit because the statute of limitations had expired. A lower court denied sellers' motion to dismiss, but an appeals court reversed that decision and granted the motion. **Venkateswaran v. Wilmers, 2021 N.Y. Misc. LEXIS 5093, 2021 N.Y. Slip Op. 50936(U) (App. Term 1st Dep't Oct. 25, 2021)**.

The court reasoned that the alleged misrepresentation was contained within the contract of sale and there were no allegations of any other misrepresentations. Thus, the purchaser's only remedy was an action for breach of contract. Contract actions are governed by a six-year statute of limitations, which in this case had expired. The purchaser also attempted to categorize his claim as one for fraud, which may have a longer statute of limitations depending on the facts. The appellate court rejected this theory, holding that "incidental" allegations of fraud could not be used to revive a stale breach of contract claim.

WHAT CAN BOARDS DO WHEN "TEMPORARY" COOP RESIDENTS OVERSTAY THEIR WELCOME?

Most cooperative proprietary leases prohibit the occupancy of apartments by non-shareholders, or close family members of shareholders, unless the shareholder is also in residence. This raises the question how a Board of Directors should address a situation in which an individual initially occupies an apartment as a temporary guest, but prolongs his or her stay indefinitely without seeking or obtaining the board's approval. Options that might be available to a board, depending on the specific circumstances, could range from demanding that the unauthorized occupant leave, culminating in seeking to terminate the proprietary lease if this does not occur, or requiring that the occupant's name be added to the proprietary lease or that the shareholder and the occupant sign an occupancy agreement.

Ganfer Shore Leeds & Zauderer LLP partner William D. McCracken recently published a column on this issue in *Habitat* magazine. If you would like a copy, please feel free to request one from Bill or from your contact at the firm.