GANFER SHORE LEEDS & ZAUDERER LLP

CLIENT ADVISORY

SEPTEMBER 2019

MARGERY WEINSTEIN CHAIRS CITY BAR COOP AND CONDO LAW COMMITTEE

Margery N. Weinstein has been named Chairperson of the Cooperative and Condominium Law Committee of the New York City Bar Association, effective September 1, 2019. Ms. Weinstein is a real estate partner at Ganfer Shore Leeds & Zauderer LLP whose practice handles a wide variety of issues related to condominium and cooperative properties, including counseling boards on all aspects of matters that come before them. She also represents companies, investor groups, trusts, and individuals in the acquisition and financing of commercial properties, mixed-used buildings, and high-end residences. In addition, David Fitzhenry, another real estate partner at the firm whose practice includes a variety of sophisticated residential and commercial transactions, has been named Secretary of this committee. Please join us in congratulating both of them on these important appointments.

CONDOMINIUM UNIT OWNER MAY NOT SUE INDIVIDUAL MEMBERS OF BOARD OF MANAGERS IN DISPUTE OVER COMMON CHARGE ALLOCATION

A commercial condominium unit owner who disagreed with the allocation of its common charges may not sue the individual members of the Board of Managers for having voted for the allocation. In **Cielo Garage Owners Co., LLC v. Board of Managers of the Cielo Condominium, 2019 N.Y. Misc. LEXIS 4590, 2019 N.Y. Slip Op. 32468(U) (Sup. Ct. N.Y. Co. Aug. 20, 2019)**, the owner of a garage unit asserted that its common charges had been computed incorrectly in violation of the By-Laws and a prior settlement agreement. In addition to suing the Board of Managers and the managing agent, the unit owner asserted claims against all the residential members of the Board.

The court dismissed all claims against the individuals. The breach of contract claims against the individuals were dismissed because none of the individual defendants were parties to either the settlement agreement or the By-Laws. The claim against the individuals for breach of fiduciary duty was dismissed because the unit owner did not allege that "the individual board members committed an independent wrong that was distinct from the actions taken as a board collectively." Ganfer Shore Leeds & Zauderer represented the successful individual defendants in this case.

COURT HOLDS THAT TENANT-SHAREHOLDER WAITED TOO LONG TO DISPUTE NUMBER OF SHARES ALLOCATED TO HER APARTMENT

A tenant-shareholder in a Cooperative filed a lawsuit challenging the number of shares allocated to her unit. However, the tenant-shareholder had purchased the unit more than 15 years earlier. The court held that "[p]laintiff acceded to the terms of her proprietary lease and related share certificates which allocate 300 shares to her unit, for at least 15 years, and may not now seek to avoid the terms of those instruments." The court found that the Cooperative would be prejudiced if plaintiff's claim were entertained at this late date because, among other things, the Attorney General no longer maintains copies of amendments to the Cooperative's offering plan, filed in 1985, which changed the allocation of shares. Accordingly, the Cooperative was granted a declaratory judgment that the number of shares of stock allocated to plaintiff's unit is 300. **Sidore v. 334 East 5th Street, 2019 N.Y. App. Div. LEXIS 5312, 2019 N.Y. Slip Op. 5321 (1st Dep't July 2, 2019)**.

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

LEASE CAN BE TERMINATED FOR BREACH OF "NO PETS" CLAUSE WHERE RESIDENT FAILS TO SHOW THAT DOG IS A SUPPORT ANIMAL

Federal, state, and city anti-discrimination laws require landlords (including cooperative boards) to allow tenants to keep support animals in their apartments, even where a "no pet" policy would otherwise preclude them. In recent years, court decisions and administrative agencies have frequently sided with tenants who assert that they suffer from a disability and that an animal provides them with emotional support. However, the landlord may require some evidence that the tenant is disabled. If a court finds that the tenant does not actually suffer from a disabling condition, it may side with the landlord.

In **Westchester Plaza Holdings, LLC v. Sherwood, 2019 N.Y. Misc. LEXIS 4589, 2019 N.Y. Slip Op. 51378(U) (Mount Vernon City Court Aug. 23, 2019)**, the landlord sought to evict a tenant and her son because they failed to cure a violation of a no-pet clause. The son, who occupied the apartment, claimed that his dog was an emotional support animal. He testified that he suffers from kidney problems and depression and that his therapist had advised him to obtain a dog. He produced a "Service Animal Registration certificate and photo ID for his dog as an Emotional Support Animal," provided by the "U.S. Service Animal Registry."

The court observed that no-pet clauses are generally enforceable, although they must yield when the need for reasonable accommodation of a disability is established. To establish a claim for reasonable accommodation under the Human Rights Law, an individual must demonstrate that he or she is disabled; that because of the disability, he or she needs the animal in order to use and enjoy the apartment, and that the reasonable accommodations could be made to allow him or her to keep the animal. Here, the court found that the tenant's son failed to submit evidence that the dog helped him with his symptoms of depression or kidney disease, and failed to present medical or psychological evidence, such as testimony from medical professionals, that the dog was necessary for him to enjoy the apartment. The dog's service animal registration was unpersuasive because "the registration of a dog with this entity can be completed by anyone after paying a fee and there is no case law or statute requiring this Court to accept this entity's determination that a dog is deemed to be an emotional support animal." Accordingly, the landlord could enforce its no-pets clause.

Landlords and boards must proceed cautiously if they wish to dispute a resident's claim to be a disabled person entitled to the reasonable accommodation of a support animal. While the landlord may require the tenant to provide some medical evidence supporting the diagnosis of disability, the courts and agencies have limited the landlord's ability to demand back-up documentation or more detailed explanations. A landlord or board that challenges a tenant's claim of disability and loses may be required not only to allow the animal to remain, but also to pay the tenant's attorneys' fees and, in some cases, substantial compensatory and punitive damages. To avoid this result, all "no pets" buildings should have policies and procedures in place governing requests for reasonable accommodations and should consult with counsel when a request is received.

STATE LAW ALLOWS EMPLOYEES PAID TIME OFF FOR VOTING

An amendment to the Election Law imposes new obligations on employers regarding paid time off on election days. The law now provides that an employee who is a registered voter "may without loss of pay for up to three hours, take off so much working time as will enable him or her to vote at any election." The employee must request the time off at least two days before the election, and the employer may decide whether the time will be taken at the beginning or end of the work day. Employers must post a notice of employees' rights under this provision at least 10 days before each primary and general election day. Although the text of the law provides for an employee to obtain this paid time off when this is "required" in order to "enable him or her to vote," the notice form provided by the Board of Elections implies that paid time off must be provided to all employees who are registered voters and request it, even if they already have ample time to vote before or after their work day. Employers with questions about the new law should consult with their counsel.