

# CLIENT ADVISORY

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## LAWSUIT AGAINST CONDO BOARD AND ITS MANAGING AGENT IS DISMISSED

An action brought by a condominium unit owner against the Board of Managers and the managing agent, alleging that they improperly failed to make repairs to her unit and overcharged certain fees and penalties, was dismissed in its entirety. **Makhnevich v. Board of Managers of 2900 Ocean Condominium, 2021 N.Y. Misc. LEXIS 4082, 2021 N.Y. Slip Op. 50679(U) (Sup. Ct. N.Y. Co. July 21, 2021).**

The court first addressed the claims against the Board of Managers. The Board asserted that the action should be dismissed because the Board was not properly served. Plaintiff attempted service on the Board by delivering the summons and complaint to the Condominium's managing agent. The court held that this was improper service because General Associations Law § 13 requires that an unincorporated association be served by delivering the papers to its President or Treasurer. The court rejected plaintiff's argument that the Condominium was a corporation, not an unincorporated association, based on a building registration filed with the Department of Housing Preservation and Development, which referred to the Condominium as a corporation. The court observed these registrations exist to provide contact information for owners of multiple dwellings, not to provide definitive information on an owner's legal status, such as would be found in filings with the Secretary of State. As in other recent court decisions addressing service of process on condominiums, the court did not discuss provisions of the Real Property Law providing for alternative means of service.

The court then turned to plaintiff's claims against the managing agent. Plaintiff's first claim, for negligence, was dismissed because the managing agent was "an agent for a disclosed principal (namely the board of managers)" and thus could be liable "only for 'affirmative acts of negligence,' as opposed to merely failing to take action." An exception to this rule might apply if the managing agent was "in exclusive control of the building," but this was not alleged. Plaintiff's second claim, for breach of fiduciary duty, was dismissed because the managing agent "owes a fiduciary duty only to the Board of Managers, rather than to individual unit owners with respect to their particular units." Plaintiff's third claim, for breach of contract, was dismissed because plaintiff did not identify any contract between herself and the managing agent (for example, the managing agent is not a party to the Condominium's By-Laws). Plaintiff's fourth claim, for fraud, was dismissed because plaintiff failed to provide particulars of any alleged misrepresentation by the managing agent. Plaintiff's final claim, for deceptive practices in violation of General Business Law § 349, was also dismissed because that statute prohibits fraudulent acts that "have a broader impact on consumers at large," rather than the unit owners of a particular condominium building with respect to their individual units.

## CO-OP BOARD'S DENIALS OF PURCHASE APPLICATION AND APPLICATION TO AMEND STOCK AND LEASE ARE UPHELD

Plaintiff is the tenant-shareholder for a cooperative unit. In 2020, plaintiff entered into a contract to acquire the stock and lease for a second unit in the same cooperative. The purchase was subject to board approval, and the Board rejected the application. Two months later, plaintiff submitted a separate application to add his son to the stock certificate and proprietary lease for his original apartment. The Board rejected this request as well. The Board did not provide the reasons for its decisions. Plaintiff then filed an Article 78 proceeding challenging the Board's rejection of both of his applications.

## **GANFER SHORE LEEDS & ZAUDERER LLP**

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The court observed that review of the Board's actions was governed by the Business Judgment Rule unless an exception to that rule applied. With respect to the disapproval of plaintiff's purchase application, the courts have repeatedly held that "in general, and in the absence of illegal discrimination, a cooperative corporation is not restricted in withholding its consent to the transfer of an apartment." Here, By-Laws also confirmed the Board's broad discretion to decide on purchase applications. Accordingly, "the party seeking to negate a co-op board's reliance on the business judgment rule bears the burden of raising a triable issue of fact by submitting evidence that the board acted in bad faith." The court held that plaintiff here failed to meet that burden. The board's failure to provide plaintiff with a written explanation of its reasons for denying the application did not constitute evidence that the denial was arbitrary or in bad faith. There was no basis on which the court could compel the board to provide a written explanation of its reasons for the denial.

The court reached the same conclusion with respect to the Board's denial of plaintiff's request to add his son to the stock and lease. Plaintiff cited several decisions in which courts applied a "heightened standard of reasonableness" to board decisions denying succession rights under proprietary leases. However, those cases arose in the context of share transfer applications submitted by family members after a tenant-shareholder had died, and did not apply to a request by a living tenant-shareholder. **Fitterman v. Seward Park Housing Corp.**, 2022 N.Y. Misc. 3723, 2022 N.Y. Slip Op. 31911(U) (Sup. Ct. N.Y. Co. June 17, 2022).

### **BOARD VIOLATED PROPRIETARY LEASE BY REJECTING INSTALLATION OF HVAC UNIT**

While the protections afforded to co-op and condo boards are substantial, as reflected in the case discussed above, they are not unlimited, as illustrated by **Lemberg Foundation, Inc. v. Shuttleworth Artists Ltd.**, Index No. 651734/2021, 2022 NYLJ LEXIS 791 (Sup. Ct. N.Y. Co. July 22, 2022).

Plaintiffs brought this action against a cooperative board, the board of directors, and the cooperative's directors individually. Plaintiffs asked the court to order defendants to approve their installation of an HVAC system on the roof or façade of the Cooperative's building. The defendants defaulted in the action by failing to respond to the summons and complaint in a timely manner. Defendants' excuses for their default, including that the parties were engaged in settlement discussions and that their attorney had a series of medical and personal issues, were insufficient to set aside the default.

Despite the default, the court was still required to review plaintiff's papers to decide whether they had pleaded a valid claim. The proprietary lease provided in relevant part that alterations were subject to board approval, "which consent shall not be unreasonably withheld." Plaintiffs asserted that they had sought the board's consent since 2016 and that they had hired architects, presented design plans, and purchased a noise-reducing HVAC unit, but that "defendants repeatedly refused to grant permission to plaintiffs and gave no reasoned explanation." Moreover, the court observed that even in response to plaintiffs' court papers, defendants failed to explain why they denied defendants' requests, nor did defendants identify any other tenant-shareholder who objected to plaintiffs' request to install the HVAC unit. The court rejected defendants' argument that the proprietary lease prohibited plaintiffs from installing equipment on the roof of the building. The proprietary lease authorized the Cooperative to install equipment on the roof, but this did not mean that plaintiffs could not also do so. The court held that plaintiffs were entitled to specific performance (equivalent to a permanent mandatory injunction) allowing them to install their HVAC unit on the roof and requiring defendants to apply for the permits necessary for plaintiffs to do so. The court also held that plaintiffs could recover their out-of-pocket expenses caused by the board's violation of the proprietary lease, including attorneys' fees incurred after the date by which the board's continued withholding of consent to the HVAC installation became unreasonable. However, the court dismissed plaintiffs' claims against the individual directors, because no breach of fiduciary duty by the directors in their personal capacity had been shown.