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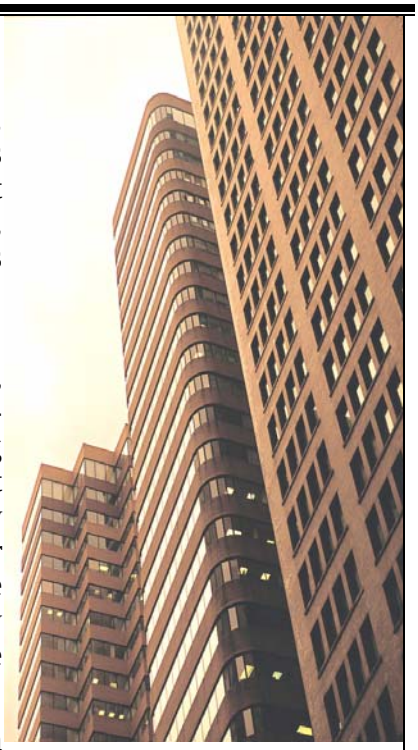
CONDO MAY LIMIT LEASING AND SALES



Many purchasers prefer condominiums to cooperatives, because they believe condominiums afford owners greater flexibility to lease or sell their units. But that could not be farther from the truth. Frequently, condominiums take a highly restrictive stance on sales and leasing, as demonstrated by the case of *Demchick v. 90 East End Avenue Condominium.*

The building in question consists of 43 residential units, 38 of which are described as "large, expensive, multi-bedroom units," with the remaining five comprising "small, relatively inexpensive studios." Apparently, it was the custom and practice of this full-service, luxury building to allow owners to utilize the studio units for their "household help," and it was understood that these studios could not be sold to anyone who did not already live in the building. Interestingly, these restrictions were not reserved in the offering plan or bylaws.

After the Plaintiffs purchased their four-bedroom apartment and a studio unit (which was used for storage), the Board circulated a proposed amendment to the condominium's bylaws formalizing the building's prior practice which restricted the leasing or sale of the studio apartments. When the amendment was later adopted by a majority of the owners, Plaintiffs commenced suit in the New York County Supreme Court declaring the amendment "illegal," on the grounds that it constituted "an unreasonable restraint on alienation."

An array of common-law, constitutional and statutory protections are in place to prevent "undesirable" limits on the transfer of real estate. Restrictions which are "unjustified" run afoul of these safeguards and comprise a form of "unreasonable restraint" which will not be honored or enforced by the Courts.

The Supreme Court found the Condominium's amendment "unreasonable" and granted relief in the Plaintiffs' favor. On appeal, the Appellate Division, First Department, reversed, noting that Real Property Law section 339-v(2) grants condominiums the power to control the "alienation, conveyance, sale, leasing, purchase, ownership and occupancy of units," so long as those restrictions do not serve as a pretext or basis for discriminatory conduct. As the Appellate Division observed:

> The restriction on the leasing of studios does not constitute an unreasonable restraint on alienation...Nor can it be said that the purpose of the restrictions of sale of the studio units–to preserve the character of the Condominium–is unreasonable. Although the duration of the restriction appears to be unlimited on its face, the restriction can be modified or removed at any time by a duly called meeting of the unit owners to further amend the bylaws. While there appears to be no New York

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WHAT'S THE DIFFERENCE BETWEEN "SHIFTING" AND "SETTLING?"

A property owner filed a claim with its insurance carrier after incurring some $183,000 in structural damage, triggered by construction, underpinning and shoring activities which had occurred on an adjoining parcel. Citing to certain policy exclusions, Greater New York Mutual Insurance Company disclaimed coverage and litigation eventually ensued. On motion, the New York County Supreme Court found in the insurer's favor and dismissed the owner's case, since the policy's "settling, cracking" exclusions precluded a recovery. The judge could discern no "meaningful difference" between the building's "settling," which was excluded from coverage, and "shifting," which was an encompassed event.

On appeal, the Appellate Division, First Department, looked to a Webster's dictionary for guidance and disagreed with the Supreme Court's assessment of the case:

> Contrary to the motion court's conclusion, the words "shifting" and "settling" have different and distinct meanings. The word "settle," in the context of a fixed object such as a building or structure, means "to sink gradually to a lower level: SUBSIDE"...In contrast, "shift" means "a change in place or position"... Had [the insurance company] intended to exclude damage caused by "shifting," it should have said so....

The appellate court also rebuffed the insurer's attempt to rely upon the policy's "Negligent Work exclusion," since neither the owner nor its agents were responsible for the activities which led to the damage in question. As the court noted:

> To apply the negligent work exclusion to negligent work performed by persons other than the insured or those acting on its behalf or to work on other than the insured premises would require a strained and irrational interpretation of the exclusion. The exclusion does not refer to external forces generated by the activities of third parties that cause damage to the insured premises. The only reasonable explanation of the negligent work exclusion is that it applies to negligent work by or on behalf of the insured in planning, designing or constructing the insured building, which results in damage to the building.

Since the policy's wording did not to exclude acts caused by third parties, the Appellate Division construed that omission "in favor of the insured and against the insurer, the drafter of the policy language" and reinstated the owner's case. Do you get the sense that the insurer will be shifting to a settlement?

If you have any questions or comments about this article, please contact partner Robert Finkelstein at 212-619-5400 x 227 or email him at RFinkelstein@FinkelsteinNewman.com. To join the debate, visit us at www.nyreblog.com.

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> cases on this point, other states have found such a restriction not to be an unreasonable restraint on alienation...The reasoning set forth in those cases is sound and applicable here.

With all due respect to the Plaintiffs in this case, we can not get over the fact that an apartment in a luxury building, located across from the East River and Carl Schurz Park, was being used for storage.

But then again, after watching a replay of Disney's 1991 blockbuster, "Beauty and the Beast," who wouldn't agree that household items–like Chip, Cogsworth, Feather Buster, Footstool, Lumiere and Mrs. Potts–only deserve the very best?

If you have any questions or comments about this article, please contact partner Jonathan H. Newman at 212-619-5400 x 205 or email him at JNewman@FinkelsteinNewman.com. To join the debate, visit us at www.nyreblog.com.

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WHAT'S THE MATTER OF FERRARA?

A "power of attorney" authorizes another to act in your absence, and in your place and stead, in any legal or business transaction. The person giving the authority is known as the "principal" or "grantor," while the individual accepting the responsibility is referred to as the "agent" or "attorney-in-fact." Transfers made pursuant to a "power of attorney" are subject to strict scrutiny and will be subject to rescission or modification, particularly when an agent engages in exorbitant "self-gifts" and the dispositions conflict with a will.

In June of 1999, a retired stockbroker, George J. Ferrara (no relation), signed a last will and testament which left all his property to The Salvation Army. It was George's intention that a "memorial fund" be established in his name with the annual income to be used in furtherance of the organization's charitable purposes in the Daytona Beach, Florida area. (Interestingly, the will disclaimed all family members as beneficiaries.) Yet, later that same year, as his health deteriorated, George called on his brother, John, and John's son, Dominick, for assistance.

George's relatives contended that shortly prior to his death, George wished to allow his relatives to dispose of his property as they saw fit. To that end, on January 25, 2000, George signed and initialed several copies of a "Durable General Power of Attorney: New York Statutory Short Form," which appointed John and Dominick as his "attorneys-in-fact." In addition to authorizing an array of transactions, the form contained an additional, typewritten provision which permitted the relatives to "make gifts without limitation in amount to John Ferrara and/or Dominick Ferrara."

Some three weeks after the forms were executed, George was hospitalized and died. Within that same three-week window, Dominick transferred about $820,000 of his uncle's assets to himself.

Upon learning of George's death, and how the monies had been disbursed, The Salvation Army commenced a special Surrogate's Court proceeding, against Dominick and other surviving relatives, seeking a "turnover" of George's assets. Finding that George had been competent and properly completed the forms prior to his death, and further noting the absence of any wrongful conduct (like "self-dealing" or other demonstrable "impropriety"), The Salvation Army's case was dismissed. On appeal, the Appellate Division, Second Department, affirmed because the forms "specifically authorized the distribution" to Dominick.

When the case reached the state's highest court, the New York State Court of Appeals disagreed with both the Surrogate's Court and the Appellate Division. After reviewing the governing law and its legislative history, the Court of Appeals concluded that "all gifts" made pursuant to a "power of attorney" must be "in the best interest of the principal" and found that the statute's intent had not been furthered by George's surviving relatives in this particular instance. As the Court observed:

> [T]he best interest of the principal includes "minimization of income, estate, inheritance, generation-skipping transfer or gift taxes."…In short, the Legislature sought to empower individuals to appoint an attorney-in-fact to make annual gifts consistent with financial, estate or tax planning techniques and objectives–not to create gift-giving authority generally, and certainly not to supplant a will.

The Court of Appeals sent the *Matter of Ferrara* back to the Surrogate's Court for "further proceedings."

So, who do you think has "the power" now?

If you have any questions or comments about this article, please contact partner Lucas A. Ferrara at 212-619-5400 x 211 or email him at LFerrara@FinkelsteinNewman.com. To join the debate, visit us at www.nyreblog.com.

LAWYERS RATED "LEAST GERMY"

Lawyers, stand up and be proud!

According to a report released by The Clorox Company–which just happens to be in the market of selling "disinfecting wipes"–lawyers are among the "least germy" professionals in the country.

Here's how we ranked on a 9 point scale, from "germy" (#1) to "least germy" (#9):

1)	Teacher	4)	Radio DJ	7)	Consultant
2)	Accountant	5)	Doctor	8)	Publicist
3)	Banker	6)	Television Producer	9)	Lawyer

The dirt doesn't end there. According to recent surveys, while 57 percent of American workers snack at their desks at least once a day, a large chunk of us "only occasionally" clean our desks before eating. (And, according to Clorox, some 20 percent "never do.") But, even as far as these "surface stats" are concerned, lawyers still come out relatively clean. Here's how we rate when it comes to common surface areas in our offices:

Computer Mouse
Most germy: Teachers
Least germy: TV Producers

Pens
Most germy: Accountants
Least germy: Lawyers

Computer Keyboard
Most germy: Teacher
Least germy: Banker

Telephone
Most germy: Teachers
Least germy: Publicist

Desks
Most germy: Accountants
Least germy: Lawyers

In case you were wondering, the average desk surface reportedly harbors 400 times more bacteria than the average toilet seat. How does that sit with you?

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“Scandalous!”

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