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Inside this issue

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HOW ACCOMMODATING WAS THIS?

A Manhattan condo dweller sued his fellow owners for $23.5 million in compensatory damages based upon "an alleged failure to make handicap accessible the residential condominium in which the disabled plaintiff and his wife" resided.

In *Pelton v. 77 Park Avenue Condominium*, Dean Pelton was unable to maneuver common-area steps due to muscular dystrophy, a degenerative disease. In June 2002, the condominium's president was advised of Pelton's physical disability and a request was made to make the building "handicap accessible." While there was an initial period of inactivity, in late 2003, after an informal complaint was filed with the New York City Commission on Human Rights (HRC), architects were eventually retained by the building to advise of possible wheelchair-accessible modifications.

It wasn't until June of 2004 that the board finally advised Pelton that it planned to address his concerns. In the short term, to facilitate access to the stairs leading to the passenger and service elevators, the board offered to install a portable wheelchair lift which would be operated by building personnel (who were on duty 24 hours a day). Over the long-term, the building would install platform lifts to both the passenger and service elevators.

Discussions faltered when Pelton refused to agree to the proposal. Despite that impasse, and Pelton's filing of a lawsuit in the New York County Supreme Court, the condominium installed a portable stair climber in the building's lobby at the cost of $13,000 and secured the vote of the building's other unit owners to a special assessment in the amount of $130,000 to fund the renovation plan.

When the condo asked for the case's dismissal, the New York Supreme Court denied the request asserting that the condo board enjoyed no immunity for its actions since unlawful discriminatory conduct had been alleged.

On appeal, the Appellate Division, First Department, didn't agree and found that considerable deference must be given to a board's decision-making process unless a shareholder can establish the existence of elements espoused by the Court of Appeals in its 2003 case of *40 W 67th St. v. Pullman*. As our state's highest court noted in that opinion:

> To trigger further judicial scrutiny, an aggrieved shareholder-tenant must make a showing that the board acted (1) outside the scope of its authority, (2) in a way that

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IT AIN'T ADVERSE IF YOU OFFER TO BUY!

In *Sugarman v. Malone*, Lydia Sugarman sought to acquire a Manhattan cooperative apartment from her sister-in-law's husband by way of "adverse possession."

Sugarman had lived in the apartment since 1984 with her late husband, Howard, who died in 1990. The owner of the shares was Howard's father, who died in 1995, leaving the shares to Howard's sister. She then died a year later, leaving the shares to her husband, Laurence Malone. Malone didn't assert his interest in the apartment for some nine years. Consequently, Sugarman filed suit in 2005, "seeking a declaration that she is the rightful owner of the shares through adverse possession."

When the New York County Supreme Court granted Malone's request to dismiss the case, Sugarman appealed to the Appellate Division, First Department.

The AD1 determined that "hostility" -- which is one of the elements required in any adverse possession case -- was lost when Sugarman offered to buy the apartment in 1998, while the governing ten-year statutory period was still running.

We're guessing Sugarman found nothing sweet about that.

HOW ACCOMMODATING WAS THIS?

cont'd from pg. 1

did not legitimately further the corporate purpose or (3) in bad faith.

Since he couldn't prove the existence of at least one of these three factors, Pelton's case couldn't survive. Because the building employed several measures to accommodate him -- including retaining architects, debating possible structural solutions, purchasing a temporary lift and holding a board meeting to discuss financial plans -- the AD1 didn't believe that Pelton was able to show any "bad faith" or discrimination by the board or its members. Moreover, his claim that the board employed discriminatory "stall tactics" was found to be without merit.

The AD1 was concerned that exposure to suits would discourage volunteer service on boards. In that regard, the appellate panel wrote:

> Courts must hold those who would challenge the decisions of condominium and cooperative boards to the requirement of pleading with specificity claims of discriminatory conduct or wrongdoing. Otherwise, the threat of baseless litigation, with its attendant serious financial and personal burdens, would pose a formidable obstacle to those willing to volunteer their talent, experience and knowledge for the common good of their homeowner communities by serving on such a board.

The AD1 was quite accommodating, wouldn't you agree?

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

WHEN TIME IS "OF THE ESSENCE"

Typically, "time of the essence" means that a specified performance obligation must occur on or before the date specified in the parties' agreement. Without that "mumbo jumbo," the governing deadlines contained in a contract may not be "set in stone."

A case in point is *ADC Orange, Inc. v. Coyote Acres, Inc*. In that dispute, ADC agreed to buy (from Coyote) a plot of land in Orange County, New York, for $600,000.

ADC made an initial downpayment of $100,000 and was to make an additional remittance of $250,000 "upon the later of the preliminary approval [of the contemplated construction] … from the applicable authorities for the subdivision or December 31, 2001, but in no event later than December 31, 2001." The $250,000 payment wasn't made until on or about January 11, 2002.

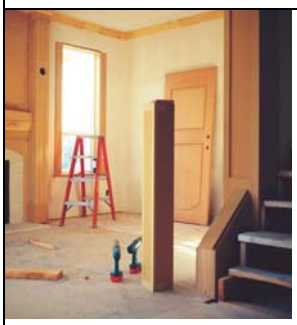
After attempts to reach a settlement failed, ADC filed suit in the Orange County Supreme Court seeking "specific performance" -- an order compelling the seller to convey the property in accordance with the contract of sale's terms. Coyote, on the other hand, alleged that ADC violated the agreement by failing to timely remit the $250,000, and that default entitled Coyote to walk away from the deal and keep the $100,000 downpayment. (Coyote also claimed that the deal ended when ADC was unable to secure final approval of the subdivision by the applicable deadlines.)

The Supreme Court found that Coyote improperly repudiated the contract, as there was no "time of the essence" clause, and granted ADC's "specific performance" request.

On appeal, the Appellate Division, Second Department, found that ADC's failure to tender payment in a timely fashion materially breached the contract's terms thereby allowing Coyote to cancel the contract and keep ADC's downpayment.

On review, the New York State Court of Appeals concluded that the absence of a "time of the essence" provision implied a reasonable time for payment. Standing alone, the payment due date, without a default provision, did not afford ADC adequate notice that a delay would jeopardize the contract. Additionally, our state's highest court found that there were questions -- or "material issues of fact" -- as to whether Coyote had intentionally frustrated ADC's ability to perform, and sent those issues back to the Supreme Court for further review and consideration.

Get the essence of that decision?



CONDO OWNERS LIABLE FOR WORK

In *Canela v. TLH 140 Perry St., LLC*, Jose Canela was injured while completing alterations to a condo unit owned by TLH 140 Perry Street, LLC and David Smilow ("unit owners").

When the Kings County Supreme Court found Andrews Building Corp and 140 Perry Street Condominium liable for the injuries, Andrews and 140 settled with Canela and paid him an unspecified sum.

After that payment was made, a dispute arose as to whether the unit owners were responsible for the monies remitted to Canela. When the court denied the reimbursement claim, an appeal to the Appellate Division, Second Department, ensued.

Since the condo's by-laws provided that "all unit owners making alterations to their units are deemed to agree to indemnify and hold the [building owners] harmless from and against any liability, cost and expense arising from such alteration work," the unit owners were required to reimburse Andrews and 140 for the sums paid to Canela together with all defense-related litigation costs.

Killed by the by-laws! (There's no altering that.)

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

AN UNINVITED PARTY

After Harry N. Gold died, his mortgage went unpaid and his lender filed a foreclosure proceeding against his estate.

When a court-appointed referee determined that $334,393.01 was due and payable, Gold's son made a motion to dismiss the case claiming that the lender failed to name and join, as a "necessary party" to the suit, Lorraine Bowen (one of Gold's daughters).

Since Gold's widow, as the estate's administrator, had already been named and joined as a party to the dispute, and was the only "necessary party" to the case, the Suffolk County Supreme Court denied the motion.

On appeal, the Appellate Division, Second Department, noted that, "Even if Lorraine Bowen were a necessary party, she was not an indispensable party whose absence mandates dismissal of the complaint. The absence of a necessary party in a mortgage foreclosure action simply leaves that party's rights unaffected by the judgment of the foreclosure and sale."

In other words, should she be so inclined, Bowen could seek to set aside the judgment and sale.

Was that extra step really necessary?

If you have any questions or comments about the above article, please contact partner Daniel Finkelstein at 212-619-5400 x 209 or email him at DFinkelstein@fnfllp.com. To join the debate, visit us at www.nyreblog.com.

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