# REAL TIME

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A PEARSON LAW OFFICE QUARTERLY NEWSLETTER

## The Need for an Experienced Cooperative/Condominium Attorney

A cooperative and condominiums attorney's role should be keeping litigation at bay and making sure all organizational and contractual documents are negotiated and executed properly. The goal is to find an attorney who will manage legal matters most important to the cooperative or condominium corporation. In each case or situation, the cooperative or condominium attorney must be prepared to represent their client in a wide variety of scenarios.

- If your shareholders are in arrears – your Co-op attorney will represent you in Landlord-Tenant Court
- If your shareholder wants to transfer shares – your Co-op attorney can draft the transfer documents.
- If your shareholder wants to sell their unit – your Co-op attorney will make sure that the interests of the Co-op will be protected.
- If your Co-op Corporation has commercial property – your Co-op attorney can draft and enforce the lease.

Source The Cooperator -The Coop & Condo Monthly. "The Role of the Counsel" by Lisa Iannucci. Jan. 2014

## Importance of Maintaining an Updated Proprietary Lease

Boards can save time and money if the language in their proprietary lease is updated to reflect language that is used in the 21st Century. There may be phrases in your proprietary lease about the coal chute or running a clothesline out of your window, which is representative of an outdated proprietary lease. An example of an outdated language is the case of the Hotel des Artistes, a co-op on Manhattan's Upper West Side, was forced to refund $300,000 in sublet fees to former shareholders because the fee policy, approved by a majority of tenant-shareholders, was never incorporated into the lease. It has also been the case members have gotten blindsided when they belatedly damage awards and not legal fees, forcing board members to pay considerable sums out-of-pocket. How can the board get consent from shareholders to update language? Education is the key.

Shareholders need to know that the changes are good for the co-op as a whole and it is in everyone's interest.

What should you pay attention to when updating your proprietary lease?

Technology – Some proprietary leases are not clear as to the building's rights to access the roof or someone's balcony to install cable or internet, which are some things that were not common some years ago.

The Law – Co-op boards and their lawyers need to keep up and be aware of any new legislative statutes but also case law created by the court decisions that clarify those statutes. One major statutory change came in 1988, when New York State amended the Business Corporation Law to increase the indemnification available to board members. If your bylaws, in this case, rather than the proprietary lease, don't contain up-to-date language, that could spell trouble.

Aside from issues of damage and repair, other areas you should look at include: Fees, such as sublet and late fees; Flip Taxes; Subletting and other uses of the apartment; Insurance; House Rules; Alterations. Some proprietary leases need updating critically. First, because this is a legal document and secondly, time and money is spent in board meetings trying to decipher the language.

Compiled from – habitatmag.com
New York Times. March 2012.

# Purchasing an Additional Cooperative Unit in Your Building

The purchase of another or an additional apartment by an existing shareholder may present a complexity. This is because, under New York law, a co-op "has a fiduciary duty to treat its shareholders fairly and evenly and must discharge that duty with good faith and scrupulous honesty." Additionally, "any departure from uniform treatment of shareholders" may be actionable as a breach of fiduciary duty.

In other words, the standard for rejecting an existing shareholder is often more stringent than would be the case with an outside purchaser. Of course, if an existing shareholder has regularly been in default in the shareholder's obligations to the co-op or may have problems in meeting future increased financial obligations resulting from the apartment purchase; a co-op board would appear warranted in rejecting the application. The board must also consider unique problems arising from the purchase of an additional apartment in the building. Is an apartment combination contemplated? Will the shareholder seek to have domestic employees or family members in the second apartment without combining it with the first apartment? Some answers to these questions may present issues for boards which could support a rejection.

- Excerpt from New York Law Journal VOLUME 234—NO. 44.

**Fiduciary Duty to Shareholders**

# Duties of Cooperative Corporations to Current Sellers - Shareholders

While not as clear as the duty owed to purchaser-shareholders, some measure of fiduciary duty extends to shareholders as sellers of their apartments. For example, a board must not allow the personal interest of a director to affect its decision to reject a sale. In Axelrod v. 400 Owners Corp., the seller-shareholder claimed that the board repeatedly rejected purchasers, thereby delaying her sale for 18 months and forcing her to sell at a lower price. The board's rejections allegedly stemmed from the misgivings of one director, who feared that children might occupy the seller-shareholder's apartment and disrupt the peace of his nearby unit. The court denied the board's motion to dismiss the complaint, holding that such board conduct, if proved, was actionable. Further, the court sustained the shareholder's claim of housing discrimination, although she was not targeted by the alleged discrimination. Like their purchaser counterparts, seller-shareholders should receive equal process. Nor can boards give preferential treatment to a purchaser-shareholder. In Aronson v. Crane the Second Department found that a seller-shareholder advanced a valid breach of fiduciary duty claim where the board allegedly assisted the purchaser-shareholders to breach the contract by coaching them on how to secure a board rejection. Generally, boards may not tortuously interfere with a contract for the sale of an apartment, even where the purchaser is a mere contract vendee.

-Excerpt from New York Law Journal VOLUME 234—NO. 44.

## Current Real Estate Case Law

*CYRILLE ALLANNIC et al., Appellants*
*v.*
*PAUL LEVIN et al., Respondents.*

Appellate Division of the Supreme Court of New York, First Department.

Lesson: The Business Judgment Rule Only Shields Board Members with Disinterested Independence.

The board of 682 Sixth Avenue Housing Development Fund Corporation in Manhattan decided to extend the master lease for a space owned by the cooperative under the "80/20" rule provisions for commercial space. The shareholders sued the board and tenant claiming that all shareholders were not being treated equally under the extension, and that the board had breached its fiduciary obligation to them by extending the lease. The lower court dismissed the case, but the Appellate Division, First Department reversed and reinstated the case on the grounds that the board members were not disinterested members when they voted in favor of the lease extension and thus not necessarily insulated from judicial scrutiny under the Business Judgment Rule. The Business Judgment Rule is a powerful shield, but not for board members with conflicts of interest.

**The Business Judgment Rule Only Shields Board Members with Disinterested Independence**

Retrieved from casetext.com 2014

# Falsified Mortgage Applications on the Rise

The New York Times reports falsified applications are now the most common type of mortgage fraud, their incidence having risen steadily for the last three years, according to LexisNexis Risk Solutions' annual mortgage fraud report.

The report, scheduled for release on Monday, breaks down the composition of verified mortgage fraud activity in 2013 as reported by lenders, insurers and other subscribers to a LexisNexis database known as MIDEX. The database tracks only fraud involving industry professionals, such as loan officers, real estate agents and appraisers. Tim Coyle, LexisNexis Risk Solutions' senior director of financial services and an author of the report, attributed the rising incidence of application fraud to tight credit conditions that make it harder for borrowers to qualify and for industry professionals to profit. Credit fraud also increased last year, according to Jennifer Butts, the manager of data insight and also an author of the report. Credit fraud, such as undisclosed debt on a credit history or misrepresentation on the credit report, occurred in 17 percent of reported fraud investigations, which was a big jump from 5 percent in 2012, she said.

Source: New York Times Article by Lisa Prevost December 11, 2014


# Co-op Corporation Process for Handling a Shareholder Death

The well-managed co-op should have procedures in place to facilitate an orderly transition and ultimate transfer of ownership, as well as to deal with the issuers that arise between death and transfer. It is especially important that the co-op retain control over and limit apartment occupancy after the shareholder's death to only such persons as the law permits or the board approves.

Co-op management should instruct the building staff to report the death of a shareholder to the building superintendent should promptly report this information to the managing agent. For management, two immediate issues arise: who has the right to occupy the

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payments to be made. There is a dearth of case law on the issue of co-op apartment occupancy. However, because the relationship between co-op and shareholder is akin to that of landlord and tenant, cases relating to ordinary residential leases provide guidance for co-ops.

-Excerpt from New York Law Journal. VOLUME 231—NO. 4

# Deceased Shareholder(s) Without a Will - Intestate Shareholder

Where a shareholder dies intestate and there is not yet a personal representative appointed, a creditor, including a co-op, has no one upon whom to serve process or notice of a claim. In such a case, the co-op may petition the Surrogate's Court to have the office of the public administrator appointed as the personal representative of the estate of the deceases shareholder. All subsequent proceedings, including a summary dispossess for nonpayment of maintenance charges, would thereafter be addressed to the public administrator.

Where the deceased shareholder is a foreign domiciliary, primary probate proceedings are likely to be in the foreign domicile and appointment of a local personal representative may be delayed, while maintenance arrears continue to grow. Further, the shareholder may not have a surviving spouse, children or distributes under a will who are subject to service of process in New York. In this circumstance as well, the co-op may petition the Surrogate's Court to appoint the public administrator as the personal representative of the estate.

-Excerpt from New York Law Journal. VOLUME 231—NO. 4

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The Pearson Law Office provides cooperative and condominium board representation; real estate purchase/ sale/ refinance services; business entity formation; business/real estate litigation; commercial and residential landlord/tenant representation and rent controlled/rent stabilized lease buyouts.

Malik was formerly a litigation associate at Wilson, Elser, Moskowitz, Edelman & Dicker, LLP. Wilson Elser is a full service law firm employing 750+ attorneys in 21 offices in the United States and England. Prior to practicing at Wilson Elser, Malik was an in-house attorney at Forest City Ratner Companies. Forest City Ratner Companies is one of the foremost urban real estate developers in the New York metropolitan area with notable developments including Barclay's Stadium and The New York Times Building.

Malik received his Bachelor of Business Administration with a concentration in finance from the University of Washington and his law degree from Brooklyn Law School. While at Brooklyn Law School, Malik was a member of the Moot Court Honor Society and founded the Brooklyn Real Estate Society. Malik is admitted to the New York State bar, United States District Court for the Southern District of New York and United States District Court for the Eastern District of New York. Malik is a member of New York County Lawyers' Association and New

# BOARD MEMBER LIABILITY

**Eliminating Personal Liability**

BCL §402(b) permits co-ops to include in their certificates of incorporation a provision eliminating personal liability of directors to the co-op and its shareholders for damages for breach of a duty owed to them. Recent case law confirms that courts will enforce such a provision. In Glazer v. Grossman, the Appellate Division, Second Department, unanimously affirmed summary dismissal of breach of fiduciary duty claims against directors for settling claims against the corporation's former consultants, holding that the directors were shielded from liability by the exculpation included in the corporation's certificate of incorporation. Therefore, for co-ops, if a certificate of incorporation does not exculpate directors from personal liability, it can and should be amended to do so. For condominiums, the act permits bylaws to provide for such exculpation. If no exculpatory provision is included, the by-laws can be amended. However, this generally requires a two-thirds vote of unit owners, in interest, which may be difficult to accomplish.

**Retention of Experts**

BCL §717(a)(2) permits co-op board members to rely on the advice of professionals or persons whom they believe have expertise in the matter at issue in performing their corporate duties. Directors are free of personal liability for actions taken in reliance on such advice. The Court of Appeals in Levandusky v. One Fifth Avenue Apartments Corp., expressly held that BCL §717 also applies to condominium boards. Importantly, even if the advice relied on is ultimately determined to have been incorrect, exculpation from personal liability is unaffected.

-Source New York Law Journal.
Volume 244—NO. 44

THE PEARSON LAW OFFICE, PLLC