
CLIENT ADVISORY

JANUARY 2010

HAPPY NEW YEAR

Ganfer & Shore, LLP wishes all of our clients and friends a very happy and healthy 2010.

GANFER & SHORE, LLP WELCOMES MARGERY WEINSTEIN

Ganfer & Shore, LLP is pleased to announce that effective January 1, 2010, Margery N. Weinstein has become a member of the firm. Ms. Weinstein has more than 25 years of experience as a real estate attorney in Manhattan. Prior to joining Ganfer & Shore, LLP, Ms. Weinstein was counsel at Weil, Gotshal & Manges LLP, practicing in that firm's real estate group for more than 16 years. She began her law career as a real estate associate at Fried, Frank, Harris, Shriver & Jacobson. Ms. Weinstein concentrates her practice on matters relating to residential transactions, including townhouse conveyances, cooperative and condominium purchases and sales, residential financing, leasing, and bulk purchases. She joins the other partners in our real estate practice: Steven R. Ganfer, Sandra Jacobus, and Matthew J. Leeds. We welcome her and her clients to Ganfer & Shore.

Ganfer & Shore, LLP is also pleased to announce that litigation associate Justin R. Bonanno has been promoted to partner effective January 1, 2010. Mr. Bonanno's litigation experience is broad and includes extensive real estate, securities, contract, and general commercial litigation. He joins our other litigation partners: Steven J. Shore, Mark A. Berman, Allen L. Finkelstein, Ira B. Matetsky, and David M. Perlmutter.

ESTATE OF DECEASED CO-OP PURCHASER HELD STILL BOUND BY CONTRACT OF SALE

A woman entered into a contract to purchase a cooperative apartment, making a 10% down payment, and obtained board approval. However, she died before the sale closed. Who is entitled to the down payment? A decision allowing the sellers to keep it was recently affirmed in **Warner v. Kaplan**, 2009 WL 4672672, 2009 N.Y. Slip Op. 9169 (App. Div. 1st Dep't Dec. 10, 2009).

The parties entered into a contract of sale in May 2005, with the closing scheduled for September 15, 2005. After the purchaser submitted the required documentation and attended a personal interview with the board, the board approved her application on August 18, 2005. The parties disputed whether the purchaser had been notified of the approval before she died unexpectedly on September 1, 2005. The purchaser's executors decided not to go through with the transaction and demanded the return of the down payment. The sellers refused and litigation resulted.

In deciding the parties' rights, the appellate court, like the trial court before it, focused on the language of the contract of sale. It contained a paragraph providing that the contract would bind not only the parties themselves but also their heirs, legal representatives, and successors-in-interest. In the words of the appellate court, "[t]he inclusion of this provision indicates that the parties explicitly contemplated, and provided for, the possibility of either party's death before closing, by specifying

that that death would not terminate the contract, but that the contract would survive, to be performed by the successors or heirs of the deceased party.” Moreover, “[t]hat the provision is a standard clause in a form contract renders it no less enforceable; the clause is clear and unambiguous, and if it inaccurately reflected the parties’ intentions, it could have been rewritten.”

The court considered, but rejected, the estate’s arguments that the purchaser’s death rendered performance impossible or frustrated the entire purpose of the contract of sale, because the possibility that one of the parties might die before closing was foreseeable. The court also rejected the estate’s argument that the approval process had not been completed at the time the purchaser died, as well as its contention that that the board’s prior approval was inapplicable because the purchaser would not be residing in the apartment. The estate argued that it was general knowledge that the board would not approve an estate as an applicant. The court responded that the estate should have submitted a formal follow-up application to the board on behalf of the estate or an occupant designated by the estate. By failing to do so, the estate made it impossible to determine how the board might have voted on such an application.

Although the contract of sale in this case was entered into in 2005, it appears that the parties used a form contract that predated the most recent form contract for sale of a cooperative apartment, which was prepared by a group of bar associations in 2001. The more recent form specifically addresses the possibility of the purchaser’s death by providing that should the purchaser (or all purchasers if there are more than one) die before closing, the contract is automatically cancelled. Had this form of contract been utilized, this case would likely have had a different result. In all instances, parties entering into contracts for the purchase and sale of any property (cooperative or otherwise) should consider the desirability of a contract clause relieving the parties of their obligations in the event the purchaser dies or becomes seriously disabled, or at least, allowing the contract to be assigned under such circumstances.

FAILURE TO REGISTER LLC BEFORE TRANSFERRING PROPERTY TO IT VOIDS CONVEYANCE, COURT HOLDS

Lawyers often caution clients to make sure that all the paperwork is in order before proceeding with a real estate transaction. Sometimes, parties voice frustration, asking whether the delays and expense associated with completing and checking all the documentation is really worth it. That the answer is often “yes” is the lesson learned from the case of Matter of Hausman, 2009 WL 4250128, 2009 N.Y. Slip Op. 8854 (N.Y. Dec. 9, 2009).

In this case, the owner of a property decided to transfer it to a newly formed limited liability company (LLC) to be owned by certain members of her family, apparently for purposes of estate planning. Articles of Organization for the LLC were prepared, and a Deed was drafted and signed under which the property owner transferred the property to the LLC. However, the Articles of Organization were not filed with the New York Secretary of State, as required by statute, until about two weeks after the deed was signed. The result, holds New York’s highest court, is that there was no entity in existence to which the property could have been deeded and the conveyance is void.

This case involved an intra-family transaction in which no sales price was paid, and it is not certain how the courts might apply the holding to an arms-length transaction in which substantial money changed hands. However, when one encounters a closing checklist requiring formal certified proof that a corporation or LLC is in good standing before a transaction can close, concern about cases such as this one is the reason.