

A.R.S. ABSTRACT, LTD.

LEGAL BRIEFS

From: John A. Kazazis
jkazazis@arsabstract.com

Date: 11/01/2006

Condominiums – The Appellate Division, Second Department, held that a unit owner does not have standing to sue individually for damages to the common elements of the condominium. This right to bring an action or proceeding with respect to common elements on behalf of two or more unit owners is in the Board of Managers under Real Property Law Section 339-dd ("Actions"). However, the Court also held that a unit owner may bring a derivative action on behalf of the condominium. According to the Court, **"(a) derivative action proceeds...as an assertion of the interest of the entity by one or more of its owners or members when the management of the entity fails to act to protect that interest"**. In this case, Plaintiffs asserted derivatively, on behalf of a condominium located in Queens County in which they are unit owners, causes of action alleging breach of fiduciary duty by the Sponsor, members of the Sponsor and of the Board of Managers, for waste and gross mismanagement of condominium property against those Defendants and managing agents, and for professional negligence against the Condominium's accountants. *Caprer v. Nussbaum*, decided October 17, 2006, is reported at 2006 WL 2963128 (N.Y.A.D. 2 Dept.).

Corporations – A corporation was dissolved by proclamation by New York's Secretary of State in 1973 for the non-payment of franchise taxes and not reinstated. The majority shareholder transferred all of her rights in the corporation to the minority shareholder in 1981. In 1986 the corporation conveyed the title to its real property to its then sole shareholder. It was asserted (presumably by an heir of the deceased former majority shareholder) that the corporation's deed and the deed re-conveying the property to the grantee and his wife were void, since upon dissolution of the corporation the property reverted to its shareholders. The Appellate Division, Second Department, affirmed the ruling of the Surrogate's Court, Rockland County, which denied the Petition for a ruling that the deeds were void. According to the Appellate Division, **"(t)he dissolution of a business corporation for failure to pay franchise taxes does not affect the corporation's right to collect or distribute its assets" and the corporation therefore retained title**

until its conveyance in 1986 to its then sole shareholder. Matter of Sullivan, decided July 18, 2006, is reported at 819 N.Y.S. 2d 531.

Mechanics' Liens - The Appellate Division, Second Department, affirmed the Order of the Supreme Court, Queens County, granting Plaintiffs' motion to vacate a demand for a verified statement under Lien Law Section 76(5), and denied the Defendant's motion for leave to amend its answer to assert a counterclaim seeking the imposition of a trust under Lien Law Article 3-A to enforce its rights to be paid for its installation of modular workstations. **According to the Appellate Division, "(t)he installation of modular workstations does not qualify as an 'improvement' within the meaning of Lien Law Section 2(4) and Section 70(1). The appellant did not demolish, erect, or alter any structure, nor did it perform work or furnish materials for its permanent improvement"**. Under Lien Law, Section 3, a mechanic's lien can be filed against real property by a mechanic or a materialman who "performs labor or furnishes materials for the improvement of real property". Negvesky v. United Interior Resources, Inc., decided August 29, 2006, is reported at 821 N.Y.S. 2d 107.

NYC Real Property Transfer Tax ("RPTT") - The New York City Tax Appeals Tribunal held that the RPTT, applicable to the transfer of a controlling interest in an entity owning real property, was properly collected on the transfer of all of the stock of five international business companies formed in the British Virgin Islands which owned all of the stock of five Delaware corporations which held the interests in a Delaware limited liability company owning the Four Seasons Hotel in Manhattan.

NYC Street Maps - In 1918 the City of New York adopted a map widening Amboy Road in Richmond County which, as widened, cuts through the Plaintiffs' property. A surveyor testified that 2,185 square feet of the property, which has a gross area of 5,042 square feet, was within the bed of the widened street. A house on the property, part of which is within the widened street, was built in 1925. In 1926 General City Law Section 35 was enacted which prohibits, except when land within a mapped street is not yielding a fair return on its value to the owner or the proposed street widening has been shown on the official map for ten years or more and the City has not acquired title, the issuance of a permit to allow building in the bed of a mapped street. Plaintiffs brought an action seeking to declare as void so much of the map as affected their property or for compensation for the loss of value to their property. They claimed that the map restrictions rendered the property un-saleable and without value. The Supreme Court, Richmond County, granted the City's motion to dismiss without prejudice to Plaintiffs' commencement of another action. **A planning map that**

produces such substantial damage as to render a property useless for any reasonable purpose is an unconstitutional taking. However, Plaintiffs did not offer any proof of the diminution in value resulting from the filing of the map or any proof that they were unable to sell their property because the street as widened went through their property. Royal v. City of New York was reported in the New York Law Journal on October 11, 2006.

Notice/Tax Lien Foreclosure – In an action to foreclose a tax lien, Plaintiff moved for an Order allowing service by publication against The Seamen’s Bank for Savings (“Seamen’s”), claiming that service could not otherwise be made. **The Supreme Court, Kings County, determined sua sponte from the Internet that the Federal Deposit Insurance Corporation (“FDIC”) had seized the bank’s assets and thus denied the motion. The Court directed the Plaintiff to perform a thorough investigation through the FDIC to determine the status of the lien that was held by Seamen’s and provide notice, as appropriate, to the FDIC or its assignee within ninety days.** The Court noted that the FDIC might have arranged for the sale of Seamen’s assets to another bank. NYCTL 2004-A Trust v. Mesivta Yeshiva Rabbi Chaim Berlin, decided September 7, 2006, is reported at 2006 WL 2572002 (N.Y. Sup.).

Partnerships – In 1992 R&L Realty Associates (the “Partnership”) was the Sponsor of an offering plan to convert a building in Manhattan to cooperative ownership. The Plaintiff and one of the Defendants were its partners. The Partnership was in financial distress, a mortgage on the building was being foreclosed, and the Defendant-partner (“Partner”) was not making her full contributions. To raise money, the Plaintiff consented to the below market sale of four units to a Trust and a corporation in which the Partner or her husband, also a Defendant in the Action, held all of the beneficial interests, which was not disclosed to the Plaintiff. Within two years of discovering the fraud (which fraud tolled the running of the statute of limitations under CPLR Section 213.8), Plaintiff sued to rescind the sales. **The Supreme Court, New York County, found that the Partner breached her fiduciary duty to the Plaintiff and declared the sale of the units to be void. The Partnership was, in turn, directed to return to the Defendants the amounts paid for the units, but without interest. The Court also awarded the Partnership, as the beneficiary of a constructive trust, the rents and profits realized by the Partner and her husband as owners of the units from the time of the sale until the present.** Further, the Partnership was to be dissolved and the assets divided equitably. Shomron v. Fuks, decided September 27, 2006, was reported in the New York Law Journal on October 17, 2006.