GDB LAW

Winter 2019

LEGAL UPDATE

Providing current information about legal developments for our clients and friends.

New Responsibilities for NYC Cooperative and Condominium Board Members

By: Marc J. Luxemburg, Esq.

Both New York State and New York City have recently enacted a number of laws that impose new responsibilities on the Boards of cooperatives and condominiums. We have previously reported on the State requirement to provide an annual conflict of interest report to shareholders or unit owners (Legal Update Summer 2018), and the City obligation to enact a smoking policy (Legal Update Spring 2018). Some of the other significant laws include:

SEXUAL HARASSMENT

Both the State and the City have each recently enacted laws in regard to sexual harassment in the workplace that apply to coops and condos. State law applies to all employers, regardless of the number of employees:

- Starting October 9, 2018, employers must distribute written anti-sexual harassment policies to all of their employees. Employers must adopt the State model policy or establish that their own policy provides all the required information.
- Starting October 9, 2018, employers must provide annual anti-harassment training for all of their employees. The State will produce a model sexual harassment prevention training program.
- The State Law also protects "non-employees," such as contractors. An employer may be liable when the employer knew or should have known that the non-employee was subjected to sexual harassment in the employer's workplace.
- Employees are also protected against harassment by non-employees in the worksite.

New York City now requires all employers to display an anti-sexual harassment rights and responsibilities poster designed by the City in common areas where employees gather. The City will develop an information sheet on sexual harassment that employers must distribute to employees at the time of hire.

- Employers with 15 or more employees must conduct annual interactive anti-sexual harassment trainings for all employees, including supervisory and managerial employees, and for new hires effective April 1, 2019.

continues on page 6

Anonymous Need Not Apply — Entities Getting Bank Accounts

By: Jay L. Hack, Esq.

You go to a bank to open an account for your company and the account officer gives you the third degree. Why do they make it so hard? Don't they want your money?

Don't blame the bank. Federal regulations force banks to find out who owns and manages the bank's "legal entity" customers. The bank must identify every natural person who directly or indirectly owns 25% or more of an entity customer AND at least one person who is an executive officer or manager. "Customer" is defined broadly to include borrowers, depositors and anyone else with an asset account at a bank. The bank is prohibited from opening a deposit account or making a loan for any entity customer unless it gets the information.

Here are some things you should know:

1. What if no one owns at least 25%? Then you should list no one as an owner.

2. Do we still have to list an executive officer or manager even if no one owns 25%? Yes. You must provide information about at least one person no matter how diverse the ownership.

3. What if a 25% owner is also an executive officer? You may list the same person in both capacities.

4. What if my company is owned by two other companies? The bank must drill down to indirect owners. If Company A is owned 60% by Company B and John owns 50% of Company B but none of Company A directly, then John is considered to own 30% of Company A.

continues on page 4

IN THIS ISSUE

Required Notifications to Neighbors About Construction – New Amendments to the New York City Building Code

By: Eugene H. Goldberg, Esq.

A new law applicable only to New York City requires the Department of Buildings (DOB) to give three notices to adjacent property owners (neighbors) when a property is going to be the subject of construction. The notices are required:

- First, when the DOB receives an application for approval of construction plans.
- Second, when the DOB receives an application for a building permit based on DOB approved plans.
- Third, at least 30 days before construction/demolition work begins. The notice must include a copy of the building permit and proof of insurance.

Legislative history shows that the new law was not intended to apply to excavation.

The new law (passed by the State legislature) grew out of the collapse of a Brooklyn building undergoing repair. The building shared an interior party wall with an adjacent building. During repair, structural failures in the party wall were observed on one side only, in the adjacent building. On the other side, construction professionals and the DOB saw nothing. The law encourages adjacent residents to look out for unsafe construction conditions.

The DOB has historically ignored most neighbor comments as to DOB plan approvals and permit granting. The new law is an implicit invitation to a neighbor, who may be affected by a construction project next door, to participate at the DOB.

The notices are at three different times. Notice of plan submission is at an early stage. The neighbor may seek amendment of the proposed construction plans to reflect concerns. Incidentally, if the owner doing the construction needs access to the adjoining property for construction operations, this should also start negotiations for a license/access agreement.

The second notice is warning that construction operations are likely. The neighbor who now raises his concerns to the DOB may affect construction means, methods and safety plans.

The neighbor who waits for the third notice — the building permit and proof of insurance — has little opportunity at the DOB to affect construction means, methods, or safety plans. This notice warns of imminent construction. The neighbor should call the DOB if problems arise during construction. If damage occurs during construction operations, the adjacent owner knows the name of the contractor and the identity of its liability insurer if a lawsuit is necessary.

The DOB has for some years required a contractor to file a DOB proof of insurance form and insurance certificate. The DOB form requires an insurance broker to swear to the accuracy of the insurance certificate. The DOB form will now be provided to a neighbor. A broker who misrepresents insurance coverage may be liable to a neighbor relying upon the DOB form.

> *The new law is an implicit invitation to a neighbor, who may be affected by a construction project next door, to participate at the DOB.*

The law leaves many questions unanswered. Who is entitled to the notice as an "adjacent owner" — the condominium/cooperative apartment owner immediately upstairs, downstairs, next-door, or the owner of the adjacent lot 150 feet away? Does notice depend upon the type of construction operations (e.g. one rule for pile driving and another for installing a new electrical fixture), or will there be a simple bright line rule? Should an alteration permit be treated the same as a new building application? Why not notify adjacent tenants? Will the DOB administratively require an expediter, submitting plans/permits, to provide stamped, addressed envelopes and form notices for mailing to adjacent owners?

We expect these questions to be answered gradually, as the DOB administers the new law. Meantime, if you, as a neighbor, receive a DOB notice that there is going to be construction next door, take advantage of your right to be involved in the process to protect your property.

ABOUT THE AUTHOR

Eugene H. Goldberg *is an associate at Gallet Dreyer & Berkey, LLP. He handles complex litigation involving construction matters, insurance coverage and claims involving sureties, architects and engineers. Mr. Goldberg also drafts and negotiates contracts relating to the construction industry. Mr. Goldberg can be reached at ehg@gdblaw.com.*

Asset Protection for Property Owners and Real Estate Professionals

By: Asher Rubinstein, Esq.

Owners and developers of real estate are already well-aware of the threats of litigation from tenants, guests, workers and even passers-by. Sources of potential liability include construction and renovation sites, lead paint, mold and other environmental risks, personal injuries and the "scaffold law." Under New York's scaffold law, a property owner is held liable for injuries even though the work was performed by an independent contractor over which the property owner exercised no control. For example, if a managing agent hires a painting contractor as part of a renovation project and the painter's employee falls from a ladder and is injured, the injured worker can seek recovery from the property owner, irrespective of the owner's lack of wrongdoing.

> *The first point is that asset protection works best when the asset protection plan is implemented well before the lawsuit arises.*

Considering the litigation risks, our real estate clients continually ask us about protecting their assets from potential lawsuits. The first point is that asset protection works best when the asset protection plan is implemented well before the lawsuit arises. Getting sued and transferring assets shortly thereafter will not be looked upon favorably by a court. The best asset protection is prophylactic and pre-emptive, not defensive.

There are two paths to asset protection: domestic and offshore. Domestic asset protection utilizes legal entities including limited liability companies, family limited partnerships and certain trusts. We also chose favorable jurisdictions whose laws make it difficult to penetrate these entities in order to reach assets. When a potential plaintiff learns that his target's assets are not attachable, he may be incentivized to drop the suit and agree to an insurance settlement. This process brings insurance back to doing what it is supposed to do — cover the property owner rather than invite a lawsuit.

continues on page 7

ABOUT THE AUTHOR

Asher Rubinstein, *a partner at Gallet Dreyer & Berkey, LLP, provides advice and guidance regarding asset protection, U.S. tax and estate planning, and tax controversies. He represents foreign and domestic clients. Mr. Rubinstein has published numerous articles on tax compliance, offshore asset protection and wealth preservation strategies in the* Journal of Taxation and Regulation of Finance, Tax Notes International, *and other publications. He is also the author of the blog, www.assetlawyer.com. Mr. Rubinstein can be reached at ar@gdblaw.com.*

GDB PARTNERS

DAVID T. AZRIN
dta@gdblaw.com
Franchise, Trademark, Employment, Litigation

DAVID L. BERKEY
dlb@gdblaw.com
Real Estate, Co-op/Condo, Litigation, Crisis Management

MORRELL I. BERKOWITZ
mib@gdblaw.com
Litigation, Real Estate

MARK B. BRENNER
mbb@gdblaw.com
Corporate, Bankruptcy, Real Estate

DAVID S. DOUGLAS
dsd@gdblaw.com
Litigation

DAVID I. FAUST
dif@gdblaw.com
Corporate, Trusts and Estates, Tax, Real Estate, International Business Law

ADAM M. FELSENSTEIN
amf@gdblaw.com
Litigation, White Collar Criminal Defense

JAY L. HACK
jlh@gdblaw.com
Banking, Securities, Corporate

RANDY J. HELLER
rjh@gdblaw.com
Construction, Suretyship, Litigation

BEATRICE LESSER
bl@gdblaw.com
Real Estate Litigation, Co-op/Condo, Commercial and Residential Landlord/Tenant

MARC J. LUXEMBURG
mjl@gdblaw.com
Real Estate, Co-op/Condo, Corporate, Litigation

PETER R. MASSA
prm@gdblaw.com
Co-op/Condo, Real Estate, Corporate, Banking

DAVID N. MILNER
dnm@gdblaw.com
Tax, Trusts and Estates, Corporate, Real Estate

PERRY L. MINTZ
plm@gdblaw.com
Real Estate, Co-op/Condo, Corporate

MICHELLE P. QUINN
mpq@gdblaw.com
Real Estate, Litigation, Co-op/Condo, Landlord/Tenant

SEYMOUR D. REICH
sdr@gdblaw.com
Trusts and Estates, Real Estate

ASHER RUBINSTEIN
ar@gdblaw.com
Asset Protection, Tax, Trusts and Estates

SCOTT M. SMILER
sms@gdblaw.com
Real Estate, Co-op/Condo, Corporate

JERRY A. WEISS
jaw@gdblaw.com
Real Estate, Co-op/Condo, Litigation

Entities Getting Bank Accounts

(continued from page 1)

5. Who chooses which executive officer or manager to list? The regulation gives little guidance. The bank may require that it be a chief executive officer or chief financial officer.

6. Is the bank allowed to ask for more details? Yes. The bank may require disclosure, for example, of all 20% owners or at least two executive officers.

7. Does the bank have to investigate the information I give? No, the bank may rely on what you say if it knows no facts indicating that the information may be unreliable. However, you will have to certify that the information is true and lying to the bank is a federal crime.

8. Must the bank get proof of identity of the owners and the executive officer? Yes. The bank must follow procedures similar to the procedures for opening an account for an individual. Bring copies of drivers' licenses or passports for all owners and one executive officer/manager when you open a deposit account. The bank must also get a residence or business address for each person.

9. How long does the bank keep the information? Five years after the account is closed. If the same information is used to open multiple accounts, the information and your certification must be kept for five years after the last account closes and the last loan is repaid.

> *Federal regulations force banks to find out who owns and manages the bank's "legal entity" customers.*

10. What happens if my company has a 30 day certificate of deposit that is rolled over every month? Each rollover requires recertification. Banks may avoid monthly recertification by requiring you to notify it of any change in the information you provide. You must then give notice of any change, such as if 25% ownership changes, an executive officer is replaced, or someone moves to a new address.

11. How about trusts as owners of legal entities? In most cases, such as trusts under wills, living trusts and credit shelter trusts, the trust is not a legal entity and is treated as an individual. If such a trust owns 25% of a corporation, the trustee, rather than the trust, is listed as an owner. If there is more than one trustee of the same trust, then at least one must be listed.

12. What if the trustee is a corporation? The corporation is listed as the owner, with no requirement to drill down to the owners of the trustee unless the bank has such a requirement as part of its customer identification program.

13. What if I do business personally under a trade name (known as a d/b/a)? A d/b/a is not a legal entity and the rule does not apply. However, a limited liability company (LLC) is an entity even if it is disregarded for tax purposes as a partnership.

14. What about charities and not-for-profit corporations? They are exempt from the disclosure rule, regardless of whether they qualify as tax-exempt charities.

ABOUT THE AUTHOR

Jay L. Hack *is a partner at Gallet Dreyer & Berkey, LLP and head of the firm's banking department. Mr. Hack is the past Chair of the Business Law Section of the New York State Bar Association. His practice focuses on providing a full range of legal services to banks and other financial institutions. Mr. Hack can be reached at jlh@gdblaw.com.*

GDB ANNOUNCEMENTS

GDB is proud to announce that Michelle P. Quinn has been promoted to partner

Michelle represents businesses and individuals in commercial and residential landlord-tenant litigation, including summary proceedings. She has substantial experience with Mitchell-Lama Cooperatives, Redevelopment Companies, and tenancies protected by New York State Rent Regulations.

FIRM NEWS AND HONORS

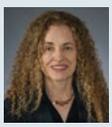
David L. Berkey

In January, partner David L. Berkey was a panelist speaking on First Amendment/Religious Freedom issues at NYSBA's Real Property Law Section Committee on Condominiums and Cooperatives.

Jay L. Hack

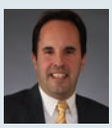
In December, partner Jay L. Hack delivered a presentation on lawyer responsibilities regarding bank deposits that they hold in escrow.

Beatrice Lesser



In December, partner Beatrice Lesser was quoted in *The New York Times* regarding small co-ops without leaders and what can be done to avert a collapse.

Scott M. Smiler



In November, partner Scott M. Smiler closed on a $52.3 million dollar loan from the New York City Housing Development Corporation (HDC) for Lindsay Park. Lindsay Park is set to undertake a major capital improvement project, which included the negotiation of a $42 million dollar construction contract.

In October, Scott closed on the sale of a portion of real property belonging to one of our Mitchell-Lama clients, Lindsay Park Housing Corp. The sale, together with an option premium, totaled $19.5 million dollars. To Scott's knowledge, this is the first time that the sale of a portion of a Mitchell-Lama property to a private developer was permitted by HPD.

Marc J. Luxemburg

In November, partner Marc J. Luxemburg presented two seminars at the Annual Conference of the Council of New York Cooperatives and Condominiums. The first was on Current Significant Legal Decisions of 2018, which focused on legal decisions that impacted the operations of cooperatives and condominiums and how to deal with the challenges they present; the second was on the topic of New Responsibilities for Board Members, and covered recent amendments to NY state law and the NYC administrative code, which require action by boards to comply with the new requirements.

In September, Mr. Luxemburg presented a seminar titled "An Introduction to Coop Board Responsibilities" for new directors with co-presenter Gregory Carlson, President of the National Association of Housing Cooperatives. He also presented a seminar on the new form of Proprietary Lease and the changes it makes from current forms in use.

Peter R. Massa

In November, partner Peter R. Massa was a speaker at the Annual Conference of the Council of New York Cooperatives and Condominiums. The Seminar focused on issues relating to the transfer of apartments to trusts and limited liability company ownership.

Asher Rubinstein

In June, partner Asher Rubinstein's article, "Asset Protection for Doctors via Family Limited Partnerships" appeared in *The White Coat Investor* (whitecoatinvestor.com), a finance website for doctors.

In March, Mr. Rubinstein's article, "U.S. Tax Returns and Offshore Assets: What You Need to Know" appeared in *Offshore Red.*

GDB LAW GALLET DREYER & BERKEY, LLP

845 THIRD AVENUE, 5TH FL
NEW YORK, NY 10022-6601
T: 212.935.3131 ▪ **F:** 212.935.4514
WWW.GDBLAW.COM ▪ INFO@GDBLAW.COM

New Responsibilities for NYC Coop/Condo Board Members

(continued from page 1)

For those buildings within the five boroughs, it is necessary to comply with both the State and City programs.

FIRE SAFETY PLAN & NOTICE

The Fire Department has expanded the rules that require building owners to prepare and distribute fire safety plans to apartment occupants and building employees, and post fire safety notices in apartments and in the buildings' common areas.

Owners must prepare a fire safety plan containing information about the building's construction and its fire safety systems. It must also tell people how to get out of the building in the event of a fire. Owners must copy the plan from the Fire Department's sample fire safety plan.

Owners must annually distribute a copy of the fire safety plan to occupants, including those who move into the apartment, and building employees, either during Fire Prevention Week or with the annual window guard notice.

The Fire Department has also developed fire safety notices, which provide the procedures to follow if there is a fire. These notices must be posted in the building's common areas. The owners or proprietary lessees of the individual units in coops and condos are responsible for the posting of the fire emergency notice on the inside of their apartment doors.

BED BUG REPORTS

The NYC Administrative Code provides that the owner or occupant in control of a dwelling shall keep the premises free from rodents and insects. A recent law has now added two new requirements:

> *Owners must annually distribute a copy of the fire safety plan to occupants, including those who move into the apartment.*

1. that the owner of the building must annually file with the Department of Health a bed bug report on an official form concerning which apartments had a bedbug infestation in the prior year (November to November); and

2. either provide each tenant upon commencement of a new lease a copy of the report and an approved notice of how to prevent bedbugs, or post the report and the notice in a prominent place in the building.

Another new requirement is that the building owner shall attempt to obtain a bedbug infestation history for the previous year from the tenant or prior owner, including whether eradication measures were employed.

The report is due in December for the prior year through November, starting December 2018.

GAS PIPING

Commencing January 1, 2019, building gas piping systems of most coops and condos will be required to be periodically inspected at least once every five years.

At each inspection, all exposed gas lines from point of entry into the building up to, but not including, individual tenant spaces, shall be inspected for excessive corrosion and non-code compliant installations. Public spaces shall be examined to determine if there is a gas leak.

If an inspection reveals any unacceptable conditions, the inspector shall notify the building owner, the utility and the fire department immediately and the building owner shall immediately take corrective action.

The Board must also deliver to each tenant and prospective tenant, and must post in a common area of the building, a notice regarding the procedures that should be followed when a gas leak is suspected.

Please note that if the gas is required to be shut off in order to cure an unacceptable condition, it may cost hundreds of thousands of dollars of repairs to the system in order to get the gas turned back on. Boards would be advised to examine their gas piping now to see if any repairs may be needed in order to anticipate how to finance extensive repairs.

ABOUT THE AUTHOR

Marc J. Luxemburg *is a partner at Gallet Dreyer & Berkey, LLP. His practice focuses on real estate transactions, cooperative and condominium law, and real estate litigation. Mr. Luxemburg represents numerous buildings and sponsors in the New York City area. He is the President of the Council of New York Cooperatives and Condominiums, a non-profit membership organization with more than 2,300 cooperative and condominium members, which provides educational activities and monitors legislation that affect its members. He has taught numerous seminars on the legal aspects of operating cooperatives and on the role of the board of directors. Mr. Luxemburg can be reached at mjl@gdblaw.com.*

Fish or Fowl

By: David I. Faust, Esq.

Whether shares representing ownership of a cooperative apartment are real property or personal property has perplexed estate lawyers and their clients, especially when the owner/decedent is a non-domiciliary of New York. Is succession of the shares governed by the laws of New York, where the co-op is located — the case if the shares are realty — or the laws of the domicile of the decedent? If there is no will, or if a spouse elects against the will, which law applies?

A recent Supreme Court, New York County, case sheds some, albeit dim, light on this question.

The case involved an attempt to foreclose a judgment against two commercial coops owned by the judgment debtor and his wife. The wife was not liable on the judgment. If the shares were held to be personal property, they would be owned in a "tenancy in common," which means that the judgment debtor could force the sale of the shares and apply the husband's portion in satisfaction of the judgment against him. If the shares were deemed to be real estate, they would be held as "tenants by the entirety," not subject to partition and not subject to forfeiture, in whole or in part, for the debts of one but not of both of the owners.

Relying on a 1977 Court of Appeals case involving a tax lien, and acknowledging that coop shares do not fit neatly into traditional classifications, the New York County Supreme Court reasoned that the interests of the judgment creditor in the coop shares — seeking money to satisfy a judgment — fit more within the realm of a claim against personal property than against real estate. This is the same rule that applies when banks lend money secured by shares representing ownership of coop units in New York; they do not get a mortgage on the unit. Instead, they get a security interest because the coop shares are treated as personal property. One wonders if the result would have been different if the judgment creditor were seeking partition and possession of any of the real estate subject to the proprietary lease which accompanied the coop shares.

This is a matter of state law. In Connecticut, coop shares are treated as real estate and are mortgaged the same as any other real property. The New York decision did not refer to the fact that shares in a coop are inseparably linked to a proprietary lease for a specific coop unit, which lease is an interest in real estate.

In the estate context, particularly where there are multiple heirs, the objective is typically to sell the coop and distribute the proceeds rather than to obtain possession or the right to occupy the coop unit. Under the analysis of the recent decision, this would tend to make the shares personalty, whether the claim of an heir arises under a will, a spousal election or the laws of intestacy. The result might be different if an heir sought possession and use of the underlying real estate, subject to the rules, requirements and restrictions of the coop corporation.

The difference between shares regarding ownership of a coop unit being considered as real or personal property is of particular importance to a non-resident alien owner. Whether considered real or personal property, coop shares are U.S. assets for federal estate tax purposes and, therefore, are subject to estate tax if owned by a foreign decedent. If they are deemed to be real estate, they may also be subject to a federal gift tax if gifted by a non-resident alien…but if deemed to be personal property, they are intangible and therefore would not be subject to U.S. gift tax. This means that the shares could be gifted during life without a transfer tax that would be due on a testamentary disposition.

ABOUT THE AUTHOR

David I. Faust *is a partner at Gallet Dreyer & Berkey, LLP. His practice includes the general representation of individuals and corporations on all aspects of commercial, corporate, real estate, trusts, estates and tax law. In addition, Mr. Faust advises clients on cross-border corporate issues, tax matters, estate planning and trusts. Mr. Faust's practice includes representation of United States and non-United States clients involved in international business and personal matters in the United States and elsewhere throughout the world. Mr. Faust has authored numerous notes and articles, including a chapter in* Trusts in Prime Jurisdictions, 2nd Ed., *published by Globe Law and Business, and two chapters in the 3rd and 4th Editions of that book. Mr. Faust can be reached at dif@gdblaw.com.*

Asset Protection for Property Owners

(continued from page 3)

Offshore trusts offer additional asset protection by removing assets from U.S. jurisdiction to a jurisdiction that is safe and beyond the reach of U.S. creditors. A litigant will be more inclined to settle upon terms favorable to the property owner, rather than pursue litigation in a foreign country, without contingency fees, where the burden of proof and statute of limitations will be against the litigant.

The increasing risks and liabilities facing property owners and real estate professionals are clear and compelling, including lawsuits based upon injuries which they are powerless to prevent. Proper asset protection strategies offer property owners, developers and other real estate professionals a viable safety net for their property when faced with inevitable litigation.

GDB LAW
GALLET DREYER & BERKEY, LLP

845 Third Avenue, 5th Fl
New York, NY 10022-6601