GDB LAW

Spring 2019

LEGAL UPDATE

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

How to Prepare for and Conduct Your Annual Meeting

By: David L. Berkey, Esq.

May and June are the months when most Cooperatives and Condominiums conduct their annual meetings of shareholders or unit owners. Advance planning is essential for a successful annual meeting.

Such planning includes a review of the relevant by-laws and for cooperatives their certificates of incorporation to determine:

- how much notice of the annual meeting must be given to shareholders or unit owners,
- when and where the meeting should be held,
- whether and what type of proxy may be used at the meeting,
- how to determine who the nominees for board seats will be,
- how many directors or managers are to be elected,
- whether cumulative voting or straight voting is required,
- what items other than elections should be on the agenda,
- whether inspectors of election should be appointed or elected, and
- when the election results should be reported.

There are special requirements that must be followed if shareholders or unit owners are going to be asked to amend the certificate of incorporation, by-laws or other governing documents at the annual meeting. Usually such changes can be accomplished by super-majority vote or written consent. If by vote, then the proposed changes are usually distributed to shareholders or unit owners with the notice of meeting. Examples of certificate of incorporation changes are increasing the authorized number of shares or allowing cumulative voting at elections. Examples of changes to by-laws include creating a staggered board, or enlarging or reducing the size of the board.

The Board should determine who will preside at the annual meeting, who will present reports to the shareholders or unit owners, who will explain and

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Keeping Up With the Times:

New York City Housing Court Seeks to Implement Changes

By: Michelle P. Quinn, Esq.

It has long been noted that the existing housing courts are ill-equipped to handle the number of litigants and extensive caseloads which New York City's housing courts see each day. From the long lines of litigants (often with children), to the lack of available courtrooms and meeting spaces, and even failing infrastructure, it has become increasingly difficult for matters to be equitably and efficiently resolved.

In 2017, Chief Judge Janet DiFiore created a Special Commission on the Future of the New York City Housing Court. Members of the Commission included active and retired housing court judges, legal services providers, private practice attorneys representing landlords, tenants, or both, and others. The Commission recommended numerous proposed reforms to effect a transformation of the housing court.

One major change which has already taken place is the Universal Access to Legal Services Law, signed into law in 2017, which provides access to legal representation in housing court to low-income tenants facing possible eviction living in certain New York City areas. Other litigants who do not meet the requirements will also have access to a free legal

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IN THIS ISSUE

Misconceptions About Bankruptcy

By: Mark B. Brenner, Esq.

The focus of my practice is real estate and bankruptcy law. Completing a real estate purchase, sale or lease requires cooperation. If the parties can't cooperate, there is no deal. Bankruptcy imposes similar clarity by rewarding full disclosure of required information and discouraging spendthrift behavior. Bankruptcy Judges are part of the federal court system that does not readily countenance misbehavior by unscrupulous lawyers and litigants, who may evade punishment for bad conduct elsewhere. Though people have a basic understanding about real estate, bankruptcy requires study. As a result, what most people know about it, including lawyers who don't practice it, is heard on the street. Examples follow.

1. Bankruptcy kills debts. Some people mistakenly believe that the mere act of filing for bankruptcy discharges obligations. It does not. Bankruptcy is not applied to debt like insecticide is sprayed on bugs. It is true that an automatic stay goes into effect upon the filing of a bankruptcy case. The automatic stay prevents most creditors from pursuing claims against the debtor (excluding creditors who seek to enforce domestic support obligations, most tax obligations, and criminal fines and penalties) unless and until one or more creditors seek a court order "modifying the stay" to permit continued collection efforts. However, the underlying debts remain very much alive until the court issues a final decree and order of discharge that may take months and years to issue, assuming one ever does. The party who files for bankruptcy ("debtor") is required to complete a challenging set of statements and schedules in good faith that fully discloses assets, liabilities, income and expenses, so that creditors and other interested parties, including chapter 7, chapter 11 or chapter 13 case trustees can review that information and determine whether there are bankruptcy estate assets worth administering, or reasons to seek dismissal or conversion of the debtor's case, or to sustain an objection to discharge of obligations. A debtor must work to obtain a discharge, and often continues to owe debt that is "non-dischargeable".

2. Bankruptcy kills the debtor's future because a debtor will never obtain a good job or get to keep any assets. In truth, bankruptcy is the first responsible economic decision many debtors have made in years. Chapter 7 debtors whose credit cards have been frozen begin receiving credit card applications in the mail immediately after filing for bankruptcy. The interest rate and service charges on these 'subprime credit cards' are high and often avoidable. But to a debtor who has received no offers of any kind, good or bad, for extensions of credit before filing for bankruptcy, are astonished to receive credit card offers within days after filing. As for employment, the bankruptcy code makes it unlawful for an employer to discriminate against one who files for bankruptcy. Finally, if debtors seek advice sooner rather than later, there are many "exempt assets" they can keep after filing for bankruptcy.

> *After experiencing so much misfortune, it is hard to imagine why a prospective debtor would make a choice about filing for bankruptcy without first seeking legal advice.*

3. Anyone can file for bankruptcy on his own ("pro se") because debtors have nothing to lose and don't need a lawyer. This rumor may help explain why a bankruptcy debtor's expertise in financial planning is not universally recognized. After experiencing so much misfortune, it is hard to imagine why a prospective debtor would make a choice about filing for bankruptcy without first seeking legal advice. Indeed, filing "pro se" may be a correct strategy. But a bankruptcy filed pro se or otherwise is not the right choice for everyone. In some cases, filing for bankruptcy is a very bad move.

Filing a business entity bankruptcy "pro se" can be especially damaging. In fact, corporate and limited liability companies that file for bankruptcy must be represented by legal counsel. A person who runs a corporate or limited liability company may think she is the company. But she is not. A recent pro se filer of a corporate bankruptcy learned that lesson the hard way. At the first hearing before the court after filing her company's Chapter 11 case, the Judge converted the

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ABOUT THE AUTHOR

Mark B. Brenner *is a senior partner at Gallet Dreyer & Berkey, LLP. He serves as general counsel to business and real estate clients and represents debtors and creditors in bankruptcy court in the Southern and Eastern Districts of New York. His litigation background and transactional experience provide Mr. Brenner with a valuable skill set that permits him to identify and address a comprehensive array of client issues and concerns. Mr. Brenner can be reached at mbb@gdblaw.com.*

May I Steal a Part of Your Backyard?

By: Randy J. Heller, Esq.

The doctrine of "adverse possession" remains one of the most interesting facets of real property law. The possibility that your neighbor can magically take ownership of some of your property through your own inattentiveness continues to fascinate and confound homeowners.

What makes it so interesting is the counter-intuitive way it works. Giving permission for your neighbor to occupy your land denies him any claim. But refusing his encroachment may cause you to lose the disputed strip. Here's how that dichotomy played out in a recent appellate case.

Homeowners Mr. A and Mr. B were next door neighbors in Rye, New York. In 1977, Mr. A built a tennis court in his yard. Approximately 22% of the court crossed over into Mr. B's backyard. Nothing was apparently said until 2002, when Mr. B offered to sell the strip of land on which the court encroached to Mr. A, who declined the offer. Thereafter, Mr. A continued to play tennis, with Mr. B's express permission, for the next decade.

> *Giving permission for your neighbor to occupy your land denies him any claim. But refusing his encroachment may cause you to lose the disputed strip.*

In 2012, however, Mr. A wished to resurface his tennis court. Mr. B (perhaps holding a lingering grudge since his offer was declined in 2002), refused to allow access to Mr. A's contractor. Mr. A then brought a lawsuit claiming that he owned the encroaching strip of land by adverse possession.

In order to acquire a parcel of land through adverse possession, one needs to satisfy a 5-pronged test. Basically, one must demonstrate that one's possession of the land was (1) actual, (2) open and notorious, (3) exclusive, (4) continuous for at least a 10-year period, and (5) hostile. While the elements of this test were tweaked by the legislature in 2008 to make it slightly harder to "steal" a neighbor's property, they are similar enough for the purposes of this article.

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New York City Housing Court

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consultation. Attorneys representing landlords are encouraged to include information regarding this new law in the notice of petition when commencing a proceeding. It is believed that the assignment of counsel under this plan should happen at the earliest opportunity to facilitate early resolution of disputes between landlords and tenants.

Other reforms that have already been implemented include elimination of certain specialized parts (including those for condominium and cooperative apartments and those involving military personnel). Matters involving condominiums and cooperatives are now heard by all housing court judges randomly assigned by the clerk's office, not automatically directed to a specific part.

Trial assignment has also changed. If cases are not settled in the resolution part, matters are sent to a trial assignment part where they are immediately assigned to a trial part. Prior practice was for litigants to wait in the assignment part until a trial part became available, sometimes for several hours or even days, further delaying trial. Now, to further expedite the process, after being assigned to a trial part, litigants must participate in a pre-trial conference before the trial judge to resolve any evidentiary issues, identify exhibits and witnesses, and potentially resolve the proceeding.

On the horizon are procedural improvements such as staggered calendars, multi-language forms, and electronic filing. Instead of only two (or sometimes three) start times for court appearances (9:30 a.m., 11:00 a.m., or 2:00 p.m.), with the majority of cases being scheduled for 9:30 a.m., the staggered calendars proposed by the Commission address several current difficulties, including decreasing congestion in security lines, courtrooms, and hallways, and enabling landlord attorneys to timely appear in multiple parts, thereby reducing tenant wait times.

The New York Supreme Court has had mandatory electronic filing ("e-filing") for all cases filed since February 19, 2013, which has streamlined the efficiency of service and filing of pleadings, motions, orders, and other legal documents. In Supreme Court, to a limited extent, litigants may opt-out of e-filing, typically where a litigant is not represented by counsel. Conversely, in housing court, litigants would be able to opt-in to participate in e-filing, but it would not be mandatory (at least initially). The advent of e-filing would consequently necessitate increased availability of court-provided computer terminals for submission or retrieval of documents, as well as additional court personnel and information to guide litigants through the e-filing process.

Ideally, court buildings would be redesigned to provide private or semi-private areas for conferencing; concession stands to enable litigants to get lunch or other refreshments without having to exit and re-enter the courthouse (requiring re-screening by security); and child-friendly areas with books, games, and snacks. Of more urgent need is improved maintenance of bathrooms and stairwells; clearer signage and information to properly direct litigants; and appropriate surfaces and seating areas for drafting of in-court settlement agreements.

> *The recent legislation is a promising step toward improving conditions and procedures in New York City Housing Courts. Many of the proposed enhancements will necessarily take time to adopt, and some are so financially ambitious — such as structural redesign and upgrades — that they may take years to realize.*

The recent legislation is a promising step toward improving conditions and procedures in New York City Housing Courts. Many of the proposed enhancements will necessarily take time to adopt, and some are so financially ambitious — such as structural redesign and upgrades — that they may take years to realize. With an average of 350,000 filings in housing court each year, the strain on the system is great, and the need for improvement is real.

ABOUT THE AUTHOR

Michelle P. Quinn *is a partner at Gallet Dreyer & Berkey, LLP. She represents businesses and individuals in commercial and residential landlord-tenant litigation, including summary proceedings. Ms. Quinn has substantial experience with Mitchell-Lama Cooperatives, Redevelopment Companies, and tenancies protected by New York State Rent Regulations. Ms. Quinn can be reached at mpq@gdblaw.com.*

FIRM NEWS AND HONORS

Asher Rubinstein

In December, partner Asher Rubinstein's article, "2018: The Offshore Year in Review" was published in "Taxnet Pro."

In February, Mr. Rubinstein presented a webinar titled "FBAR and U.S. Tax Reporting: Compliance Requirements for Foreign Assets."

David L. Berkey

In January, partner David L. Berkey was a speaker at the Real Property Law Section's Committee on Condominiums and Cooperatives annual meeting on the subject of First Amendment and Religious Freedom Issues in Condominium and Cooperative communities.

David T. Azrin

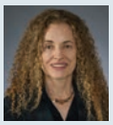
In February, partner David T. Azrin was selected as a 2019 Legal Eagle by the *Franchise Times*.

Marc J. Luxemburg

In February, partner Marc J. Luxemburg presented a seminar for members of cooperative boards on the new form of Proprietary Lease issued by the Council of New York Cooperatives & Condominiums. The seminar explains the changes that the new form of lease introduces, explores the deficiencies in existing forms of proprietary leases, and details how the new form clarifies the authority of a board to manage a cooperative.

In March, Mr. Luxemburg was the speaker at a seminar sponsored by the Association of Riverdale Cooperatives entitled "A Review of Current Significant Legal Issues of 2018." The seminar was a survey of court decisions in the past year affecting cooperatives and condominiums, with an emphasis on how boards need to update their procedures to keep abreast of new developments.

Beatrice Lesser



In March, partner Beatrice Lesser taught a CLE on objectionable conduct holdovers at the New York City Bar Association.

Jay L. Hack

In April, partner Jay L. Hack was a featured speaker at the Independent Bankers Association of New York State Compliance Conference. He discussed what community banks can learn from recent federal and state regulatory enforcement actions.

Randy J. Heller

In April, partner Randy J. Heller taught a class of engineers and architects at the New York University Tandon School of Engineering on the skills needed to conduct an effective construction industry arbitration.

Peter R. Massa

In April, partner Peter R. Massa gave a presentation titled "Seller's Concessions in Residential Real Estate Closings," during the April 2019 meeting of the Real Property Law Section's Committee on Condominiums, Co-Ops and HOAs.

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Annual Meeting

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supervise the election process, how to conduct question and answer periods, whether the candidates will be permitted to speak to introduce themselves and to answer questions concerning their qualifications and policies they wish to implement if elected.

Boards should review their by-laws and determine how they will solicit nominees for open seats, whether there will be a nominating committee selected to review potential candidates and create a slate of qualified candidates, whether there will be nominations permitted from the floor at the annual meeting, whether nominations will require a "second" and acceptance by the candidate, and whether the nominees will attend a candidates' night prior to the annual meeting so shareholders or unit owners can meet and speak with them prior to the election.

> *The annual meeting should be well publicized and shareholders and unit owners reminded to attend at regular intervals.*

It is essential to have a quorum present so the business of the annual meeting (primarily the election of board members) can be conducted. Efforts should be made to distribute and collect proxies in advance of the meeting to ensure a quorum. The annual meeting should be well publicized and shareholders and unit owners reminded to attend at regular intervals.

If there are contested elections or contentious issues to be voted upon, the Board may wish to retain a special election company to collect and validate proxies, to collect, review, validate and count the ballots, and to determine who has been elected.

The cooperative's or condominium's counsel should be involved in meeting planning and should review the notices, proxy, agenda, ballot and other materials prior to their being distributed to shareholders and unit owners. Counsel usually is present at the meeting to assist with agenda items, to make sure the by-laws are properly followed and voting is properly conducted. Most counsel are experienced in leading annual meetings and can help make sure that your meetings run smoothly and your elections will not be subject to challenge.

ABOUT THE AUTHOR

David L. Berkey *is a partner at Gallet Dreyer & Berkey, LLP and head of the firm's Cooperative and Condominium Practice. A seasoned litigator, Mr. Berkey is a trusted advisor to numerous cooperative and condominium boards, banks, insurance companies and individuals. Mr. Berkey can be reached at dlb@gdblaw.com.*

Bankruptcy

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proceeding to chapter 7, and appointed a chapter 7 case trustee to take over the company, identify its assets, sell them off, and wind down its affairs. The person who filed that company for bankruptcy "pro se" was out of a job. Moreover, the chapter 7 case trustee was free to pursue claims against her to recover "fraudulent transfers" and "preferential transfers", including money previously collected by that prior owner as "salary" that the trustee claimed was really an improper dividend paid to her as an investor before secured and general unsecured creditors of the company who should have been paid first. The lesson is plain. Look before you leap.

4. We can always file for bankruptcy. A client who is a commercial landlord called me the day that the City Marshal was delivering possession of certain commercial premises to his company pursuant to a warrant of eviction. The evicted tenant had just appeared at the store with a notice of commencement of a Chapter 11 case. The City Marshal delivered possession to the landlord who changed the locks on the premises 3 hours before the date and time stamped on that bankruptcy notice. The store was not an asset of the bankruptcy estate. The former tenant was directed out of the premises.

If you or someone you know is considering filing for bankruptcy, or seeks to protect or recover assets including real estate interests from someone who may have filed, or may yet, Mark B. Brenner, a senior partner at this firm, is available for consultation.

Stealing Part of a Backyard

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Mr. A argued that his use of the tennis court was open for all to see, exclusive to him, and continuous for well more than 10 years. The battle lines were drawn, however, on whether his use was "hostile." That legal term of art does not require any animus—merely that the neighbor did not consent to its use. If the use is with the neighbor's permission, it cannot be deemed to have been "hostile." Mr. B argued that at least since 2002, when he offered to sell the strip to Mr. A, he had given express permission to Mr. A to continue to use the encroaching court — thereby negating the "hostile" prong of the test.

But Mr. A countered, and the court agreed, that Mr. A had already acquired the strip by adverse possession in 2002, having used the court since 1977 without ever having obtained Mr. B's permission. Since Mr. B could easily witness the encroachment (the "actual" and "open and notorious" prongs) and since Mr. A's exclusive use had continued for over 10 years, Mr. A automatically became the owner by operation of law. While Mr. B may have given permission in 2002, it was too little and too late. He'd already relinquished ownership of the strip. Although the pre-2008 law was applied due to the fact that ownership to Mr. A was alleged to have transferred in 2002, the result would likely be the same under the new law.

The takeaway from this case is that you actually protect your property by giving permission to your neighbor to use it. Once you deny permission, the clock starts ticking on a potential adverse possession claim 10 years down the road. If an encroachment is operating with your permission, it doesn't matter if it has been going on for 50 years. You can withdraw your permission at any time and the land remains yours.

Prior to 2008, one could fairly easily claim ownership of a neighbor's property by merely mowing that lawn, or cultivating it, or putting up a simple split rail fence. The legislature made that much tougher and one must now build a much more substantial structure on the land (a tennis court would probably still qualify).

But as before, if you sit silently for more than 10 years, watching your neighbor encroach without giving your permission, you may find yourself no longer the owner of that strip of land.

The ball is in your court.

ABOUT THE AUTHOR

Randy J. Heller *is a partner at Gallet Dreyer & Berkey, LLP. He represents contractors and owners in a wide array of sophisticated construction related matters as well as litigation. In addition to being named a Super Lawyer for many years running, Mr. Heller is considered one of the top attorneys in construction law in the New York metropolitan area by the* New York Times Magazine, *and one of the Best Lawyers of* New York by New York Magazine. *In addition, Gallet Dreyer & Berkey, LLP has once again been given the highest "Tier 1" rating by* U.S. News & World Report *for its construction law and litigation practice. Mr. Heller can be reached at rjh@gdblaw.com.*

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