On the Residential Hybrid Known as the "Cond-Op"

COUNSELS' CORNER:

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Residential cooperative apartment corporations, condominiums and their more recently developed sibling the "cond-op" face many interesting dilemmas and decisions with regard to commercial establishments that are either tenants of the premises or themselves owners of the premises. Some of these issues were brought to light in the recent New York County case of Royal York Owners Corp. v. Royal York Associates, L.P.[1] This case involved a condop and a dispute between the owners of the commercial portion of the Condominium and the residential cooperative portion of the condominium.

Sponsors and unit owners alike must be aware of some of the benefits and pitfalls involved in the affiliations of commercial "residents" of these types of entities. The specific issues underlying the *Royal York* case are a result of the offering plan and the by-laws as they were initially established and accepted. The offering plan establishes and sets forth a variety of details about the entity that is being created. In the case of a condominium, the plan sets forth not only the percentage of the common elements that are attributable to each specific unit but also in some cases, such as the *Royal York* case, what percentage of the common elements each unit is responsible for regarding the costs of repairs and maintenance. In the case of a cooperative, the plan sets forth the number of shares of stock in the corporation that are attributable to each specific unit in the corporation. For a cooperative, each shareholder is responsible for his or her proportionate share of the maintenance and repairs of the premises and the common elements based on the number of shares he owns in the corporation.[2]

The plan also typically defines what common elements are and what items the unit owners individually are responsible for the maintenance of and what items the entity (the condominium or cooperative) is responsible for the repairs and maintenance of.[3] In this regard, the unit owners have very little say over what the plan and by-laws state regarding these types of divisions as these documents are prepared by the sponsors.

In the normal course of events, with regard to condominiums the percentage of common elements attributable to a specific unit is generally based on the percentage of square footage of each unit as to the entire entity as well as other factors, such as location. In the *Royal York* case, this was not the situation.[4] The residential cooperative (hereinafter "Residential unit") comprised 95% of the common elements of the condominium while the commercial portion, which was actually a parking garage (hereinafter "Garage unit"), owned 5% of the common elements according to the declaration of the condominium. The declaration also provided, however, that the residential unit was responsible for 98% of the cost of repairing and maintaining the common elements while the garage unit was only responsible for 2% of these costs.

This disparity in the percentages of responsibility of repairs and maintenance as opposed to the percentages of ownership of the condominium was not the only issue of dispute in this case. The parties were also litigating over what the definition of a common element was in this case. Specifically, the dispute in this case centered on whether the roof over the Garage unit of the condominium was a common element or rather did the roof belong solely to the Garage unit. The effect of this determination is that if the roof was found to be a common element that the residential unit would be responsible for 98% of the cost of repairs and maintenance but if it was found to belong solely to the garage unit than the total cost would be the responsibility of the garage unit.

One problem that the Cooperative plaintiff encountered in this case was that certain of their causes of action were barred by the relevant statutes of limitations. This was mainly because the Court held that the relevant dates related to when the garage roof, which is the center of the controversy in this case, was defined as a common element.[5]

The plaintiff's strongest argument was for reformation based on the fact that, they claimed, the Declaration did not comply with the Condominium Act.[6] The Court held that the condominium act, which itself defines common elements, defines a roof on a building as a common element.[7] Under this analysis, the Court held that the Declaration in this particular case did not violate the Condominium Act.[8] In light of that the Court further held in this case that "the Declaration, the Bylaws, as well as the Offering Plan define the garage roof as a common element."[9] Thus, in the first instance the responsibility to repair was that of the Condominium not the Garage unit

With regard to that aspect of the case dealing with the inequitable allocation of responsibility for the cost of maintaining and repairing the common elements, the Court allowed this cause of action to proceed. In its holding, the Court stated "RPL § 339-m states that the common profits of the property must be distributed among, and the common expenses must be charged to, the unit owners according to their respective common interests. Alternatively, profits and expenses may be 'specially allocated ... based on special or exclusive use or availability or exclusive control of particular units or common areas by particular unit owners' (RPL § 339-m)." The Court withheld judgment on the appropriate distribution of profits and expenses pending a showing of the appropriate method of calculating said distribution.

It is interesting to note that neither the Court nor the parties to this litigation seemed to address the possible issue of what the definition of a roof is. Much seems to have been made of the fact that a roof is a common element, but the parties never clearly define why the garage roof, which in this matter is not open to the air or the elements, is a roof and not a ceiling. This may be something that was addressed at another point in this litigation and not the subject of this decision. Again, it would be interesting to see how the Court would have addressed the situation differently if they found that the garage had a ceiling and not a roof and how this would be affected by the definition of common elements that the Court employed in this case.

While disputes between sponsors and shareholders or unit owners are commonplace the parties must beware that the resolution of many of the issues lies in the Declaration, the By-laws and/or the Offering Plan. Delays by any of the parties in resolving issues such as these that arise from these documents may bind the parties permanently. Thus, the parties should be sure to address these issues as soon as the offering plan is filed. Unit owners and shareholders should be aware of the potential inequities between themselves and the sponsor when they purchase.

1 *Royal York Owners Corp. v. Royal York Associates, L.P.*, 8 Misc.3d 1002(A), 2005 WL 1389350 (N.Y.Sup.), 2005 N.Y. Slip Op. 50889(U). This decision was published in the New York Law Journal, Wednesday June 22, 2005, page 18, Col. 1.

2 This is similar to any normal corporation where the shareholders share in both the profits and losses based on the number of shares that they own in the corporation. For example, if the board of directors of a cooperative determines that it is necessary to assess the unit owners a certain amount, that amount will be assessed on a per share basis and the maintenance is charged (and, again if the board of directors deems necessary, raised) on a per share basis, so that each shareholder pays their "fair share".

3 Generally speaking, unit owners are responsible for their unit and everything within their unit from the face of the walls except for common elements or items associated with common elements that may run through the unit (electrical wiring for example). This depends completely, however, on what the bylaws, offering plan, and/or declaration (if relevant) state.

4 *Royal York,* supra at 2.

5 See *Royal York,* supra at 4. The garage roof was defined as a common element in the declaration. The specific claims that are time barred under the statute of limitations as a result of this are the claims that relate to unjust enrichment.

6 See *Royal York,* supra at 1 and 4. Article 9-B of the Real Property Law is also known as the Condominium Act.

7 See *Royal York,* supra at 4.

8 *Royal York,* supra at 4. The Court held that "[i]n the Declaration, common elements are those which serve or benefit or are necessary or convenient for the entire condominium."

9 *Royal York,* supra at 5.

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THE HANLEY REPORT

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Examining Hot Industry Issues During The Days of Summer

WHITE PLAINS – Things have slowed down.

That line is consistently heard, on an annual basis, from members of the local business community during July and August. The phrase, however, is not accurate this summer for members of the local building and realty industry.

A series of events affecting members of the Building and Realty Institute of Westchester and the Mid-Hudson Region (BRI) and the industry have kept things relatively hot.

For starters, owners and managers of properties affected by the Emergency Tenant Protection Act (ETPA) are still awaiting the decision of the Westchester County Rent Guidelines Board on guideline rates affecting lease renewals for the upcoming lease term.

The nine-member board is the entity that annually rules on increases for lease renewals. The board reaches its decision after three public hearings and separate deliberations. The board's decision will affect one or two-year leases which begin between October 1, 2005 and September 30, 2006.

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