McGovern
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Newsletter

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Is it a golf cart? Is it a low speed vehicle? Is it a neighborhood electric vehicle?

By: Francis J. McGovern, Jr., Esq.

Do they really mean "golf carts" or are they talking about "low speed vehicles" a/k/a "neighborhood electric vehicles"? Golf carts in the strict sense are "off road vehicles". That being said, LSVs and NEVs are not. LSVs and NEVs are typically limited to 25 or 30 miles per hour and are subject to National Highway Traffic Safety Administration regulations as well as to certain Federal Motor Vehicle Safety Standards. We represent many active adult communities and although we have not had to prepare such a resolution yet (some just allow golf carts), we encourage our age restricted communities to seriously consider golf cart/LSV/NEV resolutions. Not only are these vehicles, if properly regulated, convenient, as residents "age in place" there is a strong probability that such vehicles will permit residents enhanced mobility and/or be required as "reasonable accommodations" for certain handicapped people - we have already seen such cases come out of Florida courts.

Jury finds Developer Guilty of Consumer Fraud in Marketing High Rise Condominium

By: Patricia Hart-McGlone, Esq.

In Etelson v. Shore Club Urban Renewal LLC, a Hudson County jury found that the developer, the LeFrak Organization, Inc., Newport Associates Development Company and James LeFrak violated the Consumer Fraud Act and Planned Real Estate Development Full Disclosure Act ("PREDFA") in their advertising and marketing of a luxury high rise riverfront condominium in Jersey City (Shore Complex, North and South Towers). The jury found that the developer and its marketing materials misled purchasers of condominium units by advertising breathtaking and panoramic views of the water and Manhattan skyline when the developer knew those views would be blocked in the near future.

The jury relied upon several key facts in order to find the Developer liable for consumer fraud. The developer's marketing materials included a painting of the Shore Complex showing a smaller 11- 12 story building to be constructed across the street and northeast, between the Shore Complex and the Hudson River. The developer's sales brochure and website did not show any buildings located between the shore Complex and the Hudson River. There were some drawings that showed a smaller building to be constructed in the future. In addition to the developer's marketing materials, the developer's sales staff told potential purchasers that a smaller building (12-15 story) might be constructed on the nearby parcel. All the while the developer was constructing a larger building that would block the view of the river and the Manhattan skyline.

The unit owners testified that they purchased these units for the views of the river and the Manhattan skyline. The unit owners also testified that they would not have purchased the units if they were informed that a taller building was going to be constructed across the street blocking their views.

The jury awarded the unit owners $1,253,420 in damages representing the reduction in value of their units without the views. Because the jury found that the developer violated the Consumer Fraud Act, the plaintiffs were awarded treble damages, plus their costs and attorneys fees for a total damage award of $4,817,638.12. The developer appealed and the Appellate Division affirmed the jury verdict and found that it was supported by the evidence.

The evidence at trial showed that while actively marketing the Shore Complex, the developer had submitted plans to

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the city planning board seeking approval for a 31 story rental apartment building tower to be constructed which would block the Shore Complex unit owners' views of the river and the Manhattan skyline. The developer did not change its marketing material and did not disclose this to potential purchasers. Instead the developer continued to market the units by advertising spectacular views knowing that they would not last for long.

The jury found that the developer had misrepresented the views and failed to disclose their plan to develop the taller 31 story tower that would block the views. None of the developer's sales agents told prospective purchasers that a taller building would be constructed between the Shore Complex and the Hudson River. The developer's sales staff was not told about the plans to construct a 31 story tower. They assured potential purchasers that the building to be constructed in the future would not block views for anyone residing on the 15th floor or higher. Interestingly, the developer's sales staff testified that if they had known of plans to construct a 31 story tower between the Shore Complex and the river, they would have disclosed this to potential purchasers.

At trial, the developer argued that it did not mislead the purchasers because there were disclaimers on the marketing material and in the Public Offering Statement. The Appellate Court noted that these disclaimers were not dispositive on the issue of misrepresentation and indicated that the developer would still be liable if the jury found that there were misrepresentations or omissions that induced a purchaser to buy a unit.

This case is significant to Associations who are in the process of transition, the transfer of control from the developer to the Association and the identification and resolution of construction defects and financial defects. The court affirmed that a developer can be liable to individuals for consumer fraud in the marketing and advertising of the condominium. The court also noted the significance of marketing materials, advertisements and conversations that were not part of the sales contract or the POS.

Please feel free to contact us if you have any questions or concerns that you would like to discuss.

SMOKE-FREE LIVING

By: Scott K. Penick, Esq.

New Jersey, along with many other states, has adopted a Smoke-Free Air Act (the "Act") that bans smoking tobacco or electronic cigarettes in the workplace and in indoor public places. Most people are aware that this ban extends to restaurants and stores, but the definition of "indoor public place" also includes an "apartment building lobby or other public area in an otherwise private building." (N.J.S.A. 26:3D-57). Most agree that this definition includes common areas in condominium associations and cooperatives, but banning smoking in common areas is not where the challenge of creating a smoke-free community lies.

Even though a board may ban smoking in common areas, such rules do nothing to stop secondhand smoke in units from filtering into a non-smoker's unit. This can become a critical quality of life and health issue for the non-smoker next door. According to the Centers for Disease Control and Prevention (CDC), "There is no risk-free level of exposure to secondhand smoke."[i] The CDC goes on to note that research has shown that exposure to secondhand smoke increases the risk of heart disease, lung cancer, Sudden Infant Death Syndrome (SIDS) and numerous other health risks, especially for children. In other words, secondhand smoke is more than just a nuisance.

The only way to completely eliminate secondhand smoke from homeowners' living spaces in a condominium or cooperative association is to ban smoking within the units themselves.

Banning Smoking Within Units.

Although, there are no published cases in New Jersey on the enforceability of banning smoking within condominium or cooperative units, case law around the country suggests that the trend is toward upholding these types of smoking restrictions. However, since few boards have the power to establish these rules on their own, the most effective way to enact a rule that bans smoking within units is to amend the association's bylaws in a condo association or the proprietary lease in a cooperative.

Since the amendment process requires a membership vote, there is an additional benefit – greater acceptance by homeowners, even those that did not vote for the amendment. When a

[i] http://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/health_effects/

New Attorney Spotlight

Tiffany L. Byczkowski, Esq.

Tiffany L. Byczkowski, Esquire

Tiffany is licensed to practice law in New Jersey and New York.

Tiffany received her paralegal certificate from Middlesex County College in 2003.

Tiffany then attended Seton Hall University. She graduated cum laude in 2005 with a major in political science. While studying at Seton Hall University, Tiffany worked full-time as a collections paralegal at McGovern Legal Services, LLC. She held that position until April of 2009.

Tiffany then received her J.D. from Rutgers School of Law – Camden in May of 2011.

Following law school, she worked as a collections attorney for a large multi-state law firm.

Tiffany rejoined McGovern Legal Services, LLC in May of 2015.

person buys into a condominium or cooperative association, they know – or should know – that the members are empowered to change the rules. For most people, a change made through a vote of the membership is easier to accept than the vote of a few board members.

Enforcement of Smoking Bans

The biggest obstacle to creating a smoke-free community is enforcing a smoking ban. While voluntary compliance would be a nice fairytale ending to the implementation of such a rule, it is unlikely. Also, boards should remember that the real goal in passing a smoking ban is not to run people's lives and turn their homes into boot camps. The goal is to protect residents and owners who are concerned about the health effects of secondhand smoke. Focusing on this "goal" is important, as it should guide an association's enforcement efforts and help them to steer clear of witch hunts for smokers.

Before issuing a violation notice for smoking, there needs to be an eyewitness or "nosewitness" to the smoking. This person should be required to file a complaint that is submitted to the association's ADR process. If ADR and fines do not result in compliance, an association may choose to sue a smoker.

Although lawsuits are often time consuming and expensive, a case to enforce a smoking ban will likely be a good candidate for a relatively quick summary judgment motion, unless the defendant alleges that s/he does not smoke in their unit.

The best way to enforce any rule is to encourage voluntary compliance. Providing convenient locations for smokers outside of residential building(s) is one option that can help encourage compliance and reduce litter from discarded cigarette butts. These locations could range from a simple smoker's stand, to actual covered areas away from doors and windows of residential buildings. Designating certain areas for smoking also shows the membership that the association is concerned about all members' ability to use and enjoy their homes, as long as it does not endanger the health, safety or welfare of other owners or residents.

McGovern Wins Appeal: The Appellate Division Affirms Associations' Rights to Sell Units

By: Marlena Miller, Esq.

Along with associations' ability to sell units by foreclosing on liens, they can also sell units to satisfy money judgments – if they can prove the owner has no other personal assets. A New Jersey court rule and statute both permit a judgment creditor to levy upon a debtor's real property if the creditor cannot find assets to satisfy the judgment elsewhere. In other words, if the association sends an information subpoena to the debtor, performs asset searches and sends the Sheriff to the debtor's property to inventory personal property, and there are no assets found that can satisfy the judgment, the court rules and statute allow the association to levy the debtor's real property and sell it at Sheriff's sale. At Sheriff's sale, either a third party

will purchase the property or ownership will revert back to the association and the association can rent the property.

This process was recently confirmed by the Appellate Division. On behalf of an association, this firm filed a motion to permit sale since no personal assets could be found. The motion judge denied the motion because there was an outstanding mortgage on the property and the judge felt that it would not be fair for the association to sell or rent the property and collect its judgment while the mortgagee was foreclosing. This firm appealed the motion judge's decision and argued the matter before the Appellate Division. The Appellate Division reversed the motion judge's decision in the unpublished opinion, Birch Glen Condominium Association, Inc. v. Boahene. We successfully argued that the outstanding mortgage on the property is irrelevant to the association's motion. The Appellate Division agreed with this firm's position that the motion judge erred by failing to base his decision on whether the association had taken adequate steps to try to satisfy the judgment out of personal property. The case was remanded back to the motion judge with instructions that the judge determine whether the association made reasonable efforts to located the defendants' assets to satisfy its judgment.

Going Once, Going Twice, SOLD!

By Kayci D. Petenko, Esq.

Association Sheriff's Sales are becoming more prevalent in the collections field as a way for the Association to obtain ownership to a unit granting it the power to rent the unit. After the excitement of the bidding is over and the Association has obtained the Sheriff's Deed to the unit, the Association must determine if the unit is vacant and if it is not, who is residing there. If there are tenants residing in the unit, there are important steps that the Association must follow.

Providing Tenant(s) with Notice

New Jersey is a very tenant-friendly state and as such provides many statutory protections for tenants. Within ten (10) business days of the Sheriff's Sale, the Association must provide the tenant with specific notice which advises the tenants that ownership of the unit has changed and that the tenant has specific rights as a result of this.

Obtain a Copy of the Lease

The Association must honor the current lease that the tenant entered into with the previous owner. In order to do so, the Association must attempt to obtain a copy of the lease from the current tenant or the prior owner. It is imperative to know the terms of the lease so that the Association may file suit in the event the tenant fails to pay rent or comply with the lease terms.

Register as a Landlord

New Jersey law also requires an Association that is acting as a landlord to complete a Landlord Registration Form or Certificate of Registration depending on the type of unit that is being rented and to provide the tenant with a copy of the registration. Various townships throughout the state have their own registration obligations separate from the statewide registration requirements.

Failure to comply with the above steps may result in an Association being fined or having limited legal avenues to deal with a non-complaint tenant. Contact our office for additional information on how to legally and successfully rent out a unit to help pay down arrears.

McGovern Legal Services, LLC. is continuing to advocate manager education and certification. Please support us in encouraging CAI-NJ to financially support Manager Education and Certification.