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CONDO, CO-OP BOARDS FACE BIGGER RISKS

BY JOSH BARBANEL AND STEVE EDER • JULY 13, 2012

As president of the board for her white-brick apartment building on East 68th Street, Carole Caine has sometimes had to struggle to find neighbors to serve with her on the panel. Now that job may have gotten a little bit harder, she said.

A state appellate court decision handed down last week makes it easier for individual board members to be personally sued for damages when co-op or condo boards are taken to court by spurned apartment applicants or unhappy residents.

Lawyers and board members say that decision could have a chilling effect on some of the thousands of New Yorkers who attend the seemingly endless monthly board meetings and field complaints from neighbors about everything from dogs in the elevators to lobby renovations.

Most buildings carry insurance that typically pays for legal fees for board members, but doesn't cover punitive damages or damages that may be awarded in discrimination cases, insurance experts say.

"Sitting on co-op and condo boards just got a whole lot tougher," said Steven R. Wagner, a real-estate lawyer who is on the board of Southgate, a five-building co-op complex in the East 50s near the East River.

The unanimous court decision was handed down July 3 by a five-judge panel of the Appellate Division in Manhattan in a discrimination case brought by Alphonse Fletcher Jr., a black hedge-fund manager, against the Dakota, the gabled co-op building facing Central Park at West 72nd Street.

The case is still at a preliminary stage and there haven't been depositions or testimony or findings of wrongdoing.

Mr. Fletcher, a former president of the Dakota board, sued the building and a number of board members last year after he was turned down for the purchase of another co-op next to one he already owned in the Dakota.

He said that the board was retaliating against him for standing up for the rights of other buyers.

The board said it turned down Mr. Fletcher's application because he couldn't afford the second apartment, based on an analysis of his financial filings.

Two board members named in the suit had asked the appellate court to dismiss all claims against them, based on preliminary filings, assuming that all of Mr. Fletcher's allegations were true. But the court allowed some claims against the board members to continue on the path to trial.

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The court took the unusual step of directly overruling part of a 2006 decision by another unanimous five-judge panel of the same court in connection with a discrimination claim involving handicapped access to a Park Avenue building.

That decision sharply limited when board members could be named as individual defendants. It allowed such claims only when board members were accused of specific acts that were independent of actions taken by a co-op or condo board, lawyers said.

Marc Kasowitz, the lawyer for Mr. Fletcher and his hedge fund, Fletcher Asset Management, said the decision was “an important step forward in the fight” by Mr. Fletcher and his firm “to vindicate their rights arising from unlawful retaliation, defamation, discrimination and other wrongs.”

Christine Chung, who represents the Dakota board and board members, said she was confident that “discovery will demonstrate all of the plaintiffs’ claims to be baseless.”

“The board made a good-faith judgment that Mr. Fletcher, a former two-time president of the board himself, wasn’t financially qualified to purchase a second Dakota apartment,” she said.

Robert O. Owens, a broker who provides insurance to many boards, said that in New York insurers can’t cover “a bad faith act” such as discrimination, which is “against public policy.”

Still, he said that while discrimination claims are filed from time to time, formal findings of discrimination are rare. He said that despite some “uninsurable risks” many people have been and will be willing to serve.

“Anybody who wants belt and suspenders for safety wouldn’t serve on a co-op and condo board anyway,” he said.

Stuart Saft, a real-estate lawyer and chairman of the Council of New York Cooperatives & Condominiums, said the appellate court decision was “extraordinarily important in clarifying the law” but should not lead people to “forgo being on a board.”

He said that most board members have long been aware that they didn’t enjoy immunity from “bad faith” acts, self-dealing or discrimination.

But Ron Gitter, a lawyer who represents buyers who are sometimes rebuffed by boards, said the decision was important for another reason. He said many buyers feel they are treated unfairly by boards but don’t sue because of the cost.

“For lawyers it is always fighting Goliath,” he said. “So if there is something that gives the board pause when you raise an issue like discrimination, it helps.”

Ms. Caine’s board experience goes back two decades and she has seen the glories of board work, such as overseeing a successful renovation and improving a building’s finances, as well as the squabbles as well.

Ms. Caine said she was on the first board when her postwar building at 20 E. 68th St. on the corner of Madison Avenue was converted into a co-op with condo rules in 1992.

After living in Aspen, Colo., and Italy for a while, she came back to the building and served on the board for the last four years, including two as president, before retiring again in May after she said she completed her planned improvements in the building. Ms. Caine is a broker at Brown Harris Stevens and has several listings in the building.

“It is very difficult to get people to serve on the board,” she said. “Most people don’t want to be bothered. They want somebody else to do it and be in the line of fire.”