STATE OF NEW YORK DEPARTMENT OF LAW

OFFICE OF ATTORNEY GENERAL ROBERT ABRAMS

MEMORANDUM

TO: REF Attorneys & Legal Assistants

DATE: 10/27/87

FROM: Mary Sabatini DiStephan/Nancy Kramer MSD

RE: Commercial/Professional Use of Residential Units
(Replaces memo dated 3/20/85)

Recent court decisions have changed our treatment of conversion plans with units that have residential certificates of occupancy but are used, illegally, for commercial or professional purposes. The typical situation is a building with one or more commercial or professional tenants (often physicians or psychologists) who are using their apartments solely as offices. (This is not the legal home/occupation use where the lessee also lives in the unit.) Such illegal use of a residential apartment constitutes a zoning violation and perhaps also a nuisance or security problem to the residential tenants. It is the sponsor's obligation to cure this violation, however, the sponsor may not be in control of the tenant's actions.

Several questions arise:

(1). Should the units be deemed vacant for the purpose of computing long-term vacancies?

Answer. Generally, no. Our consistent view has been that if a "tenant" pays rent and actually occupies the unit, the unit is considered occupied, notwithstanding how the tenant uses the apartment or the tenant's relationship to the sponsor.

It is a different situation, however, if the landlord/sponsor rented up residential units knowing that they would be used for commercial or professional use, in violation of the certificate of occupancy, intending to avoid a finding of excessive long-term vacancies in an anticipated cooperative or condominium conversion. In that case, these units may be deemed vacant, because they are not occupied by bona fide tenants. The facts may also point to an illegal scheme to defraud.

(2). Do the "illegal tenants" have the right to buy their units?

Answer. Recent court decisions say no. Both Gluck v. Jackson Management Corp., Supreme Court, Queens County, N.Y.L.J., May 28, 1986 and 1235 Park Avenue Associates v. Abrams, Supreme Court, New York County, N.Y.L.J., January 14, 1987, held that the sponsor is not required

to offer non-residential tenants the exclusive right to purchase their units. (Decisions attached.)

(3). Will purchases of these units count toward effectiveness?

Answer. No. See the decision in 1235 Park Avenue.

In plans with such units several issues should be addressed. First, the illegal occupancy should be made a special risk and should be referenced to a page in the body of the plan where there is fuller disclosure.

Also, the violation(s) should be cured by the sponsor (and tenant), not left for the cooperative board or condominium regime to inherit after closing. We have attached model disclosure language to deal with the problem. Also attached are model affidavits for tenants and tenants' assignees.

attachments (s)

MODEL LANGUAGE

"There are (number) residential units in the building which are not being used for residential purposes, namely: [state unit numbers]

These units are being offered for sale as residential units, in compliance with the uses permitted in the proprietary lease (or condominium declaration) and in the existing Certificate of Occupancy for the building.

Sponsor will not close title to any of the aforesaid units while occupied, unless the purchaser thereof executes, acknowledges and delivers to the Selling Agent, an affidavit (form included) representing to Sponsor and to the cooperative (or condominium) board, under penalty of perjury:

(a) that he or she is purchasing the unit for residential purposes in compliance with the uses permitted under the proprietary lease (or declaration), by-laws, and certificate of occupancy; and

(b) that he or she will make necessary alterations, additions, improvements and repairs to the units, at his or her sole cost and expense, in order for the unit to be in compliance with the certificate of occupancy and all applicable law; and

(c) on the date he or she acquires title to the shares allocated to the unit (or the unit), it will be in compliance with the certificate of occupancy and all applicable law and will continue in compliance while he or she is the owner of the shares allocated to the unit (or the unit); and

(d) he or she will post a bond in the amount of $25,000.00 for a period of two years after acquiring title in order to secure the obligation to continue in compliance with the aforesaid representations.

The failure of a purchaser of any of the aforesaid shares allocated to such units (or units) to comply with subparagraphs (a), (b), (c), and (d) above shall be an event of default under the subscription (or purchase) agreement. The affidavit must contain an agreement by the purchaser to indemnify the cooperative (or condominium) against all claims resulting from the purchaser's failure to comply with these representations. A permitted assignee of a subscription agreement (or purchase agreement) for any of the aforesaid units must deliver to Selling Agent an affidavit (form included) in addition to complying with all other assignment requirements set forth in the Plan.

If by the closing of title (or by the first closing) there are any violations of record against the property and not awaiting dismissal concerning the illegal use of the above residential units, sponsor will escrow at closing $100,000 toward the cost of legal and other expenses which it may incur. Sponsor agrees to indemnify, defend and hold the cooperative (or condominium) harmless from and against any and all claims, liability and expense (including but not limited to legal fees and litigation expenses) asserted or arising against the cooperative (or condominium) prior to or subsequent to closing (or first closing) in connection with any claim resulting from the use of the above residential units for non-residential purposes. The limit of this liability and expense by the sponsor is not limited to the amount placed in escrow for the benefit of the cooperative (or condominium).

If the existing tenant-purchaser of any of the aforesaid units closes title after complying with the above requirements and subsequent to such closing, a violation of record is issued by the Department of Buildings against such unit and is not awaiting dismissal concerning the use thereof by the existing tenant-purchaser for non-residential purposes, then in such event the tenant will forfeit to the cooperative (or condominium) the amount of such bond and sponsor will: (1) for a period of one year from the closing (or first closing), at its sole cost and expense upon a majority written request of the members of the cooperative (or condominium) board unaffiliated with the sponsor, pursue all remedies available to the sponsor and or the Board permitted by Law, and (2) indemnify, defend and hold harmless the cooperative (or condominium) from and against any and all claims, liability and expense (including but not limited to, legal fees and litigation expenses) asserted or arising against the cooperative (or condominium) in connection with any claim resulting from the use of such unit for non-residential purposes.

Under no circumstances will sponsor include subscription (or purchase) agreements of purchasers of the above-mentioned units in declaring the plan effective.

AFFIDAVIT OF TENANT OF RESIDENTIAL UNIT
BEING USED FOR COMMERCIAL OR PROFESSIONAL PURPOSES

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Re: Residential Unit _____

_____, (the "Undersigned") being duly sworn, deposes and says:

1. The Undersigned (having an office at) (residing at) _____ is the tenant of record of the above-referenced Residential Unit in [name of cooperative or condominium] located at [address of cooperative or condominium].

2. In order to induce ("Sponsor") to accept the Undersigned's Subscription (or Purchase) Agreement for the Residential Unit and convey title to the Undersigned in connection therewith and the Board to accept the Undersigned as the Owner of shares allocated to the Residential Unit (or the Residential Unit) the Undersigned hereby represents, warrants and covenants that

   (a) the Undersigned is purchasing the shares allocated to the Residential Unit (or the Residential Unit) for residential purposes in compliance with the uses permitted under the proprietary lease (or Declaration) and By-Laws of the Cooperative (or Condominium) and the Certificate of Occupancy of the Building; and

   (b) the Undersigned will, at the Undersigned's sole cost and expense, make all alterations, additions, improvements and repairs to the Residential Unit which may be required so that the Residential Unit will comply with the Certificate of Occupancy of the Building and all applicable law; and

(c) on the date the Undersigned acquires title to the shares allocated to the Unit (or the Residential Unit) the Residential Unit will be in compliance with the Certificate of Occupancy of the Building and all applicable Law and the Undersigned represents that the Residential Unit will remain in compliance while the Undersigned is the Owner of the shares allocated to the Residential Unit (or the Residential Unit).

(d) on or before the date the Undersigned acquires title to the shares allocated to the Residential Unit (or the Residential Unit), the Undersigned will post a Bond in the amount of $25,000.00 for a period of two years after such date in order to secure his obligations to continue in compliance with the aforesaid representations.

3. The failure of the Undersigned to comply with the representations, warranties and covenants contained in subparagraphs (a), (b), (c), and (d) above shall be an Event of Default under the Undersigned's Subscription (or Purchase) Agreement and the Proprietary Lease (or Declaration) and By-Laws of the Cooperative (or Condominium).

4. Sponsor and/or the Cooperative (or Condominium) Board, their agents and representatives shall have the right at reasonable times (but not more than four times per annum) and on forty-eight hours written notice to inspect the Residential Unit to assure the Undersigned's compliance with the representations set forth in paragraph 2 above.

5. The undersigned agrees to indemnify, defend and hold Sponsor and the Cooperative (or Condominium) harmless from and against any and all claims, liability and expense (including, but not limited to, legal fees and litigation expenses) asserted or arising against Sponsor and/or the Cooperative (or Condominium) in connection with any claim resulting from the Undersigned's failure to comply with the representations set forth in paragraph 2 above.

6. The Undersigned's representations, warranties and covenants contained herein shall survive the closing of title to the shares allocated to the Residential Unit (or the Residential Unit) from Sponsor to the Undersigned.

7. The Undersigned agrees that an assignment of the Undersigned's rights under the Subscription (or Purchase) Agreement, which is otherwise done in accordance with the terms of the Offering Plan for the Cooperative (or Condominium), shall be void unless the assignee executes, acknowledges and delivers to Sponsor an affidavit (in the form set forth in the Offering Plan of the Cooperative (or Condominium) which is incorporated herein with the same force and effect as if set forth at length.

8. All capitalized terms used herewith shall have the same meanings ascribed to them in the Offering Plan, the Proprietary Lease (or Declaration) and the By-Laws of the Cooperative (or Condominium).

9. This Affidavit is made under penalty of perjury.

_____
Purchaser

_____
Purchaser

Sworn to before me

this day of , 19

_____
Notary Public

AFFIDAVIT OF ASSIGNEE OF TENANT OF
RESIDENTIAL UNIT BEING USED FOR
COMMERCIAL OR PROFESSIONAL PURPOSES

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Re: Residential Unit _____

_____, (the "Assignee") being duly sworn, deposes and says:

1. The Assignee has received and read the Affidavit of _____ (the "Assignor") signed and sworn to on _____ _____ (the "Affidavit), a copy of which is annexed hereto.

2. The Assignee hereby adopts, accepts and approves the Affidavit which is hereby incorporated with the same force and effect as if set forth herein at length and hereby assumes all of the obligations, promises, covenants and responsibilities of the Assignor contained therein as if the Assignee had signed the Affidavit.

_____
Assignee

_____
Assignee

Sworn to before me this
day of , 19

_____
Notary Public

New York Law Journal Wed. 5/28/86

IA PART 2
Justice Durante

GLUCK v. JACKSON MANAGEMENT CORP.—In this action for a declaratory judgment and money damages, plaintiffs move for a preliminary injunction. Defendants Jackson Management Corp. (hereinafter "Jackson"), Barclay Plaza Apartments (hereinafter "Barclay") and, by separate notice of motion, 110-20 71st Road Apartments, Inc. (hereinafter "the Apartment Corporation"), cross-move to dismiss each cause of action on the grounds that a defense is founded upon documentary evidence and that the causes of action are legally insufficient. Defendant Apartment Corporation also bases its motion on the additional ground of failure to state a cause of action.

Plaintiffs are medical doctors and tenants in apartments at premises located at 110-20 71st Road, Forest Hills, New York. Defendant Barclay was the owner and landlord of said premises from or or about June 1, 1971, until May 1, 1984. Defendant Jackson is the managing agent of the premises and was sponsor of an offering plan to convert the premises to cooperative ownership. As sponsor, Jackson offered for sale shares of stock in defendant Apartment Corporation. The Apartment Corporation acquired title to the premises from Barclay pursuant to said offering plan on May 1, 1984. Plaintiffs contend that the apartments they occupy should have been offered for sale to them at the "insider's" price at the time the premises was converted to cooperative ownership.

A preliminary offering plan distributed to the tenants of the premises on or about June 1, 1981 proposed that the premises be converted to cooperative ownership and that shares in the proposed apartment corporation be allocated to plaintiffs' apartments at the same price per share as for the apartments of other tenants. However, the final offering plan (hereinafter "the Plan"), which was accepted for filing by the Attorney General of the State of New York pursuant to article 23-A of the General Business Law on or about Aug. 17, 1982, differed in its terms. Under the Plan, no shares in the apartment corporation were allocated to plaintiffs' apartments. Rather, said apartments were identified as "PROF" for "professional" with the following explanatory note:

"These apartments are not being offered for sale under the Plan. Owner will obtain an Amended Certificate of Occupancy for the Building before the Closing so that these seven apartments may be lawfully occupied as doctors' offices."

The Plan was amended twelve times, without affecting the above-quoted provision and the non-allocation of shares to plaintiffs' apartments, and was declared effective on Oct. 31, 1983. Plaintiffs' apartments became the property of defendant Apartment Corporation when it took title to the premises on May 1, 1984 and their leases were assigned to the Apartment Corporation. Plaintiffs have remained to date as rental tenants.

Subsequent to the conveyance of the premises to it, the Apartment Corporation decided to allocate shares to the professional apartments and offer them for sale. By letters dated Nov. 1, 1985, the Apartment Corporation advised plaintiffs that it had decided to offer their apartments "for sale to the current professional tenants." Plaintiffs were given an exclusive opportunity to purchase their apartments until Dec. 31, 1985 and advised that if they decided not to purchase, their leases would not be renewed when they expired. The apartments were offered at a stated price less a 10 percent discount. The purchase prices were in excess of the prices that would have attached had they been calculated at the rate given to insiders in the Plan. This action followed.

In the four causes of action herein, plaintiffs seek (1) a judgment declaring that they were tenants in occupancy entitled to the right to subscribe to purchase shares of stock in the Apartment Corporation which should have been allocated to their apartments, as they were in the proposed offering plan, at the lowest price offered in the amendments to the Plan; and (2) money damages for a deprivation of their statutory rights under the General Business Law and the Rent Stabilization Law and Code by virtue of defendants' refusal to allocate shares and offer them to plaintiffs.

On this motion, plaintiffs seek preliminary injunctive relief (1) tolling the running of the remaining time period, set forth in the Nov. 1, 1985 letter, in which plaintiffs may accept the offer from the Apartment Corporation to purchase the shares now allocated to their apartments at the price contained therein; (2) staying defendant Apartment Corporation from offering to sell or selling said shares to any other party; (3) staying defendant from taking any action to evict plaintiffs. A temporary restraining order containing these terms has been in effect since Dec. 12, 1985.

The provision in the General Business Law relied upon by plaintiffs provides that "[t]he tenants in occupancy on the date the attorney general accepts the plan for filing shall have the exclusive right to purchase their dwelling units or the shares allocated thereto for ninety days after the plan is accepted for filing by the attorney general * * *" (General Business Law, §352-eeee[3][d][ix]). A similar provision is contained in paragraph (b) of subdivision 4 of section 61 of the Code of the Real Estate Industry Stabilization Association of New York City, Inc. (hereinafter "the Code").

Plaintiffs allege in their complaint that each of them occupies their respective apartments pursuant to a standard form apartment lease which states that the apartment can be used both for living purposes and for the practice of medicine. They further allege that from May 29, 1966 to March 8, 1968, the Certificate of Occupancy for the premises issued by the New York Department of Buildings listed that each of their apartments was for dwelling purposes. Based upon these allegations, as well as allegations concerning the allocation of shares in the proposed offering plan and certain statements in the Plan referring to the total number of apartments in the building as being "residential apartments" and stating that all apartments are subject to the Rent Stabilization Law (hereinafter "RSL") and Code, plaintiffs' complaint concludes that they were entitled to the rights to purchase of tenants in dwelling units protected by the RSL and Code and article 23-A of the General Business Law. For the reasons that follow, defendants' cross-motions to dismiss must be granted.

Initially, the court notes that the proposed offering plan is simply that, i.e., a proposal. Inasmuch as no offer was extended to plaintiffs thereby, and plaintiffs were clearly advised on the face of the proposed plan that no offer was being made therein and that the information contained therein was subject to completion or amendment, plaintiffs cannot rely on any statements in the proposed plan to establish rights under the final Plan.

It is true that the Certificate of Occupancy in effect on the date the Plan was accepted for filing listed the use of plaintiffs' apartments as "Multiple Dwelling 'A'". However, copies of plaintiffs' leases submitted on the instant applications belie plaintiffs' allegations that they are all standard apartment leases permitting use for both living purposes and the practice of medicine. Rather, with the exception of the lease of plaintiff Gluck, each lease specifically limits the use of the unit to the practice of a particular medical specialty. Furthermore, although the printed form of plaintiff Gluck's lease provides that it is to be occupied for living purposes only, a typewritten rider thereto states that "[t]he permitted use for these demised premises shall be the practice of medicine." This specific typewritten provision takes precedence over the inconsistent provision in the printed form (Matter of Cole Dev. Co. v. Conciliation and Appeals Board, 94 AD2d 229, aff'd 61 NY2d 976). Moreover, plaintiffs do not dispute that they have never used their units for any purpose other than their medical practices. It is also undisputed that these apartments were never registered with the Rent Stabilization Association. Furthermore, despite certain references to the RSL, it is evident from a reading of the leases and renewals that the rents and increases provided for were not governed by the RSL and Code. Plaintiffs are tenants of professional apartments under commercial leases, not rent-stabilized, residential tenants.

By their terms, both section 61 of the Code and the above-quoted provision of section 352-eeee of the General Business Law are applicable only to tenants in occupancy of dwelling units. A dwelling unit is defined in subdivision f of section 2 of the Code as a unit "occupied or intended to be occupied by one or more individuals as a residence." Although the term dwelling unit is not defined in article 23-A of the General Business Law, the legislative history of section 352-eeee demonstrates that it was enacted for the purpose of protecting residential tenants in buildings undergoing conversion to cooperative ownership (L. 1982, ch. 556, §1). Of course, the RSL and Code were originally enacted to regulate residential rents and evictions and to protect residential tenants faced with a housing emergency and a shortage of dwellings (Administrative Code of the City of New York, §YY51-1.0). It follows that the thrust of the protections afforded thereunder to tenants in occupancy during a cooperative conversion is to protect them "from exposure to eviction from their homes" (Richards v. Kaskel, 32 NY2d 534, 541).

Thus, the court concludes that plaintiffs, as non-stabilized tenants with commercial leases who actually used their apartments as offices, are not within the ambit of the protection offered to tenants in occupancy of dwelling units by section 61 of the Code and section 352-eeee of the General Business Law. Therefore, these statutes do not confer purchase rights on plaintiffs. In such a situation, the terms and conditions of the Plan and the conduct of the sponsor or his agents are dispositive as to whether an offer of purchase was actually made or relied upon to a party's detriment (Sachellaridou v. Pasent Realty Co., 104 AD2d 764).

Plaintiffs herein make no claim of fraud or other such misconduct on the part of the sponsor or its agent. They do point to a provision in the Plan which states that "[e]ach tenant in occupancy * * * on the date the Plan was accepted for filing by the Department of Law will have the exclusive right to purchase the shares allocated to his apartment for 90 days thereafter at the price stated in the schedule * * *" as establishing that an offer was made. However, the Plan, as with all instruments, must be read as a whole so as to give each section meaning (Weiss v. Weiss, 52 NY2d 170, 174). Inasmuch as no shares were allocated to plaintiffs' apartments, they cannot benefit from this ninety day provision. The Plan not only does not allocate shares for plaintiffs' apartments, it expressly excludes these apartments from the offer, stating that said apartments are not being offered for sale. Thus, it is clear that the language of the Plan did not create an offer to plaintiffs permitting them to purchase at the insider price (cf. Sachellaridou v. Pasent Realty Co., supra).

Accordingly, defendants' cross-motions are granted to the extent that the complaint is dismissed. Plaintiffs' motion for a preliminary injunction is denied as moot. As agreed by counsel upon oral argument before the court, the exclusive offer to purchase made to plaintiffs in the letters dated Nov. 1, 1985 will continue for thirty days following the date of the order to be settled hereon.

Settle order.

New York County

SUPREME COURT

IA PART 2
JUSTICE A. KLEIN

1235 PARK AVENUE ASSOCIATES v. ABRAMS—Plaintiff moves pursuant to CPLR for summary judgment in the underlying declaratory judgment action involving the proposed conversion of the premises located at 1235 Park Avenue, Manhattan, New York City to condominium ownership pursuant to Article 23-A of the General Business Law ("The Martin Act").

Defendant, the Attorney General of the State of New York, cross-moves for summary judgment dismissing the complaint.

In the underlying cause of action, plaintiff, sponsor of a proposed non-eviction condominium plan, seeks to have a policy memorandum, issued by the Attorney General in connection with such plans, declared null and void. Said policy memorandum, dated March 20, 1985, requires the sponsor of a condominium conversion plan to offer to "illegal" professional-/commercial tenants the right to purchase units at the "insiders" price, but prohibits the sponsor from including any such purchases toward the 15 percent of all dwelling units in the building required to declare a non-eviction plan effective pursuant to GBL §352-eeee(b). Plaintiff contends that said policy is arbitrary, capricious and in conflict with the law governing condominium conversion.

In the recent decision of Gluck v. Jackson Management Corp. (NYLJ, May 28, 1986, p. 16, col. 3), Justice Joan M. Durante held that the provisions of GBL §352-eeee, requiring the sponsor to offer units to tenants at the insider's price, applied only to residential tenants in occupancy, and not to commercial/profession tenants who were using the premises in violation of the certificate of occupancy. The court cited the legislative history of the Martin Act to demonstrate that said act was passed for the purpose of protecting residential and not commercial tenants. This court agrees with the decision of my learned colleague, Justice Durante, in the Gluck case.

Accordingly, that portion of the Attorney General's memorandum which requires the sponsor to offer the unit to commercial tenants, is in contravention with the statute and case law.

However, the court finds that the portion of the Attorney General's policy memorandum which prohibits the sponsor from including those units occupied by illegal professional/commercial tenants toward the required 15 percent to have the plan declared effective is in furtherance of the policy embodied in the Martin Act of allowing only bona fide tenants in occupancy to be counted toward the required 15 percent. "The Attorney General has broad powers to effect the remedial purposes of the statute . . ." (Harbor Tower v. Abrams, 85 AD2d 558; see also Matter of Attorney General [Cenvill Communities], 82 Misc. 2d 418). Hence, that portion of the policy memorandum cannot be said to be arbitrary, capricious or in violation of the statute.

Settle order in accordance with said decision.

1/14/87
NYLJ