



the *Sidebar*

STRATEGIES FOR KEEPING THE LAW ON YOUR SIDE

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Two Important Court Decisions on Condos and Co-ops

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By John Gordon, Esq.

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1. CO-OPS AND THE ALTERNATIVE MINIMUM TAX

Most homeowners know that payments made toward mortgage interest and property taxes are deductible on an income tax return. Likewise, co-op shareholders can deduct mortgage interest paid and the portion, on a per-share basis, of their maintenance applied towards property taxes and mortgage interest payments for the building.

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However, when computing the Alternative Minimum Tax ("AMT"), which denies some types of deductions to certain people with high incomes, a homeowner must add back the deductions taken for property taxes. Until a Federal appellate court decision, co-op shareholders were not adding back such deductions in computing their AMT. That, however, has changed.

The case, Ostrow v. Commissioner of Internal Revenue, was originally decided by the United States Tax Court and affirmed by the Second Circuit Court of Appeals. Both opinions describe the legislative intent of the tax law on this subject. Originally, co-op shareholders could not deduct their real property taxes at all, because they did not pay them directly. In that regard, they were not deemed to be "taxpayers" within the meaning of the prior law. A subsequent change in the law put co-op shareholders on an even keel with homeowners and permitted them to deduct their proportionate share of a co-op's property taxes. In the same vein, the courts in Ostrow held that it would be against the purpose of the law if co-op shareholders were allowed to use this deduction for calculating the AMT that homeowners are not allowed to use.

While this decision may not effect everyone, it could spell big problems for thousands of co-op shareholders subject to the AMT if the IRS decides to re-open their income tax returns and finds that they deducted their property taxes. The plaintiffs in Ostrow were disallowed a deduction of \$10,489.00, a substantial amount of money. With interest and penalties, there could be significant sums of money due to the IRS from some co-op shareholders. Clearly, you should consult with your accountant or attorney if you believe that you may be affected by these decisions.

2. DO CONDOMINIUMS HAVE THE RIGHT TO PLACE RESTRICTIONS ON SALES?

A decision by the Appellate Division, First Department, could drastically change the rules for condominiums. Generally, a condominium is prohibited from making rules that place unreasonable restrictions on sales. This is referred to as an "unreasonable restraint on alienation." This concept

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is ages old and began as a response to landowners putting very restrictive terms into deeds. Co-ops, on the other hand, are exempt from this prohibition because the actual property owned is shares of stock, not real estate.

Condominium managing boards have long enjoyed certain rights such as the right to bar unit owners from leasing their units. Boards have also been allowed to exercise a right of first refusal with respect to sales. The decision in Demchick v. 90 East End Avenue Condominium, however, apparently represents a significant expansion of a condominium board's authority to impose restrictions on sales. In Demchick, a condominium apartment building had certain studio apartments that were intended to be occupied by the condominium unit owners' household employees. The board passed a by-law

amendment that restricted the sales of studio apartments to anybody other than a current owner of another apartment in the building. The Appellate Division ruled that this was not an unreasonable restraint on the alienation of real property, and reversed the trial court's decision to strike the amendment to the by-laws.

While there are some parts of the decision which suggest that it might be limited to the facts of the case, it nevertheless creates a slippery slope. Indeed, the court found that the restriction had a reasonable purpose, namely "to preserve the character of the Condominium." Therefore, the decision suggests that like co-op boards, condominium boards now enjoy similar rights with respect to imposing restrictions on sales. However, it bears noting that such restrictions will be enforceable only if they are deemed to be "reasonable". As to what restrictions are "reasonable" awaits future court rulings. ■



The CV Golf Outing for the benefit of the Multiple Sclerosis Society raised \$10,975.53. Pictured are partners Joseph G. Milizio and Joseph Trotti presenting the donation check to Pamela Mastrotta, President of the Long Island Chapter.

> *Employee Bonuses: When are Employers Obligated to Pay Them?*

By: Andrew A. Kimler, Esq.

An issue which often plagues New York employers involves the payment of bonuses. While in some instances the law concerning an employee's right to be paid a bonus may appear to be quite clear, there are, nevertheless, circumstances which may pose a problem in determining an employer's obligation to pay bonuses.

As a general rule, an employee in New York has no enforceable right to compel an employer to pay bonuses where the bonus is discretionary. The employee's right to be paid a bonus is usually governed by the terms and conditions reflected in an employer's handbook or the parties' contract. It should be noted, however, that an obligation to pay a bonus may be enforceable even if the employer's bonus plan is only reflected in the parties' oral communications.

Whether unpaid "incentive compensation" under an employer's bonus plan constitutes a "discretionary bonus" or "earned wages" which are not subject to forfeiture, is the critical concern of the courts when dealing with these situations. For example, employees may enforce an agreement to pay an annual bonus made at the onset of the employment relationship where the bonus constitutes a "integral part" of the employee's compensation package. When determining whether a bonus is deemed to be enforceable and nondiscretionary, a court may consider the past practices of the employer. For example, in one case a former executive sued his employer for an unpaid bonus. According to the parties' contract, the employee could receive bonuses "from time to time" as determined by the employer's management. The employee asserted that the court should consider the past practices of the employer. More specifically, the employee contended that he was entitled to a bonus since he had received a bonus each year of his employment. The employer argued that the court should not consider the parties' prior practices since the parties' contract provided that bonus payments were at the discretion of the company. Refusing to dismiss the employee's claim, the court noted that the parties' agreement was ambiguous with respect to the amount of discretion the employer had concerning the payment of a bonus. In that regard, the court noted that the employee had successfully demonstrated that the employer had a

past practice of paying bonuses based upon meeting certain goals and thus, the payment of a bonus was not purely discretionary. Accordingly, the court concluded that the parties' course of dealing could be considered as an indication that the parties understood the employment contract to mean that the employee would be entitled to a bonus if certain financial goals had been achieved by reason of the employee's efforts. Under such circumstances, the bonus would not be deemed "discretionary" and the refusal to pay it would be deemed to be a breach of contract by the employer.

On the other hand, a bonus plan may give an employer absolute discretion and provide that it is not earned until it is paid and it will not be paid if the employee is no longer with the company on the date of payment. Under those circumstances, an employee who is no longer with the company may not have an enforceable claim. It has also been held by the courts that merely because the bonus to be awarded was not specified does not make the contract unenforceable. In that regard, employment contracts that contain open additional compensation clauses are nonetheless binding agreements. That the amount of the bonus cannot be determined does not bar recovery under an implied contract. Thus, the court can consider the circumstances and determine whether there are sufficient guidelines to enable it to determine a bonus figure.

In order to avoid disputes concerning the enforceability of bonus arrangements, it is best that both employer and employee enter into a written agreement which reflects with specificity their understanding. For example, the understanding (which can be reflected in an employee/employer handbook) should provide whether the employee is entitled to a bonus based upon certain performance goals. Moreover, the parties' understanding should provide how much discretion the employer has in the payment of bonuses or whether the payment of bonuses are purely discretionary. As noted above, the bonus plan may also provide that the bonus is not only discretionary, but that it is not earned until it is paid. Moreover, it may provide that it will not be paid if the employee is no longer with the company on the date of payment. Clearly, the language that is used in a bonus plan will play a significant role in determining the enforceability of an employee's bonus claim. The best way to avoid contentious litigation is to make certain that the parties' understandings concerning the payment of bonuses are comprehensively and accurately reflected in a written agreement which should be carefully drafted with the assistance of counsel. ■

> *SIDEBRIEFS*

Capell Vishnick LLP will be the proud sponsor of its fourth annual dinner dance for the benefit of the Multiple Sclerosis Society, which will take place on Saturday, September 8, 2007 at Verdi's in Westbury. Please contact Jennifer Messina at 516-437-4385 x 112 if you are interested in attending.

Baby Boom! Marianne Pinto, a trusts and estates legal assistant became a grandmother for the second time. Julia was born on 1/11/07 and weighed 6 lbs 14 oz.

Wedding Bells are ringing! John Gordon, a real estate associate, and his fiancé Karen will tie the knot on June 8, 2007. Lauren Notarnicola, a litigation paralegal, said YES when Nicko asked her to be his wife. A wedding date has been set for June 2008. Best wishes to all of them!

Audrey Hurley, a litigation paralegal and Kevin Morgan were married at the Westbury Manor on November 4, 2006.

On April 26, 2007, **Andrew A. Kimler** and **Michael J. Stacchini** spoke at the Economic Development Commission of the Town of Islip on the topic of litigation avoidance for the small and medium size company.

Bernard and **Sherri Vishnick** will be honored on May 20, 2007 at the Jewish Theological Seminary for their hard work, commitment and dedication to the Seminary.

Joseph Trotti's parents, Frank and Theresa, celebrated their 50th wedding anniversary on April 27, 2007. Congratulations!!

On May 1, 2007, CV held a "Lunch and Learn" Seminar. **Frank Levin**, Vice President of Bernstein Global Wealth Management spoke on the topic of business succession planning.



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