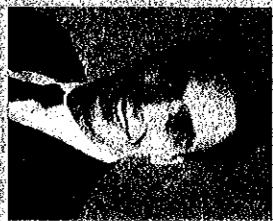


Pulman Revisited – Examining An Important Realty Ruling

COUNSELS' CORNER:

By Kenneth J. Finger
and Carl L. Finger



WHITE PLAINS - Last year the very important case of *40 West 67th Street v. Pullman* was decided by the Court of Appeals.

The case was the subject of a prior article in *Impact*, but for those who are not familiar with its principle, the Court of Appeals held that when the shareholders of a cooperative corporation voted to terminate a shareholder's proprietary lease because the shareholder was deemed to be objectionable, the decision of the cooperative would be upheld and basically subject to a very limited court review under the *Levandusky* principle of the business judgment rule where the Court should defer to the cooperative and accept the cooperative's decision and action.

The significance of *Pullman* was that previously, in order to terminate a proprietary lease on the ground of objectionable conduct, the court had to affirm that determination generally after extensive litigation, motions and a trial.

In *Pullman*, the Court determined that, unless the cooperative corporation acted in bad faith, or illegally, the cooperative, as opposed to the Court, would be the decision maker as to whether the shareholder's conduct was objectionable enough as to justify the termination of the shareholder's proprietary lease.

Recently, the Housing Court in New York City, in the case of *13315 OWNERS CORP. V. KENNEDY* ("13315"), a case

which supports the principle that bad cases make bad law, determined that *Pullman* was not applicable where a decision was made by the board of directors.

A Key Analysis

While at first blush that case would appear to be devastating to the authority given cooperatives in *Pullman*, an analysis of 13315 appears to lead to the conclusion that this case was an aberration, due to the unique facts of that case and that cooperative boards can breathe a sigh of relief.

The basic question that we, of the cooperative and condominium bar, who represent many cooperatives have asked ourselves since the *Pullman* decision, was whether or not a court would come to the same decision as in *Pullman*, and leave it to the cooperative to determine whether or not a shareholder was sufficiently objectionable to allow the cooperative to terminate his or her proprietary lease, if the decision was made by the cooperative's board of directors rather than the shareholders. 13315 appears to answer this question in the negative. However, as stated, an analysis of the facts of 13315 leads one to believe that in an appropriate case, the answer might well be in the positive.

In 13315, the subtenant of the Shareholder-Respondent renovated the apartment and removed portions of the walls and ceiling without the board's

consent, and without securing proper permits from the New York City Department of Buildings. Further, the subtenant was repeatedly arrested for narcotic violations, the renovations cut off the heat to the building, the subtenancy was renewed without board ap-

"Thus, the lesson to be learned is that the cooperative must follow proper voting procedures to elect the board, the board must be properly elected to take proper corporate action, counsel must prepare or review the notices to assure that they are correct and there must be basic, fundamental fairness provided to the shareholder whose tenancy is sought to be terminated."

proval, the neighbors were objecting to the noise, garbage was thrown out of the apartment to the street, people were living in the apartment without permission and the Respondent did not promptly move to evict the subtenants.

The board of directors served a notice of a meeting to the shareholders "to discuss what it termed as the respondent's objectionable conduct. The board announced the meeting to the shareholders by a notice on the letterhead of an entity named "133 East 15th Street Owners Corp." The notice was signed by "the management of 133 East 15th Street Owners Corp. The Petitioner's correct name is 13315 Owners Corp.... Respondent and his attorney attended the February 10 meeting."

It was disclosed that the shareholders did not duly elect the board members present at the Board meeting of February 10, "at which time the board members silenced respondent's attorney."

A Call For A Vote

Additionally, the "board cut short the presentation and called for a vote... Respondent [shareholder] claims that board members rejected his attorney's request to discuss respondent's allegedly objectionable conduct. Shortly after the respondent's attorney finally began speaking, someone at the meeting told him to "shut-up." Neither respondent nor his attorney spoke further.

At the conclusion of the meeting, the board, but not the shareholders, voted to terminate respondent's proprietary

lease, due to his alleged objectionable conduct and that of his subtenant, Holland."

On February 11, the respondent received a termination notice from the board and when Respondent refused to vacate, the cooperative commenced a holdover proceeding.

The cooperative argued that the *Levandusky* and *Pullman* business-judgment rule shielded the board's decision to terminate respondent's proprietary lease and that it was entitled to a judgment of possession in its favor. They argued that under *Pullman*, "courts should defer to a board's

vote as competent evidence that the shareholder-tenant's conduct is objectionable under RPAPL 711 unless the shareholder-tenant makes a showing of one of the following: "That the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith."

The Judge, in 13315 stated that "when a shareholder-tenant successfully raises one of these defenses, the court can no longer assume that the shareholders and board members properly examined the competent evidence, and the court determines from its own evaluation of the competent evidence whether the cooperative is entitled to possession."

Discussing the main issue that is of relevance to us, i.e., the effect of the vote being by a board of directors rather than the shareholders, the Court stated that it was unclear whether *Pullman* applied to this proceeding, which involves a board of directors' vote rather than a shareholder's vote.

While the Court stated that the Court of Appeals' language in *Pullman* implied that *Pullman* applies to this proceeding, that language was not determinative. The Judge stated that the Court of Appeals interpreted *Levandusky* to mean that "[i]n the context of cooperative dwellings, the business judgment rule provides that a court should defer to a cooperative board's determination, etc."

"The Court of Appeals recognized in *Pullman* that a cooperative board's broad powers could lead to abuse' that requires courts to 'exercise a

heightened vigilance in examining ... the board's action." The Court concluded that the "multiple references to cooperative boards might mean that the Court [of Appeals in *Pullman*] intended the business-judgment rule to apply to a board vote; these references, all dicta, have no binding precedential value."

The Judge concluded that "what the *Pullman* Court did was apply the business-judgment rule to a shareholder vote, not a board vote."

The Judge, in 13315, stated that "it is also possible that when the Court of Appeals referred to the "board" in *Pullman*, it meant a board's taking actions required by a shareholder vote. *Pullman*'s proprietary lease was terminated under what is typically known in New York as Paragraph 31 (g) of a proprietary lease. Paragraph 31 (g) calls for a shareholder vote to determine whether the "objectionable" tenant's conduct merits lease termination. If, under Paragraph 31 (g), a supermajority of the shareholders vote to terminate a lease, then the board may confirm the decision and begin an eviction proceeding. When the Court of Appeals discussed "the board's determination" or the "board's decisions," it might have meant a board whose actions are based on a shareholder vote. Only time will write the perfect ending to this question."

Further Judicial Findings

The Judge went on to state that "some believe that if *Pullman* applies to board votes as well as shareholder votes, the courts will, some believe, increasingly erode shareholder-tenant protection, since rather than requiring a majority of the shareholders to consider the shareholder-tenant's conduct objectionable before the cooperative evicts the shareholder-tenant, it will be enough that a board of several members finds it so." However, in spite of the spate of language by the Judge questioning *Pullman*'s applicability to action by a board of directors, the Judge then stated that it was irrelevant to this particular case, since it found that the board of directors had acted "outside the scope of its authority and in bad faith in conducting its vote to terminate respondent's proprietary lease" and therefore did not apply the business-judgment rule.

The Judge in 13315 found "(1) that the notice of the board meeting did not give petitioner's correct name, (2) that no cooperative board officer signed the notice of the board meeting, and (3) that the shareholders did not properly elect the board members." There was also discussion about the conduct of the meeting. This was sufficient to defeat the application by the cooperative to apply the *Pullman* rule and avoid the court's scrutiny of the board's actions. The Court set the matter down for a

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THE
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REPORT

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Building Industry Conditions Producing Varied Results, Study Says

ARMONK — Based on data evaluating the local building and construction industry, market conditions in the Westchester and Mid-Hudson Region are remaining somewhat upbeat.

According to a report from the F.W. Dodge Division of McGraw Hill, total construction activity in Westchester County through August produced a 10 percent increase when compared to the same period in 2003. Residential activity, the report said, recorded a 12 percent jump.

The report, which tracks conditions involving new, addition and major alteration projects, also illustrated the following data for other counties in the region through August, in comparison to activity through August, 2003:

- Total construction activity in Putnam County showed a four percent decline.
- Dutchess County is continuing its recent level of high activity. The study recorded a 58 percent increase in total construction activity. The Total Building category, which tracks the Residential and Non-Residential sectors, saw a 40 percent hike in activity.
- Orange County is also continuing its hot pace. Total construction activity increased by 14 percent. The Total Building sector saw a 15 percent hike.
- Rockland County experienced a 27 percent decrease in its total construction activity. Residential activity in the county, however, recorded a 46 percent increase.

"The results from the different counties in our region demonstrate the continuation of the cyclical nature of the overall building and construction industry in our market," said

Albert Annunziata, executive director of the Building and Realty Institute of Westchester and the Mid-Hudson Region (BRI). "The numbers tell the story — some counties experienced healthy work levels, while others, for the most part, did not."

Annunziata added that the BRI — as it has in recent years — is continuing to cite that the lack of production of new dwelling units is a serious problem facing the region.

"New and affordable units are urgently needed in our area," Annunziata said. "It is a dilemma that must be addressed. A region of our size needs a more consistent production of affordable units for those who work here, and want to live here."

On The Horizon

Members of the BRI's Cooperative and Condominium Advisory Council (CCAC) are in for an interesting meeting next month.

The CCAC, which is commemorating its 25th anniversary this year, has scheduled a Nov. 9 conference that is offering two topics — "How to Select and Work With Your Managing Agent" and "How to Deal With Late Maintenance and Common Charge Payments." A full report on the meeting is on page 1.

The CCAC, a membership organization representing more than 400 cooperatives and condominiums, has consistently drawn large crowds to its membership conferences. Advance reservations are indicating that another strong turnout is expected. Advance reservations are being accepted at (914) 273-0730.

Pullman Revisited

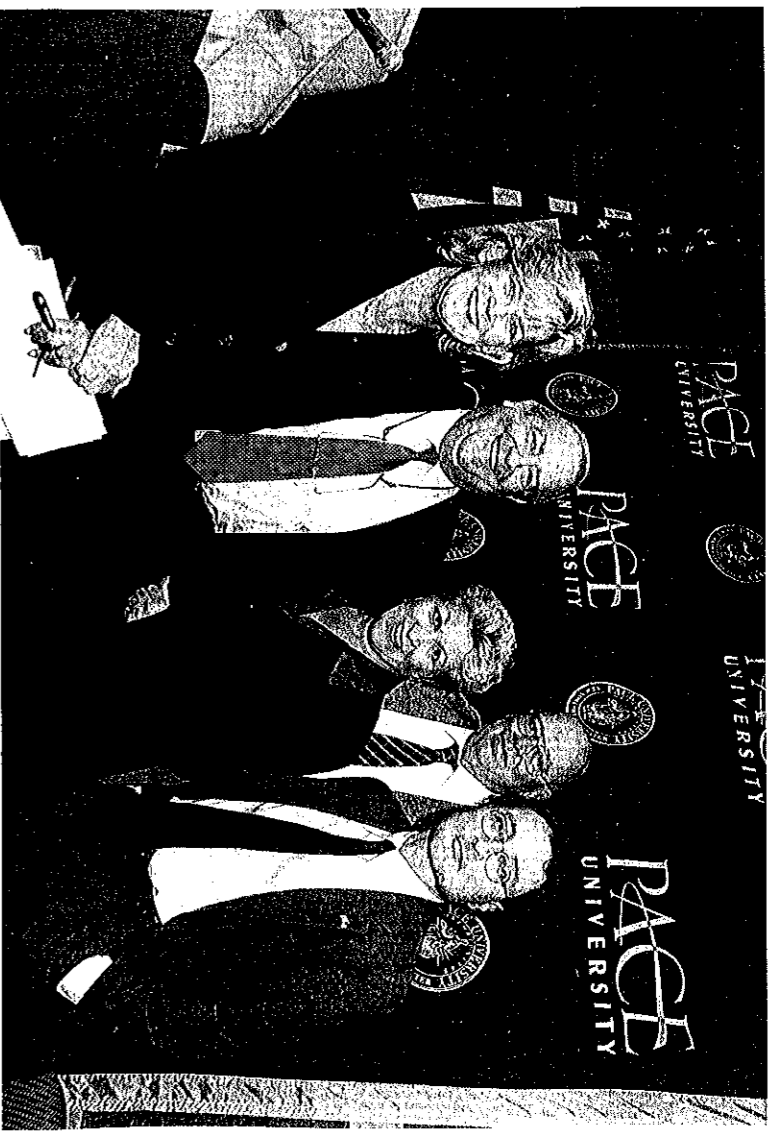
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trial on the issues of whether the shareholder's conduct had been objectionable.

Thus, the lesson to be learned is that the cooperative must follow proper voting procedures to elect the board, the board must be properly elected to take proper corporate action, counsel must prepare or review the notices to assure that they are correct (in 13375 the name of the cooperative was wrong on the notice of the meeting), and there must be

basic fundamental fairness provided to the shareholder whose tenancy is sought to be terminated.

Editor's Note: The authors, both attorneys, are with Finger and Finger, A Professional Corporation, based in White Plains. Kenneth J. Finger is chief counsel to the Building and Realty Institute of Westchester and the Mid-Hudson Region (BRI).

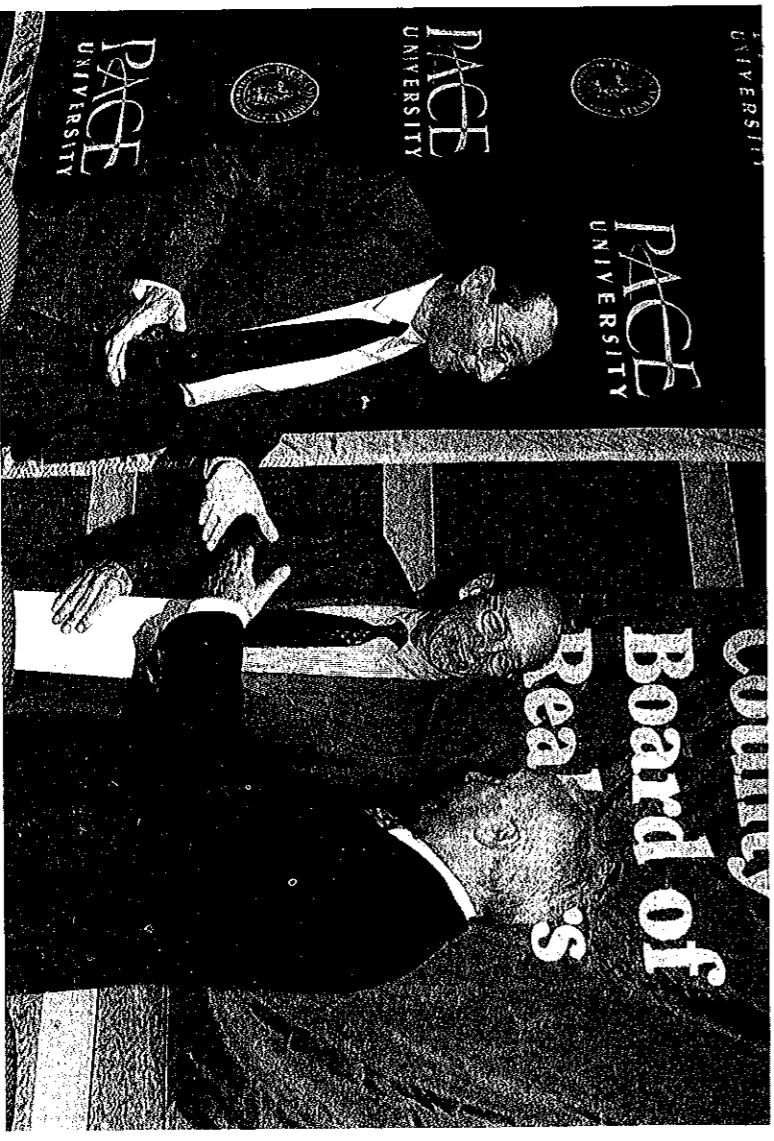


The Building and Realty Institute (BRI), the Business Council of Westchester, the Construction Industry Council (CIC) and the Westchester County Board of Realtors sponsored a State Legislator Candidates Forum on Sep. 28 at the Pace University Graduate Center in White Plains. Pictured, from left to right, are Ellen Lynch, the Business Council of Westchester; Hank Fries, Westchester County Board of Realtors; Janine Rose, News Director, News 12 Westchester; Gil Mercurio, Westchester County Board of Realtors; and Albert Annunziata, BRI.



Photos by Barbara Hanson

Pictured after the forum are, from left to right, Ross Pepe, president, Construction Industry Council (CIC); State Senator Suzi Oppenheimer; and Albert Annunziata, executive director, Building and Realty Institute (BRI).



Involved in a discussion after the forum are, from left to right, Albert Annunziata, executive director, Building and Realty Institute (BRI); Ross Pepe, president, Construction Industry Council (CIC); and State Assemblyman Richard Brodsky.