

# Court Upholds Discrimination Claims Against Co-ops

## COUNSEL'S CORNER

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WHITE PLAINS—The Appellate Division First Department has upheld a variety of causes of action claiming discrimination by cooperatives in two cases this year where the cooperatives refused to approve purchases of apartments.

In each case the Plaintiff still needs to prove what happened, but the Court clarified and potentially added to the liability that the cooperatives and their directors face with regard to claims of discrimination.

In *Stalker v. Stewart Tenants Corp.*, 93 A.D.3d 550, 551, 940 N.Y.S.2d 600, 602 (2012), the Plaintiffs had contracted to sell their cooperative apartment to a couple who were senior citizens. The cooperative rejected the application and the seller claimed that the rejection was for illegal reasons, age and national origin. The cooperative, for its part, asserted that the purchasers did not meet the residence requirements of the cooperative because they resided out of state. The Court did not decide whether the residency was problematic, but dealt with the issue of who could bring the lawsuit.

Notably the claim in the *Stalker* case was not brought by the parties that allegedly suffered the discrimination, the purchasers, but rather by the sellers. The sellers were not themselves subject, even allegedly, to any discrimination. The Defendants applied to the Court for dismissal of the case.

The Court, however, interpreting the New York State Human Rights Law and the Fed-

eral Fair Housing Act, held that the Plaintiffs were qualified to bring a claim against the cooperative. The Court held that “we find that this more expansive language provides a remedy for any person adversely affected by reason of discrimination in the provision of housing in New York,” *Stalker v. Stewart Ten-*

*ants Corp.*, 93 A.D.3d 550, 551, 940 N.Y.S.2d 600, 602 (2012). The finding in the *Stalker* case ultimately points to the fact that the Courts may well allow for such expansion of who may commence actions based on discrimination to effectuate the “purpose of the Human Rights Law, which embodies ‘the strong antidiscrimination policy of this State.’”

erally, it also implicitly points to the need for all cooperative policies, such as those pertaining to residency at issue in this case, to be written and maintained in the corporate records.

### Another Example

In *Fletcher v. Dakota, Inc.*, 948 N.Y.S.2d 263, 266 (App. Div. 2012) the Plaintiff was a prospective purchaser of an apartment adjacent to an apartment he already owned in the cooperative. The Board re-

fused to approve his purchase. In that case a significant issue addressed by the Court was the potential for individual liability of a director in a case of discrimination.

The Court, in the *Fletcher* case, specifically addressed the matter of *Pelton v. 77 Park Ave. Condominium*, 38 A.D.3d

N.Y.2d 530, 554 N.Y.S.2d 807, 553 N.E.2d 1317 [1990], which protects the decision making of the board from scrutiny by application of the business judgment rule, to a claim of discrimination, and found that there needed to be independent tortious conduct by a director in order to subject the director to individual liability. In *Fletcher* the Court specifically overturned the holding in *Pelton*.

The Court in *Fletcher* held that the Court itself failed in *Pelton* to distinguish between a contractual obligation and an intentional tort, finding that an intentional tort, such as discrimination may not be protected by the business judgment rule.

Interestingly, and worthy of warning, the Court used the term “tort” later in the decision without reference to “intentional.” This and other language in the decision raises the con-

cern that tort claims in general may not be protected by the business judgment rule in the future to the extent previously understood. Hopefully, for cooperatives and their directors, this will not lead to a later and further dilution of the business judgment rule as it may apply to unintentional torts such as negligence.

In any event, the Court held that the Plaintiff *Fletcher* had stated a cause of action against certain individual directors and the case could proceed against them.

Both *Fletcher* and *Stalker* serve as an important reminder to cooperatives and their boards that the approval process must be attended to with great concern. This process is fraught with liability and they must be careful to adhere to their policies concerning admissions and hew tightly to the available legal bases for deciding applications.

**Editor's Note:** *The authors are with Finger and Finger, A Professional Corporation. The firm, based in White Plains, is Chief Counsel to The Building and Realty Institute of Westchester and the Mid-Hudson Region (BRI).*

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