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WHY ROMEO AND JULIET COULD NOT HAVE BEEN WRITTEN IN NEW YORK

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Balconies — a symbol of romance whether one is an aficionado of the immortal Bard or prefers to spend Saturday nights watching movies with the Drifters. Fortunately for English literature, the Capulets owned a single-family home in Verona and not a condominium in lower Manhattan for if they had to deal with the New York Condominium Act (*Article 9-B of the NY Real Property Law*), the "light through yonder window breaks" [1] may have come from a hallway.

Michael Odell had a novel idea. He wanted to buy a condominium on the ninth floor of 704 Broadway, remove a portion of one of the exterior walls and rebuild it about eight feet inside the unit. The result would be a rectangular outdoor alcove measuring roughly eight feet by twenty-five feet to which Mr. Odell would add about six feet, thereby creating the only balcony in the entire condominium.

Knowing that the alteration would require the approval of the Board of Managers, Mr. Odell's broker wrote to the Condominium's president, Jonathan Leitersdorf on January 28, 1999, asking whether the members of the Board would agree "in concept" to a balcony for the ninth floor unit. The broker acknowledged that even if the Board agreed with the concept, the purchaser would need to submit architectural plans to the Board for its approval before construction could commence. Mr. Leitersdorf — in his capacity as Board President — countersigned the broker's letter below the words "Agreement to above" and returned it.

Having overcome this hurdle, Mr. Odell purchased the unit for $1,725,000 in February of 1999. He retained an architect to pursue a building permit from the NYC Department of Buildings. Mr. Leitersdorf signed the building permit application as President of the Condominium Board. [2] Approval for the permit was given on May 14, 1999. A week later, Mr. Odell submitted a complete set of plans for the balcony to Mr. Leitersdorf and asked him — as President of the Board — to countersign the letter to signify that the plan had been reviewed and approved. Mr. ***26** Leitersdorf did sign the letter — as president — under the legend: "The above accepted and agreed to." Work on the Odell unit began soon thereafter.

Apparently, Mr. Leitersdorf had not shown his fellow Board Members either the pre-purchase "agreement in concept" letter or the post-purchase "here are the plans for your approval" letter. Nor had he told them that he had signed the building permit application on behalf of the Condominium. He simply acted alone. When the two other Board Members learned about the project, they summoned Mr. Odell and his architect to a meeting on July 14. Within hours after the meeting ended, Mr. Odell received a letter from the Condominium's managing agent advising that the Board had voted to reject the idea of a balcony because it would increase the size of his unit and create a "unique amenity" not found in the other units. Other proposed alterations including the exterior alcove — *sans* balcony — were approved.

Shocked by this turn of events, Mr. Odell pondered:

Whether 'tis nobler in the mind to suffer

The slings and arrows of outrageous fortune,

Or to take arms against a sea of troubles

And by opposing, end them. [3]

He decided on the latter course and retained a modern-day Portia whose efforts have given us *Odell v. 704 Broadway Condominium, 284 AD2d 52, 728 NYS 2d 464 (1st Dep't 2001)*. Before analyzing the case itself, there is one issue that is not mentioned in the decision which warrants some consideration. Condominium units in multi-story buildings are specks of space suspended in mid-air. The unit owner has fee title to a cube within the building and easement rights over the common areas, so that the owner can go to and from the unit without needing a catapult and a parachute. Mr. Odell's proposed six-foot balcony was designed to extend past the line of the east wall, meaning that he would break out of his cube. He either would intrude upon the common elements of the condominium, or if the east wall of the building coincided with the eastern boundary of the condominium's property, he would trespass upon the neighboring property.

If the Odell balcony would have extended into the common elements, the Board of Managers could have denied the proposal on that basis alone. Perhaps that was what they meant when they disapproved the ***28** balcony because it would have made the Odell unit larger. If instead, the balcony would have extended over the air space of the easterly neighbor, a building permit should not have been issued. Since the Court discusses none of this, there is no way to know whether this point was even raised.

Apparent authority

One can only imagine Mr. Odell's frustration. Here, as part of his "due diligence" before buying the unit, he had his broker write to the chief executive officer of the Condominium outlining his concept and asking for the Board of Managers' reaction. Only after receiving assurance did he purchase the unit. He then asked for — and seemingly obtained — Board approval before starting construction. How could he have known that the Board President had not shared the correspondence with the rest of the Board? More important, why should he be the one to suffer from the President's usurpation of authority?

He shouldn't, said the Court. "[A] president of a corporation has apparent authority to act within the general scope of his office and such acts are binding on the corporation against one who does not know of any limitation or the president's true authority." [4] This is true "regardless of whether the president has actual authority to carry out such acts." [5] Ergo, President Leitersdorf "had the power, whether actual, implied or apparent, to approve of the proposed construction and to bind the entire board." [6]

The Condominium then retreated to form a defensive perimeter around its by-laws. Article IV, Section 7 thereof provides:

[A]ll agreements, contracts, deeds, leases, checks or other instruments of the Condominium shall be executed by any two (2) officers of the Condominium or by such other person or persons as may be designated by the Board of Managers. [7]

Persons dealing with corporations have constructive notice of the derivation and the limitation upon the powers of the corporate officers with whom they deal, argued the Condominium. Mr. Odell should have known that under the by-laws two corporate signatures were required in order to approve his plan.

***29** Not so, answered the Appellate Division. "Approval of an alteration to the condominium ... does not constitute an agreement, contract, deed, lease, check or other instrument of the condominium as those terms are used in the by-laws." [8] But if it were, the last phrase of section 7 by which the Board can imbue "such other person or persons" with the authority to execute documents on behalf of the Condominium means that "it was well within the board's authority to designate the president as the person to approve the construction plan." [9] Since the by-laws do not require the designation of "such other person or persons" to be in writing, even if Mr. Odell had read section 7, he could rely on President Leitersdorf's single signature under the doctrine of apparent authority.

Does this conclusion mean that Mr. Odell gets his balcony? Not necessarily. Enter *NY Real Property Law § 339-k*.

The Neighborly Veto

When appropriately parsed, this section of the Condominium Act provides:

No unit owner shall do any work which would jeopardize the soundness or safety of the property, reduce the value thereof or impair any easement or hereditament, nor may any unit owner add any material structure .... without ... the consent of all the unit owners affected being first obtained.

"Ay, there's the rub". [10] Mr. Odell did not obtain the consent of Ms. Schrager, the owner of the eight-floor unit directly below his. Hence, if the balcony is a "material structure", more than just the approval of the Board of Managers was necessary.

But I did get Ms. Schrager's consent, cried Mr. Odell. Each owner of a condominium unit at 704 Broadway executes a power of attorney which appoints "the persons who may from time to time constitute the Condominium Board, true and lawful attorneys - in - fact for the [unit owner] ... to execute, acknowledge and deliver ... any consent ... affecting the Condominium or the Common Elements, that the Condominium Board of Managers deems necessary or appropriate." [11] When Mr. Leitersdorf countersigned the May 21 letter, not only did he bind the Board, he gave Ms. Schrager's consent as well.

***30** Mr. Odell's creative plucking of the words from the power of attorney to form the sentence he wanted was met with equally good word play from the Court. "The power of attorney ... confers authority on 'the persons who may from time to time constitute the Condominium Board', not the Board, qua Board, to give the necessary or appropriate consent .... It follows from the requirement of the consent of the board members that the power of attorney may not be acted upon by any individual member, even the president, acting independently." [12]

Let's be realistic. When Mr. Leitersdorf countersigned the May 21 letter, he was not acting as Ms. Schrager's attorney in fact. The letter requested Mr. Leitersdorf's "signature as President of the Board, indicating that the submitted work has been reviewed and approved." [13] Accordingly, he signed his name as President of the Board of Managers. He was not asked to grant Ms. Schrager's consent by countersigning the letter pursuant to her power of attorney; nor did he sign her name. Had he wanted or thought he was exercising the authority given under the power of attorney, Mr. Leitersdorf would have had to sign the letter something like this: "Carol Schrager by Jonathan Leitersdorf, President of the Board of Managers of 704 Broadway Condominium, her attorney-in-fact."

Rejecting Mr. Odell's power of attorney argument on this ground would have been simpler, more direct and consistent with what really happened. Instead, the First Department's approach leaves open the question of what would have happened if only two of the three members of the Board of Managers had approved the balcony on behalf of the Condominium and those two wanted to give Ms. Schrager's consent to the project via her power of attorney while the third one refused. Would the majority rule or must it be unanimous?

The Court's decision

While the failure to obtain Ms. Schrager's consent did not bode well for Mr. Odell, it did not end the inquiry. *NY Real Property Law § 339-k* requires the consent of affected unit owners for the addition of "any material structure". The statute does not define that term. Since the opponents "claim that the balcony, only eighteen inches above three large bedroom windows in the eighth-floor unit, would block light and cause a loss of view, [while Mr. Odell] insists that the eighth floor will incur only 'some loss of light', primarily, in May, June and July, and that the ***31** loss of light during the remainder of the year will be de minimis." [14]. Since *Odell* reached the First Department after cross-motions for summary judgment had been denied, the Appellate Division could not make a determination of "materiality" upon the record before it. The issues of "light" and "view" required a trial was the Court's ultimate ruling.

After two years of litigation, all *Odell* yielded was more litigation. Though sharing very little common ground, after reading this decision both Mr. Odell and Ms. Schrager did share one thought: "The first thing we do, let's kill all the lawyers." [15]

Footnotes

1 *An Excellent conceited Tragidie of Romeo and Juliet, Act II, Scene II.*

2 *Probably a requirement of the New York City Building Department.*

3 *The Tragedy of Hamlet, Prince of Denmark, Act III, Scene I.*

4 *Id. at 57, 728 NYS 2d at 469.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id. at 58, 728 NYS2d at 469.*

10 *The Tragedy of Hamlet, Prince of Denmark, Act III, Scene I.*

11 *Id. at 58, 728 NYS 2d at 470.*

12 *Id. at 58-9, 728 NYS2d at 470.*

13 *Id. at 54-5, 728 NYS 2d at 467.*

14 *Id. at 59, 728 NYS 2d at 470.*

15 *The Second Part of Henry the Sixth with the Death of Good Duke Humphrey, Act IV, Scene II.*

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