VICTORY IN APPEALS COURT FOR MITCHELL-LAMA ADVOCATES

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In the latest chapter in the court battle to preserve affordable Mitchell-Lama housing at East Midtown Plaza, the Appellate Division, First Department on June 14, 2011 issued a resounding vindication of the positions argued by the East Midtown Plaza Mitchell-Lama Organization (EMP-MLO) and rejected the contentions advanced by the pro-privatization EMP board.

In an appeal vigorously argued before four judges in September, 2010, the court upheld by a 3-1 vote the original March, 2010 determination by Justice Emily Jane Goodman of the New York State Supreme Court dismissing the case brought by the EMP board. In the lower court, EMP-MLO had been granted the right to intervene in the case of East Midtown Plaza Housing Company, Inc. v. Andrew M. Cuomo, as Attorney General of the State of New York and The New York City Department of Housing Preservation and Development (Index No. 401278/09).

The EMP Board, as Petitioner, had sued the State Attorney General (AG) and the City Department of Housing Preservation and Development (HPD) in April, 2009 in an effort to force the government agencies to allow EMP to exit from the Mitchell-Lama program. On the appeal, EMP sought to overturn Justice Goodman's decision, arguing that the AG had no jurisdiction or authority to prevent EMP from leaving the program and that HPD's method of counting dissolution votes was contrary to the agency's own regulations.

The Appellate Division rejected both arguments. On the first issue, the court held that Article 23-A of the General Business Law, commonly referred to as the Martin Act, applies in this case and that the Attorney General has jurisdiction over this matter. "Given that current shareholders of petitioner are being offered shares in a new private entity, with different rights and liabilities," the court explained, "petitioner's plan to dissolve and/or reconstitute is a 'public offering or sale…of securities' within the meaning of General Business Law §352-e."

The court held that the Attorney General properly rejected petitioner's second amendment to the offering plan. According to the court, the second amendment inaccurately stated that petitioner's privatization plan had passed, based on a per-share vote counting method, when, in fact, it had not passed in accordance with HPD's required per apartment unit method. The court confirmed EMP-MLO's contention that the offering plan contained serious misrepresentations. The court ruled that it is within the Attorney General's discretion under General Business Law §352-e "to reject an offering plan amendment on the basis that it makes an untrue or misleading statement…"

On the second issue, the Appellate Division judges determined that HPD's method for counting dissolution votes, i.e. one vote per shareholder, was rational and lawful. The court explained that Petitioner's Certificate of Incorporation specifies that each shareholder shall be entitled to one vote, regardless of the number of shares held by such holder. "Contrary to petitioner's contention," the court stated, "HPD's rule regarding dissolution, 28 RCNY 3-14(i)(7)… does not provide that dissolution votes should be counted per share."

The major points set forth by EMP-MLO in its brief and oral argument before the Appellate Division were upheld by the court. One judge dissented in the case, claiming that petitioner's plan to exit the Mitchell-Lama program does not entail a public offering and, therefore, the Attorney General had no power to stop privatization. This position was not accepted by the majority.

The EMP Board still has one possible avenue to pursue, an appeal to the Court of Appeals, the State's highest court. However, this appeal is not as of right and EMP would have to seek permission of the court to pursue such further plea. In general, such permission is not readily granted by the court. If it were to be granted, we are looking at yet another year of limbo in this saga, as well as the continuing drain on EMP's budget for even more legal fees.