

## RESIDENTIAL REAL ESTATE

### Scrutiny Important When Reviewing Power of Attorney

*Agents Should Stick to Procedure  
To Check Validity of Documents*

BY ANDREW P. BRUCKER

**P**ERHAPS NO "wrinkle" in residential real estate transactions is as common as the use of a power of attorney when one of the principals cannot attend the closing. This seems to be especially true in the sale of cooperative housing units. Yet this little problem is potentially fraught with danger.

The closing of a sale/purchase of a cooperative unit is actually a three party transaction (although, of course, there may be additional parties if there are lenders involved). The seller is "selling" a unit by assigning the proprietary lease and selling shares in the cooperative housing corporation. Therefore, the seller must sign, among other things, a stock power (so as to transfer the shares) and an assignment of the lease.

The purchaser assumes the obligations under the lease by either signing an assumption agreement or a new lease (or sometimes both). The "transfer agent" of the coopera-

tive is the third party, as the transfer agent must cancel the seller's stock certificate, issue a new one to the purchaser, and either deliver a new proprietary lease, signed by an officer of the cooperative corporation, for execution by the purchaser, or consent to the assignment of the seller's lease.

One unique aspect of a cooperative unit sale is that unlike a condominium unit or a one-family house, there is typically no title insurance company at the closing to assure the purchaser that he is actually receiving good title. Since the purchaser of a cooperative unit is not purchasing real estate but rather shares in a corporation, there is no recording of any documents, and thus a title company cannot insure

good title. On the other hand, the transfer agent (and the cooperative itself) becomes an "insurer" of title of sorts, as a new certificate representing the shares would be issued unless the owner on the books and the records of the cooperative corporation is the one "selling" the unit by executing all of the appropriate paperwork.

For numerous reasons, either the seller or purchaser may not be available, and the use of a power of attorney by either the seller or purchaser is quite common. And, in fact, many transfer agents (who are usually the managing agent of the building or the general counsel to the corporation) accept the power without question, provided that the attorney-in-fact executes an affidavit that the power is still in full force



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and effect. But it is quite clear that the acceptance of a power should not be handled in a routine manner, but rather with as much care as any complication in a transaction.

### Presumption and Exceptions

In *Norman J. Liberman, as Temporary Administrator of the Estate of Theodore Wichter v. Jacoby & Meyers, et al.*,<sup>1</sup> a shareholder in a cooperative housing corporation passed away. Wayne Worden, one of the named defendants, who also acted as Mr. Wichter's practical nurse, listed the cooperative apartment for sale with a broker.

After some negotiations, a contract for the sale was signed by Mr. Worden, as Mr. Wichter's attorney in fact, and the sale was consummated some two months later. At the closing, Mr. Worden signed an affidavit that the power of attorney was still in full force and effect, and the transaction was completed. But, as they say in Hollywood, this was not the end of the story, only the beginning.

Three years after the sale was consummated, members of Mr. Wichter's family learned of his death, and discovered that Mr. Worden had absconded with, or transferred without authority, the bulk of Mr. Wichter's estate, including the shares for the cooperative apartment. The Estate also discovered that the power of attorney in which Mr. Wichter granted Mr. Worden his rights as his attorney in fact, may not have been executed by Mr. Wichter.

The Estate advised the cooperative corporation of its claim to the apartment, and even notified the purchaser who had closed with Mr. Worden. Nevertheless, some two years later, the purchaser then resold the apartment, and the cooperative corporation allowed the sale of the shares and an assignment of the lease to a new owner. Criminal charges were brought against Mr. Worden, but he soon passed away. A Temporary Administrator was appointed, and he brought a number of actions to recover the assets looted from Mr. Wichter's estate.

The cooperative housing corporation, the transfer agent (which was the management company) and the other defendants contend that they had every right to rely on the notarized power of attorney, and that the plaintiff failed to rebut the presumption of validity that attached to notarized documents. The Administrator, on the other hand, claimed that the instrument was not duly

executed, and its validity should have been called into question. The defendants submitted motions for summary judgment for all 40 causes of action, yet the court denied but one of the motions.<sup>2</sup>

The court correctly indicated that the long established law is that "where a statement contains the jurat and stamp of a notary public, it is presumed that the notary has acted within his or her jurisdiction and carried out the duties required by law, unless there is a showing to the contrary."<sup>3</sup> The court went on to explain the exception to the rule: "Where evidence is presented of suspicious circumstances surrounding the execution and notarization of [the] document, a factual issue is raised that will necessitate a trial."<sup>4</sup>

Therefore, the court has given fair notice to all cooperative housing corporations, and their transfer agents and corporate counsel, that acceptance of a power of attorney should not be automatic, and that the execution of an affidavit of full force and effect by the attorney in fact does not eliminate any liability on the part of the corporation, its agents or counsel. Yet now that these parties have been put on notice as to the care it must give to accepting a power, what should these parties look for? What factors should raise suspicion on the part of those involved, and when is it proper to reject a power of attorney which is submitted by a party to the sale of a cooperative housing unit?

### Warning Signs

Perhaps the most persuasive fact which led the court to decide as it did was the fact that the very instrument itself was questionable upon review. First, the jurat seemed to have been altered. Plaintiff alleged that the date of the jurat was noted as Nov. 20, 1992, but that it was crossed out and replaced by the date of Nov. 20, 1991, indicating that the power of attorney may have been executed after Mr. Wichter's death.

Second, plaintiff alleged that Mr. Wichter's signature was forged and that it bore a strong resemblance to the manner in which Mr. Worden signed Mr. Wichter's name on other documents submitted at the closing.<sup>5</sup> Therefore, there was reason to doubt the validity of the power immediately, simply based upon the instrument itself.<sup>6</sup> But there were other factors which the court felt were important, and which created an affirmative obligation on the cooperative (and its transfer agent) to make further inquiries.

The court noted that facts concerning both Messrs. Wichter and Wor-

den were important and, when taken together, certainly created "suspicious circumstances." The court claimed that the cooperative corporation and the transfer agent both knew of Mr. Wichter's advanced age (he was in his 90s), that he departed from the premises in a wheelchair, and that he failed to return though seven months had passed.

While the court did not indicate if these facts alone would have required the cooperative corporation to make further inquiries before allowing a sale of a unit by an attorney in fact, it certainly stands out as a warning signal that these types of facts concerning a tenant-shareholder in a cooperative may be imputed to the cooperative corporation and its managing agent, and that such factors may require special attention if a power of attorney is being utilized in a sale.

The court also noted certain other circumstances concerning Mr. Wichter. The court noted that his nephew had represented him only two years earlier when Mr. Wichter's wife died. The nephew not only represented Mrs. Wichter's estate, and had been in contact with the cooperative corporation and the managing agent in order to determine valuation for her estate, but had also represented Mr. Wichter when the stock and lease was changed from joint ownership to Mr. Wichter's name alone.

Finally, the court noted two other circumstances which, when taken with all of the other factors, presented "suspicious circumstances." The court noted that the power of attorney gave authority to "a non-professional, non-family member" to act as attorney in fact. Again, there is some question whether this alone should cause suspicion, but it is quite interesting that the court specified these two factors. The overwhelming majority of those persons who are granted powers of attorney are indeed attorneys or immediate family members,<sup>7</sup> but the fact that this is now recognized by a judge makes this an important factor to consider.

### Minimum of Scrutiny

While the court was thorough in outlining factors which might lead one to suspect that a power of attorney is invalid, there are certainly additional factors. One such factor is the age of the power itself. If a power is 10 years old, there is the

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increased possibility that the grantor of the power has died. Further, a review of the transaction itself may be helpful. If the seller is utilizing a power of attorney, and the check is not in the name of the seller, but rather in the name of the attorney-in-fact, there may be reason to question the power.

As fate would have it, another case involving a power of attorney was decided by the same judge soon after *Lieberman*. The case,<sup>8</sup> while not involving a cooperative corporation, does outline the responsibilities of those accepting a power of attorney. Ferman was appointed the Executrix of her brother's estate, and she retained an attorney to probate the estate. Ms. Ferman also executed a power of attorney granting the attorney full authority to handle the banking transactions of the Estate. The attorney then, after gathering the assets of the Estate and depositing them in Chase Manhattan Bank, withdrew the sums so deposited for her own purposes. The Executrix then sued Chase, charging it with complicity in the fraud, negligence and breach of fiduciary duty.

The court granted Chase's motion for dismissal of all claims. The court held that:

In general, a bank may assume that a person acting as a fiduciary will apply entrusted funds to the proper purposes and will adhere to the condition of the appointment .... A bank is not in the normal course required to conduct an investigation to protect funds from possible misappropriation by fiduciary, unless there are facts ... indicating misappropriation.<sup>9</sup>

But the court also noted that "[w]here facts sufficient to cause a reasonably prudent person to suspect that trust funds are being misappropriated a duty on the part of the depository bank to inquire will be triggered,<sup>10</sup> and if the bank failed to conduct a reasonable investigation when the obligation arose, then the bank will be charged with such knowledge as an inquiry would have revealed."<sup>11</sup>

Though *Ferman* and *Lieberman* both relate to powers of attorney, the fact patterns are certainly different. In *Lieberman*, there is a question of whether there was a valid

power, while in *Ferman*, there is a question of whether the bank should have investigated the activities of the attorney in fact. However, in both cases the judge sets forth the proposition that if there are facts that would raise a suspicion in the mind of a reasonably prudent person, anyone accepting that power had best investigate the circumstances.

The best procedure for any transfer agent to adopt is one in which every power is subject to a minimum of scrutiny. If a power is to be used at a closing, the transfer agent should be informed of this fact at least five days in advance. By doing so, the agent might make certain basic inquiries. These might include the identity of the attorney in fact (is it an attorney or a family member), when the shareholder was last seen at the cooperative, and the age and general health of the shareholder. Finally, a call to the shareholder himself, confirming the name of the attorney in fact, would be quite useful.

While this may be easy to articulate, it may not be as easy to put into practice in terms of the cooperative apartment sale. Clearly the best and most efficient manner in which to ascertain whether a power is valid (i.e. it was signed by the person granting the power, and he is still alive<sup>12</sup>), is to speak with the shareholder the day of the closing. However, this is not always practical. Some powers are signed by elderly persons many years earlier, who may now, unfortunately, not be able to communicate effectively over the telephone; and yet whose power of attorney still is effective due to the clause which states that the power will survive the disability of the principal. If this is the case, then additional information may have to be gathered.

Need a power of attorney be accepted by the transfer agent? Section 5-1504 (1) of the General Obligations Law states that "No financial institution located in this state shall refuse to honor a statutory short form power of attorney properly executed in accordance with section 5-1501 or 5-1506 of this title." The definition of "financial institution," however, includes banks, credit unions, etc., but does not include a cooperative housing corporation. This being the case, the transfer agent certainly has the right not to accept a power of attorney if there is any question of its validity, whether based upon the execution of the instrument or whether it is currently in full force and effect.

Clearly a policy by a transfer agent and/or cooperative that powers of attorney will not be acceptable is short-sighted, and would not be taken lightly by the shareholders. There are times when a power is necessary, as in the case of the entertainer who is out of town for months at a time, or the elderly person who is bed-ridden. Therefore, in lieu of such a policy, it is best to adopt a methodology for accepting powers. This would include notice and a copy of the power days in advance of the closing, and a procedure for confirming that the power is still valid. The days of accepting a power on its face, and of believing that the receipt of an affidavit of full force and effect from the attorney in fact will act as insulation against any liability, may be both relics of the past.

(1) Memorandum Decision, Supreme Court, New York Co., entered Sept. 29, 1999; Index No. C12291-97.

(2) The court dismissed as time barred only the claim for conversion against the cooperative corporation, the transfer agent and the purchaser who took title from Mr. Worden.

(3) *Collins v. AA Trucking Renting Corp.*, 209 A.D.2d 363 (1st Dept. 1994).

(4) *McKenna v. Double G Development Corp.*, 251 A.D.2d 202, 674 N.Y.S.2d 356, (2d Dept. 1998).

(5) Attorneys in fact sign their name, as attorney in fact for their principal, or sign the principal's name, and then their name as attorney in fact. Worden obviously chose the later.

(6) It is interesting to note that the omission of the date on the jurat in an affidavit in support of a petition was held to be a technical defect of verification insufficient to warrant denial of the petition. *Matter of Miller v. Board of Assessors*, 666 N.Y.S.2d 1012 (1997); CPLR 3026.

(7) Though there is no known survey of this fact, 25 years of practice in this field, plus an unofficial survey of five organizations representing over 500 cooperative corporations, has led the author to this conclusion.

(8) *Ferman v. The Chase Manhattan Bank*, 1999 WL 1568298 (Sup. Ct., New York Co.).

(9) See too *Matter of Knox*, 64 N.Y.2d 434, 438 (1985).

(10) *Board of Managers of Continental Towers Condominium v. Crestmont Management Corp.*, 186 A.D.2d 49 (1st Dept. 1992).

(11) *Home Savings of America FSB v. Amoros*, 661 N.Y.S.2d 635 (1st Dept. 1997).

(12) The death of the principal revokes the power of attorney by operation of law. *Etterle v. Excelsior Ins. Co. of New York*, 74 A.D.2d 436, 428 N.Y.S.2d 95 (4th Dept. 1980).