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To: Our clients and friends

From: Stuart M. Riback

Re: Important Victories: buy-sell litigation and appeal

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Two victories in the same case in less than a week. That doesn't happen very often but I'm pleased to say it happened this month. On Thursday, April 9, the Appellate Division, First Department affirmed a lower court ruling in favor of our client. The Appellate Division ruled that Justice Charles Ramos of Supreme Court, New York County had been correct to reopen our client's case and let it proceed. The following Tuesday, April 14, Justice Ramos granted our client summary judgment in the same case. So in the space of five days the New York courts ruled both that our client had a legitimate claim, and that the claim was not just legitimate, but a winner.

The case concerns ownership and control of the office building at 587 Fifth Avenue in midtown Manhattan. Justice Ramos's summary judgment order directed the defendant, the current 2/3 owner of the company that owns the building, to convey his interest to our client, the current 1/3 owner. As a result (assuming we weather an appeal successfully), our client will own and control the building outright.

The case arose from a "buy-sell" procedure. The building is owned by a limited liability company called Baruch LLC. Baruch was owned 2/3 by Asher Roshanzamir ("Asher") and 1/3 by Elyass Eshaghian ("Elliott"). Asher was Baruch's managing member. Baruch's LLC agreement has a number of interesting governance provisions, but for current purposes two are worth noting. First, Baruch cannot sell its assets without unanimous approval of all members. Second, the LLC agreement provides for a "buy-sell" procedure: either owner may offer to buy the other's interest, so long as he is also prepared to sell his own interest to the other owner at the same price if the other owner chooses.

On April 17, 2012, Asher sent Elliott a buy-sell notice. He offered to buy Elliott's 1/3 interest in Baruch for \$3 million, and deposited 10% of the purchase price in escrow. In the same notice, Asher advised Elliott that Elliott could elect to buy Asher's 2/3 interest for \$6 million. The deadline for responding to the notice was 45 days later, on June 1. On May 31, Elliott informed Asher that he was electing to buy Asher's 2/3 interest for \$6 million, and he deposited into escrow 10% of his purchase price. But Asher refused to sell. By the end of July it was clear that Asher couldn't be persuaded, so Elliott sued. He sought specific performance of the buy-sell (in other words, he wanted the Court to direct Asher to convey his interest to Elliott), a declaration of rights and an injunction.

The case got complicated very quickly. By the time the Court heard the matter in October 2012, there was a motion for a preliminary injunction, a motion by Asher's son to intervene in the case, and a

motion by Asher to dismiss the case. The court ended up dismissing the case on the grounds that Elliott had not himself supplied the money for his down payment on the buy-sell. Instead, he had borrowed it from his nephews and they had wired the money directly to the escrow agent. In the Court's view, that invalidated the down payment, so Elliott's election to buy was likewise invalid. I will not comment on the merits of this ruling. Elliott filed an appeal.

Elliott asked my firm to step in and handle the appeal. We agreed. Then, in March 2013, while we were working on the appellate brief, we learned that Baruch had been sued. Apparently, in March 2012 – a month before Asher sent Elliott the buy-sell notice, and seven months before the court appearance – Asher had caused Baruch to enter into a contract to sell the building to another company at a price notably higher than the value implied by the buy-sell. Asher's attorneys hadn't disclosed any of this to Justice Ramos when the argument was held in October 2012.

The buyer had sued Baruch to try to enforce the contract and buy the building. When Asher's lawyers moved to dismiss the buyer's lawsuit, we found that they had filed the contract in the court file. So we downloaded it and read it through. We found that it provided for Asher to commence the buy-sell procedure in order to attempt to buy Elliott's 1/3 interest in Baruch. The idea was that Asher would buy Elliott's interest and then, once Asher owned 100% of Baruch, he would cause Baruch to sell the building to the buyer. (Asher couldn't sell the building without Elliott's consent, so he needed to buy Elliott out in order to sell the building.) The really interesting part, though, is that the contract permitted Asher to take part of the buyer's down payment and use it as Asher's down payment on the buy-sell. In other words, Asher was using someone else's money for his own deposit – the precise thing he had earlier told Justice Ramos was enough to invalidate Elliott's deposit.

Armed with this new information, we asked Justice Ramos to reopen the case – which he did. Asher appealed that ruling. The Appellate Division decision that affirmed the order reopening the case was issued on April 9. That was victory number one.

Victory number two came in the lower court. While the appeal was pending we moved ahead with the case before Justice Ramos. In February of last year we moved for summary judgment – basically, we asked the Court to award Elliott judgment without a trial. Briefing went on for several months, then the Court heard oral argument and asked for supplemental submissions. Both sides made their last submissions in September 2014. Just five days after the Appellate Division ruling, Justice Ramos issued his Decision and Order granting Elliott summary judgment and declaring that Asher was required to sell his 2/3 interest in Baruch to Elliott. That was victory number two.

It has been a long slog, and Asher may yet appeal, but right now we are very pleased with the way things have gone. We'd rather have the client where he is now than where he was two years ago.

If you have any questions about this case or would like to see any of the litigation papers, feel free contact me via telephone at (212) 981-2326 or via email at sriback@wilkauslander.com.