CO-OP&CONDO
CASE LAW TRACKER
digest
COOPCONDOCASELAWTRACKER.COM
BROUGHT TO YOU BY HABITAT

ACCESS

150 E. 73RD ST. CORP. V. 145-149 E. 72ND ST. LLC
2022 NY SLIP OP 31798(U) (SUP. CT. N.Y. CNTY. JUNE 7, 2022)

In RPAPL 881 Proceeding, Court Determines License Fee Based on Terms Parties Had Previously Agreed on

SQUIB BY DAVID S. FITZHENRY, PARTNER, GANFER SHORE LEEDS & ZAUDERER LLP

OUTCOME: Decided for Petitioner Co-op

WHAT HAPPENED: The petitioner, an apartment corporation, brought a proceeding under Real Property Actions and Proceedings Law (RPAPL) §881 seeking access to the neighboring property so that it could perform façade work on its own building and remove existing violations that had been issued by the Department of Buildings. The petitioner and owner of the neighboring property had agreed to the amount of the license fees months earlier, but the parties were ultimately never able to finalize all of the terms of a license agreement. In this proceeding, the owner of the neighboring property for which access was sought, as the respondent, did not object to the petitioner's access to its property, but asserted that the petitioner should be ordered to pay retroactive license fees for the months that had passed since the time that the parties had almost reached an agreement, as well as reimbursement of its professional fees.

IN THE COURT: The court acknowledged that this was an unusual RPAPL 881 proceeding because both parties were in agreement that both the desired access and the work to be performed were necessary. The court granted access to the petitioner, and also determined the reasonable license fees to be paid to the respondent. The court determined the amount of license fees based upon the amounts the petitioner had agreed upon months earlier, finding that such amounts were reasonable because the parties had agreed upon them months earlier. The court also determined that because an agreement was ultimately never finalized between the parties, the payment of such fees would commence as of the time of access, and would not be

(continued on p. 2)

AUGUST 2022 CONTENTS

CO-OP & CONDO CASE LAW TRACKER DIGEST includes cases and squib commentary written by the Tracker's Advisory Panel and contributors, who are New York's leading co-op/condo practitioners. This issue covers court decisions from June 2022. For additional cases, visit https://coopcondocaselawtracker.com.

retroactive to the date on which an agreement was almost reached. In addition, the court declined to award either party reimbursement of their respective professional fees, as both parties had an opportunity to reach a settlement prior to the issuance of the court's decision.

TAKEAWAY

In an RPAPL 881 proceeding, the court can award reasonable license fees to a party, and in lieu of holding a hearing as to the reasonableness of a license fee, the court can look to amounts that the parties had previously agreed upon in principle, even when a license agreement was not ultimately executed by the parties.

ALTERATIONS

BRODIE V. BD. OF MGRS. OF THE ALDYN 2022 NY SLIP OP 31982(U) (SUP. CT. N.Y. CNTY. JUNE 24, 2022)

Alteration Agreement Didn't Specify Deadline for Completing Project

SQUIB BY MICHELLE P. QUINN, PARTNER, GALLET DREYER & BERKEY

OUTCOME: Decided for Plaintiff Condo Unit Owners

WHAT HAPPENED: Condominium unit owners had received permission for and began performing alterations in their unit in 2019. By the spring of 2022, the alterations had not been completed. Because the duration of the project exceeded the board's expectation, the board issued a "stop work notice," issued fines, and seized the unit owners' security deposit. The unit owners commenced an action for a permanent injunction to prevent the board from enforcing the "stop work order" and for breach of contract based on the assessment of unauthorized and excessive fines.

IN THE COURT: The plaintiffs sought a preliminary injunction requiring the board to permit them to complete the alterations, which were near completion, which was granted. The court emphasized the fact that the alteration agreement

(continued on p. 3)

Publisher: Carol J. Ott **Executive Editor:** Heather L. Stone **Production Director:** Chad Townsend
Librarian: Jeffrey Buckley **Database Content Manager:** Heather Hess
Associate Publisher: Bill Fink **Marketing Director:** Peggy Mullaney

the HABITAT group

Volume 2, Issue 3

SUBSCRIPTIONS: CO-OP & CONDO CASE LAW TRACKER DIGEST is published by The Habitat Group. Annual subscription rate to the database at www.co-opcondocaselawtracker.com and monthly digest: $498 for single user access; $1,992 for team access.

failed to fix a date for the completion of the project: The "Required Completion Date" was left blank. As it was solely in the board's interest to have clarity of that term, the consequence of the ambiguity was solely for the board and the condominium to bear.

The court further noted the irreparable harm that would be borne by the plaintiffs in the absence of the injunction, and held that they should be afforded time to complete the project, and in its discretion fixed its own deadline of November 30, 2022.

TAKEAWAY

If the duration of an alteration project is of concern to a board of a cooperative or condominium, care should be taken to ensure that all material information, including the specific deadline and consequences for failure to meet it, is clearly spelled out in the agreement. Even a seemingly minor mistake or unintentional oversight can have major consequences and a potentially significant impact on building operations.

ALTERATIONS

CHAN V. 907 CORP. 2022 NY SLIP OP 04117 (1ST DEP'T JUNE 28, 2022)

Co-op Board Can Order Shareholders to Shut Off Plumbing Lines They Installed

SQUIB BY STEWART E. WURTZEL, PRINCIPAL, TANE WATERMAN & WURTZEL

OUTCOME: Decided for Defendant Cooperative

This case is another example of a co-op board's business judgment authority when dealing with alterations in an apartment. A dispute arose in a 100-year-old building involving the combination of apartments and relocation of plumbing lines. The cooperative board had issued a directive that the plaintiff shut off a plumbing waste line that they had installed. The lower court directed the cooperative to lift that directive and to allow the plaintiff to use that water drain line.

The Appellate Division reversed the lower court and reinstated the shutoff. The court noted that the alteration agreement expressly authorized the cooperative to direct placement of pipes, had no limitation on where the co-op can direct pipes to be placed, and allowed the cooperative to suspend work for the shareholder's failure to comply with its directives. Similarly, the proprietary lease gave the cooperative discretion as to how the building, including the water supplies, were to be maintained. The court found that shutting off the waste line was not a breach of the cooperative's duty to provide wastewater, especially since the shareholders had another functioning bathroom that was not impacted by the drain shutoff. The court dismissed the plaintiffs' claims of breach of fiduciary duty, noting that the decision to reroute the waste line was made in good faith to avoid leaks in the 100-year-old pipes and joints.

TAKEAWAY

Well-drafted documents, particularly the alteration agreement, made it clear exactly what the cooperative's rights were with regard to controlling the alteration and what the shareholder was and was not permitted to do. Further, the board was able to demonstrate a sound basis for its decision, making it clear that the board was acting for a proper corporate purpose.

ALTERATIONS

PARC 56 LLC V. BD. OF MGRS. OF THE PARC VENDOME CONDO., 2022 NY SLIP OP 31818(U) (SUP. CT., N.Y. CNTY., JUNE 8, 2022)

Condo Board Waived Its Rights to Object to Alteration Agreement

SQUIB BY MICHAEL P. GRAFF, PRINCIPAL, GRAFF DISPUTE RESOLUTION

OUTCOME: Partial Summary Judgment granted to Plaintiff Unit Owner

WHAT HAPPENED: The plaintiff unit owner and condominium entered into an alteration agreement after the board reviewed the plans and specifications submitted, in accordance with the proposed lease of the unit. The court determined that the alteration agreement was binding. It was for the use previously approved by the board for the prior owner. The board argued that its managing agent sent the incorrect alteration agreement and that the correct alteration agreement was never signed. The court determined that the board never said a word for months, and thus waived its rights to now come back and require a different alteration agreement.

IN THE COURT: The history of this case prior to this motion may help in understanding the decision on this motion by the plaintiff, a unit owner, for rearmament or renewal of a motion for partial summary judgment.

In a prior interim order (2022 NY Slip Op 30549(U) (Sup. Ct. N.Y. Cnty. Feb. 16, 2022), *https://www.nycourts.gov/reporter/pdfs/2022/2022_30549.pdf)*, the court found the board "acted in bad faith in failing to exercise or waive the Right of First Refusal (ROFR)" of a lease of the commercial unit. It pocketed the lease until 15 months had gone by since it had received notice of the proposed lease and failed to act on it. The court held that the board indicated that the use of the commercial condominium was not acceptable, and it would not sign the forms needed to amend the certificate of occupancy for the requested use. The court found that puzzling because the very same use was approved for the unit's prior owner when it waived the ROFR.

In the instant motion, the court found the alteration agreement was deemed approved and binding, being for the same use the board previously approved for the prior owner of the commercial unit. The board did not say a word for months, waiving its rights to then come back and require a different alteration agreement. An issue of fact was found as to whether the board waived its ROFR. Fact issues remain as to whether board requests for further information were proper or whether they were evidence of the board's continued bad faith and breach of the governing documents. Further discovery was required.

An appeal, as well as a motion to reargue, both filed by the board, are pending in this case. In its motion to reargue the above decision, the board is seeking to delete the finding that: (1) it acted in bad faith; (2) the board falsely told the court that it did not know the location of the check for the alteration fee; and (3) the plaintiff need not indemnify the board for costs incurred in the alterations. The gravamen of the case appears to be who must bear the costs of implementing the alterations.

TAKEAWAY

Dealing with the ROFR on a sale or lease requires strict compliance with the condominium documents, particularly the time required to exercise (or else waive) the ROFR and request supplemental information. Punctiliousness is even more important in applications for the approval of alteration agreements. Inattention to detail may result in a board's waiver of the right to reject or request further documentation. The reason for greater concern in respect to alteration agreements is that, while exercise of a ROFR is rare, issues with alteration agreements are commonplace and potential damage can result from failure to timely object. The board's request for supplemental information is discretionary and must be exercised with good faith. In such cases, the board must deal honestly with all concerned, which the court found was not the case here. The unusual conduct attributed to the board in this case suggests that there are issues not fully disclosed in the decision.

ALTERATIONS

176 W. 87TH ST. OWNERS CORP. V. GUERICO 2022 NY SLIP OP 31999(U) (SUP. CT. N.Y. CNTY. JUNE 28, 2022)

Gas Leak During Shareholder's Renovation Damaged the Building's Entire Gas System

SQUIB BY STEWART E. WURTZEL, PRINCIPAL, TANE WATERMAN & WURTZEL

OUTCOME: Decided for Plaintiff Cooperative

This is a case that once again demonstrates how complicated litigation can be when damage occurs to the building during an alteration. Defendant shareholders entered into an alteration agreement with the cooperative allowing the shareholders to undertake construction and renovation in their two apartments. As a result of a gas line and gas meter allegedly being removed by the shareholders' contractor, a gas leak occurred and the entire building's gas delivery system was damaged. The cooperative sued the shareholders, the shareholders' architect, the general contractor, and the company that performed the plumbing work for the cost of replacing the entire gas system in the building. The architects moved for summary judgment to dismiss the complaint, and the general contractor moved to amend its answer to assert crossclaims for indemnification and contribution against all other defendants.

The architect sought dismissal, alleging it had no duty to the cooperative as it was retained by the shareholders and it performed no work relating to the plumbing. The court found a triable issue of fact existed as to whether the architect oversaw the construction, including oversight of the work on the gas meter, and therefore denied the motion to dismiss the negligence and negligent supervision claims.

The general contractor's motion for leave to amend its answer to assert a claim of indemnification against all other defendants was denied because indemnification is not available to a party who has actually participated in the wrongdoing. However, it was allowed to amend the answer to assert claims for contribution from the other defendants.

TAKEAWAY

Well-drafted documents, particularly the alteration agreement, will hopefully make clear that the shareholder is responsible for the damage their contractors caused. As with many multi-party lawsuits, the legal fees for the cooperative are likely to be substantial and the ability to recover those fees, as well as the cost of repairs, will depend on the language of the alteration agreement.

BOOKS & RECORDS

6 W. 20TH ST. TENANTS CORP. V. DEZERTZOV 2022 NY SLIP OP 50529(U) (APP. TERM 1ST DEP'T JUNE 27, 2022)

Nonpayment Proceeding Dismissed When Co-op Can't Prove Defendant Was the Shareholder

SQUIB BY ANDREW P. BRUCKER, PARTNER, ARMSTRONG TEASDALE

OUTCOME: Decided for Defendant Co-op Shareholder

WHAT HAPPENED: A nonpayment proceeding was brought by a cooperative corporation against a tenant-shareholder. However, though the co-op claimed there was a proprietary lease between the parties, the co-op admitted at trial that it was not in possession of any lease, any share certificate, any transfer agreement, or any other direct evidence of any lease agreement.

IN THE COURT: The court found that there was no direct evidence of a leasing arrangement. Further, the "circumstantial" evidence of such a leasing agreement provided to the court lacked credibility and was otherwise contradictory, unreliable, and inconsistent according to the court. Nor was there proof that the individual defendants ever paid maintenance to the co-op.

(continued on p. 6)

Therefore, the court dismissed the action against the defendant, as the court held that the co-op failed to make out a prima facie case.

On appeal, the Appellate Division held that the lower court's decision should be affirmed. The court stated that the trial court's fact-finding decision should not be disturbed on appeal unless that court's conclusions could not have been reached under any fair interpretation of the evidence.

TAKEAWAY

In any action against a cooperative shareholder, the corporation must at the very least show the court that there is a lease. Without this, the lawsuit is flawed. But the bigger lesson here is that the corporation must be careful and keep accurate and complete records. Though this is often delegated to management, the board should make sure that these records are kept. There should be a file for each shareholder with an original of the lease with the shareholder, copies of correspondence (i.e., complaints) sent to the shareholder, a copy of the stock certificate, the recognition agreement with the shareholder's lender, etc. It might be wise for a review of all records on a regular basis in order to avoid any problems in the future.

BUSINESS JUDGMENT RULE

FITTERMAN V. SEWARD PARK HOUS. CORP. 2022 NY SLIP OP 31911(U) (SUP. CT. N.Y. CNTY. JUNE 17, 2022)

Co-op's Decision to Deny Two Transfer Requests Protected by Business Judgment Rule

SQUIB BY WILLIAM D. McCRACKEN, PARTNER, GANFER SHORE LEEDS & ZAUDERER LLP

OUTCOME: Decided for Defendant Co-op Corporation

WHAT HAPPENED: The petitioner in this case is a shareholder of the respondent apartment corporation. The shareholder submitted two separate transfer applications to the board of directors—one, to purchase a neighboring apartment in the building, and two, to add the shareholder's son to the existing apartment's stock and lease. Both transfers required board approval. The board denied both applications without explanation. The shareholder then filed this Article 78 proceeding seeking to annul the two adverse decisions and compel the two transfers.

IN THE COURT: The court denied the petition and dismissed the proceeding. Here, as in most cooperative proprietary leases, the cooperative had an absolute right to grant or deny consent to transfer of ownership of apartments (with certain exceptions that did not apply here). It is well settled in these cases that "in the absence of illegal discrimination, a cooperative corporation is not restricted in withholding its consent to the transfer [of] an apartment." Thus, the board's decision was protected by the Business Judgment Rule, and the petitioner failed in his burden to submit evidence overcoming the rule's presumption that the board had acted in good faith for a proper purpose.

The petitioner also sought to compel the board to provide "a written explanation of the reason it denied his request," arguing that the board's refusal to do so was evidence of a "personal animus" towards him. The court rejected that argument, however, reasoning that the petitioner was merely attempting to shift the burden of proof to the board.

TAKEAWAY

When reviewing proposed transfers, the board of a cooperative corporation generally has almost absolute discretion to approve or withhold consent. As long as the board's decision is untainted by evidence of discrimination, self-dealing, or misconduct by board members, courts will apply the Business Judgment Rule and refuse to second-guess the cooperative's decision or require that it explain itself.

BYLAWS/HOUSE RULES

BD. OF MGRS. OF RIO THE CONDO. AND SPA V. HIRSH NO. 153857/2022 (SUP. CT. N.Y. CNTY. JUNE 14, 2022) NYSCEF NO. 30

In Lawsuit to Enforce Rules, Condo Gets Preliminary Injunction Barring Unit Owner from Use of Pool

SQUIB BY THOMAS P. HIGGINS, PARTNER, HIGGINS & TRIPPETT

OUTCOME: Decided for Plaintiff Condominium

WHAT HAPPENED: The plaintiff, a Manhattan condominium, sued the defendant unit owner for violating the house rules regarding use of the fitness center, which included a pool, gym, and locker rooms. The defendant, an elderly woman, was said to have engaged in "outrageous" and "unsanitary" behavior that created a "nuisance" for other unit owners, making it "utterly impossible" for others to peacefully use and enjoy the fitness center. The plaintiff sought a preliminary injunction, barring the defendant from using or accessing the fitness center, and also barring her from communicating, orally or in writing, with any staff member about accessing the fitness center. In support of the motion for the injunction, the plaintiff contended in affidavits that the defendant abused the pool reservation system, wore improper attire, failed to sanitize machines, did not shower before using the pool, failed to wear a COVID-19 face mask, made excessive noise, flooded the showers, defecated in the pool, struck a lifeguard on duty, and entered the men's instead of the women's locker room. After being denied access, the defendant was said to have obtained the code to the fitness center from others, forced herself into the fitness center as others exited, pressured building staff over access, and entered a board member's apartment to demand access to the fitness center. The defendant defaulted on the motion, submitting nothing to contradict the factual assertions of the plaintiff.

IN THE COURT: The court acknowledged the drastic nature of a preliminary injunction, but nevertheless granted the plaintiff's motion on default, barring the defendant from accessing the pool, fitness center, locker rooms, and related areas. The court declined to prevent the defendant from approaching or communicating with the staff.

TAKEAWAY

Tasked with making sure all unit owners have reasonable use of the condo's pool and amenities, and assuming the factual allegations are true, one can understand why the board went to court and sought such a drastic remedy. One can also understand why the court granted the relief, since there were no contrary facts submitted in opposition. In this light, the decision seems well warranted, and it could be useful precedent against other unit owners who flout a condo's rules and hinder the use of amenities by others. And yet, other filings in the case indicate that the defendant was 85, living alone without familial or community support, and suffering from dementia, memory loss, and confusion. Litigation is a blunt instrument, and it sometimes ends in an unfortunate result, even when warranted under the law.

CHARGES/FEES

210 E. 73RD OWNERS CORP. V. SIMONSON NO. 159743/2021 (SUP. CT. N.Y. CNTY. JUNE 3, 2022) NYSCEF NO. 22

Co-op Brings Nonpayment Action in Supreme Court, not in Landlord/Tenant Proceeding

SQUIB BY DALE DEGENSHEIN, PARTNER, ARMSTRONG TEASDALE

OUTCOME: Decided for Plaintiff Co-op Corporation

Plaintiff cooperative corporation brought an action for money damages against its shareholders for nonpayment of maintenance and late and legal fees. The defendants denied that the amounts claimed were proper, but offered no affirmative defenses. There had been a previous landlord/tenant action commenced by the corporation, which was discontinued when monies demanded in the petition were paid in full. Here, the shareholders challenged the amount due, but did not dispute that maintenance was due.

Accordingly, the court awarded summary judgment to the cooperative and ordered a trial on the amount owed.

TAKEAWAY

The corporation here commenced a money action after it began, and then dismissed, a landlord/tenant action in accordance with the dictates of the Housing Stability Tenant Protection Act (HSTPA). The statute implemented certain rules regarding the maintenance of a landlord/tenant proceeding, including what monies can be recovered by a landlord, including cooperatives. It may be that, given the challenges posed by these rules, we will begin to see more actions for cooperative maintenance brought in Supreme or Civil Court.

CHARGES/FEES

BD. OF MGRS. OF THE COBBLESTONE LOFTS CONDO. V. MCMAHON
2022 NY SLIP OP 31882(U) (SUP. CT. N.Y. CNTY. JUNE 10, 2022)

Court Won't Dismiss Case Based on Co-op's Delay in Seeking Unit Owners' Arrears

SQUIB BY JEREMY S. HANKIN, PARTNER, HANKIN & MAZEL

OUTCOME: Decided against Defendant Unit Owners

WHAT HAPPENED: The plaintiff condo alleged that the unit owner defendants failed to pay the common charges and assessments required by the condominium's bylaws and sued the unit owners for $930,532.59 and foreclosure of the units, on which the condo had recorded liens. A prior pending litigation between the parties commenced in 2014 was ready for trial at the time this action was commenced. The unit owner defendants moved to dismiss the newly commenced action, or, alternatively, stay the action, pending the determination of the 2014 action. The court denied the unit owners' motion to dismiss.

IN THE COURT: The basis for the defendants' motion to dismiss was: (i) laches, inasmuch as the common charges sued for stem back to 2012; and (ii) prior action pending. The court held that, with respect to the laches argument, the defendants failed to demonstrate any prejudice attributable to the condo's delay in commencing the action; indeed, the court found that inasmuch as some of the arrears are barred by the applicable statute of limitations, the delay by the condo actually benefited the unit owners.

The court held, with respect to the prior action pending argument, that the prior action involved some different parties and issues; therefore, there was no real risk of inconsistent rulings. Moreover, the court reasoned that because the first action was ready for trial, any possible overlapping issues in the two actions would be resolved in the first action long before they would be reached in this action.

(continued on p. 9)

The reasoning the court used to deny the unit owners motion to dismiss the action based on laches and prior action pending is the same reasoning the court used to deny their application for a stay of the action.

TAKEAWAY

In order to establish a laches defense, a party must demonstrate prejudice attributable to the delay in commencing legal action, and in order to obtain a stay of one action based upon another prior pending action, the prior action must resolve some or all issues such that there is a risk of the inconsistent rulings from the court.

COMMERCIAL UNIT

ONE PLAZA LLC V. BD. OF MGRS. OF PARK CIRCLE CONDOS.

NO. 500968/2020 (SUP. CT. KINGS CNTY. JAN. 12, 2022) NYSCEF NO. 42

Preliminary Injunction Granted to Garage Operator; Board's Motion to Compel Arbitration Denied

SQUIB BY JOSEPH GOLJAN, ASSOCIATE, BRAVERMAN GREENSPUN

OUTCOME: Decided for Plaintiff Parking Garage Condo Unit Owner

The plaintiff, the owner/operator of the parking garage unit of the condominium, brought an action against the board of managers seeking to preliminarily enjoin the board's ingress and egress through the garage to and from the condominium building abutting the garage. The plaintiff also seeks damages for breach of contract and breach of the Condominium Act. The board moved to compel arbitration and stay the case pursuant to CPLR 7503.

The court denied the defendants' motion to compel arbitration. The court found that the bylaw provision cited by the board was ambiguous insofar as it did not apply to a dispute between a "Unit Owner" and the "Board of Managers" itself, as those terms are defined in the bylaws.

The court also granted the plaintiff's motion for a preliminary injunction and barred the "board of managers"—the only named defendant—from accessing the garage unit pending the determination of the action.

"To warrant a preliminary injunction, a party must demonstrate (1) a likelihood of success on the merits of the action; (2) the danger of irreparable injury in the absence of preliminary injunctive relief; and (3) a balance of equities in favor of the moving party[.]" In holding that all such elements were satisfied, the court noted that seeking compensation for past use does not bar an application for an injunction to enjoin use going forward, and that the threat of future trespass warranted an injunction.

COMMERCIAL UNIT

LUCKY CASHEW ASSOCS., L.P. V. BD. OF MGRS. OF THE 125 E. 4TH ST. CONDO.

2022 NY SLIP OP 32006(U) (SUP. CT. N.Y. CNTY. JUNE 28, 2022)

Trial Needed to Determine Whether Commercial Unit Owner Must Bear Entire Cost of Repairing Sidewalk

SQUIB BY ANDREW P. BRUCKER, PARTNER, ARMSTRONG TEASDALE

OUTCOME: Decided for Defendant Condo Board

WHAT HAPPENED: The plaintiff owned the one commercial unit in a six-unit condominium (the balance of the units being residences). A portion of the sidewalk adjoining the condominium collapsed, and the condominium made the repairs. However, the condominium charged the entire cost of the repairs ($259,059.44) to the commercial unit owner.

The unit owner claimed that this was incorrect, and that the expense should be an obligation of the entire condominium, of which the commercial unit owner was responsible for only 14.22 percent. The commercial unit owner claimed that the collapse involved common elements and therefore

(continued on p. 10)

the entire condominium should pay. The condominium board, on the other hand, claimed that beams and supports that held up the sidewalk were actually in the vault space located under the sidewalk, and since the vault space was used exclusively by the commercial unit owner's tenant, the repair should not be a common expense. The board charged the commercial unit owner the full amount, and when unpaid, filed a common charge lien against the unit.

IN THE COURT: The plaintiff sued to have the lien removed, and asked that the court determine that the repairs were the responsibility of the condominium (and not just the commercial unit). The plaintiff made a motion for summary judgment, and for the dismissal of the condominium's counterclaims. Both motions were dismissed. The court determined that the plaintiff (the commercial unit owner) did not present enough facts to indicate that the deteriorated beams which caused the collapse were the responsibility of the condo. The court felt that it was unclear, prior to trial, to determine who exactly was responsible for maintaining the supports, and therefore ordered the trial to determine who was responsible for the repairs.

TAKEAWAY

Careful reading of the decision seems to indicate that the engineers in the case may not have presented a report that was convincing. If a professional's report and opinion are presented to the court, the attorney should be confident that it presents its point of view accurately, to the point, and convincingly. Not only will such report be carefully scrutinized by the court, but without question, there will be a contrary report provided to the court by the opposing party.

CONTRACTS

TANGLEWOOD TERRACE AT SMITHTOWN CORP. V. UP RITE CONSTR. OF LONG ISLAND CORP.

2022 NY SLIP OP 03541 (2D DEP'T JUNE 1, 2022)

Court Dismisses Co-op's Claims Against Contractor for Allegedly Faulty Façade Work

SQUIB BY JOSEPH GOLJAN, ASSOCIATE, BRAVERMAN GREENSPUN

OUTCOME: Decided for Defendant Contractor

A cooperative commenced an action against a contractor, asserting various claims for damages in connection with allegations that that the contractor improperly performed façade work on the cooperative's three buildings, resulting in water infiltration and damage to the buildings.

The Supreme Court granted the contractor's motion for summary judgment and dismissed the cooperative's claims for breach of contract, breach of warranty, and negligence. The court held that the contractor demonstrated that it had properly performed the work required under the contract and in conformance with the architectural plans, and that the damages to the premises for which the cooperative sought to recover were not related to the contractor's work, but rather were a product of the initial design and construction of the buildings. The court held that the cooperative failed to raise a triable issue of fact in opposition to the motion because the affidavit provided by the cooperative's expert was "conclusory and speculative" and failed to address the contractor's *prima facie* evidentiary showing.

The Supreme Court also granted the contractor's motion for summary judgment dismissing the cooperative's fraud claim as duplicative of its breach of contract claim.

On appeal, the Appellate Division, Second Department affirmed the lower court's order and judgment in favor of the contractor.

DISCOVERY

BARBIERE V. 175 W. 12TH ST. CONDO. 2022 NY SLIP OP 31783(U) (SUP. CT. N.Y. CNTY. JUNE 2, 2022)

Court Won't Sanction Board Members for Inadvertently Deleting Emails

SQUIB BY KENNETH R. JACOBS, PARTNER, SMITH BUSS JACOBS

OUTCOME: Decided for Defendant Condo Board Members

This case has been actively contested for over three years so far. The plaintiffs made numerous claims, including allegations of bad faith concealment of information by the board of managers. To date the parties have conducted numerous depositions, and the plaintiffs have made extensive demands for document "discovery." Document discovery includes both paper and electronic communications, such as emails. The defendants contended that they had produced all relevant records, but in depositions, certain board members disclosed that they had deleted some emails from their personal accounts. Individual defendants gave various reasons, including their failure to receive or understand the implications of a "litigation hold" requirement that all documents and records be preserved; their habit of deleting emails; or their belief that relevant emails were stored with the managing agent.

As a result, the plaintiffs sought: (a) sanctions against the individual defendants for "spoliation" (the destruction or deliberate alteration of evidence, or the negligent failure to preserve evidence); and (b) to require the defendants either to provide an affidavit detailing their efforts to search records and affirming that they have provided all relevant records, or to re-review all their files to produce additional records.

The court denied the plaintiff's motion for sanctions. The court acknowledged that some records had been destroyed or deleted, but "to jump to plaintiff's conclusion that this somehow constitutes spoliation requires the court to ignore the entire context of this case... Employing scorched-earth tactics, plaintiffs now want sanctions against volunteer Board members, non-attorneys, who cleaned out their inboxes in the normal course of their lives.... it is impossible to see the instant motion as anything other than an effort to harass defendants." The court also observed that the plaintiffs were challenging the actions taken by the board as a whole, not by individual board members acting on their own, so the motivations of or compliance by individual defendants with particular discovery demands was substantially irrelevant.

TAKEAWAY

Two points in the court's decision stand out for this writer. First, volunteer board members are entitled to deference—even protection—when confronted with aggressive litigation tactics designed primarily to wear them down rather than to reach a conclusion in a legal action.

The court recognized when non-attorney defendants had made good faith efforts to respond to customary document demands, and rejected "scorched-earth" litigation tactics as a result. Second, the court properly focused on the actions of the board as a whole, not the views of individual board members, in communicating (or concealing) information to unit owners. Barring potential civil rights violations, individual board members are entitled to express their views internally as to the proper board action—even if those views are negligent, ignorant, or flat wrong—so long as the board, acting collectively, complies with applicable law.

The underlying case is far from resolution at this point. Readers should stay tuned for additional decisions on the substantive issues in the dispute if the two sides continue to play "hardball."

ELECTIONS

WYCHE V. HAYWOOD-DIAZ 2022 NY SLIP OP 03733 (2D DEP'T JUNE 8, 2022)

Special Shareholders Meeting to Hold Board Elections Wasn't Conducted Properly

SQUIB BY ANNA GUILIANO, PARTNER, BORAH GOLDSTEIN ALTSCHULER NAHINS & GOIDEL

OUTCOME: Decided for Co-op Board Member Appellants

WHAT HAPPENED: In January 2018 an outgoing board president appointed several individuals to the board of directors of this Brooklyn HDFC co-op, notably with no notice of election, or an actual election. Eight months later, with assistance from HPD and the Neighborhood Housing Service, a special shareholders meeting to elect a new board was held.

After the board election, Deitra Wyche and Marie Davis, members of the new board, filed a petition alleging that the "appointed to the board" individuals had engaged in certain malfeasance in their capacity as board members; refused to turn over the corporate books, records, and documents; and had not been duly elected. They also sought a "writ of prohibition" to keep the appointed individuals from accessing the co-op's bank accounts, collecting maintenance fees and rent, or exercising any control over the co-op.

IN THE COURT: In January 2019, the Supreme Court granted the Wyche and Davis petition. The individuals who had been appointed to the board appealed the decision. The Appellate Division reversed the Supreme Court's judgment and denied the petition from the new board members, finding that the Supreme Court erred when it granted the prohibition remedy for this particular instance. It also found that the co-op failed to produce evidence that the August special shareholders meeting to hold board elections was conducted in accordance with the HDFC's bylaws.

TAKEAWAY

For shareholders who are disgruntled with the current board and want a new election, there are mechanisms for doing so. But if it's not according to your co-op's bylaws or New York's Business Corporation Law, be warned. A court of law will not recognize the election, you will have spent an enormous amount of time (and potentially legal fees), and the old board will remain in place.

FIDUCIARY DUTY

67-69 ST. NICHOLAS AVE. HOUS. DEV. FUND CORP. V. GREEN 2022 NY SLIP OP 04087 (1ST DEP'T JUNE 23, 2022)

"Sweetheart Lease" Declared Void as Self-Dealing Transaction by Former Co-op President

SQUIB BY SCOTT J. PASHMAN, MEMBER, COZEN O'CONNOR

OUTCOME: Decided for Plaintiff Co-op Corporation

WHAT HAPPENED: The board of a South Harlem HDFC co-op engaged in a legal fight over its commercial space. In 2004, when the board president was Siwana Green, the co-op issued a lease for the commercial space to Thomas Green, her husband, and their partnership "A Cup of Harlem." It was a 99-year sweetheart lease at $700 per month with an option to renew for an additional 10 years at $800 per month. The Greens sublet this space for 10 years (2009 through 2019) at $2,500 per month to Antonio Contreras, who operated a hair salon, renewed the sublease at $2,800 for an additional five years, and netted nearly $350,000 in profit over this period.

In 2018, the shareholders voted out Green and her board. The election was contested, and the board successfully defended it in court. The new board discovered the lease and sublease and in May 2019 sued the Greens and A Cup Of Harlem to void the sweetheart lease and recover damages for president Green's breach of fiduciary duty. The co-op lost this round when the Supreme Court denied the co-op's motion for summary judgment.

(continued on p. 13)

IN THE COURT: The co-op appealed, and the Appellate Division's First Department unanimously reversed the order of the Supreme Court, holding that the lease was void. The court found that the lease was voidable under Business Corporation Law §713(b) because it had not been voted on by a majority of disinterested directors. The burden was on the Greens to show affirmatively that the transaction was otherwise fair and reasonable to the co-op, and they failed to do so. The co-op submitted an undisputed affidavit by a former board member establishing that he was elected to a one-year term in February 2004, that he only learned of the lease in 2018 after Green was removed from the board, and that he never would have approved a lease with such "outlandish" terms. The court also found that Green had breached her fiduciary duty of loyalty to the co-op by diverting a corporate opportunity to lease the commercial space to a tenant at the fair market rate.

TAKEAWAY

This case is a cautionary tale. Individuals who serve as members of a cooperative board owe a fiduciary duty to act in the best interests of the corporation. The record in this case shows that the defendant, Siwana Green, together with at least one relative who also served on the board until they were voted out in 2018, succeeded at enriching themselves while failing to ensure that the co-op paid the City of New York more than $1 million for real estate taxes and water charges, resulting in a foreclosure proceeding and leaving the building in dire financial straits.

INJUNCTION

MONTGOMERY V. 215 CHRYSTIE LLC 2022 NY SLIP OP 67824(U) (1ST DEP'T JUNE 23, 2022)

Motion to Temporarily Enjoin Defendants Pending Appeal from "Perpetrating Sound" into Plaintiff's Apartment Denied

SQUIB BY SCOTT J. PASHMAN, MEMBER, COZEN O'CONNOR

OUTCOME: Decided for Co-Defendants Sponsor and Condo Board

The plaintiff owns Apartment 26E at 215 Chrystie Condominium located at 215 Chrystie Street on Manhattan's Lower East Side. The plaintiff purchased her unit in December 2016 for $7,250,000 before the building was constructed. Apartment 26E is actually located on the 19th floor of the building, directly above a rooftop bar and live music venue on the top floor of Ian Shrager's 367-room PUBLIC Hotel. The condominium Offering Plan, which was incorporated by reference into the plaintiff's purchase agreement, warned that potential purchasers may experience light, sound, and similar occurrences one would reasonably expect to encounter living on top of an operating hotel in a densely populated urban area.

In October 2020, the plaintiff brought suit against the sponsor and the condominium board alleging violations of the New York City Noise Code, nuisance, and related claims resulting from mechanical noise emitting from below into Apartment 26E. Early in the case, the plaintiff moved for a preliminary injunction to halt the noise. In an order later affirmed on appeal, the Supreme Court denied that application because the requested injunction was tantamount to the ultimate relief sought in the action.

In December 2021, the plaintiff again moved for a preliminary injunction and filed an amended complaint to stop the "perpetration of noise" into Apartment 26E from the mechanical room or from the hotel's dining and entertainment areas below. Once again, the Supreme Court denied the motion on the grounds that any possible harm was compensable by measurable money damages and therefore not irreparable, as required to obtain injunctive relief. In addition, the court found the balance of equities as between one individual who mostly resided elsewhere and an operating hotel in New York City tipped in favor of the defendants.

The plaintiff appealed that order and moved for a preliminary injunction before the Appellate Division. In a typically brief order, the court ordered that the motion is denied. The plaintiff's appeal remains pending.

TAKEAWAY

Caveat emptor, Latin for "Let the buyer beware," still applies in the market for luxury condominiums in mixed-use buildings. Like the plaintiff in this case, buyers who knowingly purchase in a building that houses hotel, restaurant, bar, and club operations may find little judicial sympathy for noise nuisance claims.

LICENSES

STOLZMAN V. 210 RIVERSIDE TENANTS, INC. 2022 NY SLIP OP 31852(U) (SUP. CT. N.Y. CNTY. JUNE 9, 2022)

Trial Needed to Determine Whether License Agreement Gives Shareholder Right to Replace Rooftop AC Unit

SQUIB BY JEREMY S. HANKIN, PARTNER, HANKIN & MAZEL

OUTCOME: Decided against Movant Plaintiff

WHAT HAPPENED: This action involves a disagreement between a co-op shareholder and the co-op over the scope and intent under a license agreement of the shareholder's right to replace an existing air conditioner, whose useful life was nearing its end, on the roof of the co-op building. The court determined on a summary judgment motion that the terms of the license agreement were ambiguous and, therefore, those terms could not be determined as a matter of law on a summary judgment motion but were more properly determined by a jury after a trial.

IN THE COURT: The co-op granted the shareholder's predecessor-in-interest a license to use a 20 square foot space on the roof of the co-op for an AC unit. The original AC unit was approaching the end of its useful life. The dispute was whether the license agreement permitted the current shareholder to use only the existing AC unit or remove and install a new AC unit. After discovery, the shareholder moved for summary judgment on the issue.

In denying the shareholder's motion for summary judgment, the court held the that the text of the agreement may reasonably be read as permitting only use of the existing AC unit, and also permitting both use of the existing unit and its replacement with a new unit. Therefore, the license agreement is ambiguous. The court therefore concluded that extrinsic evidence must be examined in order to determine the parties' intent. However, the court was not persuaded that the extrinsic evidence presented on the summary judgment motion established that the shareholder's reading of the license agreement was correct "as a matter of law." Accordingly, summary judgment was denied as the court concluded that the issue of the intent of the parties was more properly determined by a jury after trial.

TAKEAWAY

License agreements must be carefully drafted to clearly and expressly reflect the intent of the parties especially in terms of the term of the agreement, its revocability by either party, and the terms of use.

NUISANCE

O'HARA V. BD. OF DIRS. OF THE PARK AVE. & SEVENTY-SEVENTH ST. CORP.
2022 NY SLIP OP 03872 (1ST DEP'T JUNE 14, 2022)

Co-op Owner's Claims Based on Neighbor's Noisy, Jumping Kids Are Trimmed, But Complaint Survives

SQUIB BY THOMAS P. HIGGINS, PARTNER, HIGGINS & TRIPPETT

OUTCOME: Decided for Defendants in part

WHAT HAPPENED: Based on the alleged noise and stomping caused by a neighbor's children, the owners of a Manhattan cooperative apartment sued their upstairs neighbors, the cooperative corporation, and the board of directors. Against the neighbors, the complaint alleged that the jumping and noise constituted a nuisance that affected the health of one plaintiff and caused structural cracks in the walls and ceiling of the plaintiffs' apartment. The plaintiffs also claimed the neighbors breached their own proprietary lease by damaging the plaintiffs' apartment and failing to abide by the co-op's house rules. Against the co-op and board, the plaintiffs asserted

(continued on p. 15)

that the board failed to investigate the matter, which constituted unequal treatment of shareholders, a dereliction of the board's duties, and a breach of fiduciary duty. The plaintiffs also asserted that the proprietary lease was breached by the co-op because it was responsible for walls and ceilings of the plaintiffs' apartment, and also that the co-op had an obligation to enforce the house rules against the neighbors. Finally, the complaint alleged that the noise and stomping violated the warranty of habitability.

The defendants moved to dismiss the complaint, but the trial court largely denied the motion. The defendants appealed.

IN THE COURT: The appellate court modified the trial court's order in part, on the law, and granted in part the motions to dismiss of the neighbors, the co-op, and the board. For the neighbors, the court found that the complaint stated claims for nuisance based on allegations of noise and physical damage. But the contract claims against the neighbors, those based on the proprietary lease, were legally deficient. The plaintiffs were not third-party beneficiaries of their neighbors' proprietary lease, and so the plaintiffs had no right to enforce the lease's terms against the neighbors. Regarding the board, the breach of fiduciary claim was insufficient as a matter of law, since the board members were not alleged to have acted outside their official capacities.

With regard to the co-op, the plaintiffs stated a valid claim for breach of the provisions of the proprietary lease regarding the condition of the ceilings and walls. But the co-op could not be held liable for the neighbor's alleged breach of the house rules, as the proprietary lease expressly said the co-op cannot be liable for the actions of other shareholders. Finally, the claim against the co-op for breach of the warranty of habitability stands, but only insofar as it relates to the alleged refusal to repair structural damage and cracks. The noise allegations were not so excessive as to deprive the plaintiffs of the essential functions of a residence, and so the warranty of habitability was not breached as a matter of law.

TAKEAWAY

Kids can be noisy, but New York City apartment buildings have always housed children. I was a kid in Stuyvesant Town about a million years ago, and my sisters and I surely made a ruckus. Noise is one of those things a New Yorker must expect and tolerate; you're not living in the Catskills. But cracks in the ceiling and walls are another thing entirely, and no one should have to tolerate damage to their apartment. It seems it would take a lot of jumping to cause cracking, so it will be interesting to see if the allegations of the complaint, which had to be deemed true by the trial and appellate courts, turn out to be true.

NUISANCE

SILVERMAN V. PARK TOWER TENANTS CORP. 2022 NY SLIP OP 03581 (1ST DEP'T JUNE 2, 2022)

Noise Complaint Leads to Counterclaims of Harassment, Wrongful Termination

SQUIB BY DALE DEGENSHEIN, PARTNER, ARMSTRONG TEASDALE

OUTCOME: Decided for Defendant Co-op Shareholders

This case involves neighbors and their cooperative corporation. The court consolidated two actions for discovery and trial. In one, the Toussies (defendants here) commenced an action against the corporation, essentially alleging that the corporation was wrongfully attempting to terminate their proprietary lease based on false complaints of noise.

In this case, Silverman, who lives next door to the Toussies, brought this action claiming that the Toussie's daughter, Danielle, plays loud music, slams her door, and that the Toussies (parents and daughter) engage in other harassing conduct. Silverman claims nuisance, intentional infliction of emotional distress, negligent infliction of emotional distress, and seeks injunctive relief. Silverman also seeks claims against the corporation.

The Toussie defendants counterclaimed for intentional infliction of emotional distress, negligent infliction of emotional distress, injunctive relief, and they name Mei Mak, another resident of the floor,

(continued on p. 16)

in their counterclaims. While the court's decision does not mention it, the record shows that Mak is a member of the corporation's board of directors. Mak made a pre-answer motion to dismiss all claims against her.

Toussie's first claim is that Silverman, in concert with Mak, subjected Danielle to a campaign of harassment and, among other things, falsely claimed noise, so that the corporation would take action against her. Indeed, based on what Toussie alleges are false claims, the corporation issued the first of a total of three notices of objectionable conduct. Danielle claims that she lodged many complaints about Mak.

Toussie alleges that Silverman and Mak spied on Danielle and gained unauthorized access to her Instagram account to track her. Mak also allegedly confronted and intimidated Danielle, making her feel unsafe. The Toussies claim they live in fear that Mak will continue to make false claims and that Silverman and Mak engaged in a deliberate effort to cause the corporation to terminate the Toussies' lease.

Mak claims that the Toussies made only trivial and conclusory allegations against her, none of which would allow the court to sustain claims against her.

The court discussed the legal elements of the claims. As summed up by the appellate court, the claims alleged a three-year pattern of conduct in which Mak, in concert with Silverman, engaged in a deliberate, systematic, and malicious campaign of harassment and intimidation. The allegations, cumulatively, satisfy the outrageousness requirement for intentional infliction of emotional distress. Accordingly, the court determined that, viewed in the light most favorable to Toussie (as it must), the claims reflect that Mak's acts were deliberate. There was nothing to show that they were not systematic and malicious. Toussies' claim for negligent infliction of emotional distress was dismissed, but Mak did not sustain her burden of demonstrating that the facts do not state a cause of action for intentional infliction of emotional distress.

Mak's motion to dismiss the claim for a permanent injunction was also denied.

TAKEAWAY

This appears to be a case of neighbors at war with one another, and while the cooperative is not a part of this motion practice, it is clearly involved in two litigations. There is a lot we don't know in this case, but when complaints about noise are made, it is often prudent for the corporation to make sure a member of the building staff is contacted to confirm the noise. We also don't know whether Mak recused herself from decisions concerning Silverman and Toussie.

OWNERSHIP

RESIDENTIAL BD. OF MGRS. OF WALKER TOWER CONDO. V. GOTHAM TOWER LLC

2022 NY SLIP OP 31918(U) (SUP. CT. N.Y. CNTY. JUNE 17, 2022)

Condo Board Cannot Unwind Transaction to Exercise Right of First Refusal

SQUIB BY WILLIAM D. McCRACKEN, PARTNER, GANFER SHORE LEEDS & ZAUDERER LLP

OUTCOME: Decided for Defendants Unit Owner and Lender

WHAT HAPPENED: Under most condominium governing documents, the board of managers has what is known as a "right of first refusal," whereby any unit owner intending to sell their apartment to a third party has to first offer to sell the unit to the board of managers on the same terms and conditions as the third-party proposal. This right of first refusal, while not often exercised, gives the board some measure of protection from undesirable potential buyers or below-market sales.

In this case, however, the board of managers tried and failed to exercise its right of first refusal. The condominium had a large penthouse apartment that had been seized by the United States government as part of a prosecution of a vast international conspiracy to launder money misappropriated from a Malaysian investment bank. As part of the prosecution, which took place in Federal Court in the Central District of California, a consent judgment of forfeiture was entered transferring title to the apartment to the U.S. government. Notably, the board of managers of the condominium, which had

(continued on p. 17)

filed a claim for unpaid common charges in the federal litigation, did not assert a right of first refusal to repurchase the apartment as part of the consent judgment.

After the consent judgment was entered, the U.S. government sold the apartment to the current unit owner at a steep discount. At the point of that transfer, the board of managers attempted to assert a right of first refusal to buy the apartment at the discounted rate and relist it closer to its supposed true market value. However, both the District Court and Ninth Circuit found that the board's right of first refusal had been extinguished by the consent judgment. The board then filed this case in the Supreme Court, New York County.

IN THE COURT: The board of managers' complaint was styled as an ejectment action brought against the current unit owner and its lender to remove the unit owner from the apartment on the theory that the sale from the U.S. government to the unit owner was "void," because the board had not been given an opportunity to exercise its right of first refusal.

The defendants successfully moved to dismiss the complaint. The board of managers admittedly had not joined the U.S. government as a party because it is immune from suit under principles of sovereign immunity, but had argued that joinder was excused. The court rejected that argument, because, among other reasons, the board of managers had the ability to litigate the right of first refusal issue in the California Federal Court. Indeed, the consent judgment itself contemplated further proceedings in Federal Court should any disputes arise, and the board had already litigated the right of first refusal issue in California. "Thus," the court found, "there is another forum which is available to resolve this dispute. Plaintiff is merely dissatisfied with that forum's decisions and seeks to relitigate the issue in this court."

TAKEAWAY

A condominium board's right of refusal is a contract right that can be waived by inaction. Under the unusual circumstances presented in this case, the board of managers lost the ability to repurchase the apartment because the consent judgment entered in Federal Court extinguished the board's "right, title and interest" in the transfer to the U.S. government.

PETS

ZEKHTSER V. HARWAY TERRACE, INC. 2022 NY SLIP OP 50540(U) (SUP. CT. KINGS CNTY. JUNE 9, 2022)

Co-op Waited Too Long to Enforce Its No-Pet Policy Against Shareholder

SQUIB BY ANNA GUILIANO, PARTNER, BORAH GOLDSTEIN ALTSCHULER NAHINS & GOIDEL

OUTCOME: Decided for Plaintiff Co-op Shareholder

WHAT HAPPENED: The defendant co-op established a Pet Policy, which prohibits proprietary lessees from having a dog reside with them in the building unless they receive the co-op's prior written consent. If a proprietary lessee violates this Pet Policy, then the violation will result in a $1,500 fine and a continual $250 charge each month until the violation has been corrected. The co-op's House Rules state that a violation of the rules constitutes a default under the proprietary lease.

On or around Feb. 11, 2021, the plaintiff shareholder began to reside in his apartment with a dog without the co-op's prior written consent. Despite the co-op's undisputed knowledge that the plaintiff was openly and notoriously harboring a pet, and despite the co-op's failure to initiate any action or proceeding to evict the plaintiff or remove the pet, on or about May 29, 2021, the co-op asserted that the plaintiff was in violation of the co-op's Pet Policy and fined him $1,500.

IN THE COURT: The plaintiff commenced this action seeking, in pertinent part, a judgment declaring the co-op's fines and any attempt by the co-op to terminate his leasehold or remove the pet to be unenforceable; and enjoining the co-op from taking any steps to terminate his leasehold or impose any fines upon him based upon the claim that he is in violation of the building's Pet Policy.

The co-op interposed counterclaims seeking, in pertinent part, a judgment declaring that: (1) New York City Administrative Code §27-2009.1 does not prevent the co-op from enforcing its entire Pet Policy against

(continued on p. 18)

the plaintiff; and (2) the fines were properly assessed against the plaintiff for his violation of the Pet Policy.

Both the plaintiff and the co-op filed motions for summary judgment on their respective declaratory judgment actions.

The court held that the co-op waived the plaintiff's breach of the lease because it did not enforce the no-pet clause promptly. Therefore, the court denied the co-op's motion for summary judgment in the entirety and granted the plaintiff's motion for summary judgment.

TAKEAWAY

This case serves as a reminder to landlords and co-ops that if you discover that a tenant/proprietary lessee is harboring a pet in violation of the lease or no-pet policy, you must take immediate action to stop that behavior, which should include a notice to cure. After three months, an imposition of penalties for violating the lease or house rules will not suffice and will be deemed a waiver.

REPRESENTATIONS

BD. OF MGRS. OF BRIGHTWATER TOWERS CONDO. V. M. MARIN RESTORATION, INC.

2022 NY SLIP OP 03491 (2D DEP'T JUNE 1, 2022)

Civil Contempt Application Against Attorneys Didn't Include Mandatory Warning

SQUIB BY JOSEPH GOLJAN, ASSOCIATE, BRAVERMAN GREENSPUN

OUTCOME: Decided for Non-Party Law Firm Respondents

At issue in this decision and underlying motion for contempt and disqualification are the communications between two law firms engaged by a condominium board for purposes of litigating four separately filed—but later consolidated—actions.

Specifically, between 2015 and 2017, the board commenced four actions—one against the condominium's former managing agent, and the other three against individual vendors who had made repairs to the condominium buildings—alleging, among other things, breach of contract and negligence. One law firm initially represented the board in all four cases.

Prior to consolidation, the managing agent successfully moved to disqualify the plaintiff's initial counsel on the grounds that the law firm had previously represented the managing agent in another litigation. The board engaged substitute counsel for that action accordingly.

Thereafter, one of the vendor defendants moved to consolidate, and both law firms engaged by the board submitted opposition. In its order granting the consolidation motion, the Supreme Court also ruled that, since one law firm had been disqualified from representing the board in the action against the managing agent, it was disqualified as counsel for the board in the consolidated action.

The managing agent moved to hold both sets of attorneys for the board in civil contempt, arguing that they had violated the disqualification order by communicating with each other when preparing their opposition to the motion to consolidate. The managing agent also sought to disqualify both law firms from representing the board in the consolidated action.

The Supreme Court denied the contempt/disqualification motion. The managing agent appealed, and the Appellate Division affirmed.

Pursuant to Judiciary Law §756, a contempt application must be in writing, must be made upon at least 10 days' notice, and—as applicable here—must contain on its face the statutory warning that "FAILURE TO APPEAR IN THE COURT MAY RESULT IN . . . IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT." Here, the managing agent's motion did not contain the warning required by Judiciary Law §756, and one of the law firm respondents objected accordingly. The court held that it therefore lacked jurisdiction to punish the firm for contempt.

The Appellate Division further held that although some attorney-respondents had not objected to the warning requirement and thus, waived its protections, the Supreme Court nevertheless providently exercised its discretion in denying the motion to hold them in civil contempt. To prevail on such a motion, the movant is required to prove, by clear and convincing evidence, "(1) that a lawful order of the court was in effect, clearly

(continued on p. 19)

expressing an unequivocal mandate, (2) the appearance, with reasonable certainty, that the order was disobeyed, (3) that the party to be held in contempt had knowledge of the court's order, and (4) prejudice to the right of a party to the litigation[.]" Here, although the two law firms admittedly communicated while preparing their opposition to the consolidation motion, the motion failed to establish through clear and convincing evidence that those communications were in furtherance of the disqualified law firm's representation of the board in the action against the managing agent. Indeed, that firm had an ongoing independent obligation to represent the board in the other three cases.

Finally, the Appellate Division held that the managing agent had failed to prove any of the requisite elements that would warrant the disqualification of the board's substitute counsel in the consolidated action.

SALES

PRIETO V. 3520 LLC NO. 159730/2021 (SUP. CT. N.Y. CNTY. JUNE 8, 2022) NYSCEF NO. 56

Prospective Buyer Claims Tortious Interference with Contract in Connection with Board's Exercise of its Right of First Refusal

SQUIB BY DAVID S. FITZHENRY, PARTNER, GANFER SHORE LEEDS & ZAUDERER LLP

OUTCOME: Decided for Third-Party Plaintiff Commercial Condo Unit Seller

WHAT HAPPENED: The plaintiff was in contract to purchase a commercial condominium unit; however, the condominium's board of managers had a right of first refusal with respect to the sale of the unit. Despite efforts to obtain the board's waiver of its right of first refusal, the plaintiff was ultimately notified that the board was exercising its right of first refusal, and that a newly formed entity would be the board's designee for purposes of acquiring the unit. The plaintiff brought an action against the seller seeking specific performance with respect to the sale of the unit, as well as claims against the board alleging tortious interference with a contract. The seller brought a third-party complaint against individual members of the board and the individual principals of the designee entity, who were also principals of the other commercial unit at the building (one of whom was also a member of the board). The plaintiff and the seller both alleged that the board failed to comply with the condominium's rules governing the right of first refusal, and the seller's third-party complaint also alleged that the board exercised its right of first refusal for the benefit of the other commercial unit owner (and not on behalf of *all* other unit owners).

IN THE COURT: The two third-party defendants who were principals of the designee entity brought a motion to dismiss pursuant to CPLR 3211(a)(1) and (7). The court denied the motion because the none of the documentary evidence presented conclusively established a defense to the asserted claims as a matter of law.

TAKEAWAY

The failure of a condominium board to exercise a right of first refusal in accordance with the rules set forth in the condominium's governing documents could amount to tortious interference with a contract and bad faith. In addition, an individual board member who causes the board to exercise a right of first refusal for his or her own personal gain could give rise to a breach of fiduciary duty claim.

TAX

TRUMP VILL. SECTION 4, INC. V. TAX COMM'N OF CITY OF NEW YORK 2022 NY SLIP OP 03732 (2D DEP'T JUNE 8, 2022)

Co-op Loses Appeal of City's Tax Assessment

SQUIB BY MICHAEL P. GRAFF, PRINCIPAL, GRAFF DISPUTE RESOLUTION

OUTCOME: Petition of Co-op Denied

WHAT HAPPENED: The owner of two 23-story, multifamily buildings, under cooperative ownership, challenged the city's tax assessment over a five-year period. Testimony and an appraisal report was submitted by both parties. The property owner submitted substantial evidence of a valid and credible dispute as to the valuation of its property. Such is the minimal threshold standard that must be met by a petitioner to demonstrate the existence of a valid and credible dispute regarding valuation. But meeting the minimum threshold is not enough. The owner failed to prove its case by a preponderance of the evidence, and that evidence was not found to be credible.

IN THE COURT: The appellate court sustained the trial court's denial of the petition and dismissal of the case. It held that where, as here, the taxpayer satisfied its threshold burden, the presumption of the validity of the city's assessment disappears. In such cases, the court must then weigh the entire record, including evidence of the claimed deficiencies in the assessment to determine whether the owner has established, by a preponderance of the evidence, that its property has been overvalued. The trial court's purpose is to arrive at a fair and realistic value of the property involved so that all property owners contribute equitably to the public treasury.

The appellate court found no reason to disturb the trial court's determination that the property owner failed to establish by a preponderance of the evidence that the property was overvalued. It looked at certain income, subsidies, a contingency and collection allowance, insurance expenses, and the capitalization rate—which the court found to be based upon unreliable rate sources. The appellate court also deferred to the trial court's resolution of credibility issues. It agreed with the finding that the owner failed to establish by a preponderance of the evidence that the property had been overvalued.

TAKEAWAY

Property owners have the burden of proof as to their positions in tax cases and proceedings. That means that their evidence must be more persuasive than that of the tax assessor. If the evidence on both sides is equal, the case is dismissed. A tie score is a loss. Because such is more often the outcome of cases disputing the tax assessor, the overwhelming percentage of these cases are settled in conference.

TRANSFERS

DORCE V. CITY OF NEW YORK NO. 19 CIV. 2216 (S.D.N.Y. JUNE 24, 2022) ECF NO. 16

NYC Violated Homeowners' Constitutional Rights by Seizing Property without Proper Compensation

SQUIB BY MICHELLE P. QUINN, PARTNER, GALLET DREYER & BERKEY

OUTCOME: Decided for Plaintiffs in part and Defendants in part

WHAT HAPPENED: This case is a class action by homeowners whose property was seized by the City of New York for transfer under the "Third Party Transfer Program" ("TPT Program"), which permits the transfer of distressed properties to third parties without consideration paid to the homeowner. The transfers were predicated on the asserted tax debts of the plaintiffs, but were made without compensation to the plaintiffs for the excess value of their properties.

IN THE COURT: The plaintiffs sued the City of New York, the New

(continued on p. 21)

York City Department of Housing Preservation and Development, the New York City Department of Finance, and various HDFC entities to recover the surplus equity, asserting multiple violations of the United States and New York State Constitutions, among other claims. The plaintiffs alleged that the TPT Program unfairly targets homeowners of color because the defendants believe they are less likely to have the resources to mount a legal challenge. On remand from the Second Circuit Court of Appeals, which reversed the federal district court's dismissal of the plaintiffs' original complaint except upholding the dismissal of the plaintiffs' declaratory and injunctive claims, the defendant again sought to dismiss the plaintiffs' complaint.

The court specifically found that the plaintiffs sufficiently pleaded their claims for: (1) violation of federal and state Takings Clause; (2) violations of federal and state Equal Protection Clause; (3) violation of federal and state Due Process Clause; (4) violation of federal and state Excessive Fines Clause; (5) conspiracy to deprive plaintiffs of their Constitutional Right to Equal Protection; (6) conversion under New York State law; (7) unjust enrichment under New York State law; (8) deceptive practices under New York State law; and (9) civil conspiracy under New York State law. The court granted the dismissal of the plaintiffs' state civil conspiracy claim and limited the plaintiffs' damages to the amount of their surplus equity, excluding recovery for punitive or exemplary damages.

TAKEAWAY

The extreme and potentially prejudicial nature of the TPT Program warrants requiring the state to strictly comply with procedural and Constitutional protections afforded to the homeowners, including providing adequate notice and providing compensation for the seizure of the property, represented by the differential between the tax debt owed and the property's value.