CO-OP&CONDO
CASE LAW TRACKER
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ACCESS

REDEEMER PRESBYTERIAN CHURCH E. SIDE V. 160 E. 91 OWNERS CORP.
2022 NY SLIP OP 34281(U) (SUP. CT. N.Y. CNTY. DEC. 15, 2022)

Co-op Must Grant Neighbor Access to Install Protections During Approved Development Project

SQUIB BY DANIELLE GRECO, PARTNER, KLEIN GRECO & ASSOCIATES

OUTCOME: Decided for Petitioner, Co-op Adjacent Property Owner

WHAT HAPPENED: The petitioner church needed access to the respondent adjacent property—a co-op—in order to install certain protections to the respondent's property for its own protection (including that of its residents). The respondent refused and denied access. The petitioner filed all plans with the NYC Department of Buildings, which were approved. The petitioner's plans also met any code requirements. The petitioner sought in court via Order to Show Cause an order granting it a limited license pursuant to RPAPL §881 to enter the respondent's property.

IN THE COURT: The court found that the petitioner's application was complete in providing the necessary documents and affidavits showing the legitimate need for the license and met the factors required for the court to grant the license. The respondent had known about the project for a long time and decided only when the petitioner's work was about to commence that the protections would affect its building. Apparently, as the court hints, the neighboring co-op was really trying to stop an "as of right" development that would impact its "access to light and air."

TAKEAWAY

It is important to have all your T's crossed and I's dotted, all plans approved, and all codes met when requesting access to neighboring property in case your request for access ends up in court.

FEBRUARY 2023 HIGHLIGHTS

CO-OP&CONDO CASE LAW TRACKER digest

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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 December 2022. For additional cases, visit https://coopcondocaselawtracker.com.

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ALTERATIONS

BRODIE V. BD. OF MGRS. OF THE ALDYN

2022 NY SLIP OP 34316(U) (SUP. CT. N.Y. CNTY. DEC. 20, 2022)

Board's Continuing Assessment of Fines Not Willful Violation of Court Order

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

OUTCOME: Decided for Defendant Board

WHAT HAPPENED: Condominium unit owners began alterations in their unit in 2019 pursuant to an approved alteration agreement. By the spring of 2022, since the alterations had not been completed and the duration of the project exceeded the board's expectation, the board issued a "stop work notice," imposed 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 the fines. On June 24, 2022, the court issued an order restraining the board from enforcing its "stop work notice" and directing that the plaintiffs be permitted to complete the work by Nov. 30, 2022—the deadline that was missing from the original alteration agreement. The plaintiff provided an architect's certification to the board on Dec. 7, 2022, stating that the non-decorative alterations had been completed.

IN THE COURT: Despite the plaintiff having this additional time, the board continued to assess fines for the plaintiff's work performed after the "stop work notice" was issued. The fines and other charges culminated in $115,030.62 in arrears, for which the board filed a common charge lien, which caused the plaintiff to seek a motion for contempt against both the board and its attorneys for violation of the court's June 24, 2022, order. The board took the position that the previously imposed fines and continuing assessment of fines had not been determined by the June 24, 2022, order and were still the subject of litigation.

The court found that even though the board and its attorneys "erred in their comprehension" of the order, it did not rise to the level of contempt, which requires a *willful* violation. That said, the court clarified that its intent was that the fines be suspended during the injunction period from June to November 2022.

The board sought a declaration that the plaintiff had not completed the non-decorative work, as reflected in the plaintiff's own architect's certification, which listed functional items, such as doors and tiling, rather than decorative items, that remained outstanding. The court agreed, finding that work performed after the expiration of the Nov. 30, 2022, injunction was subject to fines being imposed by the board.

TAKEAWAY

When seeking relief, both sides need to have absolute clarity in their understanding of what is and is not ordered by the court, or be prepared to have their conduct deemed improper. When an alteration deadline is set, owners should do what is necessary to meet the deadlines or be prepared to have penalties assessed. Proper planning is key.

ALTERATIONS

PARC 56 LLC V. BD. OF MGRS. OF THE PARC VENDOME CONDO. 2022 NY SLIP OP 75199(U) (1ST DEP'T DEC. 6, 2022)

Appeals Court Denies Condo's Request for Stay to Prevent Unit Owner's Alterations

SQUIB BY KELLY A. RINGSTON, PARTNER, BRAVERMAN GREENSPUN

OUTCOME: Decided for Plaintiff-Respondent-Appellant Unit Owner

WHAT HAPPENED: The defendant condominium asked the First Department Appellate Division for a stay of the lower court's Oct. 25, 2022, decision and order pending a disposition on appeal. The condominium asserted that in the absence of a stay, the plaintiff commercial unit owner would proceed with its alteration despite critical issues, including life and safety and structural stability concerns identified by the board's professionals. The Appellate Division granted the defendant an interim stay while the motion was reviewed by the full panel.

IN THE COURT: The Appellate Division summarily denied the condominium's motion for a stay pending a disposition of the appeal and vacated its previous order granting an interim stay.

TAKEAWAY

This decision is only the latest in a string of legal setbacks for the condominium. The lower court's scathing June 8, 2022, and Oct. 25, 2022, decisions in this matter detail a pattern of intentionally dilatory and obstructionist conduct by the board and its professionals toward the plaintiff unit owner and perhaps more damning, a series of material misrepresentations to the court. This resulted in the lower court finding that the condominium was acting in bad faith and issuing a series of orders, *inter alia*, granting summary judgment for the unit owner, striking the condominium's pleadings, holding the condominium in civil contempt, and requiring its former counsel to respond to a subpoena.

With this backdrop, the condominium and its professionals lacked the credibility to persuade the Appellate Division that there were legitimate concerns for life, safety, and structural stability justifying a stay enforcement of the lower court's order.

ATTORNEY FEES

TELIMAN HOLDING CORP. V. VCW ASSOCS. 2022 N.Y. SLIP OP. 07017 (1ST DEP'T. DEC. 6, 2022)

Attorney Fees Awarded to Commercial Tenant Aren't Subject to Rent Calculation

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

OUTCOME: Decided against Plaintiff Co-op

WHAT HAPPENED: The commercial tenant was the prevailing party in a litigation with the cooperative landlord and awarded $238,994.10 in attorney fees in accordance with the parties' lease, which granted a prevailing party in a litigation attorney fees. Another provision of the parties' lease provided that the tenant was to pay an annual rent equal to 20 percent of the landlord's aggregate "cash requirements." "Cash requirements" is defined in the lease as "'expenses and outlays . . . connected with the ownership, maintenance and operation of [the] building[,]' including 'legal fees.'" The landlord sought to recoup from the tenant, as part of the tenant's annual rent, 20 percent of those very same legal fees paid to the tenant.

IN THE COURT: The court declared that the landlord could not include legal fees paid to the tenant in its "cash requirements." The court reasoned that the lease clause that awarded legal fees to a prevailing party was in conflict with the lease clause that permitted the landlord to include legal fees in its calculation of its "cash requirements," 20 percent of which was the tenant's annual rent. If legal fees incurred by the landlord could be included in "cash requirements," then the tenant would, in effect not recover all of its attorney fees as the prevailing party as provided for in the lease.

TAKEAWAY

A landlord cannot essentially negate a lease clause awarding legal fees to a prevailing party by including the attorney fees awarded to the commercial tenant in part of the tenant's annual rent calculation.

ATTORNEY FEES

MEADOW APTS. CORP. V. S AND H LLC 2022 NY SLIP OP 07158 (1ST DEP'T. DEC. 15, 2022)

Sponsor's Appeal to Get Attorney Fees Backfires as Appeals Court Reverses Lower Court Order in Entirety

SQUIB BY LAUREN E. LEWIS, ASSOCIATE, NORRIS MCLAUGHLIN

OUTCOME: Decided for Plaintiff Co-op

WHAT HAPPENED: A cooperative sponsor leased itself all 40 of the cooperative's parking spaces, for a 49-year lease term, at a low price of $3,424 per year, but was charging the cooperative's own tenant-shareholders $84,000 per year to use the spaces.

The cooperative corporation sought to terminate the lease pursuant to the Condominium and Corporation Conversion Protection and Abuse Relief Act (the "Abuse Act"), claiming it was an abusive sweetheart lease and constituted self-dealing by the sponsor.

Though shareholders voted to terminate the lease, the sponsor refused, declaring the vote and termination untimely and barred by the Abuse Act's two-year statute of limitations.

IN THE COURT: The cooperative corporation commenced a suit against the sponsor seeking a judgment declaring the lease terminated and for related damages.

The sponsor filed a pre-answer motion to dismiss three out of four of the corporation's claims, based upon documentary evidence establishing that the corporation's attempted termination of the lease was barred by the statute of limitations, and therefore void.

The lower court agreed with the sponsor and granted the sponsor's motion, dismissing the corporation's first three causes of action, but the court did not award the sponsor attorney fees.

Despite its win, the sponsor then appealed the portion of the order regarding attorney fees.

On appeal the First Department unanimously modified the lower court order in its entirety, denying the sponsor's motion to dismiss.

TAKEAWAY

Don't cut off your nose to spite your face! Rarely, if ever, do litigants get everything they want, and it's important to know when to walk away. In this case, the sponsor undid its own victory by subjecting an otherwise favorable order to appellate review and reversal, learning the hard way that perhaps there is no such thing as a "partial appeal."

BUSINESS JUDGMENT RULE

RUMORE V. LYAN NO. 707450/2020 (SUP. CT. QUEENS CNTY. NOV. 15, 2022) NYSCEF NO. 61

Court Grants Defendant's Motion to Dismiss Neighbor's Nuisance Claim Based on Co-op Board's Findings

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

OUTCOME: Decided for Defendant Co-op Tenant

WHAT HAPPENED: The plaintiff and defendants are both occupants of separate apartments in the same cooperative building. The plaintiff initially brought claims of nuisance and negligence against the apartment corporation's board of directors, the lessee under the proprietary lease, and the subtenants of an apartment located one floor above the plaintiff's apartment, alleging that the occupants of the apartment were creating excessive noise and were in violation of a house rule requiring that 80 percent of an apartment's flooring be carpeted. The plaintiff, the co-op board, and the proprietary lessee entered into a stipulation of discontinuance, and the instant action pertained only to the plaintiff's remaining claims against the subtenants of the apartment.

IN THE COURT: The defendant brought an unopposed motion to dismiss the plaintiff's complaint pursuant to CPLR §§3211(a)(1) and (7) for failure to state a cause of action because the co-op board

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had investigated the plaintiff's noise complaints and found that the defendant was in compliance with all of the apartment corporation's rules with respect to noise and carpeting of the apartment. Citing well-settled precedents pertaining to the business judgment rule, the court ruled that it would not interfere with the determinations of the co-op board and granted the defendant's motion to dismiss.

TAKEAWAY

Courts have and will continue to defer to a co-op board's determinations as protected by the business judgment rule, provided that such determinations are made in good faith, are in the interest of the apartment corporation, and are within the scope of the board's authority. This deference can extend to matters of nuisance, whereby a court may defer to a co-op or condominium board's determination with respect to whether the alleged nuisance claim has merit. As seen in this case, a court can dismiss a nuisance claim based solely upon the fact that a co-op or condo board found that no such nuisance existed, noting that such determination was protected by the business judgment rule.

BYLAWS

TURAN V. MEADOWBROOK POINTE HOMEOWNERS ASSOC., INC. 2022 N.Y. SLIP OP. 07255 (2ND DEP'T. DEC. 21, 2022)

House Rule Barring Large Dogs Wasn't Properly Approved as Amendment to Bylaws

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

OUTCOME: Decided for Plaintiff Unit Owner

The plaintiff unit owner sued the condominium board, alleging a house rule prohibiting dogs greater than 25 pounds from being present on the condominium's premises was invalid as not having been approved by unit owner vote amending the declaration or bylaws.

After noting that the court must apply the business judgment rule in determining whether the plaintiff asserted a claim, the court found that the board's adoption in the house rules of a weight restriction was not authorized by the bylaws and therefore, not protected by the business judgment rule as it was not within board authority to adopt. The court found that there was no restriction on the size of the dogs in the bylaws or the declaration even though the bylaws did grant the board the power to adopt reasonable rules and regulations. Therefore, the house rule constituted an amendment of a permitted use of the plaintiff's unit that required an amendment to the declaration approved by two-thirds of unit owners, which did not happen. The rule was declared null and void.

TAKEAWAY

Boards must be aware that their power to adopt "house rules" is severely limited and must be consistent with the express powers granted to them under the bylaws. This case makes clear that boards do not have a broad right to adopt a house rule that impinges on a unit owner's use of his premises if such authority is not expressly contained in the bylaws. Restrictions on use would require amendment to the bylaws that often requires a two-thirds vote of all unit owners—a vote that is not always easy to obtain.

BYLAWS

BD. OF MGRS.OF VAN WYCK GLEN CONDO., V. VAN WYCK AT MERRITT PARK HOMEOWNERS ASS'N, INC.
2022 NY SLIP OP 07044 (2ND DEP'T. DEC. 14, 2022)

Condo Associations, Not Master HOA, Have Right to Receive Rents from Vacant Units Despite Appointment of HOA as "Irrevocable Managing Agent"

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

OUTCOME: Decided for Plaintiff Condos

WHAT HAPPENED: Van Wyck at Merritt Park Development was comprised of three condominium phases governed by a master homeowners association (HOA). The bylaws of each condominium association provided in part that the HOA would be appointed as the "Irrevocable Managing Agent" to maintain, repair, and replace the common elements of the condominium and to collect assessments to pay for such work. However, this appointment and the powers that went along with it were not contained in the HOA Declaration of Covenants.

The condo associations sued the HOA seeking a declaration from the court that: (a) they were entitled to control their affairs, subject only to a "limited assignment" of the repair and maintenance functions to the HOA; and (b) they were entitled to the immediate release of rental proceeds derived from certain condominium units that the HOA had rented in its capacity as the "Irrevocable Managing Agent." They also sued two individual HOA board members for breach of fiduciary duty, asserting that they had failed to properly repair common elements, withheld funds needed to manage the condominium, intentionally interfered with management of the condos, failed to provide other directors of the HOA notice of meetings, and failed to recuse themselves where patent conflicts of interest existed.

The HOA counterclaimed, seeking a declaration from the court interpreting the rights of the "Irrevocable Managing Agent," and seeking the dismissal of the fiduciary duty claims because the directors allegedly acted within the scope of their duties.

Settlement negotiations resulted in the issuance of a court order in 2018 allowing the condo associations to amend their bylaws to delete the sections designating the HOA as their "Irrevocable Managing Agent" and granting the HOA additional powers in furtherance of such designation. Two of the three condo associations amended their bylaws in response.

The condo associations subsequently sought a judgment on three claims: (a) a declaration that the counterclaim filed by the HOA to interpret the powers of the "Irrevocable Managing Agent" was moot since that portion of the bylaws had been deleted; (b) a judgment that they were entitled to control their own repair and maintenance obligations, as sought in the original litigation; and (c) return of $40,696.32 in rental revenues (with interest from 2017) from condominium units that the HOA had rented to third parties.

In turn, the HOA sought dismissal of the claims for breach of fiduciary duty, asserting that they failed to allege the supposedly tortious conduct with sufficient "particularity" as required by statute, and a judgment in its favor on its counterclaim relating to the powers of the Irrevocable Managing Agent.

IN THE COURT: The court ruled that the counterclaims of the HOA seeking an interpretation of the powers of the "Irrevocable Managing Agent" were moot since the condominium associations had deleted the relevant section of the bylaws. (Related requests of the associations and the HOA for rulings as to their respective powers before the bylaws had been amended were denied as either improperly pled or moot.)

As to the return of the rental moneys, the court determined that only the condominium associations had the right to rent the units, as the units were "Homes" and the bylaws granted the condos (not the HOA) the right to rent Homes that had been abandoned or acquired through foreclosure. (However, interest was denied as it was not requested in their original complaint.)

Finally, the court determined that the claims for breach of fiduciary duty had been pled in sufficient detail as to survive the motion to dismiss, raising "material issues of fact" that needed to be decided at trial.

The HOA appealed the court's decision, but the Appellate Division affirmed the trial court's ruling and

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charged costs. The court determined that the bylaws had been properly amended, and thus any controversy relating to the rights of the "Irrevocable Managing Agent" no longer existed. The court also ruled that the complaint sufficiently alleged the elements of a fiduciary duty claim, notably: (a) the existence of a fiduciary relationship; (b) misconduct by the defendant directors; and (c) damages directly caused by that misconduct. The complaint raised triable issues of fact as to whether the defendant directors acted within the scope of their authority as board members.

TAKEAWAY

The decision illustrates several principles. First, any clause in a document can be amended using the proper procedures, unless the document specifically provides that the clause cannot be amended. Second, appointment as a "managing agent" does not give the agent unilateral authority to rent and retain the proceeds of rentals, especially of the assets of a condominium association. And third, board members should act carefully when seeking to exert broad powers under controversial circumstances.

This writer deplores the evolution of "zombie condos," under which the condo association surrenders all of its rights to a master homeowners association. The practice arose in order to convert condo common charges into HOA assessments so as to limit sponsors' monetary obligations by using "deficiency budgeting," an accounting method allowed for HOAs but barred for condominium associations. The drafter of this offering plan meant to shift some powers in the same way, but did not design the documents properly to make it permanent.

CONTRACTS

THE BD. OF MGRS. OF THE 80TH AT MADISON CONDO. V. SOMETHING NAVY, INC.

NO. 156207/2021 (SUP. CT. N.Y. CNTY. DEC. 16, 2022) NYSCEF NO. 106

Court Dismisses Commercial Tenant's Breach of Contract Claim Against Landlord Unit Owner

SQUIB BY RICHARD SHORE, COUNSEL, NIXON PEABODY

OUTCOME: Decided for Third-Party Defendant Landlord Unit Owner

WHAT HAPPENED: Plaintiff condominium board brought trespass claims and sought injunctive relief against commercial tenants Navy and Reformation for installing signage on the façade of the building without board approval. Defendant Reformation impleaded its landlord of the commercial space, the commercial unit owner with whom Reformation had entered into a lease, seeking indemnification and contribution and asserting claims for negligence and breach of contract, alleging that the landlord breached the lease, which expressly provided authority to the defendant/third-party plaintiff Reformation to install the signage.

IN THE COURT: Third-party defendant landlord moved to dismiss the third-party complaint. The court granted the landlord's motion, finding that, with respect to the breach of contract claim, there is no provision in the lease that was allegedly breached; the landlord approved the signage per the lease and has not allegedly breached that provision. The negligence cause of action was dismissed as there was no duty owed to third-party plaintiff Reformation outside of contract rendering the negligence claim duplicative. The indemnification and contribution claims failed because there cannot be common law indemnification without a vicarious liability claim and because there can be no contribution claim when the only real cause of action sounded in breach of contract.

(**Takeaway** *on p. 9)*

TAKEAWAY

There is more to the story here then the facts considered on this motion or alleged in the complaint; in fact, there is another parallel proceeding where the plaintiff condominium and the third-party defendant commercial unit owner are directly engaged with each other, litigating over the acceptance of an alteration application, and legal fees related thereto, which involves the very alteration (installation of signage) at issue here. But that's a squib for another day … My takeaway from this case is that while on its face this decision is somewhat surprising, as one would assume that if the commercial tenant is liable for trespass for installing a sign that was expressly permitted by the commercial unit owner pursuant to the lease, then the commercial tenant should be able to hold the commercial unit owner liable for relying on its express representations authorizing same. However, it is possible that there is a ripeness issue, as until the commercial tenant is actually ordered to remove the sign or found liable for trespass, there is no breach of the lease yet.

FORECLOSURE

THE BD. OF MGRS. OF HAMPTON HOUSE CONDO. V. STEO NO. 160446/2018 (SUP. CT. N.Y. CNTY. DEC. 9, 2022) NYSCEF NO. 179

Unit Owner Fails to Set Aside Sale of Unit in Foreclosure Based on Purportedly Deficient Service of Process

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

OUTCOME: Decided for Plaintiff Condo

WHAT HAPPENED: The plaintiff condominium sought to foreclose on a unit for unpaid common charges, and a judgment of foreclosure and sale was granted upon the defendant unit owner's default. Just prior to the sale of the unit, the unit owner appeared in court and filed an order to show cause to stop the sale. The parties ultimately agreed, through a stipulation signed by the judge, to hold off on the sale, provided that the unit owner paid all arrears and stayed current. The unit owner defaulted under the stipulation by failing to pay charges, so the condominium proceeded to sell the unit, at public auction. Ten days after the public sale, the unit owner filed a second order to show cause, seeking to stop the parties from completing the sale, to vacate the sale and the unit owner's default, and to dismiss the complaint based on purportedly deficient service of the complaint at the beginning of the lawsuit.

IN THE COURT: The court denied the motion to vacate the unit owner's default. While the failure to effect proper service of the complaint on a defendant does deprive the court of personal jurisdiction over that defendant and compel dismissal, that did not happen here, for two reasons.

First, the affidavit of the process server, filed when the suit was commenced, shows that service was properly effected in accordance with statute. The unit owner's conclusory denial of ever receiving copies of the papers is insufficient to set aside the default.

Second, the unit owner appeared in the lawsuit when the first order to show cause was filed; the unit owner participated in the lawsuit by entering into the stipulation signed by the judge; and the unit owner waived any right to challenge the sufficiency of service or the court's purported lack of personal jurisdiction by so participating.

Motion denied, and the sale of the unit moves to completion.

TAKEAWAY

Personal jurisdiction is the court's power and authority to render judgment over a party to a lawsuit, and if personal jurisdiction over a party is lacking, then any orders or judgments by the court will have no effect over that person. Lack of personal jurisdiction can arise if, to take a clear example, a person is named in a lawsuit but no one ever serves the person with papers. It is fundamentally incompatible with due process that a court could obtain personal jurisdiction over a person who has no knowledge of a lawsuit. And yet, if someone actively participates in litigation even if not properly served, then the person has knowledge of the suit, the person has submitted to the court's authority, and the person has consented to the court's power to render judgment. That person cannot later claim with any credibility that personal jurisdiction was lacking.

MOTION PRACTICE

LI V. WISTERIA GARDENS CONDO. NO. 713982/2022 (SUP. CT. QUEENS CNTY. NOV. 16, 2022) NYSCEF NO. 12

Unit Owner Permitted to Pursue Claims Against Condominium

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

OUTCOME: Decided for Plaintiff Unit Owner

WHAT HAPPENED: This case involves a unit owner who believes that her condominium improperly assessed fines relating to her efforts to renovate her apartment and unreasonably refused to approve her alteration applications. She had filed an earlier lawsuit asserting these claims, but did not name the condominium itself, instead suing its board of managers (along with the managing agent and two building employees). The court in that action dismissed the complaint for failure to name a necessary party (the condominium itself), but did so "without prejudice" and noted that the plaintiff would have ample opportunity to restart her lawsuit naming all of the necessary parties.

Rather than filing an amended complaint, the plaintiff filed a brand-new action, this time naming the condominium. However, the defendants moved to dismiss the complaint "because the virtually identical claims against them have been litigated and dismissed in a prior action . . . and the current action is just Plaintiff's attempt to override this Court's previous rulings."

IN THE COURT: The court denied the motion. The doctrine of *res judicata*, which the defendants sought to invoke here, applies only where the prior dismissal has been on the merits, after a full and fair opportunity to litigate the matter. It is intended to ensure finality and avoid wasting resources deciding disputes twice. In this case, however, there clearly had not been a decision on the merits, and the dismissal was "without prejudice," meaning without prejudice to the plaintiff's claims. The plaintiff had every right to file a new lawsuit asserting the exact same claims against the condominium—indeed the prior decision invited them to do so.

TAKEAWAY

It is a fundamental principle of public policy that courts should resolve disputes on the merits, and that everyone should get their day in court. When a court dismisses a prior action on technical grounds "without prejudice," the doctrine of *res judicata* will not prevent that plaintiff from correcting its technical mistakes and filing a new complaint.

OCCUPANCY AGREEMENT

CHURCHILL OWNERS CORP. V. KENT 2022 NY SLIP OP 34172(U) (SUP. CT. N.Y. CNTY. DEC. 8, 2022)

Guarantor Must Pay Maintenance Despite Not Having Access to Co-op After Shareholder's Death

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

OUTCOME: Decided for Plaintiff Co-op

WHAT HAPPENED: The defendant in the matter was the son of a former cooperative shareholder who had passed away. Prior to his death, the shareholder transferred his interest in the shares and proprietary lease to a trust, and the transfer had been approved by the apartment corporation on the condition that the defendant's father be the only authorized occupant, and that the defendant execute a personal guaranty with respect to the tenant-shareholder's obligations under the lease. The terms of the co-op's approval were memorialized in a written consent agreement by and between the apartment corporation and the shareholder trust.

Following the death of the defendant's father, the apartment corporation refused to allow the defendant access to the apartment (other than limited, supervised access), as it wanted to avoid involvement with any potential competing claims from beneficiaries or heirs, particularly given that

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the shareholder trust was involved in a Surrogate's Court matter due to the trust having no current trustee (the previous trustee resigned only one day prior to the death of the defendant's father).

In response to being denied unsupervised access to the apartment, the defendant ceased making maintenance payments to the co-op, and thereafter the plaintiff brought this action to recover the unpaid maintenance amount from the defendant. The defendant brought a counterclaim seeking to have the court order that the existing consent agreement be reformed to recognize the defendant as the authorized occupant of the apartment, arguing that such action was warranted because the apartment corporation required him to be a guarantor of the proprietary lease as a condition of its consent to the prior transfer to the trust.

IN THE COURT: The court granted the apartment corporation's option for summary judgment, basing its decision upon the language and terms of the operative documents, to wit, the consent agreement. The court found that the consent agreement unambiguously defined the authorized occupant as being the defendant's father, and not the defendant. The court reasoned that because the consent agreement identified the defendant as only the son of the former shareholder and not an authorized occupant, it can be inferred that the agreement would have affirmatively included the defendant as an authorized occupant if that were the intention of the parties. In addition, the court found that the existing consent agreement was not the product of a mutual mistake of the parties thereto or a fraudulently induced unilateral mistake, as the agreement appeared to reflect the plaintiff's clear intention to exclude the defendant from being recognized as an authorized occupant.

TAKEAWAY

Courts are unlikely to afford the guarantor of a proprietary lease with additional occupancy rights without an express written agreement recognizing such individual as an authorized occupant. In reviewing the facts of a case, courts will look to the unambiguous language of a written agreement and will be unlikely to entertain any arguments alleging oral promises when the terms of the written agreement are not ambiguous. Arguments seeking to reform an existing written agreement will likely be unsuccessful absent a showing of mutual mistake or a fraudulently induced unilateral mistake.

OWNERSHIP

YOUNG V. 101 OLD MAM'K OWNERS, CORP. 2022 NY SLIP OP 06955 (2ND DEP'T DEC. 7, 2022)

Co-op Board Can Invalidate Shares It Reissued After Co-Tenant's Death

SQUIB BY ANDREW P. BRUCKER, PARTNER, ARMSTRONG TEASDALE

OUTCOME: Decided for the Co-Defendants, Co-op and the Co-op's Former Counsel and Transfer Agent

WHAT HAPPENED: In 1993, Joan Young (the plaintiff) and her father purchased a cooperative apartment in Westchester County. Young, an attorney who represented herself at the purchase (and in this action) and her father allegedly stated that they intended to take title as joint tenants with rights of survivorship, and this was indicated in the mortgage application. But when the co-op issued the stock certificate, it did not indicate ownership as joint tenants with right of survivorship.

In 1997, Young's father died, and she requested that the co-op board reissue the shares in her name alone, allegedly on the grounds that she was the "surviving joint tenant." Finally, in 2004 the board issued a replacement stock certificate naming Young as the sole owner, but only after Young provided proof that her siblings waived any interest in the apartment.

In 2017, Young sought to sell the apartment, and the board approved the sale. But then, one week later, the board reversed itself, explaining (among other things) that it now viewed the 2004 certificate to be invalid. In short, the board was now attempting to void a certificate it had issued over a dozen years earlier, and ownership would revert to Young and her deceased father as tenants-in-common. Thus, a court-appointed representative of Young's father's estate would have to authorize the sale.

In 2019, Young commenced an action against the board of the co-op, the co-op itself, Bleakly

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Platt & Schmidt (the co-op's former counsel and transfer agent), and an employee of Bleakly who also served on the board. Young asserted various claims including breach of fiduciary duty, interference with contract, and negligence, but most importantly, Young asked the court to recognize the validity of the 2004 certificate it had issued.

IN THE COURT: The court granted Bleakly's (and their employee's) motions to dismiss, based on the fact that the lawyers did not owe Young any duty, and so any claim of negligence must fail. The court also granted the co-op's and board's motion to dismiss based on the fact that the board's decision was protected by the business judgment rule. The court reiterated that under the business judgment rule, a court will not second-guess the decision of a board provided the board acts for the purposes of the cooperative, within the scope of its authority, and in good faith. Young made only conclusory allegations, and there were no assertions of discrimination or other accusations that would be considered incompatible with good faith and the exercise of honest judgment. Young appealed.

The appellate court held that the court was correct in dismissing all claims. Absent fraud, collusion, or other special circumstances, an attorney is not liable to third parties not in privity, or near privity, for harm caused by professional negligence. As to the co-op, the appellate court agreed with the lower court, and held the business judgment rule must apply since Young did not sufficiently allege or evince any facts sufficient to overcome the business judgement rule.

TAKEAWAY

Though the decision of the court in this case may be surprising—after all, why should a board be permitted to change its mind after a decade to the detriment of a shareholder?—there is an interesting point to be found in these facts. The complaint "alleged" that in 1993 Young and her father requested that the stock be put in their joint names with rights of survivorship. But this was not done, and no one could remember that this request was actually made. The lesson here is that the board and the transfer agent should not only request in writing before the closing the correct names of the new shareholders, but how they will together own the shares.

PERSONAL INJURY

JONES V. VORNADO NEW YORK R.R. ONE LLC 2022 NY SLIP OP 34103(U), (SUP. CT. N.Y. CNTY. DEC. 6, 2023)

Con Ed, Not Condo, Responsible for Maintaining Manhole Cover on Sidewalk

SQUIB BY KELLY A. RINGSTON, PARTNER, BRAVERMAN GREENSPUN

OUTCOME: Decided for Defendant Condominium

WHAT HAPPENED: The plaintiff commenced this action as a result of injuries he sustained when he tripped and fell on an elevated manhole cover on the sidewalk adjacent to the condominium. He asserted claims against the condominium, its managing agent, Con Ed, and the ground-floor commercial unit owner. The condominium, managing agent, and Con Ed all moved for summary judgment dismissing the claims against them.

IN THE COURT: The court granted the motion of the condominium and managing agent, but denied Con Ed's motion, holding that while there is no question that the condominium is responsible for maintaining the sidewalk in a reasonably safe condition (NYC Administrative Code §7-210), liability is shifted from the condominium by 34 RCNY §2-07(b), which requires owners of street covers or gratings to monitor the covers and 12 inches of surrounding area, and to repair any defective conditions.

TAKEAWAY

A condominium's duty to maintain the sidewalk adjacent to its property is non-delegable by statute, but is not absolute, as evidenced by the very limited exception described in this case.

PERSONAL INJURY

DEJESUS V. AKAM ASSOCS., INC. NO. 152183/2019 (SUP. CT. N.Y. CNTY. DEC. 8, 2023) NYSCEF NO. 109

Condo Not Liable for Injuries of Pedestrian Who Tripped Over Christmas Tree on Sidewalk

SQUIB BY DALE DEGENSHEIN, PARTNER, ARMSTRONG TEASDALE

OUTCOME: Decided for Defendants Condominium, Agent, Retail Unit Owner, and Retail Tenant

The plaintiff was walking on the sidewalk in front of 338 East 23rd Street, in Manhattan, in early January when she fell over a Christmas tree branch. She was carrying items when she fell. She sued the condominium, its managing agent, the retail unit owner, and the retail tenant. The defendants asserted cross claims.

The court was asked to decide whether to dismiss the case on motions for summary judgment. The court acknowledged that summary judgment was a drastic remedy because it is the functional equivalent of a trial.

There was an issue of whether the plaintiff was walking on the sidewalk or in the street when she fell. Regardless, the court determined that the Christmas tree was "open, obvious and not [an] inherently dangerous condition." The plaintiff conceded she observed the tree before her accident and should have seen the top of the tree, which protruded several inches into the roadway, over which she claims to have tripped. Further, the defendants showed that there was a sufficient area of the sidewalk that was not obstructed.

The plaintiff made a further argument that the trees were placed in the sidewalk earlier than permitted by the Administrative Code. However, even if that were correct, a violation of the code section does not impose liability.

TAKEAWAY

Not all sidewalk obstructions will create liability.

PERSONAL INJURY

TRANT V. THE CITY OF NEW YORK 2022 NY SLIP OP 34193(U) (SUP. CT. N.Y. CNTY. DEC. 8, 2022)

Was Managing Agent Responsible for Maintaining Sidewalk Where Injury Occurred?

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

OUTCOME: Managing Agent Added as a Co-defendant

WHAT HAPPENED: Trant allegedly tripped and fell on a sidewalk located on a part of a street enclosure known as James Cagney Place LLC, at East 91st Street. She claimed the street, which was closed to traffic and contained a pedestrian mall known as "James Cagney Place," was maintained by the defendant condominium and Friends of James Cagney Place.

Trant asked the court for leave to amend her action to add an additional defendant, R.Y. Management, which was the managing agent of the defendant condominium. She claimed that both R.Y. Management and the condominium were involved in the creation of the street closure as a pedestrian plaza and creation of Friends of James Cagney Place and were members of its board. She offered evidence that as board members of Friends of James Cagney Place, they were actively involved in, and responsible for, the maintenance of the subject sidewalk. That included cleaning, maintenance, repairs, snow removal, lighting, etc.

R.Y. Management claimed that it did not owe any duty to Trant. It asserted that she was injured while walking on a municipal sidewalk parallel to Rupert Park, which is a city park, and the condominium has not controlled the land and sidewalks of Rupert Park since 1997. It claimed that, since the condominium is not liable for the accident as a matter of law, adding its managing agent is futile.

IN THE COURT: The owner of a property abutting a city sidewalk has a duty to maintain the sidewalk in a reasonably safe condition,

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pursuant to Administrative Code of the City of New York § 7-210. There was some showing that the managing agent was actively involved in the maintenance of the subject area. As motions to amend are liberally granted in the absence of prejudice, the court granted the motion to add the managing agent as a defendant. Such motions are addressed to the discretion of the court and are reversed only if the discretion was erroneously exercised as a matter of law. The issue of ownership and responsibility for the subject sidewalk has yet to be determined.

TAKEAWAY

The court did not expressly determine the question of whether the managing agent for the abutting owner had assumed a duty to anyone other than its principal, the property owner itself. That question of privity is yet to be decided. However, evidence that the managing agent affirmatively undertook an active role in maintaining the subject sidewalk might prove sufficient to hold it liable for the accident. Care should be taken to limit the conduct of the managing agent to advising the board.

WARRANTY OF HABITABILITY

FIONDELLA V. 345 W. 70TH TENANTS CORP. NO. 152957/2021 (SUP. CT. N.Y. CNTY. NOV. 30, 2022) NYSCEF NO. 156

Court Denies Motion for Reargument and Renewal from Serial Litigants

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

OUTCOME: Decided for Defendant Co-op

WHAT HAPPENED: On the face of it, this is a fairly straightforward motion whereby the plaintiff, a co-op tenant shareholder, sought reconsideration and renewal of the court's decision granting the defendant cooperative's motion to dismiss the plaintiff's complaint. However, the court's perfunctory, three-page decision is just the latest chapter in an incredibly contentious and bitter dispute between the shareholder and his cooperative, involving at least 12 separate litigations, three grievance complaints filed by the shareholder against the cooperative's attorney, a disciplinary suspension of the shareholder's attorney (who also happened to be the shareholder's wife), and a vote to terminate the shareholder's lease for objectionable conduct supported by almost all of the shareholder's neighbors.

The dispute with the cooperative began with complaints from the shareholder that his floor sloped and that his apartment was structurally unsound. Those disputes seemed to have been largely resolved by a so-ordered stipulation (that is, an agreement between the parties that is signed by the judge and thus has the force of a court order) entered into in 2020. But then new disputes arose regarding the electrical service into the apartment, and in March 2021 the shareholder filed a new complaint asserting claims seeking, among other things, declaratory and injunctive relief, and damages for retaliatory eviction and breach of the warranty of habitability.

The cooperative moved to dismiss the complaint. In granting the motion and dismissing the complaint, the court noted that most of the causes of action were meritless and/or mooted by the parties' obligations set forth in the so-ordered stipulation. In addition, the court dismissed the warranty of habitability claim because the plaintiff had not alleged that the electrical service issue or the sloping floors impacted his "health, safety, or welfare."

The plaintiff then moved to reargue and renew the dismissal order.

IN THE COURT: In denying the motion, the court first explained the difference between a motion for "reargument" and a motion for "renewal." Those two grounds for relief are typically sought in the same motion, but are separate concepts. A motion to reargue alleges that the court overlooked the relevant facts or misapplied a controlling principle of law. In other words, the court made a fundamental mistake that should be corrected. Despite its name, a motion for reargument is not an invitation for the losing party to "re-argue" the motion, and in any event such motions are rarely successful in convincing the judge to change the original decision. A motion for renewal asserts that new facts or a change in law would change the prior determination. In practice, litigants are rarely able to identify "new facts" (at least not any facts

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that could not have been disclosed in the initial briefing), and significant changes in law during the pendency of the motion are equally unusual. With this backdrop, and considering the plaintiff's penchant for pursuing lost causes, it comes as no surprise that the court denied the motion.

TAKEAWAY

One takeaway is that once a judge rules against a litigant, it is very difficult in a motion for reargument and renewal for that litigant to convince the judge to change their mind. The other takeaway is that long odds do not always deter litigants. Here, over a period of many years, the cooperative had been almost entirely successful at every stage of its disputes with this shareholder—yet the litigation continues.