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CASE LAW TRACKER
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ALTERATIONS

PARC 56, LLC V. BD. OF MGRS. OF PARC VENDOME CONDO.
2023 NY SLIP OP 02944 (1ST DEP'T. JUNE 1, 2023)

Condo Board Acted in Bad Faith, Waited Too Long to Respond to Alteration Agreement

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

OUTCOME: Decided for Commercial Condo Unit Owner

WHAT HAPPENED: This case involves a 14-year-old intentional and deliberate effort by the defendant board of managers to frustrate the legitimate property rights of the owner of a commercial condo unit of Parc Vendome Condominium, at 353 West 56th Street in New York, regarding a valid and binding alteration agreement between it and the board.

In 2006, non-party entities entered into an agreement with the board to perform water remediation work at the building. This work was necessitated by water damage in the unit caused by the condominium and adjoining property owners. In 2007 the prior unit owner sued the board over the water damage to the unit. That was resolved by an agreement where the non-party entities agreed that remediation work would be performed by the board and the non-party entities. In 2008 the board acted to approve a change of use in the certificate of occupancy, which is exactly what the unit owner wanted.

The alteration agreement was sent by the board's managing agent to the current unit owner on Jan. 4, 2021. The unit owner signed and returned it on Jan. 28, 2021. The board reviewed the plans and specifications for the proposed use for the unit. The board requested comments from the unit owner, which were provided. The board then waited 259 days to respond, although the bylaws provided that the plans must be acted upon within 30 days or they are deemed to be accepted.

The plans were the same as those the board approved 16 months earlier for the prior owner of the unit. The board falsely told the court it did not know the location of the check for the alteration fee. It became clear that the board knew exactly where the check was. It had been holding it for six years. It always understood that the check was to be applied to the alteration application. It never tried to return the deposit check to the prior

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AUGUST 2023 HIGHLIGHTS

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

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owner. The board argued that the managing agent lacked authority to send the alteration agreement, although it took substantial steps in furtherance of accepting the agreement. It overall acted in bad faith, with extensive delays, and therefore waived its right to later require a different alteration agreement.

IN COURT: In a prior motion, the court declined to award summary judgment to the unit owner because it found an issue of fact as to whether the obligations the board was now attempting to foist on the unit owner for certain costs and responsibilities for the work were required by the governing documents. Upon review, in the subsequent order that is the subject of this appeal (see *Parc 56 LLC v. Board of Mgrs. of the Parc Vendome Condo.*, 76 Misc3d 1225(A), 2022 NY Slip Op 51049(U)) ("Motion Court Order"), the court found that the board: (1) misrepresented that it did not have the alteration fee; (2) misrepresented that the governing documents required the unit owner to absorb certain costs and responsibilities for the work when the documents did not; and (3) then attempted to address this issue by trying to pass an amendment to do so (which was never properly passed and implemented—a fact that was hidden from the court). The motion court found it clear that the bylaws did not require the unit owner to incur such costs and obligations and that the unit owner was entitled to summary judgment.

The unit owner issued a subpoena to Elizabeth Schrero, Esq., the board's previous attorney for testimony as to the board's bad faith, and she moved for an order to quash. The court denied her motion, as she was held to have knowledge of the facts in issue and cannot be shielded for discovery based upon attorney-client privilege.

The motion court granted the unit owner's motion to punish the defendants for contempt in violating the prior decision by failure to sign and return a ministerial "no work" PW-1 form as directed, as well as the board's bad faith and willful and contumacious conduct in violation of a settlement agreement and the prior order. The board was required to pay the maximum statutory amount of $250 for civil contempt.

On appeal, the motion court's decision granting summary judgment based upon the board's bad faith and failure to reject the alteration agreement within the time allotted was affirmed, except it was modified to deny the motion for contempt. The order that denied Elizabeth Schrero, Esq.'s motion to quash a subpoena was dismissed as moot.

(**Takeaway** *on p. 4)*

TAKEAWAY

The obligation of the parties and their counsel of candor before the courts is inviolate, and breach of this obligation, as was found here, can turn an otherwise possible win into a costly defeat. This may account for the outcome in this case. Although not mentioned in any of the decisions, it is my opinion that, where the good faith of the board is the basis of the court deferring to the board, as required by *Matter of Levandusky v. One Fifth Ave. Apt. Corp.*, 75 NY2d 530 (1990), a finding of misrepresentation or bad faith by the board or its counsel may tip the court away from deferring to the board's business judgment.

It hardly seems worthwhile to seek civil contempt, which has a maximum penalty of $250. However, costs and sanctions, pursuant to Parts 37.1, 100 and 130 of the Rules of the Chief Judge offer the possibility of up to $10,000 in an appropriate case. They are rarely applied, and not referenced in the decisions in this case.

It bears repeating that when a board is presented with an alteration agreement (or the exercised right of first refusal) and the bylaws require it to be accepted or rejected within 30 days, or make reasonable requests for needed information, such time limitations must be adhered to. If the board doesn't respond in a timely manner, the agreements submitted may be deemed approved and the board may be stuck with unintended and costly consequences.

BUSINESS JUDGMENT RULE

FIELDS ENTERS. INC. V. BRISTOL HARBOUR VILL. ASSN., INC. 2023 NY SLIP OP 03165 (4TH DEP'T. JUNE 9, 2023)

Court Sustains HOA's Right to Reasonably Regulate and Manage Its Property in Dispute with Marina Owner

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

OUTCOME: Decided for Plaintiff Marina Owner, Defendant Homeowners Association

WHAT HAPPENED: The defendant, Bristol Harbour Village Association, Inc., is the homeowners association that has managed a residential community on the west shore of Canandaigua Lake since 1971. During the development of the village, a citizens group called Concerned Citizens of Canandaigua Lake raised objections that resulted in a stipulation, recorded in 1990, imposing certain limitations on the project.

A marina sits on a landlocked parcel at the bottom of a sheer cliff below the village. In 2016, the plaintiffs bought the marina and rented slips to non-residents, as was allegedly the longstanding practice. In 2018, a lawsuit against the marina ended with a consent order decreeing that the 1990 stipulation ran with the land.

The instant dispute arose from slip rentals to non-residents and marina access for that purpose, which can be done only by a staircase or an elevator owned by the village, both of which were temporarily closed due to structural safety concerns. In May 2020, due to the COVID-19 pandemic, the HOA imposed strict regulations over the use of its elevator providing that, at least initially, only residents of the village would be permitted to use it.

IN COURT: The plaintiffs sued the HOA seeking, among other things, a declaration that they and their invitees, including non-residents of the village, had a right to use the elevator. The parties cross-moved for summary judgment. The Supreme Court, Ontario County, denied the plaintiffs' motion and partially granted the HOA's cross-motion, declaring that it had standing to enforce the 1990 stipulation and also the authority to reasonably regulate and manage its own land, including parcels of land it owns that are needed to access the marina, pursuant to its governing documents. The plaintiffs appealed.

The Appellate Division reversed the lower court's judgment to the extent that it agreed with the plaintiffs that the HOA did not have standing to enforce the 1990 stipulation, finding that the HOA was at most an incidental beneficiary of that agreement but with no right to enforce it. The court also held that the HOA did not meet the requirements to qualify as an inured successor to the 1990 stipulation, and thus had no right to seek enforcement of any covenant running with the land.

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On the other hand, the court agreed with the HOA that its governing documents grant it the authority to impose reasonable limitations on the use of the land that it owns, including with respect to access to its elevator. The court said that, absent claims of fraud, self-dealing, unconscionability, or other misconduct, the reasonableness of the HOA's exercise of its rulemaking authority should be measured under the business judgment rule and the court should limit its inquiry to whether the action was authorized and whether it was taken in good faith in furtherance of the legitimate interests of the HOA.

TAKEAWAY

While the facts that gave rise to this dispute were unique, the starting point for any controversy involving the permitted uses of common elements is the governing documents from which the board's powers are derived. Most of the time where the governing documents empower the board to issue a particular regulation, as in this case, the board's exercise of such power will be measured under the deferential business judgment rule.

CERTIFICATE OF OCCUPANCY

GRASSFIELD V. JUPT, INC. 2023 NY SLIP OP 32167(U) (SUP. CT. KINGS CNTY. JUNE 26, 2023)

Loft Owner-Occupants Are Not "Residential Occupants" Subject to MDL Protections

SQUIB BY MARIA BOBORIS, ASSOCIATE, BRAVERMAN GREENSPUN

OUTCOME: Decided for Defendant Co-op

WHAT HAPPENED: In 1985, the plaintiff, Paul Grassfield, along with six other artists, formed the defendant corporation for the purpose of acquiring two contiguous commercial buildings that pre-dated New York City's certificate of occupancy requirement. After the acquisition, the initial shareholders took occupancy of the buildings "for studio purposes only."

In 2001, the initial shareholders obtained a no-action letter from the Attorney General to convert the buildings to cooperative ownership without the filing of an offering plan. Approximately a decade later, the defendant registered the buildings as interim multiple dwellings with the New York City Loft Board, listing Grassfield as the occupant of unit 4, and his wife and co-occupant, plaintiff Jennifer Sterns, as an officer of the co-op's board. Sometime thereafter, the board voted to begin the process of obtaining certificates of occupancy and legalizing the buildings for residential use. Pursuant to the co-op's proprietary lease, Grassfield agreed to share in the legalization costs and agreed that these costs would be deemed additional rent. He also agreed to pay, as additional rent, reasonable attorneys' fees incurred as a result of his default under the lease.

After Grassfield failed to pay his share of the legalization costs, the co-op sought to collect the unpaid additional rent and to terminate his lease. The plaintiffs then initiated this action and moved for summary judgment seeking, among other things, a declaration that Multiple Dwelling Law (MDL) §302 bars the defendant from collecting rent because the buildings lack residential certificates of occupancy and are, therefore, not in compliance with the Loft Law and MDL §301. The defendant opposed the motion and cross-moved for an order declaring that Grassfield is obligated under the proprietary lease to pay the co-op his share of the legalization costs, as well as attorneys' fees.

IN COURT: The court ruled in favor of the defendant, holding that: (1) both Grassfield and his wife, Sterns, are essentially owner-occupants for purposes of the Loft Law and are not entitled to protection under MDL §302; and (2) the co-op was the prevailing party and was, therefore, entitled to its attorneys' fees pursuant to the proprietary lease.

TAKEAWAY

An owner-occupant under the Loft Law is not a protected residential tenant under the MDL.

CONTRACTS

BD. OF MGRS. OF THE 432 PARK CONDO. V. 56TH AND PARK (NY) OWNER, LLC

2023 N.Y. SLIP OP. 31873(U) (SUP. CT. N.Y. CNTY. JUNE 1, 2023)

Engineers Land First Punch in Fight Over Alleged Design Defects in New York's Tallest Condo

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

OUTCOME: Decided for Third-Party Defendants

WHAT HAPPENED: 432 Park Avenue, the tallest residential building in the world when completed 10 years ago, is part of Billionaire's Row on 57th Street. Today, it is the third tallest building in New York City, trailing only One World Trade and the Empire State Building. Its residential condominium units are among the most expensive in the world.

Despite the building's renown, height, location, and famous architect, owners have complained about water infiltration, drywall cracks in ceilings, malfunctioning sliding doors, condensation in windows, repeated tripping of circuit breakers, and an energy efficiency rating of "D," the lowest mark. In addition, there are allegedly severe noise and vibration issues due to the sway of the slender building. The sway is said to cause creaking, banking, and clicking that is so pervasive that sleep is impossible during inclement weather.

By September 2021, the board of managers had enough, and a lawsuit was filed against the condominium's sponsor and certain individuals. In March 2022, those sponsor defendants in turn filed their own claims, as third-party plaintiffs in a third-party complaint, against the condominium's engineers, naming them as third-party defendants. The third-party complaint alleged that the purported defects in the condominium were due to defective design by the engineers. In a pre-answer motion to dismiss, the engineers moved to dismiss some of the many third-party claims filed against them by the sponsor.

IN COURT: The court granted the third-party defendants' motion in part and denied the motion in part. Some of the claims were too old and barred by the three-year statute of limitations, the engineers argued, but the court disagreed. The engineering design professionals were providing the sponsor with plans and drawings for possible remediation work within three years of the filing of the lawsuit, so the sponsor's claims were timely.

The engineers also argued that professional malpractice claims and claims under the engineering contracts were duplicative, and the court agreed. If a party has a claim under a specific contract for professional services, then malpractice claims are repetitious and subject to dismissal.

Finally, the engineers sought dismissal of common law indemnification claims asserted against them by the sponsor, which sought indemnification from the engineers if the board's claims against the sponsor were to be upheld. The engineers argued that the board's complaint against the sponsor alleged that the sponsor itself engaged in active wrongdoing, and a party cannot be indemnified under the common law when it has engaged in active wrongdoing. The court agreed and dismissed the sponsor's third-party claims against the engineers for common law indemnification.

TAKEAWAY

The issues resolved by the court may wander a bit into the legal weeds—third-party complaints, common law indemnification, distinction between contract and professional malpractice claims—yet practitioners in the field, as well as board members, might take away at least two pointers.

First, the responsibility for problems that unit owners might experience, especially in newly constructed or newly renovated buildings, may not be so easy to isolate or define. This lawsuit shows the many levels of legal responsibility that might exist for leakage and noise issues, such as professional design, construction, remediation, or maintenance.

Second, the lawsuit shows that no matter how glossy the brochure, how exclusive the street address, or how expensive the apartment, a residence is only as good as the level of care that went into its design, construction, and maintenance. Your building may be a small walkup in Brooklyn, but don't hesitate to keep it well maintained by professionals. Also, take some comfort that you're not swaying in the wind in a noisy and leaky apartment, several hundred feet above the street.

CONTRACTS

ALLEN V. 130 WILLIAM ST. ASSOCS. LLC 2023 N.Y. SLIP OP. 32030(U) (SUP. CT. N.Y. CNTY. JUNE 15, 2023)

Sponsor Didn't Breach Purchase Agreement or Offering Plan

SQUIB BY EMILY AZIZ, ASSOCIATE, KLEIN GRECO & ASSOCIATES

OUTCOME: Decided for Defendant Condo Sponsor

WHAT HAPPENED: The plaintiff, a potential purchaser of a condominium unit, commenced an action for the return of his down payment to a purchase contract against the defendant, the sponsor of a condominium building. The plaintiff alleged the defendant breached the purchase agreement and condominium offering plan by offering a unit that does not match the dimensions specified in the plan, specifically the height of the unit's ceilings. The plaintiff also alleged that the defendant violated General Business Law (GBL) §349, a claim that requires proof that the defendant's conduct was deceptive or misleading in a material way. The defendant counterclaimed retention of the down payment.

The parties had entered into a purchase agreement for the unit. The purchase agreement provides that the plaintiff received and read a copy of the offering plan, which is incorporated by reference into the purchase agreement. The purchase agreement also states that the unit was to be "substantially in accordance with the Plan . . . ." Under the purchase agreement, the plaintiff defaults if he fails to close on the unit and does not cure his default within 30 days. In the event the plaintiff defaults and does not cure the default within the time allotted, the defendant could terminate the purchase agreement and retain the plaintiff's down payment.

IN COURT: New York County's Supreme Court dismissed both the plaintiff's breach of contract claim and his claim that the defendant violated GBL §349. The court looked at the plain and unambiguous terms of the purchase agreement to dismiss the plaintiff's breach of contract claim. The plan specifically states that certain units and parts of units will have lower ceilings and states that some units in a range, including the unit at issue, will have a *maximum* ceiling height of "approximately 9'-10 1/2," with ceilings expected to be lower in some areas. The plan does not state a minimum height. Based on this unambiguous language in the plan, the court concluded that the plaintiff cannot state a breach of the plan or purchase agreement due to the dimensions of the unit.

Regarding the plaintiff's claim that the defendant violated GBL §349, the court concluded that the record did not reflect any deceptive or misleading act or practice by the defendant, as the unit was constructed within the specifications set forth in the plan. Therefore, GBL §349 was not violated.

Further, the court concluded that the plaintiff defaulted under the purchase agreement by failing to close, and thus, the defendant was entitled to the plaintiff's down payment as permitted under the purchase agreement.

TAKEAWAY

If you are representing a buyer of a new development unit, read all the documents, including the offering plan, so that all pertinent details are known and disclosed to your client.

CONVERSION

FOWLEY V. JAMES 2023 NY SLIP OP 31903(U) (SUP. CT. N.Y. CNTY. JUNE 6, 2023)

Offering Plan Not Mandatory to Convert Mitchell-Lama Co-op to HDFC Co-op

SQUIB BY MARIA BOBORIS, ASSOCIATE, BRAVERMAN GREENSPUN

OUTCOME: Decided for Respondent Co-op Board

WHAT HAPPENED: Petitioners, shareholders of a Mitchell-Lama co-op, sought to enjoin the board from holding a shareholder vote to convert the co-op to an HDFC cooperative after the Attorney General issued a no-action letter permitting the vote to proceed via a proxy statement rather than an offering plan.

The petitioners argued that an offering plan was required because the co-op has 421 units and New York Codes, Rules and Regulations (NYCRR) title 13, section 18.9(a)(3) states that a no-action letter "shall not be issued where the offering involves more than 10 residential units." The petitioners further argued that the proxy statement did not adequately apprise shareholders of the nature and risks of the conversion because it did not comply with 13 NYCRR §18.9(a)(3), which sets forth the requirements for an offering plan.

IN COURT: The court denied the petitioner's motion for a preliminary injunction, holding that: (1) the provision limiting when no-action letters can be issued applies only to public offerings and not to the conversion process; (2) the conversion process is governed by General Business Law (GBL) §352-e (b), which does not require an offering plan for a conversion vote; and (3) the proxy statement complied with the GBL's requirements of a "prospectus."

TAKEAWAY

GBL §352-e, which does not require an offering plan, applies to the conversion process from a Mitchell-Lama cooperative to an HDFC cooperative.

DEFAMATION

SKARZYNSKI V. ABM MGMT. CORP. 2023 NY SLIP OP 03491 (JUNE 28, 2023)

Fine for Unauthorized Installation Leads to Defamation and Malicious Prosecution Claims

SQUIB BY INGRID C. MANEVITZ, PARTNER, SEYFARTH SHAW

OUTCOME: Decided in Part for Defendants

WHAT HAPPENED: The plaintiff, a unit owner in the Estates at Hillcrest Condominium II, a 36-unit condominium in Queens, was fined $500 for allegedly installing unauthorized cable/internet and security alarm equipment outside his unit that damaged condominium common elements, and was charged associated late fees and attorney's fees as a result of his failure to pay the fine. After the fine was imposed, the plaintiff circulated an inflammatory letter to the condominium's unit owners, criticizing the condominium's board president, management company (ABM Mgmt. Corp.), and property manager, and calling for the removal of the board president and ABM. In response to the plaintiff's letter, the board and ABM sued the plaintiff for defamation. The suit was ultimately dismissed following a trial before a referee.

Soon after the defamation suit was dismissed, the plaintiff filed suit against ABM, ABM's president, the board president, and the condominium's board of managers, seeking money damages and other relief for alleged violations of General Business Law §349 (deceptive business acts) and for malicious prosecution, among other claims.

IN COURT: The defendants moved for summary judgment dismissing the plaintiff's complaint in its entirety, and the lower court, Supreme Court, Queens County, denied their motion by order dated Oct. 4, 2019. The defendants appealed, and by decision and order dated June 28, 2023, the Appellate Division, Second Department, affirmed in part and reversed in part.

The appellate court held that the lower court erred in denying that portion of the defendants' summary judgment motion seeking dismissal of the plaintiff's claim

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under General Business Law §349. General Business Law §349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service . . . " and a cause of action to recover damages for a violation must "identify consumer-oriented misconduct which is deceptive and materially misleading to a reasonable consumer, and which causes actual damages." The appellate court held that the conduct alleged by the plaintiff did "not amount to consumer-oriented conduct," but rather involved a private dispute "unique to the parties."

With respect to the plaintiff's cause of action for alleged malicious prosecution, however, the appellate court held that the defendants' summary judgment motion was properly denied. "The elements of the tort of malicious prosecution of a civil action are (1) prosecution of a civil action against the plaintiff, (2) by or at the instance of the defendant, (3) without probable cause, (4) with malice, (5) which terminated in favor of the plaintiff, and (6) causing special injury," and a special injury requires "some concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit."

The appellate court concluded that the defendants "failed to eliminate triable issues of fact as to whether they commenced the defamation action against plaintiff without probable cause and with malice, and as to whether the defamation action caused a special injury to the plaintiff."

TAKEAWAY

This case is a reminder of how easily a seemingly simple dispute between a condominium unit owner and a condominium board and management company can turn ugly. What started as a relatively minor unauthorized installation by a unit owner and routine resultant monetary fine by a board spiraled into years of protracted and costly litigation between the parties. Was it worth it for any of the parties in the end? Time will tell as this case isn't over yet.

FIDUCIARY DUTY

BD. OF MGRS. OF THE ALFRED CONDO. V. MILLER 2023 NY SLIP OP 32062(U) (SUP. CT. N.Y. CNTY. JUNE 22, 2023)

Court Dismisses Most of Unit Owner's Claims as Barred by *Res Judicata* and Business Judgment Rule

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

OUTCOME: Decided for Plaintiff Condo Board in part and Defendant Unit Owner in part

WHAT HAPPENED: The plaintiff, an owner of a residential condominium unit, had been involved in litigious disputes with the condo's board of managers for years, with the plaintiff's initial 2018 action alleging that the board committed a host of wrongdoings, arguing both direct and derivative claims, including a failure to timely approve his alteration agreement, failure to properly maintain the building's gym and pool, failing to address noxious fumes emanating into the building from a neighboring property, failing to install handicap-approved curbs, and permitting a "valuable tree" to be removed from the property. Ultimately, the court in that case dismissed all of the unit owner's claims with prejudice.

Subsequently, the condo board brought an action against the unit owner in 2020, with the majority of the board's claims arising out of the unit owner having made unauthorized alterations to his apartment. The unit owner brought counterclaims against the condo board in that action, alleging that the board members breached their fiduciary duties by cancelling his gym membership and allowing other unit owners to post petitions against him, but not in favor of him.

The instant action was brought by the plaintiff in 2022, wherein he alleges that the condo board breached its fiduciary duties in connection with numerous claims, including allowing the building to receive a "D" energy efficiency rating, failing to accept free trees from the Parks Department, failing to enforce the building's smoking policy, failing to correct fire doors and install bioluminescent strips and markers in the stairwells, failing to provide the police with video evidence in connection with a vandalism of his bicycle, allowing employees to park in front of the building, allowing employees of the managing agent to sell illegal drugs at the building, allowing mold to grow on the façade of the building, failing to provide records pertaining to legal fees incurred

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by the condominium, and allowing dangerous conditions to exist at the gym and pool areas and building elevators.

In addition, the plaintiff's complaint also alleges that the condo board president, in his capacity as the condo's architect, committed malpractice, and the condo board attempted to hide the structural problems in the building or take actions to correct the same. Further, the plaintiff brought an additional cause of action for conversion because the condo board had directed his tenant to remit rental payments directly to the condominium instead of the unit owner.

IN COURT: The plaintiff's own pleadings appeared to acknowledge that some of his claims had been raised in prior actions, but that they had still not been corrected. The court applied the *res judicata* doctrine, and therefore the prior claims that had been previously adjudicated in the previous actions were dismissed. Such dismissed claims included most of those whereby the plaintiff alleged that the condo board had failed to take appropriate safety measures, failed to replace trees, and failed to provide the police with video evidence of the vandalism. Additionally, the claim alleging malpractice against the board president, as the condo's architect, was also dismissed for the same reasons, as the court recognized that a mere rewording of the complaint did not change the underlying facts surrounding the claim, and that it mirrored a claim that had been previously dismissed in one of the earlier actions.

With respect to the conversion claim, the court also dismissed this cause of action, but for a different reason—the documentary evidence utterly refuted the plaintiff's factual claims. Specifically, the condo board had only directed the tenant to pay rent directly to the condominium after it had placed a lien for unpaid common charges on the unit, and therefore this action was permitted under the language of the condominium's governing documents and the lease itself. Further, once the unit owner satisfied his common charge arrears, the condo board directed the tenant to resume paying rent directly to the landlord unit owner.

The defendant condominium board had also sought dismissal of the plaintiff's claims based upon the business judgment rule, arguing that their actions were not made in bad faith, were within the scope of their authority, and were made in furtherance of the condominium's interest. The court agreed in part, finding that the board's alleged failure to enforce its smoking policy on a few occasions was not enough to overcome the protection of the business judgment rule.

The court did not dismiss the remaining claims (i.e., breach of fiduciary duty in failing to provide information regarding the condominium's legal fees and allowing an illegal drug trade at the building), as these not only involved issues of fact, but the specific actions alleged to have occurred would not allow the board to be shielded by the business judgment rule. The court referred to existing precedent providing that unit owners have a right to review the condominium records for a valid purpose, and while the plaintiff did not specify his purpose for seeking a review of the defendant's legal fees, the court inferred that the plaintiff has a valid purpose because he must be afforded all favorable inferences in connection with the defendant's motion to dismiss. Similarly, if the condominium board actually did allow an "illegal drug trade" to operate within its building, such misconduct would amount to bad faith, and therefore be outside the protections of the business judgment rule.

Finally, although two of the plaintiff's claims survived the defendant's motion to dismiss, the court did not allow such actions to proceed against the board members in their individual capacities. The court found that the actions alleged in the surviving claims, even if true, do not demonstrate that the individual members of the board acted tortuously or in any capacity other than their capacities as board members.

TAKEAWAY

The court in this case relied heavily on the doctrine of *res judicata*, as it dismissed all claims brought by the plaintiff that repeated or closely resembled those that had previously been adjudicated in prior matters before the courts. In addition, the courts will continue to shield co-op and condo board decisions from judicial scrutiny so long as they satisfy the three-pronged test for the business judgment rule: (1) there is absence of bad faith; (2) the decision was made within the scope of the board's authority; and (3) the decision furthers a corporate purpose. However, because claims are to be afforded a favorable inference when subject to a motion to dismiss, the business judgment rule test is to be applied with the assumption that the alleged facts in the claim are true.

FRAUD

BD. OF MGRS. OF 570 BROOME CONDO. V. SOHO BROOME CONDOS LLC

2023 NY SLIP OP 32182(U) (SUP. CT. N.Y. CNTY. JUNE 28, 2023)

Court Allows Fraud Claims to Proceed Against Sponsor Principals

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

OUTCOME: Decided for Plaintiff, Defendants

WHAT HAPPENED: Litigation involving new construction condominiums often follows a familiar pattern. After the sponsor of the development turns control of the board of managers over to the unit owners who bought into the condominium, the new board sues the sponsor based on a litany of construction defects that allegedly fall short of what the sponsor promised in the offering plan. In addition, because the sponsor is usually a single purpose entity that may have had any profits upstreamed to its backers by the time control is turned over, the condominium board often will bring claims against the sponsor's individual representatives, usually asserting some variant of fraud or breach of fiduciary duty allegations. The sponsor defendants will then move to dismiss the complaint, often making arguments including that the allegations against the individual defendants are duplicative of the contract claims against the sponsor entity or otherwise fail to state a claim for relief.

This particular lawsuit involves the condominium located at 570 Broome Street, located near the entrance to the Holland Tunnel. This development had already had a troubled history, from the death of a worker from a crane accident during construction to a protracted dispute with its next-door neighbor, 111 Varick Street, over permitted building heights, even before the sponsor turned over control of the building to the unit owners in July 2022.

In February 2023, the board of managers of the condominium brought a lawsuit alleging that the sponsor failed to live up to its promises in the offering plan by delivering a building riddled with over 20 separate construction defects. This was the first cause of action for breach of contract. The board also made three additional causes of action for fraud in the inducement, breach of fiduciary duty, and for voidable transactions against the principals of the sponsor in their individual capacity, asserting, among other things, that they deliberately understated the condominium budget and common charges to induce purchasers to buy apartments, then dramatically increased common charges and assessments after most sponsor-owned units were sold (and profits distributed to the sponsor's principals). So far, so familiar.

IN COURT: The defendants moved to dismiss the three claims asserted against the sponsor's principals, meaning that, no matter the outcome of the court's decision, the breach of contract claims asserted against the sponsor entity would proceed to discovery.

With respect to the fraud allegations, the defendants made the argument that New York courts do not recognize causes of action against sponsors for fraud arising out of contractual obligations under the offering plan. Here, the defendants relied heavily on a case brought in civil court a few years previously by the plaintiff's law firm on behalf of a condominium located in Turtle Bay (*Alexander Condo., by its Bd. of Mgrs. v. E. 49th St. Dev. II, LLC*, 60 Misc. 3d 1232(A)). Although the two cases were different (for example, the *Alexander* case alleged over 25 separate causes of action compared to just the four in this case), the *570 Broome* complaint's preliminary statement and many of the substantive allegations at issue were repeated verbatim from the earlier pleading. In the *Alexander* case, the judge had dismissed the fraud claims as duplicative of the breach of contract claims, and also found that the fraud allegations were not pleaded with sufficient particularity (i.e., that the complaint did not sufficiently describe who made what misrepresentation, when it was made, and to whom it was made).

Here, however, the court found differently. While the court acknowledged that the offering plan contained specific representations regarding the sufficiency of the condominium's operating budget, it nevertheless held that the allegations regarding the condominium's financial health are "distinct from the failure to construct the building to meet certain parameters in the offering plan, such as the purportedly faulty piping and improper gas

(continued on p. 12)

room venting . . . . " In permitting the fraud cause of action to proceed, the court did not discuss the *Alexander* case, nor did it specifically address the issue whether the claims had been pleaded with sufficient particularity.

With respect to the breach of fiduciary duty claims, the court found that the plaintiffs stated a cause of action against the individual defendants to the extent that they were motivated by divided loyalties to the sponsor and themselves when setting the condominium's operating budget too low. Finally, the court dismissed the voidable transaction cause of action because the plaintiff's allegations were too conclusory and unsupported by specific facts. These latter two findings, incidentally, were consistent with the *Alexander* decision.

TAKEAWAY

This case illustrates the unpredictability of these lawsuits against sponsors of new construction condominiums. The comparison of the outcome in this case and the *Alexander* case is not highlighted to suggest there is anything remiss in either decision—to be clear, there were significant factual differences and litigation strategies in the two cases, and the *Alexander* case was not binding precedent in any event. Rather, the pleadings and arguments were sufficiently similar that it would have been difficult, if not impossible, to predict differing outcomes in the two cases ahead of time, much less in whose favor the two courts would decide. This fundamental lack of certainty of outcome should guide any condominium board contemplating whether bring this type of lawsuit, as well as the sponsor's and its principals' decision whether to settle or contest such a lawsuit.

INJUNCTION

ESHAGHPOUR V. PROMENADE CONDO. 2023 NY SLIP OP 50626(U) (SUP. CT. N.Y. CNTY. JUNE 27, 2023)

Condo Can Fine Unit Owners and Restrict Their Access to Amenities

SQUIB BY ANDREW P. BRUCKER, PARTNER, ARMSTRONG TEASDALE

OUTCOME: Decided for the Defendant Condo

WHAT HAPPENED: The plaintiffs own five units in a condominium in Manhattan and have been trying to combine the units for a number of years. In 2014, the plaintiffs sued the condominium and the board in order to proceed with the construction without interference. The matter was settled.

In 2022, the condo brought a lien foreclosure action for common charges and fines owed to the condo. The fines (which the plaintiffs refused to pay) were, according to the board, due to the fact that windows were installed and railings were removed without the board's consent, which were violations of the alteration agreement between the plaintiffs and the defendants. Later that same year, the condo adopted a bylaw amendment giving the board the right to restrict a unit owner's use of the building's amenities and non-essential services if the unit owner is in arrears for more than 60 days (which, obviously, was true of the plaintiffs). The plaintiffs sued for a preliminary injunction and temporary restraining order to void the enforcement of the bylaws (i.e., the fines) and to enjoin the condo from restricting the use of the amenities.

IN COURT: The plaintiff's motion was denied. A preliminary injunction will be granted only if there is a likelihood of success and there will be irreparable harm if not granted. The plaintiffs did not provide the court with evidence that the condo was wrong in claiming that the plaintiffs violated the alteration agreement. Further, the plaintiffs' claim that the interest on the late payments (12 percent) was usurious was dismissed quickly by the court after it noted that usuary was 25 percent. Therefore, the court did not find that it was likely that the plaintiffs would ultimately succeed.

As to the "irreparable harm" requirement for a preliminary injunction, the claim that their autistic son would suffer irreparable harm was dismissed by the court after the board agreed to allow the child to use the aerobics room with his therapist. In addition, after hearing of the plaintiffs' many physical problems, the court noted that the condo never threatened not to open the building door for the plaintiffs' family members if they needed assistance, and thus dismissed this argument as well.

(**Takeaway** *on p. 13)*

TAKEAWAY

The court confirmed that a condo board may withhold non-essential services from, and deny the use of amenities by, those unit owners in arrears, as provided by the bylaws. However, the court reiterated that for any such bylaw to be blessed by a court, it must be properly passed (and all of the technical requirements for adopting an amendment must be strictly followed), and consistent with the law, which according to the court means that the imposition of money damages must be reasonable, fair, and legal. Be warned: Fines that are outrageous will not be tolerated by the courts of New York.

MOTION PRACTICE

MAKHNEVICH V. BD. OF MANAGERS OF 2900 OCEAN CONDO. 2023 NY SLIP OP 03548 (1ST DEP'T. JUNE 29, 2023)

Service of Court Papers on Managing Agent, Not Condo Board Member, Was Improper

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

OUTCOME: Decided for Defendant Condo Board

WHAT HAPPENED: The plaintiff sought to serve the condo board by delivering the summons and complaint to a paralegal at the managing agent's office. The lower court dismissed the complaint, because this is not proper service on an unincorporated association under General Associations Law §13, which requires service of process on an officer of the unincorporated association "in the manner provided by law for the service of a summons on a natural person." Delivery to an employee at the managing agent's office does not constitute service upon a board member pursuant to a method of service provided under CPLR §308.

The plaintiff appealed the lower court's order: (1) dismissing the complaint; (2) denying the plaintiff's motion to renew; and (3) denying the plaintiff's motion for clarification or to resettle the lower court's order.

IN COURT: The Appellate Division: (1) affirmed the lower court's order granting the condo's motion to dismiss the complaint; (2) affirmed the lower court's order denying the plaintiff's motion to renew; and (3) dismissed the plaintiff's appeal from the lower court's order denying her motion to clarify or resettle, holding that the order was a non-appealable paper.

TAKEAWAY

Service of legal process upon an employee of the managing agent of a condo is not proper service upon the condo board of managers or the condo—an unincorporated association. A managing agent, as an agent for a disclosed principal, cannot be held liable for negligence absent affirmative negligence on the managing agent's part. A managing agent is a fiduciary as to the condominium, but not as to the individual unit owners.

NUISANCE

MRISHAJ V. MOORE 2023 N.Y. SLIP OP. 32043(U) (SUP. CT. N.Y. CNTY. JUNE 12, 2023)

Court Allows Shareholders' Nuisance Claim Against Neighbor to Proceed

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

OUTCOME: Decided for Plaintiff Co-op Shareholders in part and Defendant Co-op Shareholder in part

WHAT HAPPENED: Plaintiff shareholders sued their downstairs neighbor, alleging that the neighbor's constant yelling, screaming, cursing, and banging on the ceiling forced them to move from their cooperative apartment as it adversely impacted their sleep, health, and the well-being of their children. They also alleged that because the defendant had a personal relationship with an officer of the cooperative, the defendant caused the cooperative to issue a notice of termination to them which resulted in their vacating the apartment. Their lawsuit asserted claims for, among other things, unlawful eviction, nuisance, harassment, and intentional infliction of emotional distress. The defendant moved to dismiss the complaint.

IN COURT: The court dismissed some but not all of the claims. It dismissed the unlawful eviction claim because there was no allegation that the defendant did not physically deprive them of access to their apartment. Rather, the claims were akin to that of constructive eviction, which cannot form the basis for a claim under New York's unlawful evictions statute. In addition, there was no landlord-tenant relationship between the two neighbors, so there could be no unlawful eviction claim against the neighbor even if the neighbor's conduct was the cause for them vacating. The court also dismissed the harassment claim as New York does not recognize a common law cause of action for harassment. The court dismissed their claim for interference with contract (as a result of having the cooperative issue a notice of termination) because the cooperative did not actually evict them, and therefore did not interfere with their leasehold.

On the other hand, the court allowed the nuisance claim to proceed, finding that the plaintiffs sufficiently alleged conduct that the defendant unreasonably interfered with their sleep and enjoyment of the apartment. In addition, the court allowed the plaintiffs' claim for intentional inflection of emotional distress to proceed, finding that the defendant's yelling and screaming, shouting profanities, and banging on the ceiling—all with knowledge that young children lived in the apartment—did set forth a campaign of indecent, intolerable, and uncivilized conduct that satisfied the high bar of an intentional infliction claim.

TAKEAWAY

This is such a common occurrence, and the cooperative should consider itself lucky that it was not named in this suit for having issued a notice of termination against a shareholder who was subject to abuse while apparently taking no action against a shareholder who the court had found engaged in uncivilized behavior potentially because of a personal relationship between the defendant and an officer of the cooperative. Laying that aside, shareholders should be aware that they could be subject to nuisance and emotional distress claims when they engage in uncivil and inappropriate conduct against a neighbor. A month doesn't go by in our practice without hearing a complaint that shareholders are being abusive to each other; the court may well have laid a pathway for an affected shareholder to properly deal with it.

NUISANCE

THE BD. OF MGRS. OF THE CHARLESTON CONDO. V. OPPENHEIM 2023 NY SLIP OP 31980(U) (SUP. CT. N.Y. CNTY. JUNE 13, 2023)

Court Denies Condo Sanctions Against Unit Owner for Alleged Violations of Settlement Agreement

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

OUTCOME: Decided for Defendant Unit Owner

WHAT HAPPENED: Beginning in 2018, the board of The Charleston Condominium, a 191-unit, 21-story building at 225 East 34th St., began communicating (through counsel) with unit owner Judith Zarucki about bylaw and house rule violations. Specifically, the board alleged that Zarucki had been causing offensive odors by smoking marijuana, keeping too many pets, and allowing them to roam off-leash in the building and cause excessive noise. For a period of time the nuisances and violations stopped, but they started up again in June 2019, with the board receiving 50 complaints over a six-month period about noise and marijuana odor. The complaints continued, and Zarucki was fined $13,600 for the bylaw and house rules violations. Finally, in 2020 the condo filed suit.

IN COURT: The Charleston sought to prohibit Zarucki from smoking marijuana (or allowing it to be smoked) in her unit, from being excessively noisy, and from keeping pets in her unit. She did not appear or oppose the motion, and in 2021 the court granted the Charleston's demands with respect to smoking and noise, but not to pets. Then, in 2022, the board and Zarucki executed a settlement agreement that for a "probationary" period of 18 months she would not permit marijuana smoking in her apartment; she would not have any more animals in her unit other than the current cat and two dogs which she would not allow to roam unaccompanied or to urinate or defecate in any common area of the condo; and she would not create disturbing and loud noises.

Despite Zarucki's agreement, her troublesome behavior continued. In 2023 the Charleston went back to court, seeking contempt sanctions for violating the 2021 court order and the 2022 settlement agreement. In support, the Charleston again provided written affidavits from building employees alleging that they smelled marijuana (and that the smell seemed stronger near Zarucki's door), from the managing agent regarding incidents when the police were called to her apartment due to loud yelling and banging, and from an employee claiming that he saw defendant Zarucki drop drug paraphernalia in the service elevator. Zarucki denied all of the allegations relating to marijuana odors and stated that the Charleston's other complaints were too vague to justify holding her in contempt.

To find a party in contempt, the complaining party must show, by "clear and convincing evidence," that: (1) the court order in effect established a clear mandate; (2) that the order was disobeyed; (3) that the violator knew about the court order; and (4) the complainant was prejudiced by the violation. The "clear and convincing evidence" standard requires the party to produce evidence making it "highly probable" that what they claim really happened.

The court ruled that the Charleston had not met that burden. The affidavits from the doormen reporting the smell could not definitively place it within Zarucki's unit, and the odor complaints took place over a series of months. Other claims regarding violations of the pet limits were also deemed unduly vague. In sum, the court held that the violations and evidence presented were neither so severe nor specific as to constitute "clear and convincing evidence" warranting a contempt finding. And if the Charleston wished to pursue the motion, the court stated, the witnesses who submitted affidavits would need to testify.

TAKEAWAY

We strongly recommend that when seeking injunctive relief (or contempt) against an owner, you must be prepared to present live witnesses at any court hearing, especially if you expect opposition. Written affidavits cannot be cross-examined by a defendant. The court is unlikely to grant relief based solely on affidavit evidence unless the defendant fails to appear at all.

PERSONAL INJURY

VILLEDA V. BD. OF MGRS. OF JAMAICA EAST CONDO. 2023 NY SLIP OP 31962(U) (SUP. CT. QUEENS CNTY. JUNE 12, 2023)

Condo Responsible for Maintaining Sidewalk Where Pedestrian Tripped and Fell

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

OUTCOME: Decided for Plaintiff Pedestrian

WHAT HAPPENED: Doing errands on a Tuesday in August 2017, the plaintiff tripped on a raised sidewalk flag adjacent to the defendant's property, causing her to lose consciousness for several minutes and suffer a broken toe. She filed a personal injury suit against the condominium that owned the property.

IN COURT: After discovery was conducted, the plaintiff filed a motion for summary judgment as to the defendant's liability only for its failure to maintain and timely repair the uneven sidewalk flag. Under the New York City Administrative Code, a property owner has an ongoing obligation to maintain the public sidewalk that abuts its property.

The defendant attempted to avoid summary judgment by arguing that the condition was open and obvious, thus relieving it of the duty to warn. However, the court held that whether a condition is open and obvious is relevant only with respect to the issue of the plaintiff's possible comparative liability, and did not discharge the defendant's obligation to comply with the Administrative Code.

The defendant also sought to shift liability to the contractor it had hired to perform the repair (which had not been done for more than a year from when the contractor had been hired). The court found this argument equally unavailing as the duty to maintain may not be delegated to a third party, leaving the defendant liable for the maintenance of the sidewalk. Indeed, the condominium association's president admitted in her deposition that the association had notice and considered the flag to be a tripping hazard.

The court granted summary judgment in favor of the plaintiff as to the defendant's liability for failure to reasonably maintain the appurtenant sidewalk flag that caused the plaintiff to trip and suffer injuries.

TAKEAWAY

Under the New York City Administrative Code, property owners must take care of not only their own building but also the adjacent public sidewalk, a duty that may not be delegated and should not be ignored. Property owners should conduct regular and thorough inspections and undertake prompt repairs to limit the risk of personal injury claims. Whether the condition is so obvious that pedestrian should have avoided the area or taken greater care does not relieve the property owner of its duty or liability.

PROPERTY DAMAGE

GREAT N. INS. CO. V. NELSON 2023 N.Y. SLIP OP. 32134(U) (SUP. CT. N.Y. CNTY. JUNE 26, 2023)

Condo Not Liable for Damage Caused by Washer Leak from One Unit to Another

SQUIB BY DALE DEGENSHEIN, PARTNER, ARMSTRONG TEASDALE

OUTCOME: Decided for Defendant Condo Board, Co-defendants

WHAT HAPPENED: Halfteck seeks to recover for property damage in excess of what was paid by his insurer after a water leak damaged his apartment. The March 2012 water leak originated from the rupture of a water supply line for a washing machine two floors above Halfteck, in an apartment owned by Nelson. Apparently, the washer and dryer were installed in 2006 and, due to the way they were placed, the supply hose could not be observed without moving the appliances.

Prior to March 2012, Nelson had not received complaints and was unaware of any problems with the washer, which was used once or twice a week by Nelson's tenant. The tenant had the dryer serviced about three weeks before the leak. This required the technician, from

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defendant BSH, to move the dryer and connect hoses. BSH, which manufactured the washer and dryer, but did not initially install them, opined that the installation caused the hose to be pinched so that it wore over time.

The condominium's bylaws provide that maintenance and repairs to, among other things, plumbing fixtures within a unit or belonging to the unit owner are to be performed at the owner's expense. While there is a dispute as to whether the superintendent was in the apartment at any time prior to the leak, there is no indication that he moved the washer/dryer at any time.

Other vendors/contractors were sued as well.

IN COURT: Various parties moved for judgment in their favor. As to the condominium and superintendent, the evidence showed that they were under no duty to repair, maintain, or inspect the washer/dryer. Further, the evidence established that they did not cause the rupture in the water supply hose. The building did not install the washer/dryer or its plumbing fixtures, nor did they interact with the washer/dryer before the leak. They could not have been responsible for the improper positioning.

In addition, the evidence demonstrated that the condominium defendants did not have notice of any dangerous or defective condition. The plaintiff, in fact, did not oppose the motion by the condominium defendants except to argue that negligence is established because—after the leak—the condominium changed its rules to require installation of pans, sensors, and a cut-off switch. However, evidence of subsequent remedial measures is not admissible to prove negligence and the condominium defendants' motion for summary judgment to dismiss the action as against them was granted.

The court also granted judgment against certain contractors, as well as the unit owner and his tenant. There was no evidence that they interacted with the washer/dryer or its plumbing fixtures. Indeed, the plaintiffs' only argument with respect to the owner and tenant is that the condominium's rules require that damage to the building caused by unit owners shall be repaired at the expense of the unit owner. The court rejected this argument: First, there was no authentication for the rules. Second, the court determined that the rule did not concern damage to another unit, but rather to the building itself.

The court denied the plaintiffs' motion for judgment against BSH, as well as BSH's motion for judgment dismissing the case as to BSH, and the case will proceed as to them.

TAKEAWAY

The court rejected any argument that the condominium had responsibility for equipment it did not install or maintain, relying on the condominium's bylaws. It also disposed of any argument that the unit owner and tenant could be responsible based on the condominium's rules. I note the absence of any discussion in the decision of whether there was an alteration agreement executed when the washer/dryer was installed, which may have also bolstered the condominium's claim that it did not have liability.

PROPRIETARY LEASE

JACOBY V. BD. OF DIRS. 85 8TH AVE. TENANTS CORP. 2023 NY SLIP OP 32145(U) (SUP. CT. N.Y. CNTY. JUNE 30, 2023)

Trial Needed to Determine Which Co-op Share Certificate Is Genuine

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

OUTCOME: Decided for Plaintiff Co-op Shareholder

WHAT HAPPENED: The plaintiff is a long-time resident of a cooperative apartment, which the plaintiff alleges was purchased in 1989 by his mother. After his mother obtained financing to purchase the apartment, the plaintiff allegedly became the owner of the apartment, as shown by a share certificate dated June 23, 1989, purportedly signed by two board members, and bearing certificate number 144. The plaintiff admits that the board has refused to issue a proprietary lease in his name or change the billing statements from his mother's name to his. He filed suit, seeking a declaratory judgment that he owns the cooperative apartment.

The defendants' answer included a counterclaim that also sought a declaration as to ownership, as

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well as a counterclaim for sanctions against the plaintiff under New York's Rule 130 for engaging in purportedly frivolous legal filings. The plaintiff moved to dismiss the counterclaims, and the defendants cross-moved to dismiss the lawsuit.

In opposition to the plaintiff's motion and in support of their cross-motion to dismiss, the defendants proffered, through an attorney's affirmation only, documents to support their own version of events. The co-op maintained that the plaintiff's mother, who is now deceased, bought the apartment with her boyfriend, a non-party to the lawsuit, in 1989 as tenants in common. A share certificate for the apartment was issued to the mother and boyfriend dated June 23, 1989, and it bears certificate number 21. A proprietary lease was also issued to the mother and boyfriend, and a copy was submitted by the defendants. Finally, the defendants proffered a UCC financing statement that showed the mother and her boyfriend as debtors, pledging the shares and proprietary lease for the apartment as security for the loan.

The plaintiff, averred the defendants, was once the president of the cooperative, and he plainly forged his share certificate, improperly obtaining it from the cooperative's stock book. In reply, the plaintiff denied that he improperly obtained his share certificate, and he further claimed that his mother's former boyfriend stated to the plaintiff that the apartment belongs to the plaintiff.

IN COURT: The court denied the plaintiff's motion to dismiss the defendants' counterclaim for a declaration over ownership, since that counterclaim was the central, unresolved issue in the case. The court did dismiss the defendants' counterclaim for sanctions, as New York recognizes no such separate cause of action under Rule 130. But the court also denied the defendants' cross-motion to dismiss, finding that the record demonstrated unresolved issues of fact.

While the purported statement of the plaintiff's ownership by the mother's boyfriend was not considered by the court, the defendant cooperative had failed to submit an affidavit from a person with personal knowledge of the facts. As such, the court stated that it could not determine how to explain the disparities between the two versions of events. One share certificate bore number 21, the other number 144, yet both were dated the same date. Something odd was obviously underfoot, but the court could not determine who was telling the truth without more information. The case was set for a discovery conference, and the parties directed to submit a stipulation outlining the issues in dispute that would be subject to discovery.

TAKEAWAY

At first blush, the court seems to have correctly concluded that the record contained unresolved factual issues. Two certificates purport to speak to ownership of the same apartment, so clearly the court needs some details. Also, why didn't the cooperative submit an affidavit of someone with knowledge?

But a review of the actual filings in the case shows that the cooperative was moving to dismiss based on "documentary evidence," so no affidavit of facts by a person with knowledge was required. Also, the cooperative's attorney authenticated the following documentary evidence in the cooperative's business records, all issued to the mother and her boyfriend at the time of sale: the share certificate, the proprietary lease, the UCC financing statement executed by the mother and the boyfriend, and the recognition agreement signed by the cooperative, the bank, the mother, and the boyfriend. That pretty much covers all documents a cooperative will retain from a sale and closing.

The cooperative went further and submitted the cooperative's stock book showing when shares numbered 140 to 145 were issued, a period including the plaintiff's share certificate number 144. Those shares were issued from 1990 through 1991, demonstrating that certificate number 144 could not have been issued in 1989, as the plaintiff claimed.

It's hard to see what else the cooperative could have submitted to prove its point. While discovery and depositions can lead to a better understanding of the facts in many situations, finding people with firsthand knowledge of what happened at a closing in 1989 may prove challenging. A similar motion by the cooperative, this time for summary judgment and fleshed out a bit with additional facts, may be forthcoming in the near future.

TRANSFERS

TRUMP VILL. SEC. 4, INC. V. YOUNG 2023 NY SLIP OP 03035 (2ND DEP'T. JUNE 7, 2023)

Did DHCR Approve Succession Rights of Deceased Shareholder's Son Before Co-op's Transition Out of Mitchell-Lama?

SQUIB BY RICHARD J. SHORE, COUNSEL, NIXON PEABODY

OUTCOME: Decided for Neither Party

WHAT HAPPENED: Plaintiff Trump Village cooperative apartment corporation was organized as a limited-profit Mitchell-Lama housing corporation from the 1960s until June 2007. Defendant Stephen Young's father Julius Young was the stockholder and died in July 2005, before the dissolution and reconstitution from Mitchell-Lama to market-rate cooperative. Prior to the reconstitution to a market-rate cooperative, while it was a Mitchell-Lama governed by the Private Housing Finance Law (PHFL), upon the death of a shareholder, *unless the shareholder was a primary resident and was thus entitled to the shares and occupancy*, the decedent's estate otherwise was to surrender the shares to the Mitchell-Lama for redemption. The courts and the New York State Division of Housing and Community Renewal (DHCR) have interpreted the PHFL to require a surviving primary resident to seek approval by the DHCR pursuant to a succession rights application.

The plaintiff, defendant, and DHCR did not have record of the DHCR's approved succession rights application, and when the defendant submitted to the plaintiff an application to transfer the name on the stockholder certificate from his deceased father to him in 2016, the dispute arose as to whether the defendant met the requirements of succession in 2005–2006, or whether the shares should have been surrendered to the cooperative at that time.

IN COURT: A declaratory judgment action was commenced by the plaintiff cooperative, and the defendant asserted counterclaims for the same relief. The parties crossed-moved for summary judgment.

Although no approved DHCR succession rights application was produced, defendant Young submitted evidence that he had submitted the requisite documentation to the cooperative in the 2005–2006 time period. He claimed that it would have been the cooperative that submitted the succession rights application, that certain cooperative records were destroyed during Superstorm Sandy, that the DHCR had destroyed its records dating back to that time period, and that he had paid maintenance and resided in the apartment for the last 10 years without the decedent.

The lower court found, and the Appellate Division affirmed, that there was a question of fact as to whether a DHCR succession rights application had been submitted and/or approved, and therefore there was a question of fact as to whether the defendant was entitled to the shares or whether they should have been surrendered to the apartment corporation prior to reconstitution.

TAKEAWAY

At issue in this case is the economic differences between a Mitchell-Lama cooperative, where there are statutorily imposed restrictions on shares being transferred to only family members who reside in the apartment, but if not applicable, the shares are surrendered to the corporation, compared with a free-market apartment corporation, where even if the estate or decedent did not have rights to occupy the apartment, they would still be able to sell the shares to the public. When a dispute arises over the facts and circumstances of what occurred now nearly 20 years ago, particularly where certain records have been lost or destroyed, it is not surprising that the court finds that there is a question of fact and summary judgment is not appropriate. Good apartment corporation record keeping is imperative, and prompt action and/or attention is best practice—the mere fact that this dispute only surfaced 10 years after the reconstitution creates significant obstacles that the apartment corporation has to overcome that it otherwise could have avoided with prompt and timely attention and action.

WARRANTY OF HABITABILITY

FIONDELLA V. 345 W. 70TH TENANTS CORP. 2023 NY SLIP OP 03194 (1ST DEP'T. JUNE 13, 2023)

Court Reinstates Shareholder's Warranty of Habitability Claim Due to Outstanding Class B Violation

SQUIB BY LAUREN E. LEWIS, ASSOCIATE, NORRIS MCLAUGHLIN

OUTCOME: Decided for Defendant in part and for Plaintiff in part

WHAT HAPPENED: A cooperative shareholder claimed that the floors throughout his unit contained a substantial slope, and that a neighbor's alterations work compromised the structural integrity of his unit. These allegations led to several years of disputes and litigations between the shareholder and his cooperative building. In 2020 it appeared that an end was in sight after the parties stipulated to settle both a Housing Part (HP) proceeding and a Supreme Court action by stipulation. Per the 2020 stipulation the cooperative and the shareholder agreed they would each hire an engineer to assess necessary repairs to agree upon a mutually acceptable plan, and that the cooperative would then undertake legally required repairs at the cooperative's expense.

Before this end was accomplished, however, things began to unravel. The shareholder began raising concerns over the electrical system inside the wall. After city inspections found that the electric conditions were safe, the shareholder continued reporting electrical hazards to the cooperative and proposed to undertake his own repairs to address them. The cooperative requested that the shareholder submit plans and pay fees to obtain approvals for his proposed electrical repairs, and when the shareholder never did so, the cooperative served the shareholder with a notice to cure, directing he submit plans to correct the electrical conditions that he claimed were hazardous. Meanwhile, the shareholder claimed that the cooperative failed to file its own required plans with the Department of Buildings or otherwise repair the violations as stipulated in 2020.

It seemed that the only thing that the cooperative and the shareholder *could* agree on was that the required repairs within the shareholder's unit remained uncorrected. The parties disputed the reason why the repairs remained incomplete, and that dispute became the subject of further litigation.

The shareholder brought a new action against the cooperative in Supreme Court, accusing the cooperative of using the notice to cure to illegally attempt to shift responsibility for the repairs back to the shareholder, in contravention of the lease and stipulation.

IN COURT: The shareholder sought declaratory relief and injunctive relief to prohibit the cooperative from escalating the notice to cure into a termination of the lease and to order the cooperative to make repairs. The shareholder also sought damages for claims of retaliatory eviction, breach of the warranty of habitability, and attorneys' fees.

In turn, the cooperative moved to dismiss each of the shareholder's causes of action, arguing that it had already agreed to withdraw the notice to cure, that the parties had already resolved the repair and habitability issues under the 2020 stipulation, and that per the 2020 stipulation, the shareholder had already agreed to sell his apartment after correction of the violations, and thus there could be no retaliation.

The lower court initially agreed with the cooperative and dismissed all of the claims raised by the shareholder. The lower court found that the 2020 stipulation constituted documentary evidence that the shareholder had agreed to sell his apartment, thus making a claim of retaliatory eviction impossible. The lower court also noted that a mere violation of the housing code did not necessarily constitute a breach of the warranty of habitability, absent a showing that the violation also impacted the health, safety, or welfare of the shareholder, or deprived him of those essential functions that a residence is expected to provide. The lower court found that conditions that were the subject of the housing violations did support a new warranty of habitability claim, and because the electrical hazard claims were not the subject of violations, those claims also did not support a warranty of habitability claim.

The shareholder appealed the court's dismissal of the warranty of habitability and retaliatory eviction claims. On appeal, the court modified the lower court's decision by

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partially reinstating the shareholder's warranty of habitability claims, for the period after the 2020 stipulation. The court affirmed dismissal of the retaliatory eviction claim.

The appellate court found that dismissal of the retaliatory eviction claim was proper because documentary evidence had established that the notice to cure was the cooperative's response to the shareholder's own complaints, and only authorized the shareholder to perform repairs that he had himself requested, and that, in any case, the notice had been withdrawn, so no steps were taken by the cooperative to evict the shareholder.

However, in reinstating the warranty of habitability claim, the appellate court disagreed with the lower court's assessment. The appellate court noted that a class B violation issued by the New York City Department of Housing Preservation and Development *is* prima facie evidence that the conditions constitute a hazard to life, health, and safety, and further, that the 2020 stipulation's contemplation of prospective habitability issues had not specifically resolved the existing claims for warranty of habitability issues arising after the 2020 stipulation.

TAKEAWAY

A warranty of habitability claim may possibly be renewed, revamped, or resurrected each time a new B or C class housing violation is issued. While issuance of a housing violation is not dispositive, it might create a presumption that a warranty of habitability claim exists. Where no housing violation is found for an alleged condition a warranty of habitability claim cannot be maintained.