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

ACCESS

201 EB DEV. III LLC V. 205 E. BROADWAY HOUS. DEV. FUND CORP.
2021 NY SLIP OP 32143(U) (N.Y. SUP. CT. N.Y. CNTY. NOV. 3, 2021)

Court Grants Developer Access to Adjoining Property During Construction

SQUIB BY JOE GOLJIAN, ASSOCIATE, BRAVERMAN GREENSPUN

OUTCOME: Decided for Plaintiff

A developer required access to the adjoining property in order to, among other things: (1) install temporary roof protection and stack scaffolding in the rear yard; (2) install flashing and related work; and (3) complete installation of dowel bars and rear yard repairs, in connection with its construction of a new seven-story building. The owner of the neighboring property effectively refused the developer's request by conditioning access on various demands, prompting the developer to sue for a license for access under Real Property Actions and Proceedings Law §881.

In granting the limited license sought by the developer, the court rejected several of the respondent owner's demands. First, the respondent failed to offer any evidentiary or expert support for its contention that all repair work to its property must be completed before the construction of the new building superstructure is complete. Second, the respondent's demand that the developer install swing scaffolding instead of stacking scaffolding, purportedly to avoid damage to its roof, was unreasonable because the stacking scaffolding was to be erected in the rear yard, not the roof. Also unreasonable was the respondent's demand that security be provided by the developer.

TAKEAWAY

When a neighbor seeks access to perform work on and/or develop an adjoining property, it is unwise to make overreaching demands as a condition of access because: (1) as in this case, a court will grant the license for access without the overreaching conditions insisted upon; and (2) "what goes around comes around," as all property owners at one time or another will need access to their neighbor's property in order to properly maintain their property.

JANUARY 2022 CONTENTS

CO-OP & CONDO CASE LAW TRACKER DIGEST includes cases and squib commentary written by the Tracker's Advisory Panel and contributors, who are New York's leading co-op/condo practitioners. This issue covers court decisions from November 2021. For additional cases, visit https://coopcondocaselawtracker.com.

ALTERATIONS

KURLAND V. 161 WEST 16TH ST. OWNERS CORP. 2021 NY SLIP OP 32319(U) (N.Y. SUP. CT. N.Y. CNTY. NOV. 15, 2021)

Board Didn't Have Authority to Approve Shareholder's Roof Renovation

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

OUTCOME: Decided for Defendant

The configuration of a "cond-op" building led to confusion over the ownership of the building's roof. Under the declaration of condominium, the building is divided into a "residential unit," consisting of the cooperative apartments, and a "commercial unit," which owns the roof.

The plaintiff's planned renovation of her cooperative apartment included the renovation of a portion of the roof adjacent to her apartment. She claimed that the roof is part of her apartment and that the cooperative's board approved of the proposed renovation.

The court found, however, that the cooperative board did not approve the proposed roof renovation since it did not have the authority to grant such approval. The court granted the defendants' cross-motion and dismissed the complaint.

TAKEAWAY

Consult all of the governing documents thoroughly *before* planning or undertaking any renovation, especially if it involves areas outside of an apartment and potentially involves or impacts a building's common areas.

Publisher: Carol J. Ott **Executive Editor:** Heather L. Stone **Production Director:** Chad Townsend

Librarian: Jeffrey Buckley **Database Content Manager:** Heather Hess

Associate Publisher: Bill Fink **Marketing Director:** Peggy Mullaney

the HABITAT group

Volume 1, Issue 8

SUBSCRIPTIONS: CO-OP & CONDO CASE LAW TRACKER DIGEST is published by The Habitat Group. Annual subscription rate to the database at www.co-opcondocaselawtracker.com and monthly digest: $996 for single user access; $1,992 for team access.

BUSINESS JUDGMENT RULE

TOLLIVER V. ESPLANADE GARDENS INC. 2021 NY SLIP OP 32310(U) (N.Y. SUP. CT. N.Y. CNTY. NOV. 16, 2021)

Board Can Remove Members Who Disseminated Confidential Information

SQUIB BY MARK N. AXINN, PHILLIPS NIZER

OUTCOME: Decided for the Defendant

Esplanade Gardens is a large Mitchell-Lama cooperative corporation with over 1,800 units in Upper Manhattan subject to supervision by the Department of Housing Preservation and Development (HPD). Two shareholders who recently became members of the board questioned the legitimacy of another board member by writing to HPD on Apartment Corporation letterhead without the authority of the entire board.

The remaining board members voted to remove the new members from the board, and the two removed members sued for reinstatement. Significantly, Esplanade's bylaws permit the board to remove members for cause, including disseminating confidential information. (In many other co-ops, only the shareholders can remove board members.)

The court denied the petitioners' claims that their removal was arbitrary and capricious, and refused to upset the board's decision to remove them from the board as it had authority to remove members for cause under Esplanade's bylaws. Specifically, the court applied the Business Judgment Rule and found that the board's determination was made in good faith, for a corporate purpose, and within the scope of its authority. As such, the board's decision was not subject to reversal by the court.

In this case, the board advised the petitioners not to disseminate confidential information to HPD on corporate letterhead, which they nevertheless did. Also, the board held a meeting on notice to the petitioners at which they were present to discuss and vote on removing them for cause.

TAKEAWAY

As is always the case, it is vital to follow the bylaws, which the Esplanade Board did in exercising its right to remove directors for cause.

CONTRACTS

CABRERA V. LINCOLN SQUARE CONDO. 2021 NY SLIP OP 06434 (1ST DEP'T NOV. 18, 2021)

Is Condominium Responsible for Death of Worker Hired to String Holiday Lights in Trees?

SQUIB BY DALE DEGENSHEIN, PARTNER, ARMSTRONG TEASDALE

OUTCOME: Decided in favor of Plaintiff; Decided in favor of one Defendant

Cabrera is the administrator of the estate of Henry Esteban Salinas Cerrato, who died while working for a company called Creative Christmas, Inc. In 2013, Cerrato was stringing holiday lights at the corner of Columbus Avenue and West 67th Street in Manhattan for Creative Christmas, which had been hired by Lincoln Square Condominium to install lights in 15 trees. Cerrato was in the bucket of a boom lift owned by defendant Altitude Equipment Rentals (a defendant/third-party defendant), which extended over a lane of travel. Orange cones had been placed in the road; however, defendant Kreitzer, who was operating a tractor trailer owned by his employer, defendant United Parcel Service, struck the bucket. Cerrato was thrown from the bucket.

On several motions for summary judgment, the court found that there were questions of fact as to whether Kreitzer should have seen Cerrato and the boom lift. There were also questions of fact on the part of Lincoln Square—its contract with Creative Christmas stated that Lincoln Square was responsible to provide a location to park the boom lift during installation. Judgment was granted to Altitude as it was merely a lessor and exercised no supervision or control after the boom lift was delivered to Creative Christmas.

(continued on p. 4)

The court also denied UPS' motion seeking to dismiss Cerrato's wrongful death and pain and suffering claims. The testimony of Cerrato's co-worker, and expert testimony, raised issues of fact.

TAKEAWAY

As it relates to cooperatives and condominiums, this case demonstrates the importance of the contractual terms they may have with those performing work on their behalf. While the court does not discuss all contract terms, the court did conclude that because it was the condominium's responsibility to provide a location for the boom lift, it would not be awarded summary judgment dismissing the case prior to trial.

CONTRACTS

920 FIFTH AVE. CORP. V. ZOOMTION FITNESS, LLC 2021 NY SLIP OP 32452(U) (N.Y. SUP. CT. N.Y. CNTY. NOV. 19, 2021)

Supplier Delay No Excuse for Failure to Timely Deliver Contracted-for Gym Equipment

SQUIB BY RICHARD SHORE, COUNSEL, NIXON PEABODY

OUTCOME: Decided for the Plaintiff

The plaintiff-cooperative contracted with the defendant for the purchase of gym equipment. The plaintiff paid for it, but the defendant failed to deliver it by the Jan. 3, 2017, contracted-for delivery date. The cooperative sued for breach of contract, and the court granted the cooperative summary judgment, awarding it the amount paid to the defendant-seller.

The court found that the defendant's purported defense based on nonperformance of its supplier was not founded in contract, as there was no contractual provision excusing performance because of supplier constraints. Also, as a factual matter, the cooperative was able to go directly to the supplier and purchase the gym equipment when the defendant failed to deliver, which belied the defendant's factual claim.

The plaintiff's fraud claim was dismissed as duplicative, and the plaintiff's claims against the principals of the defendant were likewise dismissed as they did not sign the contract in their individual capacities.

The court awarded summary judgment on the breach of contract claim for the amount the plaintiff paid to the defendant, plus 9 percent interest from January 2017, and severed the attorney's fees claim for trial.

TAKEAWAY

Despite extensive discovery delays, the plaintiff was ultimately able to obtain judgment against the defendant for a clear-cut breach of contract where payment was made but goods were not delivered. Practitioners should keep in mind, especially in light of increased costs and unavailability of certain goods and materials, that nonperformance is not excused by supplier delay unless explicitly stated in the contract.

DEFAMATION

ERDMAN V. VICTOR NO. 20 CIV. 4162 (S.D.N.Y. NOV. 17, 2021), ECF NO. 110

Amended Complaint in Defamation Suit by Unit Owner Against Board President Survives Dismissal

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

OUTCOME: Decided for Plaintiff

In June 2021, the court dismissed a complaint containing defamation claims filed by a unit owner against a condominium's board of managers and its former president. The dismissal allowed the plaintiff to replead his claims if he desired, so the unit owner filed an amended complaint against the former president only. The amended complaint specifically alleged that the former president falsely and maliciously told law enforcement and governmental officials that the unit owner engaged in serious crimes: extortion, theft of computer files, and breaches of national security. The amended complaint alleged that the former president's false statements about criminal activity were motivated by spite and ill-will, and were made to retaliate against the unit owner and his girlfriend for prior lawsuits that had been filed.

The former president moved to dismiss the amended complaint, and the motion was granted in part, but otherwise denied. To the extent that the amended complaint tried to rehash defamation claims based on a letter written by the former president, those claims were dismissed in the court's prior order in June 2021. But the amended complaint contained new allegations, namely that the former president accused the unit owner of engaging in serious crimes. A party who falsely accuses another of engaging in criminal activity commits defamation, so the lawsuit was not dismissed.

TAKEAWAY

While it may later prove true that the former board president never said what the plaintiff alleges, for now, the lawsuit continues. And if the former president did say what is alleged, and the allegations are untrue, he will answer in damages. Speech is generally said to be free in America, but defamation will cost you.

DISCRIMINATION

HIGGINS V. 120 RIVERSIDE BLVD. AT TRUMP PLACE CONDO. NO. 21 CIV. 4203 (S.D.N.Y. NOV.19, 2021), ECF NO. 87

Did Condominium Fail to Accommodate Unit Owner's Disability?

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

OUTCOME: Decided for the Defendants

The plaintiff unit owner is a disabled person within the meaning of the federal Fair Housing Act (FHA), having suffered traumatic brain injury causing post-traumatic stress disorder (PTSD). She sued the condominium in the federal district court for the Southern District of New York, asserting a violation of the FHA due to: (1) intermittent problems with noise, vibration, and noxious odors from construction occurring in the building; (2) water penetration and mold in her apartment; and (3) harassing behavior and statements made by people associated with the building. These gave rise to panic attacks and other symptoms of PTSD.

Noise and noxious odors from construction: The plaintiff, at times, had to vacate the building to avoid noise triggering headaches, vertigo, and PTSD. The condominium assured her it would use sound-reducing methods and meet with her in advance of construction. It was not always successful in doing so, and contents of her unit would vibrate and occasionally be filled with odors. The plaintiff complained and sent video recordings of the noises and vibrations. These occurred at times prohibited by house rules. She had to visit urgent care and vacate the unit.

(continued on p. 6)

The condominium offered a hotel allowance while construction was taking place, but the plaintiff claimed she incurred $5,000 in expenses. Much of the work was performed in other units. She also complained of marijuana smoke from other units. When she complained she was threatened with a Strategic Lawsuit Against Public Participation (SLAPP) by the condominium.

To establish discrimination under the FHA, there are three available theories: (1) intentional discrimination; (2) disparate impact; and (3) failure to make reasonable accommodations. In the latter the plaintiff had to prove: (1) she had a handicap; (2) the defendant knew of it; (3) an accommodation was necessary to afford the handicapped person an equal opportunity to enjoy the dwelling; (4) the accommodation requested was reasonable; and (5) the defendant failed to make the requested accommodation.

Importantly, the accommodation requested cannot be for conditions that the disabled person experiences equally with nondisabled persons. If other residents suffer the same harm from noises and odors, the FHA does not entitle the disabled resident to preferential enjoyment of her housing. She must show she was denied an *equal* opportunity to enjoy the housing. The FHA contemplates accommodation by a structural modification or a change in the rules, policies, practices, or service.

Such modification or change was not sought here. The accommodation she sought was not necessary to afford her an equal opportunity to use and enjoy her dwelling, nor was it necessitated by her disability. The noise and odors affected nondisabled tenants equally. Her allegation that she was denied an equal opportunity to enjoy her home when exposed to loud noises and odors could support a failure to accommodate claim, but she did not allege that she notified the defendants she needed an accommodation because of her disability, as opposed to the general annoyance that construction noise would cause her and others.

The plaintiff must ask for and give a defendant an opportunity to accommodate her needed disability accommodation request prior to being held liable for failing to honor her request. She never told the defendants that notice of construction by anyone, anywhere in the building was an accommodation for her disability; that it was necessary for her to derive the same use and enjoyment from her home as other residents. Her complaints of noise in violation of the bylaws were seemingly a grievance from an interested neighbor, about general harm to unit owners in general and not because of harm caused to her because of her disabilities.

Finally, this action was not brought within the applicable two-year statute of limitations.

Water penetration and mold: After she purchased the unit and renovated it to accommodate her disabilities, her contractor discovered water penetration in the walls near her windows. Water, believed to be from the façade, began to leak into her bedroom. She alleged the managing agent failed to make any repairs and insisted that the plaintiff hire her own contractor to remedy the problem.

She entered the hospital for respiratory issues, and her doctor ultimately determined her health problems were caused by exposure to mold. She sought the assistance of her insurance carrier. The insurer's contractor discovered mold in the Sheetrock behind her bedroom wall. It hired a hygienist who reported that the plaintiff's bedroom near the window exhibited an abnormal and above-background total airborne fungal spore presence.

The condominium defendant then hired a hygienist who found no evidence of mold or an active leak in the unit. They proposed installing a sealant. The plaintiff's carrier refused to allow the work because it would not remediate the mold. The windows continued to leak, and the water and mold problem remained unabated.

These allegations were deemed not actionable under the FHA. They were not due to any conduct on the part of the defendants. Some are leveled at unidentified residents and do not relate to the plaintiff's disability or to any accommodation she requested that was denied. She does not allege that she asked the defendants to remediate the mold as an accommodation for her disability and to put her on an equal footing with nondisabled residents exposed to mold. There was no allegation that the harm caused to her would be different from the harm experienced by anyone without the disability.

The purpose of the FHA is to give persons with handicaps the same opportunity as persons without handicaps. Where this condition did not affect the handicapped person differently than any other person, she cannot use the FHA to give her rights in addition to others subject to the same conditions.

(continued on p. 7)

Harassing behavior and statements: The plaintiff complained of harassment and disrespect by other tenants and persons at the building, including the property manager. After she complained at a unit owners' meeting, the board brought a SLAPP lawsuit against her, which was settled. There was no allegation of facts to assign these grievances to disability and a failure to accommodate.

Failure to provide reasonable accommodations for disability, discrimination, and retaliation under the NYC Human Rights Law: The plaintiff asserted a violation of New York State and City laws due to the failure of accommodation during the renovation work and failure to remediate the water penetration and remove the mold. She also complained of retaliation, coercion and intimidation, breach of the bylaws, the torts of negligent infliction of emotional distress, "fraudulent inducement," and slander per se.

The federal court, having dismissed the claims under the federal FHA, could have, but declined to take supplemental jurisdiction of the state and city law claims. It dismissed the federal case without prejudice to state court matters, out of respect for the role of state courts in interpreting state law cases and in resolving this housing matter in the appropriate forum.

TAKEAWAY

Forget "notice" pleading. Every element of the federal statute in derogation of common law must be pleaded with particularity. If this case was timely filed, the facts existed and were pled with greater particularity, and perhaps with a different bench, the outcome might have been different. Recalling the "eggshell" plaintiff tort cases, it might be argued that the events that drove this plaintiff to seek medical assistance differentiated her from the loss of enjoyment of her residence that nondisabled persons suffered. Also, it is important that requests for accommodations be written, directed to particular construction defects or policies, and that targeted conditions and conduct have a relationship specifically to the plaintiff's disability, as opposed to all persons in general.

ELECTIONS

SINGLETON V. MORTON 2021 NY SLIP OP 06068 (1ST DEP'T NOV. 9, 2021)

HDFC Election Meeting Lacked Quorum

SQUIB BY DALE DEGENSHEIN, PARTNER, ARMSTRONG TEASDALE

OUTCOME: Decided for Petitioner

A shareholder of 303 West 122nd St. HDFC commenced a proceeding to challenge the election of directors held at a July 16, 2020, special meeting of shareholders. The court determined that there was no quorum at that meeting, as defined in the bylaws, and that therefore the lower court properly ordered a new election. In short, the court concluded that the respondents did not raise a triable issue that, if resolved in their favor, would result in the determination that a quorum was in fact present.

There was no dispute that under the bylaws, a quorum required the presence of shareholders who owned a majority of all shares that are issued and outstanding. There was a question, however, about whether certain apartments should have been factored into the calculation. As to four apartments, the shareholders were deceased and no estates had been formed. There was no representative appointed for any of the estates, and the apartments had not reverted to the HDFC. Accordingly, those apartments were properly calculated in determining whether there was a quorum.

TAKEAWAY

This is a good example of the need to comply with a building's governing documents when determining whether an election was properly held.

FIDUCIARY DUTY

BD. OF MGRS. OF THE 651 CONEY ISLAND AVE. CONDO. V. CONEY ISLAND HOLDINGS, LLC

NO. 521896/2020 (N.Y. SUP. CT. KINGS CNTY. OCT. 27, 2021) NYSCEF NO. 64

Board Waited Too Long to Sue Sponsor for Breach of Fiduciary Duty in Connection with Construction Defects

SQUIB BY JOE GOLJIAN, ASSOCIATE, BRAVERMAN GREENSPUN

OUTCOME: Decided for Co-defendants

The plaintiff, a condominium board, commenced an action against the condominium sponsor, its individual officers, and other affiliated entities, seeking damages for alleged defects in the condominium construction. Two individual defendants—attorneys for the sponsor identified as secretary-treasurer for the board in the offering plan—moved to dismiss the complaint as against them pursuant to CPLR 3211(a)(1), (5), and (7). The plaintiff opposed the individual defendants' motions solely with respect to dismissal of the complaint's cause of action for breach of fiduciary duty. The court granted the motions and dismissed the complaint.

The court dismissed the claim on the grounds that the plaintiff failed to plead all requisite elements with the particularity required under CPLR 3016(b). The complaint failed to allege factual details and circumstances of the individual defendants' alleged misconduct and how such misconduct caused damage to the plaintiff.

Further, the court held that the claim was time-barred because a cause of action for breach of fiduciary duty seeking monetary damages is subject to a three-year statute of limitations. The defendants submitted a copy of the deed from the "first closing" on June 17, 2010, and the complaint was filed more than three years later.

In reaching its decision, the court rejected the plaintiff's attempt to invoke the governor's Executive Orders that tolled statutes due to COVID-19, because the statutory time limit expired years prior to the implementation of the orders. Finally, the court denied the individual defendants' request for attorneys' fees pursuant to CPLR 8106.

TAKEAWAY

Although sponsor designees on co-op/condominium boards have the same fiduciary obligations as their unit owner counterparts and are often faced with difficult decisions in connection with carrying out those obligations, a board asserting claims for breach of fiduciary duty must be mindful of the fact that such claims must be pled with detail as to the alleged transgressions, and to the extent they are financial-based claims, brought within the three-year statute of limitations. Where a sponsor remains in control of a board for an extended period of time, unit owner representatives should seek to enter into a tolling agreement with the sponsor extending the limitations period until a date following the relinquishment of sponsor control.

FORECLOSURE

U.S. REAL ESTATE CREDIT HOLDINGS III-B, LP V. BCS 20 W. LLC
NO. 850003/2021 (N.Y. SUP. CT. N.Y. CNTY. NOV. 10, 2021) NYSCEF NO. 75

Tenants Didn't Receive Proper Foreclosure Notice

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

OUTCOME: Decided for Defendants

This case involved an action to foreclose on three mortgages encumbering 21 condo units. The defendants moved to dismiss the action based upon the plaintiff's failure to serve Real Property Actions and Proceedings Law (RPAPL) §1303 notices.

RPAPL §1303 requires that the foreclosing party in a mortgage foreclosure action involving real property shall provide notice to any tenant of a dwelling unit of the foreclosure action within 10 days of service of the foreclosure summons and complaint. The court emphasized the settled law that compliance with RPAPL §1303 is a condition precedent to the commencement of a foreclosure action and failure to comply demands dismissal of the foreclosure action.

In this case, 11 of the 21 units are occupied by tenants and it is undisputed that the plaintiff did not serve any RPAPL §1303 notice to the tenants occupying the properties subject to foreclosure. The plaintiff argued that RPAPL §1303 was not applicable because the mortgages being foreclosed upon were commercial mortgages, not residential mortgages.

The court found the plaintiff's argument unavailing, holding that RPAPL §1303 by its terms is not limited to residential mortgages, but more broadly covers mortgages "involving" residential property, and that the plaintiff's interpretation of RPAPL §1303 would effectively vitiate the purpose of the statute, which is to inform occupants of leased premises that their tenancy is potentially in jeopardy. Accordingly, the defendants' motion to dismiss the foreclosure action was granted.

TAKEAWAY
An RPAPL §1303 notice is required with respect to any mortgage, even commercial mortgages, which involves residential property.

LABOR LAW

PRELDAKAJ V. MONARCH CONDO. NO. 20 CIV. 9433 (S.D.N.Y. NOV. 15, 2021), ECF NO. 35

Court Grants Employees' Class Settlement

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

OUTCOME: Decided for Plaintiff

The plaintiff brought a claim for unpaid wages and overtime on behalf of himself and other employees against the employer condominium and its board and managing agent. The employees' claims were resolved under a settlement agreement, which, pursuant to the Fair Labor Standards Act, requires court approval.

Acting on a joint motion, the court granted preliminary approval of the settlement class, as it met the requirements of numerosity, commonality, typicality, and adequacy of representation, and involved questions of law common to class members, not just to individual members. The court also approved the appointment of an attorney to represent the class and the content of the proposed notice to be sent to other potential class members, and scheduled a fairness hearing.

TAKEAWAY
Regardless of class size, court approval of a class settlement must meet certain requirements to be effective.

MALPRACTICE

ORLANDO V. ROBINSON BROG LEINWAND GREENE GENOVESE & GLUCK, P.C.

2021 NY SLIP OP 32235(U) (N.Y. SUP. CT. N.Y. CNTY. NOV. 9, 2021)

Unit Owner Can't Prove Attorney Was Negligent

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

OUTCOME: Decided for Defendants

"An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of the plaintiff's losses; and (3) proof of actual damages. Courts consistently dismiss legal malpractice claims when a plaintiff fails to plead facts supporting causation" (citations omitted).

In this case, the plaintiff could not establish causation—that is, "but for" the defendants' alleged malpractice the court would have ruled in the plaintiff's favor. Therefore, summary dismissal of the complaint is proper. Specifically, the court found that the "unambiguous and clear Declaration and Offering plan to be definitive and dispositive" of the factual issue of whether the basement area of the condo was part of the plaintiff's condo.

MOTION PRACTICE

BD. OF MGRS. OF 325 5TH AVE. CONDO. V. MOUNTAIN AIR MILLENNIUM HVAC LLC

NO. 656024/2020 (N.Y. SUP. CT. N.Y. CNTY. NOV. 4, 2021) NYSCEF NO. 15

Contractor Didn't Deliver HVAC Equipment—or Answer Complaint

SQUIB BY ANDREW P. BRUCKER, PARTNER, ARMSTRONG TEASDALE

OUTCOME: Decided for the Plaintiff

A condo signed a contract for certain repair work and new HVAC equipment. The condo mistakenly paid for the repair work twice. It also made a down payment for the HVAC equipment by paying one-half of the cost of the equipment, which was supposed to be delivered within 90 days. The equipment was never delivered. Management attempted to contact the contractor, but the phone number was no longer in service, and other attempts to reach the contractor were unsuccessful.

The condo sued for the duplicate payment, as well as for the down payment on the equipment, but the contractor never answered the complaint. The condo made a motion for summary judgment.

The court held that the condo had established a *prima facie* cause of action, and since the contractor did not submit an answer, the contractor was "deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them." The court therefore granted the condo judgment for the duplicate payment and the down payment.

TAKEAWAY

This is yet another example of a problematic contractor who is quick to take money, but slow to perform. Very careful due diligence is required even for the smallest project.

MOTION PRACTICE

HARWAY TERRACE, INC. V. PETROPIENTO 2021 NY SLIP OP 51074(U) (2D DEP'T APP. TERM NOV. 12, 2021)

Unit Wasn't Exempt from Rent Stabilization

SQUIB BY RICHARD KLEIN, PARTNER, KLEIN GRECO & ASSOCIATES

OUTCOME: Decided for Respondent Tenants

In this brief decision the court found that the landlord's petition in a holdover summary proceeding was defective for failing to properly identify the subject apartment. The landlord's petition incorrectly alleged that the apartment was a cooperative unit exempt from rent stabilization. This was incorrect, so the court found the petition did not comply with Real Property Actions and Proceedings Law (RPAPL) §741 and must be dismissed.

TAKEAWAY

When litigating, pay attention to the details. While the petition was dismissed without prejudice, it would seem that the landlord should be aware of such a simple fact as to the status of its unit so as to not waste time in its efforts to remove a tenant after a lease has expired.

MOTION PRACTICE

FIRST MAJESTIC SILVER CORP. V. HEITZ 2021 NY SLIP OP 32314(U) (N.Y. SUP. CT. N.Y. CNTY. NOV. 12, 2021)

BCL Doesn't Bar Canadian Corp. from Foreclosing on Co-Owner of NYC Condo

SQUIB BY RICHARD KLEIN, PARTNER, KLEIN GRECO & ASSOCIATES

OUTCOME: Decided for Plaintiff

This action arises from a money judgment obtained by the plaintiff, a Canadian corporation, after a jury trial in the Supreme Court of British Columbia against an individual who owned a condominium unit in Manhattan with his wife and son. In an effort to enforce its monetary judgment, the plaintiff foreclosed on the individual's one-third interest in the condominium unit and then sought partition and an accounting.

The defendants sought to have the complaint dismissed, in part, on the basis that the Canadian corporation lacked the legal capacity to sue under Business Corporation Law (BCL) §1312 since it was doing business in New York State without the proper authority. The court rejected this argument, finding that the only business the Canadian company was doing in New York was trying to enforce its monetary judgment and that did not constitute "systematic and regular" activity in the state essential to its corporate business. Therefore, the BCL was not applicable.

The defendants also sought to dismiss the plaintiff's causes of action for an accounting. The court found that since the defendants did not seek dismissal of the partition cause of action, the motion to dismiss the accounting cause of action was inappropriate because an accounting would be necessary in the context of a partition.

TAKEAWAY

When representing clients purchasing real estate, it might be helpful to ask them whether they are aware of any potential litigation so that in taking title, you can better protect their assets.

NUISANCE

SILVERMAN V. PARK TOWERS TENANTS CORP. 2021 NY SLIP OP 32461(U) (N.Y. SUP. CT. N.Y. CNTY. NOV. 23, 2021)

Court Won't Dismiss Emotional Distress Claim Against Neighbors Seeking Shareholder's Termination

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

OUTCOME: Judgment for Plaintiff

This multi-litigation dispute involves neighboring shareholders on a floor (the Silvermans and the Toussies), the co-op corporation, and another neighbor on the floor (Mak), who had supported the Silvermans in their claims against the Toussies.

In the first action, the Toussies sued the cooperative, alleging that it was wrongfully attempting to terminate their proprietary lease on objectionable conduct grounds based on false complaints of noise and music emanating from their apartment.

In the second action, the Silvermans, the Toussies' neighbors, sued the Toussies and the cooperative, alleging causes of action against the Toussies for nuisance and injunctive relief and intentional and negligent infliction of emotional distress.

In their answer to this complaint, the Toussies set forth their own claim for negligent and intentional infliction of emotional distress and named Mei Mak, another resident of the floor and the best friend of the Silvermans, as a third-party defendant. The allegations against Mak include that she, in concert with the Silvermans, have subjected the Toussies' daughter to a campaign of harassment and infliction of emotional distress by repeatedly making false claims that the Toussies' daughter was making unreasonable noise. They claim that as a result of the Silvermans' and Mak's false claims, the cooperative issued notices of objectionable conduct.

Mak moved to dismiss the claims against her for failure to state a cause of action. She alleged that the claim for negligent infliction of emotional distress should be dismissed because she owed no duty to the Toussies. She further alleged that the claim should be dismissed because the allegations, on their face, were not sufficiently severe to support a claim of intentional infliction of emotional distress.

The decision set forth the elements of a cause of action for intentional infliction of emotional distress and stated "a longstanding campaign of deliberate, systematic and malicious harassment" is actionable. While the decision did not discuss the legal standard for a negligent infliction of emotional distress claim, it is a breach of a duty of care resulting directly in emotional harm to a third party. The mental injury must be a direct, rather than a consequential, result of the breach.

The court found that the allegations against Mak reflect that Mak's acts were deliberate and, "as they were somewhat regular and directed solely at Danielle [the Toussies' daughter], it cannot be said that they were not systematic and malicious given the alleged intent she shared with plaintiffs of terminating the proprietary lease and evicting Danielle. Thus, Mak does not sustain her burden of demonstrating that, as a matter of law, the facts alleged do not state a cause of action for intentional infliction of emotional distress or negligent infliction of emotional distress." The claims were not dismissed.

TAKEAWAY

This is a case where the question has to be raised: What, if anything, was done to try to mitigate the hostilities between neighbors on the floor before the board decided to take action based upon objectionable conduct? Did the board investigate the nature of the complaints and the proof being offered to support the claims? While this decision had nothing to do with the board's liability or the viability of the objectionable conduct claim, it is apparent that not only has there already been a lot of litigation, there will be a lot more. Perhaps the board did everything right before taking steps to terminate the lease, but it is a reminder that boards must do their due diligence before taking any legal action against a shareholder. The overriding question is always how strong the case will be when it gets to trial, not what it is in its infancy.

OWNERSHIP

MASHIEH V. MASHIEH 2021 NY SLIP OP 06352 (2D DEP'T NOV. 17, 2021)

Wife Awarded Co-op Apartment and Attorneys' Fees

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

OUTCOME: Decided for Plaintiff

The defendant husband stipulated in a divorce proceeding to provide joint legal custody of four children to the plaintiff wife, and the judge after trial also awarded the couples' cooperative apartment to the wife in full. The husband later sought to modify the divorce judgment, now seeking sole custody of the children and a portion of the value of the cooperative apartment. The court denied the husband's motion, and on appeal, the judgment was affirmed.

The cooperative apartment was marital property since it had been purchased during the marriage, and had been maintained with marital funds throughout the marriage. The trial court providently exercised its discretion in awarding the cooperative to the wife, since the trial court also awarded the defendant his business. The appellate court further found that the trial court properly denied spousal maintenance to the husband, as the husband maintained the ability to become self-supporting. Finally, the appellate court found the trial court properly awarded $10,000 in attorneys' fees to the wife, as the husband failed to comply with various court orders and caused unnecessary litigation.

TAKEAWAY

Even if the ex-husband had meritorious arguments about the cooperative—and it's not clear he did—ignoring a court's orders is a very efficient strategy for losing your case and being made to pay the other side's attorneys' fees.

SPONSOR

BD. OF MGRS. OF LATITUDE RIVERDALE CONDO. V. 3585 OWNER, LLC 2021 NY SLIP OP 06072 (1ST DEP'T NOV. 9, 2021)

Condo's Case Against Sponsor Survives Motion to Dismiss

SQUIB BY ANDREW P. BRUCKER, PARTNER, ARMSTRONG TEASDALE

OUTCOME: Decided for the Plaintiff in part, and the Defendants in part

A condo board sued the sponsor and its owners for various causes of action. The trial court granted the defendants' motion for partial summary judgment, dismissing six causes of action, and the board appealed.

The board claimed that the defendants fraudulently induced the unit owners to purchase their units, and this claim was dismissed by the trial court. Such claim is not preempted by the Martin Act (since it's based upon allegations of affirmative misrepresentations and not omissions), but nevertheless the trial court dismissed the claim. The appeals court agreed, stating that this claim duplicated the board's breach of contract claim, and the board cannot establish as a matter of law that the statements in the offering plan about the brand of toilet, type of roofing, etc. was relied upon, as the purchasers had the means to ascertain these conditions when they inspected the apartments and the building.

Another claim accused the individual defendants, while on the board, of a breach of fiduciary duty. The appeals court determined that the dismissal of this claim by the trial court was correct due to the business judgment rule.

Certain causes of action involved installing noisy HVAC equipment into the sponsor's units. The appeals court found the trial court was correct in dismissing the claim that such installation was not proper without board approval, since there was a specific bylaw provision giving the sponsor the right to make alterations without board consent. However, the appeals court found that the trial court erred in dismissing the nuisance claim, since there was sufficient evidence to raise a triable

(continued on p. 14)

issue in regard to such installation being a nuisance under the bylaws.

The board also claimed there were constructive fraudulent conveyances by the defendants, and the trial court dismissed these claims. The appeals court found that these claims should not have been dismissed, as the board raised triable issues of fact in regard to the sales prices of units between related parties. Finally, the claim of intentional fraudulent conveyance that was dismissed by the trial court was reinstated by the appeals court, due to the fact that there were numerous overlaps in ownership among all of the parties, and there was "sufficient evidence to raise a triable issue of fact regarding the badges of fraud and the allegedly improper transactions."

TAKEAWAY

As is typically the case in most lawsuits against sponsors, the plaintiff lists numerous causes of action hoping that many will survive a motion to dismiss. Often it depends on the facts, but often it depends on establishing a *prima facie* case.