CO-OP&CONDO
CASE LAW TRACKER
digest
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ALTERATIONS

AIG PROP. CAS. CO. V. YOSHIDA

2022 NY SLIP OP 31511(U) (SUP. CT. N.Y. CNTY. MAY 10, 2022)

Former Unit Owners Not Entitled to Dismissal of Action Alleging Negligent Installation of Water Filtration System More Than 12 Years Prior

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

OUTCOME: Decided for Plaintiff Insurer

Third-party defendants Matthew and Melody Fuhr owned Unit 5E of The Sugar Warehouse Condominium in Tribeca from 2002 until 2006, when they sold the unit to defendant Yoshida. In July 2017, water was "released" and entered the apartment of the plaintiff's insureds, Andrew and Amber Roberts. Plaintiff AIG reimbursed the Robertses for damages of $1,153,836.66 and brought a subrogation action, alleging that the Fuhrs were liable for the negligent installation of a water filtration system located in the kitchen of Unit 5E that cracked over time and eventually caused a flood into the Robertses' unit.

Before their depositions, the Fuhrs moved to dismiss or, alternatively, for summary judgment dismissing all claims and cross-claims asserted against them. The court denied the motion. The first issue was whether the action was barred under the three-year statute of limitations for negligence. The Fuhrs argued that a claim based on negligent installation, whether sounding in contract or in tort, accrued upon completion of installation not later than some time in 2006. The court rejected that contention, reasoning that under New York law, only a party who hires a contractor to perform work and then seeks to sue that contractor for defective work must sue in breach of contract, which accrues on the date that the work is substantially completed. However, a party who does not hire that contractor, or one who is not an intended beneficiary of that contract, and who seeks to sue that contractor for defective work may sue in negligence, which is governed by a three-year statute of limitations, which accrues on the date of the occurrence.

The second issue was whether the negligence claim failed as a matter of law. The plaintiff contended that the Fuhrs' liability was not based

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

upon their status as the former owners of Unit 5E, but rather was based upon whether they were the individuals who actually installed the failed water filtration system in Unit 5E. The plaintiff further contended that even though the Fuhrs generally would owe no duty to a third party, this case was an exception to the general rule because the negligent installation by the Fuhrs launched "a force or instrument of harm." The court identified conflicting evidence raising questions of fact and held that the plaintiff was entitled to discovery to further explore the claim prior to a summary determination.

TAKEAWAY

Condominium and cooperative unit owners are cautioned that they should be wary of performing DIY plumbing installations that might later be the cause of leaks into neighboring units. The former unit owners in this case were sued more than 12 years after they had sold. While the court noted that the plaintiff's claims appeared highly speculative, that did not save these former unit owners from years of litigation that is still ongoing.

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

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ATTORNEY'S FEES

BD. OF MGRS. OF 207-209 E. 120TH ST. CONDO. V. DOUGAN 2022 NY SLIP OP 31491(U) (SUP. CT. N.Y. CNTY. MAY 4, 2022)

Bylaws Don't Allow Condominium to Recover Legal Fees in Case Against Unit Owner

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

OUTCOME: Decided for Defendant Unit Owner

This case is a stark reminder to condominiums that many of their bylaws do not provide the right for the condominium to recover attorney's fees when a unit owner defaults on a nonmonetary obligation. Here, the unit owner was accused of using his unit as a short-term Airbnb rental. The condominium brought suit seeking an injunction, which was granted. The court gave the unit owner time to file an answer, which he failed to do, and the condominium moved for a default judgment to recover its costs and expenses, including legal fees, incurred in bringing the action. Even though the motion was unopposed, the court denied the motion.

The court found that the relevant bylaw provisions did not provide for recovery of legal fees for violations that did not involve the recovery of common charges. The condominium claimed it was entitled to recover the legal fees under the common bylaw provision that allows the condominium to abate and remove a violation of the bylaws "at the expense of the defaulting [u]nit [o]wner[.]" The court wrote that "while this section can be read to require the unit owner to pay the expenses incurred by the Condominium in remedying the condition resulting from the unit owner's breach, such as the cost of removing a structure or eliminating a condition, it evinces no intent to impose liability on the unit owner for attorney's fees and expenses incurred in litigation." Other sections relied upon by the condominium also did not provide the right to recover legal fees, so the condominium absorbed the entire cost of bringing the action.

TAKEAWAY

The inability to recover legal fees for a unit owner's non-monetary defaults is fairly common in many condominium bylaws. Boards should look to amend these provisions to allow for legal fee recovery since there are many common situations where a condominium board is forced to bring action to enjoin a non-monetary default (unauthorized alterations, illegal use, unreasonable noise, and short-term rentals are just a few).

BUSINESS JUDGMENT RULE

BAXTER ST. CONDO. V. LPS BAXTER HOLDING CO. 2022 NY SLIP OP 03470 (1ST DEP'T MAY 31, 2022)

Condo Board May Impose Assessments Per Business Judgment Rule

SQUIB BY JEFFREY BUCKLEY, LIBRARIAN, CASE LAW TRACKER

OUTCOME: Decided for Plaintiff Condo Board

The First Department affirmed a lower court order, holding that a condo board acted properly when it imposed assessments on commercial and residential unit owners based on their proportional share of the common elements of their building. See commentary on *Baxter St. Condo. v. LPS Baxter Holding Co.*, 2021 NY Slip Op 31461(U) (N.Y. Sup. Ct. N.Y. Cnty. Apr. 19, 2021), available via https://coopcondocaselawtracker.com/cases/baxter-st.-condominium-v.-lps-baxter-holding-co.-apr-19-2021.

BYLAWS

BD. OF MGRS. OF PONDSIDE VILL. 1 CONDO. V. HIRSCH 2022 NY SLIP OP 31429(U) (SUP. CT. WESTCHESTER CNTY. APR. 27, 2022)

Board Meeting Was a Nullity Because Notice of Board Meeting Didn't Comply with Bylaws

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

OUTCOME: Decided for Defendant Board Member. Plaintiff Subdivisions Board's Application for a Preliminary Injunction Denied as Moot.

WHAT HAPPENED: Defendant Hirsch was a member of the board of her HOA subdivision and was as such designated as a member of the board of the HOA. The bylaws of the HOA stated that a member of its board could be removed by a majority vote of the members by whom she was elected. The subdivision president attempted to call a meeting of its board to remove her. However, no proper notice of that meeting was received by Hirsch and another member to satisfy the notice requirement. The time between the president's notice of the meeting and the vote to remove Hirsch was 34 minutes. In fact, the subdivision's bylaws required a two-day's notice, which was never sent. Hirsch attended an HOA meeting of the board of the HOA and took certain actions, to which the subdivision's board objected. That subdivision's board alleged the meeting was invalid and actions taken thereon were void due to an absence of a quorum because Hirsch had been removed from her position.

IN THE COURT: In considering Hirsch's motion to dismiss the complaint, the court examined the bylaws of the subdivision. It noted that the notice of its board meeting failed to comply with the notice requirements in the bylaws. It was uncontested that Hirsch and another board member had not received the required notice. Thus, the material fact of a proper meeting of that board to remove Hirsch "is not a fact at all." Hirsch was therefore not validly removed from her position on the HOA board, as that would have required a majority vote of the subdivision's board. Therefore, the removal of Hirsch from the subdivision board was a nullity and she remained a member of the HOA board. The complaint that she could not be counted toward a quorum of the HOA board had to be dismissed. Consequently, the plaintiff's application for an injunction against her serving on the HOA board was denied as moot.

TAKEAWAY

The bylaws set forth strict requirements for board meetings. Failure to follow them may nullify any action taken at the meeting or authorized by the meeting. This may impact the condominium (or co-op) as well as the individual board members and officers in unexpected and possibly expensive ways. These might include common charges and assessments, contracts with third parties, and other acts that may be deemed nullities if not properly authorized. Elections can be nullified too.

CERTIFICATE OF OCCUPANCY

13 HARRISON ST. CONDO. V. BLEICH 2022 NY SLIP OP 03341 (1ST DEP'T MAY 24, 2022)

Appeals Court Reverses Dismissal of Dispute Over Cellar Use in Small Building

SQUIB BY ANDREW P. BRUCKER, PARTNER, ARMSTRONG TEASDALE

OUTCOME: Decided for Plaintiff in Part and Defendant in Part

WHAT HAPPENED: The condominium located at 13 Harrison Street was rather small. It consisted of only two units, one of which was owned by Bleich (consisting of the first floor and the basement) and the other unit (consisting of floors 2, 3, and 4) was owned by an LLC, which had purchased it recently. When it did, the prior board issued a waiver of the right of first refusal (a very standard right given to condo boards). Soon after the purchase, disputes arose between the two unit owners in regard to the election of the Board members, the validity of the waiver, and the permitted use of the basement. Bleich claimed the hostility hindered their efforts to sell their unit. The condo (and the LLC) commenced an action seeking a declaration that: (1) the election was proper; (2) Bleich must sell their units in compliance with the bylaws; (3) the waiver was proper; and (4) Bleich violated the Certificate of Occupancy (by maintaining sleeping areas and bathrooms in the cellar). Bleich moved to dismiss all complaints made by the plaintiffs.

IN THE COURT: The court issued a declaration that Bleich must comply with the bylaws when it came to selling the apartment. As to the other declarations requested, the court granted the defendant's motion to dismiss the plaintiff's other requests, including the declaration that the cellar was being improperly used. The decision in regard to the use of the cellar was appealed, and the Appellate Division held that the lower court had make a mistake: Although it was correct in denying the LLC's motion for summary judgment on the issue of the use of the cellar, it should not have granted Bleich's request to dismiss the claim. In essence, the Appellate Division took the position that both sides had to prove their case. In addition, the appeals court (disagreeing with Bleich) noted that the fact that the Department of Buildings never fined the condo for the use of the cellar does not establish that the use in is compliance with the Certificate of Occupancy.

TAKEAWAY

The lesson here actually has very little to do with the actual facts or determination of the actions brought. Rather, this is a tale often told: Be very careful when buying into a very small building. Difficulties and differences often are diluted in bigger buildings, and the board (in a bigger building) will often fight the fight necessary against a shareholder or unit owner who does not comply with the governing documents. However, in a small building, disputes become very personal very quickly, and the owners themselves end up litigating disputes. *Caveat emptor* when it comes to buying into a small co-op or condo!

CONTRACTS

CUTONE & CO. CONSULTANTS, LLC V. RIVERBAY CORP. 2022 NY SLIP OP 31587(U) (SUP. CT. N.Y. CNTY. MAY 11, 2022)

False Claims Act Claim Dismissed, But Contract Claim Survives

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

OUTCOME: Decided for Plaintiff Engineering Firm in part

WHAT HAPPENED: Co-op City, a large Mitchell-Lama cooperative in the Bronx, hired an engineering firm to perform an energy audit and retro-commissioning audit of the co-op's common areas. The engineers uncovered what they called structural deficiencies throughout Co-op City, which the engineers believed would violate the law if not ameliorated promptly. After the engineers reported their findings, Co-op City fired them, terminated the contract, and refused to pay for further

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services. The plaintiff engineering firm sued Co-op City for breach of contract, seeking to recover payment for services. But the plaintiff also filed a retaliation claim under New York's False Claims Act (NYFCA), asserting that Co-op City ran afoul of the NYFCA by falsely certifying that its premises complied with various laws, despite actual deficiencies identified by the plaintiff. The complaint alleged that the defendant fired the plaintiff in retaliation for the plaintiff's discovery of the deficiencies. The defendant moved to dismiss the complaint, and also sought an award of attorneys' fees against the plaintiff.

IN THE COURT: On a motion to dismiss, the court must deem the allegations of the complaint as being true. The court denied the motion to dismiss the plaintiff's contractual claims, as it was clear what contract was at issue and how the plaintiff claimed lack of payment.

As for the NYFCA claim, the court dismissed it. In order for a defendant to violate the NYFCA, it must have presented a false or fraudulent claim for "money or property." Here, there was no allegation the defendant received any payment, benefit, or approval as a participant in the Mitchell-Lama program. While the plaintiff generally claimed that the defendant's certifications to various agencies were false due to the structural deficiencies in the common areas, no specific allegations were made as to when, where, or how the information was omitted; which agency had failed to receive information; and what law or contract required the conveyance of such information. Because the complaint's allegations were conclusory, the motion to dismiss the NYFCA retaliation claim was granted.

Nevertheless, the dismissal of the NYFCA claim was without prejudice. The plaintiff was not precluded by the dismissal from filing a timely amended complaint or separate lawsuit that contained adequate details alleging a retaliation claim.

The request for attorneys' fees by the defendant was denied.

TAKEAWAY

We all appreciate a creative spirit, someone who thinks outside the box. But in litigation, it sometimes makes sense to defer stretching the facts, and instead focus on the main event. Here, the central grievance seems to be obvious: Co-op City fired their engineers because they didn't like what they heard and stopped payments, thus breaching the contract. The judge gave the plaintiff a shot at coming up with facts for a retaliation claim under NYFCA, but sometimes a contract claim is just a contract claim. And sometimes that's enough.

CONTRACTS

COULTER V. SORENSON 2022 NY SLIP OP 31480(U) (SUP. CT. N.Y. CNTY. MAY 5, 2022)

Court Won't Dismiss Claim that Defendants Breached an Oral Contract

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

OUTCOME: Decided for Plaintiff

WHAT HAPPENED: In or about 2013, plaintiff Andrea Coulter allegedly proposed that defendant Carl Sorenson utilize a Tribeca co-op apartment Sorenson owned through the defendant Carl Sorenson IV Revocable Trust as a short-term rental space using the Airbnb platform. The plaintiff claims to have been responsible for fully managing the Airbnb initiative, including overseeing the apartment's renovation and decoration, servicing the apartment, as well as managing the business's account and the greeting of guests.

Coulter "alleges that the purpose of the Airbnb arrangement 'was to give Coulter a way to make money so that she could build up her savings and eventually purchase an apartment of her own…' and 'also was a way for Sorenson to financially compensate Coulter for all of the personal and business services that she had provided to him and his company by being available 24/7 to meet all of Sorenson's needs and requests.'"

Coulter alleges she was promised that the money generated from operating the business, which was deposited in a Chase bank account belonging to Sorenson, would be for her exclusive benefit, and that one-half of the apartment would be gifted to her as well.

The alleged Airbnb arrangement was at least partially memorialized in the Operating Agreement of defendant Walker 37 LLC, which reflected Coulter's involvement in the Airbnb initiative.

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The apartment was ultimately sold for $2.5 million. Coulter claims she is entitled to one half of the proceeds from the sale of the apartment. Coulter also claims that Sorenson impermissibly withdrew $357,000 from the Chase bank account.

The defendants filed a pre-answer motion seeking, in pertinent part, to dismiss Coulter's breach of contract claim, constructive trust claim, and conversion of the funds held in the Chase account.

IN THE COURT: The court denied the defendants' motion to dismiss the first cause of action for breach of contract as to Sorenson and the Trust. The court held that Coulter alleged the existence of multiple oral and written contracts entered into between herself and Sorenson. There appears to have been a clear understanding that Sorenson would return $357,000 he withdrew from the bank account in contemporaneous emails. Therefore, the documentary evidence does not irrefutably rebut Coulter's breach of contract claim.

The court determined that the claim for half the value of the apartment survives due to the apparent existence of contemporaneous evidence reflecting that agreement, and because Coulter has sufficiently alleged that enforcement of the statute of frauds would be unconscionable due to the manner in which Sorenson allegedly manipulated Coulter.

TAKEAWAY

This case serves as a reminder that a court will not strictly enforce the statute of frauds and dismiss a breach of an oral agreement if such enforcement would be unconscionable.

CONTRACTS

ETKIN V. SHERWOOD RESIDENTIAL MGMT. LLC 2022 NY SLIP OP 31728(U) (SUP. CT. N.Y. CNTY. MAY 25, 2022)

Unit Owner Acts Derivatively, on Behalf of Condominium, Against Managing Agent and Board

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

OUTCOME: Decided for Plaintiff Unit Owner in Part and for Defendants Condo Board and Managing Agent in Part

WHAT HAPPENED: Etkin, a unit owner of 500 West 21st Street Condominium, alleged a smoke condition in his unit and on his floor, emanating from the fireplace in the penthouse unit of the building. He also alleged that concrete mortar and water has been raining down from the terrace above causing damage to his terrace. He repeatedly notified Sherwood Residential Management, LLC and the condominium board, but they did not address these issues to Etkin's satisfaction. Etkin also alleged financial improprieties by the board and Sherwood by permitting the condominium to pay expenses that were the responsibilities of others. Sherwood and the condominium board made a pre-answer motion to dismiss Etkin's complaint.

IN THE COURT: The complaint alleged the following eight causes of action:

1. Derivatively (in the name of the condominium) against Sherwood for breach of contract in failing to monitor and maintain the common elements. The court denied the motion based upon the sufficiency of the allegations of the complaint.
2. Derivatively against Sherwood for breach of fiduciary duty by failing to disclose material information to the board, incurring improper charges and failing to maintain the common elements. The court granted the motion to dismiss this action as it was duplicative of the first cause of action.
3. Derivatively against the board for breach of the condominium bylaws requiring making repairs. The court denied the motion to dismiss this action against the condominium due to the sufficiency of the allegations.
4. Derivatively against the board for breach of fiduciary duties to prevent incurring expenses for which other parties were responsible and maintaining and making repairs. The court granted the motion to dismiss this action as it was duplicative of the third cause of action.

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5. Nuisance against all defendants. The motion to dismiss this action was denied as premature as against the board, but granted as against Sherwood. This was because a managing agent cannot be liable in tort to the plaintiff, who is a third party to the management agreement, to whom individually, it owed no duty.
6. Constructive eviction against all defendants. There was no landlord/tenant relationship between the defendants and the unit owner. Therefore, this action was dismissed as there were no wrongful acts by "landlord" that denied a "tenant" the beneficial enjoyment of a demised promises. The cases dealing with a co-op and a shareholder were not applicable to a condominium and a unit owner.
7. & 8. Negligence against all defendants and gross negligence against all defendants. These actions were dismissed as duplicative of the breach of contract claims.

Counsel fees are requested in this action, but the court made no comment on that request.

TAKEAWAY

Managing agents and condominium boards are legally bound in contract to the condominium itself and unit owners to address matters within their responsibility under their respective managing contract and condominium documents, including the proper allocation of expenses to be borne by the unit owners as opposed to other parties. A derivative action against them lies if, after duly requested to do so, they fail to address these issues.

This decision is not on the merits of the surviving actions. The ultimate liability of the defendants to the plaintiff is yet to be determined. Doubtless, the board will defend based upon the well-established business judgment rule, referencing the steps taken by the defendants to remedy the issues.

This is part of a long history of litigation among the parties, going back at least to *Etkin v. Sherwood 21 Assocs., LLC.*, 176 A.D.3d 442 (1st Dep't 2019) [see commentary at *https://coopcondocaselawtracker.com/cases/etkin-v.-sherwood-21-associates-llc-oct-3-2019*], which dismissed Etkin's action based on the rejected grounds that when he was purchasing this unit in 2015 for $6,669,540, the board had a duty to alert him of many scratched windows, and a decision of the motion court quashing witness subpoenas (2021 NY Slip Op 30372) [see commentary at *https://coopcondocaselawtracker.com/cases/etkin-v.-sherwood-21-assocs.-feb-4-2021*]. Possibly, a due diligence inspection might have revealed some of the issues underlying this costly litigation. The conference with the court, scheduled for July 26, 2022, might mercifully bring it to a close.

DEFAMATION

TRUMP VILL. SECTION 4, INC. V. SHVADRON NO. 502589/2017 (SUP. CT. KINGS CNTY. MAR. 10, 2022) NYSCEF NO. 279

Court Awards Plaintiff $6, But Won't Release Defendant's $100K Escrow Until Appeal Is Resolved

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

OUTCOME: Decided for Plaintiff Cooperative

WHAT HAPPENED: The plaintiff, a Brooklyn cooperative, sued the defendant for defamation based upon social media posts and an online petition that allegedly contained false and defamatory statements. During the litigation, the parties entered into an escrow agreement as security against any recovery by the plaintiff. The parties agreed that the defendant would post $100,000, and that amount would be held until there was a final, non-appealable judgment. The trial judge found that the plaintiff had been defamed but awarded the nominal sum of only $6 in damages, which the plaintiff appealed. The defendant filed his own motion, seeking release of the $100,000 held in escrow.

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IN THE COURT: The court rejected the defendant's motion, and the $100,000 remains in the escrow account. Because the plaintiff filed an appeal, and because that appeal has not been resolved yet, the case is still open, and the funds must remain in place.

TAKEAWAY

This straightforward and short order enforced the parties' escrow agreement as written. But the decision, and the public case file for this litigation, highlights how long and involved a case can get. From 2017 when the lawsuit was filed, right up to the present, there are almost three hundred separate legal filings. The defendant allegedly made his online statements critical of Trump Village after a request to have his mother's cooperative shares transferred to himself was denied. Maybe the case continues because of an aggressive plaintiff with deep pockets, or maybe because an intemperate defendant said false things he shouldn't have. But wherever the truth lies, the case continues, into its fifth year.

ELECTIONS

LIFESAVERS BLDG. HOMEOWNERS GROUP V. BD. OF MGRS. OF THE LANDMARK CONDO.

NO. 67545/2021 (SUP. CT. WESTCHESTER CNTY. MAY 23, 2022) NYSCEF NO. 114

Board Election by Electronic Procedures Is Permitted Under Amended Law

SQUIB BY RICHARD SHORE, COUNSEL, NIXON PEABODY

OUTCOME: Decided in Favor of Defendant Condo Board

WHAT HAPPENED: Petitioner-condominium unit owners commenced a CPLR Article 78 summary proceeding challenging the validity of the November 2021 board election. The issue centers on the respondent board's ability to create new electronic procedures for voting, specifically related to verification of votes by email, pursuant to recently amended New York Non-Profit Corporation Law (NPCL) §603 (whose language mirrors that of the New York Business Corporation Law (BCL) §708).

New York permanently amended provisions of the NPCL and BCL, which had been subject to Executive Orders during the pandemic, to allow companies (including cooperatives and condominiums) to use electronic means to document action by written consent by boards and to hold virtual shareholder meetings. The laws permit the board to conduct electronic meetings and to implement "reasonable measures" to "verify that each person participating electronically is a member or a proxy of a member[.]"

The court found in favor of the respondents, that the board was permitted to "require shareholders to use a pre-designated e-mail address for proxy voting, to authentic such e-mail address prior to the meeting, and that such requirement was reasonable as a matter of law." To the extent the "reasonableness" of the measures implemented by the board was questioned, it was protected by the business judgment rule.

The court also dealt with a demand for books and records, which included a demand for unit owners' telephone numbers and email addresses, and without discussion the court stated, "The petitioners have not established their entitlement to disclosure of the telephone numbers and e-mail addresses for the unit owners". The court also stated that the petitioners likewise did not establish an entitlement to review bank statements or maintenance and cleaning contracts.

IN THE COURT: The respondents' motion to dismiss was granted and the petitioner's claims dismissed.

TAKEAWAY

This is one of the first cases, if not the first, interpreting the recently enacted NPCL and BCL amendments allowing for board elections to have electronic voting, including voting by email and other electronic means. If this case is any indication of future decisions (and it is my bet that it is), courts will uphold board discretion as to the implementation of safeguards in electronic voting. Boards will likely have broad discretion in enacting safeguards in electronic voting. While boards should enact safeguards, they should be mindful of ensuring that the burdens do not prohibit voting by certain segments of shareholders.

FORECLOSURE

BD. OF MGRS. OF THE RUPPERT YORKVILLE TOWERS CONDO. V. PRASAD

NO. 158530/2017 (SUP. CT. N.Y. CNTY. MAY 10, 2022) NYSCEF NO. 172

Unit Owner Who Didn't Pay Common Charges for Over 15 Years Not Entitled to 11th-Hour Stay of Lien Foreclosure Sale

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

OUTCOME: Decided for Plaintiff

Defendants Prasad and Simmons purchased Unit 20A in the condominium building located at 1641 Third Avenue, which is part of The Ruppert Yorkville Towers Condominium, in 2005. The defendants failed to pay any common charges since 2007, resulting in arrears and fees of approximately $600,000. The condominium filed liens of common charges and brought a lien foreclosure action. The defendants defaulted, and the plaintiff obtained a judgment of foreclosure and sale.

Shortly before a lien foreclosure sale was to be carried out at the New York County Courthouse, defendant Simmons moved to stay the sale pending the disposition of another action Simmons brought against the board. In that case, Simmons sought to recover the sum of $100,000 that he alleged the board was wrongfully holding in escrow following the breakdown of a settlement discussion over the arrears in common charges, as well as his attorneys' fees.

The Supreme Court denied the plaintiff's motion for a stay. As in the case of a party seeking a preliminary injunction, the party seeking a stay must clearly demonstrate a likelihood of success on the merits, irreparable injury absent the granting of the requested relief, and a balancing of the equities in favor of the moving party.

In the instant case, the defendant had failed to establish any of the requisites necessary to support the issuance of injunctive relief. There was no irreparable harm present because the associated litigation concerned the return of funds belonging to the defendant held in escrow. Accordingly, the defendant could be made whole by a money judgment. Further, the moving papers did not demonstrate a likelihood of success on the merits because they did not address the defendant's default in the foreclosure action. Finally, the balancing of the equities firmly rested with the board because it was unchallenged that the owners of Unit 20A had not paid common charges in over 15 years and that, as a result, the other unit owners had unfairly borne the shortfall in income to the condominium.

TAKEAWAY

This case serves as a prime example of how a determined litigant can stall the inevitable by filing a steady stream of lawsuits and motions, even if devoid of merit, while continuing to injure the condominium through non-payment of common charges while the condominium must accrue legal fees in collection litigation.

INDEMNIFICATION

GUEVARA-AYALA V. TRUMP PALACE/PARC LLC 2022 NY SLIP OP 03049 (1ST DEP'T MAY 5, 2022)

Co-op Didn't Exercise Control Over Scaffold Installation

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

OUTCOME: Decided for Defendant Cooperative

The lower court decision of this case was discussed in the July 2021 Digest. [See commentary available via *https://coopcondocaselaw-tracker.com/cases/guevara-ayala-v.-trump-palace-parc-llc-mar-2-2021.*]

The question was whether the cooperative would be entitled to indemnification from various contractors and subcontractors arising out of a worker's injury on improperly laid scaffold.

On appeal, the Appellate Division held that the court should have granted the cooperative's summary judgment motion dismissing the labor law claims

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because it was undisputed that the cooperative did not exercise supervision or control over the scaffold installation. Whether the board would be entitled to common law indemnification could not be determined until it was ascertained whether the contractor or subcontractor were negligent.

INDEMNIFICATION

NIEZNALSKI V. ROCKLEDGE SCAFFOLD CORP. 2022 NY SLIP OP 03452 (1ST DEP'T MAY 26, 2022)

Vicariously Liable Condo Board Entitled to Indemnification

SQUIB BY JEFFREY BUCKLEY, LIBRARIAN, CASE LAW TRACKER

OUTCOME: Decided for Defendant Condo Board

The First Department affirmed a lower court order, holding that a condo board was not negligent when construction debris fell on a passerby and that a subcontractor was required to indemnify the board. See commentary on *Nieznalski v. Rockledge Scaffold Corp.*, 2021 NY Slip Op 31505(U) (N.Y. Sup. Ct. N.Y. Cnty. May 4, 2021), available via https://coopcondocaselawtracker.com/cases/nieznalski-v.-rockledge-scaffold-corp.-may-4-2021.

INJUNCTION

MAKAROVICH V. BD. OF MGRS. OF OCEAN GRANDE CONDO.
NO. 708395/2021 (SUP. CT. QUEENS CNTY. APR. 27, 2022) NYSCEF NO. 39

Unit Owner Claims Board, Neighbors Allowed Smoke to Infiltrate His Unit

SQUIB BY ROBERT BRAVERMAN, PRINCIPAL & MANAGING PARTNER, BRAVERMAN GREENSPUN

OUTCOME: Decided for Defendant Condo Board

A condominium unit owner sued the association's board of managers and neighboring unit owners (Defendant Neighbors) seeking equitable relief and damages allegedly caused by smoke infiltrating into his unit. The condominium's bylaws permitted smoking within the units and within limited common elements provided the smoke did not infiltrate other units in the building. The plaintiff alleges that the owners of adjoining units have caused cigarette and marijuana smoke to infiltrate his unit and have not taken any action to abate, in violation of the condominium's bylaws. The plaintiff claimed that the board failed to take appropriate action to abate the nuisance and brought an order to show cause for a preliminary injunction to abate the nuisance.

The court denied the plaintiff's application for a preliminary injunction, finding that the plaintiff failed to demonstrate a likelihood of success on the merits due to the fact that his evidence consisted only of his own affidavit and affidavits from three other residents in the building, who averred that they regularly smell smoke from the units in which the Defendant Neighbors reside. The court held that this evidence was insufficient "to show that the smoke is so pervasive or unreasonable that it merits issuing injunctive relief nor can it establish that the smoke is, in fact, emanating from the [Defendant Neighbors]", particularly in light of the fact that one of the Defendant Neighbors submitted an affidavit that neither she nor her son, who resides with her in her apartment smoke, and that she suffers from asthma.

TAKEAWAY

Obtaining injunctive relief carries a high burden, and smoking cases are often, such as this one, fact sensitive. It is essential for a plaintiff to come to court with overwhelming proof; i.e., documented instances of smoke emanating from the unit and multiple non-party witnesses.

INSURANCE

ALLSTATE INDEM. INS. CO. V. FRANKLIN BEAN, LLC NO. 522307/2020 (SUP. CT. KINGS CNTY. APR. 25, 2022) NYSCEF NO. 43

Bylaws Prevent Insurer from Pursuing Claim Against Condo Unit Owners

SQUIB BY ROBERT BRAVERMAN, PRINCIPAL & MANAGING PARTNER, BRAVERMAN GREENSPUN

OUTCOME: Decided for Defendant Condo Unit Owner

Allstate Insurance commenced a subrogation action against condominium unit owners (Defendant Owners) for insurance benefits paid to its subrogee, a neighboring unit owner following a leak into a neighboring unit.

The Defendant Owners moved for summary judgment dismissing the complaint based on waiver of subrogation language contained in the condominium's bylaws. The court found that: (i) the bylaws provision waiving the right of subrogation barred the carrier from pursuing the claim; and (ii) the plaintiff's policy of insurance contained language acknowledging the right of the insured to waive the insurer's subrogation rights.

TAKEAWAY

Most condominium bylaws that have insurance requirements contain waiver of subrogation language. It is therefore surprising that Allstate would have pursued this claim.

LABOR LAW

LEWIS V. LESTER'S OF N.Y., INC. 2022 NY SLIP OP 03109 (2D DEP'T MAY 11, 2022)

Court Won't Dismiss Plumber's Personal Injury Claims Against Condominium

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

OUTCOME: Decided for Defendants

WHAT HAPPENED: A plumbing mechanic who was injured while performing repairs at a condominium building brought an action for personal injuries against the condominium association, its managing agent, the owner of the commercial units, and one of its lessees on the first floor of the building. A leak emanated from within a drop ceiling in one of the leased commercial spaces whose pipes serviced the entire building. The condominium association hired and paid the plaintiff's employer to perform the repairs.

IN THE COURT: The court granted summary judgment dismissing the plaintiff's Labor Law claim against the managing agent, commercial unit owner, and commercial tenants, and denied the plaintiff's motion for summary judgment on the issue of liability under the same Labor Law claim. The plaintiff appealed, asserting that each defendant had liability under the Labor Law section governing scaffolding and other devices for the use of employees. Since a condominium's common elements are within the exclusive control of the association's board of managers, the plaintiff's claim under the Labor Law for injuries arising from the condition of those common elements was properly brought against the condominium association, and was properly dismissed against the remaining defendants because they had no duty to maintain the pipes which were the cause of the injuries. However, the plaintiff failed to eliminate the question of whether the lack of an adequate safety device was the proximate cause of the accident, so could not be granted summary judgment. The appellate court agreed with the trial court's findings.

TAKEAWAY

Liability for an employee's injuries comes down to a question of control over the elements or conditions that caused the accident; however, injured employees should expect that their claims may be diminished if their own conduct could have contributed to the cause of the accident or their injuries.

MOTION PRACTICE

DEP'T OF ENV'T PROT. OF N.Y. V. BD. OF MGRS. OF THE LYDIG CONDO.

2022 NY SLIP OP 22155 (SUP. CT. N.Y. CNTY. MAY 19, 2022)

Court Denies Bronx Condo's Request for Change of Venue from New York County to Bronx County

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

OUTCOME: Decided for Plaintiffs

WHAT HAPPENED: The plaintiffs, the New York City Department of Environmental Protection (DEP) and the New York City Water Board, sought a money judgment against the defendants, the Board of Managers of the Lydig Condominium, a condominium located in the Bronx, and the individual condominium unit owners, for unpaid water and sewer charges pursuant to Public Authorities Law §1045-j(5). The action was brought in the Supreme Court of New York County.

IN THE COURT: The defendant condominium board moved for a change of venue under CPLR 511, seeking to have the action moved from New York County to Bronx County, arguing that a change of venue was mandated under CPLR 507 because the money judgment sought by the plaintiffs would be inextricably linked to the lien existing under Public Authorities Law §1045-j, and therefore would affect title to the real property located within the Bronx.

The court rejected this argument, noting that the plaintiffs were only seeking a money judgment, and that the underlying action did not involve a foreclosure on the existing lien. The court held that while an action for a monetary judgment could provide definitive evidence as to the amount of a lien, such action does not actually affect the existing lien. Further, the court noted that, if granted, a money judgment would not give rise to a lien on the real property located within the Bronx until such time that the judgment is docketed with the Bronx County Clerk.

The defendant condominium board also argued that a change of venue was warranted under CPLR 510 (3) because most of the individual condominium unit owners reside in the Bronx, asserting that the travel to Manhattan from the Bronx would be inconvenient and costly for many unit owners. The court also rejected this argument because the defendant failed to provide affidavits from witnesses showing that they would be inconvenienced as a result of the case being in New York County.

TAKEAWAY

A party seeking a money judgment against a condominium's board of managers and the individual unit owners need not bring the action in the county where the condominium is located, as the relief sought in such an action is different from that of a lien foreclosure, and thus the money judgment does not affect the underlying title to the real property. Further, the mere fact that individual unit owners reside in another county is insufficient to argue in favor of a change of venue under CPLR 510 (3), as a detailed evidentiary showing must be presented showing that such witnesses will, in fact, be inconvenienced absent such relief.

MOTION PRACTICE

BD. OF MGRS. OF PASCAL V. HURVITZ 2022 NY SLIP OP 31493(U) (SUP. CT. N.Y. CNTY. MAY 9, 2022)

Court Denies Unit Owner's Request to Consolidate Two Cases Involving Her and Condo Board

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

OUTCOME: Decided for Non-Movant-Defendant

WHAT HAPPENED: The defendant moved to consolidate two actions involving the same parties. The two actions shared only one common issue: the defendant's common charge arrears. However, the two actions otherwise lacked common questions of law and fact, and are based upon different legal theories/claims and legal standards of liability. Accordingly, consolidation may render the litigation unwieldy, result in jury confusion, and prejudice the right to a fair trial.

IN THE COURT: The board of managers sued Hurvitz in one action for violation of the governing condo documents; specifically, leasing her apartment despite being in arrears in common charges and sharing her credentials with her tenants so as to allow them to enter the building. Hurvitz sued the board of managers in a separate action for damages sustained in her unit from a leak purportedly from an exterior wall. Hurvitz argued that it was the board's responsibility to inspect and repair the wall and it failed to do so. Hurvitz also claimed that a common charge lien filed by the board was improper and challenged the arrears the board claimed were due. Hurvitz moved to consolidate the two actions pursuant to CPLR 602(a), and the court denied the motion.

The court held that while the parties are identical in the two actions, the only common issue between the two actions was the issue of Hurvitz's unpaid common charges. Hurvitz's action against the board dealt primarily with facts surrounding water leaks caused by an improperly constructed/repaired exterior wall, while the board's action against Hurvitz dealt primarily with Hurvitz's violation of the governing condo documents by leasing her apartment out without board approval and while her common charges were in arrears. The court held that the one common issue was insufficient given the lack of common questions of law and fact, dissimilar legal claims, and different legal standards of liability to support consolidation of the two actions.

TAKEAWAY

Where two actions have different claims and standards of liability, are based mostly around separate factual inquiries, despite the fact that there is one common issue, consolidation of the two actions is inappropriate.

NOTICE OF PENDENCY

INGRAM V. MALCOLM 2022 NY SLIP OP 31415(U) (SUP. CT. N.Y. CNTY. APR. 28, 2022)

Thwarted Buyers Can't Get Notice of Pendency in Attempt to Recover Down Payment

SQUIB BY DALE DEGENSHEIN, PARTNER, ARMSTRONG TEASDALE

OUTCOME: Decided for Plaintiff Unit Owner

The plaintiff and defendants entered into a contract by which the defendants agreed to purchase the plaintiff's condominium unit. The plaintiff alleges that the defendants breached the contract by wrongfully having their mortgage lender withdraw its financing commitment. The plaintiff sued to retain the down payment. The defendants claimed they were entitled to a return of the down payment.

The defendants filed a notice of pendency, i.e., a lien on the unit. The plaintiff moved for an order to cancel the notice.

A notice of pendency enables a party to "cloud" title merely by serving and filing a summons and complaint and notice of pendency.

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It is a powerful tool – it can restrain property without judicial review. It has been described as an extraordinary privilege.

Under statute, the notice is appropriate only where the judgment would affect title to, or the possession or use and enjoyment of, the property.

The court noted that the lawsuit here does not affect title to, possession of, or use and enjoyment of property. The parties contracted with respect to the property, but the only remedy concerns disposition of the down payment.

The plaintiff's motion to cancel the notice was granted.

OWNERSHIP

HYLAND V. HENLEY NO. 155496/2021 (SUP. CT. N.Y. CNTY. APR. 14, 2022) NYSCEF NO. 16

Woman in "Confidential" Relationship with Deceased Shareholder Not Entitled to Apartment

SQUIB BY DALE DEGENSHEIN, PARTNER, ARMSTRONG TEASDALE

OUTCOME: Decided for Defendants

The plaintiff sought a constructive trust for a cooperative apartment owned by the deceased, Henley. The plaintiff claims that she and Henley had a confidential relationship and that the distributee of Henley's estate (a defendant) would be unjustly enriched if judgment were not granted in her favor.

The administrators and distributee made a motion to dismiss. Specifically, they claim that the plaintiff failed to plead facts demonstrating the existence of a relationship as she and Henley were not married. They also claim that any promise with respect to the apartment was void because it was not in writing (statute of frauds). Finally, the defendants claim the plaintiff did not plead facts to demonstrate loss or that the defendants were enriched at the plaintiff's expense.

The plaintiff asserts that she and Henley did not need to be married for her to be able to assert her claims and that she and Henley enjoyed a long-standing romantic and familial relationship. She claims he promised he would bequeath the apartment to her. She also claims she made financial contributions to the apartment and the household, while the defendants claim she lived in the apartment rent free. It appears as if the plaintiff lived in the apartment part time.

The court explained the legal elements of a constructive trust and unjust enrichment. The court discussed that, under the law, cohabitation without marriage does not give rise to property and financial rights normally associated with marriage. The court viewed the plaintiff's claim as one for equitable distribution, as if they had been married. While the court listed the plaintiff's specific contributions, it noted that the plaintiff did not contribute financially to the purchase or otherwise transfer any interest in reliance on a promise that she share the apartment.

Accordingly, the complaint was dismissed.

TAKEAWAY

This case is a good reminder that people should prepare a will and be mindful of estate planning. We do not know what the decedent would have wanted, but we do know that both the plaintiff and defendants spent time and money to have a court decide whether the plaintiff was entitled to the apartment. We note that the cooperative corporation was not a party to this action. One question to keep in mind: If the deceased had in fact left the apartment to the plaintiff in a will (or the court had agreed with the plaintiff that she was entitled to the apartment), do the cooperative documents permit the transfer, or even permit the plaintiff to live in the apartment?

PERSONAL INJURY

HARDEN V. CYPRESS CREST II CONDO. NO. 100835/2015 (SUP. CT. RICHMOND CNTY. APR. 18, 2022) NYSCEF NO. 198

Condominium's Insurer Must Pay $2M to Plaintiff Who Suffered Slip-and-Fall Injury

SQUIB BY ROBERT BRAVERMAN, PRINCIPAL & MANAGING PARTNER, BRAVERMAN GREENSPUN

OUTCOME: Decided for Neither Party

Defendant condominium moved for an order to vacate a judgment of $2 million awarded to a plaintiff who slipped on a patch of ice located on the condominium's negligently maintained sidewalk. The award of $2 million represented the plaintiff's past pain and suffering caused by the injury. The plaintiff opposed the defendant's motion and cross-moved to increase her jury award for future pain and suffering. The plaintiff sought to increase her future damages from the $500,000 awarded to $4 million.

The court denied the defendant's motion to vacate. In denying the motion the court considered the evidence that the plaintiff presented at trial regarding her injuries. Specifically, the court considered the extent of the plaintiff's injuries and their aftermath. To correct the injuries, the plaintiff underwent an unsuccessful surgery that left her bedridden. The court also considered the fact that the plaintiff was no longer able to participate in many of the activities she enjoyed, such as hiking, camping, and rock climbing. Based on the evidence that was presented, the court determined that the jury sufficiently and adequately considered the effect the plaintiff's injuries had on her life. To rule otherwise, the court stated, would be an abuse of discretion.

The court also denied the plaintiff's motion to increase her future damages. To set aside a jury's award the court must have found that the award deviated materially from what would be considered reasonable compensation. The plaintiff failed to present any evidence that the jury's award materially deviated from this standard and so her motion was denied.

PROPERTY DAMAGE

WILLIAMS V. HOTEL DES ARTISTES, INC. 2022 NY SLIP OP 31634(U) (SUP. CT. N.Y. CNTY. MAY 18, 2022)

Co-op Must Reimburse Shareholder for Repairs to Walls, Floors, and Ceiling After Fire in Neighboring Unit

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

OUTCOME: Decided for Plaintiff Co-op Shareholder

WHAT HAPPENED: A fire broke out in a shareholder's closet, possibly due to a faulty circuit breaker. The fire caused extensive damage to a neighboring apartment, which was rendered uninhabitable for over six months. The neighbors began a lawsuit against the cooperative to be reimbursed for the expenses of repairing damages to the walls, floors, and ceilings as required under the proprietary lease. The cooperative then filed a third-party complaint against the original shareholder alleging that the shareholder had negligently installed the circuit breaker and was therefore responsible for the fire.

IN THE COURT: The neighbor moved for summary judgment for liability on its reimbursement claims, which the court granted. Because the plaintiffs did not cause the fire, the proprietary lease clearly dictated that the cooperative was responsible for the plaintiffs' damages. The fact that the plaintiffs had previously performed a gut renovation and replaced the original fixtures in the apartment did not affect the cooperative's liability for the repair of the walls, ceilings, and floor of the apartment. As the court explained, "Any discrepancy regarding the exact amount of damages does not materially effect [sic] whether defendant is obligated to pay some amount of repair costs under the lease in the first instance." In addition, the question whether the original shareholder negligently

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caused the fire was irrelevant to the plaintiff's claims against the cooperative. Finally, even though both defendants had requested that summary judgment be denied because discovery was not complete, the court rejected that argument because discovery is not necessary if the legal liabilities are clear.

TAKEAWAY

Depending on the terms of the proprietary lease, when a fire (or other casualty) in one shareholder's apartment causes damage to a neighboring apartment, the cooperative may be responsible to repair the neighboring apartment, regardless of whether the original shareholder negligently caused the fire. The court won't wait to award damages to the neighbor while the cooperative and the original shareholder fight over who was responsible for the fire.

PROPERTY DAMAGE

ANDREAS V. 186 TENANTS CORP. 2022 NY SLIP OP 02940 (1ST DEP'T MAY 3, 2022)

Co-op Shareholders May Not Withhold Maintenance

SQUIB BY JEFFREY BUCKLEY, LIBRARIAN, CASE LAW TRACKER

OUTCOME: Decided for Defendant Cooperative in Part

The First Department affirmed a lower court order, holding that co-op shareholders need to continue making maintenance payments despite their water damage claims against the co-op. See commentary on *Andreas v. Cushing*, 2021 NY Slip Op 31460(U) (N.Y. Sup. Ct. N.Y. Cnty. Apr. 29, 2021), available via *https://coopcondocaselawtracker.com/cases/andreas-v.-cushing-apr-29-2021*.

The appellate court also modified a related lower court order, holding it premature to award attorney fees to the co-op defendant while the action is still pending.

REPAIRS

295 GREENWICH COURT CONDO., LLC V. CONSOL. EDISON CO. OF N.Y., INC.
NO. 154496/2018 (SUP. CT. N.Y. CNTY. MAY 4, 2021) NYSCEF NO. 50

Trial Needed to Determine Whether Con Ed Is Responsible for Corroded Water Pipes

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

OUTCOME: Decided in Favor of Plaintiff Condo Buildings Owner

WHAT HAPPENED: When NYC excavated the street in front of the 295 Greenwich Court Condominium in 2017, the condo noticed major corrosion on the exterior of three water pipes servicing the building and steam escaping from steam mains owned by Con Edison close to the corroded pipes. The condo hired a contractor to make emergency repairs for about $117,000. Four months later, when NYC excavated the street in front of 275 Greenwich Street (a sister building also owned by the condominium), the condo observed similar extensive corrosion under similar circumstances, i.e., escaping steam hitting the water pipes servicing 275 Greenwich. The condo replaced those pipes on an emergency basis as well at a similar cost.

IN THE COURT: The condominium subsequently sued Con Edison for negligence, alleging that the escaping steam caused the corrosion on the water pipes, and that Con Edison knew or should have known about the steam leaks and their effect on the pipes. Depositions relating to the scope and cause of the damage and the

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extent of the steam leaks were taken from the managing agent, the building superintendent, and engineers and project managers employed by Con Edison. The condominium also engaged a metallurgist as an expert witness who opined that the escaping steam from the Con Ed mains caused the corrosion in the pipes.

After depositions were concluded, Con Edison made a motion for summary judgment, asserting that based on the facts uncovered in the depositions, the condominium had not met its burden of proving that Con Edison was negligent or that Con Edison had notice of damaging steam leaks. Con Ed argued that the engineers employed by Con Edison had demonstrated conclusively that the steam escaping from the Con Edison mains did not affect the condominium's water pipes, and since neither the managing agent, her supervisor, nor the building superintendent were engineers, their observations and recollections had no weight.

The condominium naturally opposed the motion. To begin with, the condominium had provided an expert witness who had stated that the steam leaks caused the corrosion, while Con Edison had provided no outside expert. According to the condominium, the court was required to give the uncontroverted testimony of an expert witness substantial weight. Second, they asserted that Con Edison had selectively quoted from its engineers' depositions; other deposition testimony they had given actually supported the condo's claim.

A party making a motion for summary judgment essentially claims that even viewing the evidence in a light most favorable to the non-moving party, there are no material factual issues remaining to be decided at trial, and that the court can make a legal judgment based on the evidence before it. In other words, none of the factual evidence provided by the other side is sufficient to call into question the validity of the claims made by the moving party, so no further fact-finding (at trial) is required.

The court rejected Con Edison's motion for summary judgment. The court observed that Con Edison had "failed to demonstrate the absence of material issues of fact." While Con Ed had identified potential weaknesses in the condo's case, it had hardly made any conclusive demonstration that it had not been negligent in the way that it maintained its steam pipes, or that the leakage did not cause the corrosion. For example, Con Ed's engineer had stated that he had observed only "vapor" near the water service pipes, not "steam." The court questioned the practical difference. Furthermore, the condominium's opposition papers had raised triable issues of fact by its expert and its witnesses that also needed to be resolved at trial.

Con Ed actually filed a motion for reargument, which was denied. The court stated, "the initial motion court did not overlook or misapprehend any facts or relevant law" that had been presented to it [the usual grounds to seek reargument]. "The purpose of a motion for leave to reargue is not 'to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided[.]'" Notwithstanding, Con Ed has now filed a Notice of Appeal.

TAKEAWAY

This case illustrates why property damage claims usually go to trial if they're not settled. The cause and scope of damage is a factual question. The plaintiff makes fact-based arguments to show how the other party caused the damage, and the defendant makes fact-based claims why it was not responsible for the damage. Unless the court deems that one party had no legal duty (or had an unbreakable legal duty) to the other, or the evidence on one side is overwhelming, the court will usually elect to have a jury (or the court) weigh the credibility of the competing claimants at a trial, rather than making a judgment based on depositions and documents alone.

The same standard applies to construction defect cases. Frequently the condominium asserts construction deficiencies in the building caused by the poor work of the sponsor's contractor. Each party engages an engineer to review and comment on the claims, and their opinions frequently differ. Unless the claims are settled by negotiation, a court is unlikely to disavow preemptively the testimony of the experts engaged by the parties. Lacking a procedural basis for dismissing a claim (no legal duty, statute of limitations, etc.) the dispute will need to go to trial. As a result, these cases can last for several years, draining the resources of the condominium and negatively affecting owners' ability to sell or obtain mortgages in the interim. Even though many of these claims have a basis in fact, condo boards need to weigh the unintended consequences on the community before making them.

REPAIRS

BURDEN V. GLENRIDGE MEWS CONDO. 2022 NY SLIP OP 22163 (CIV. CT. QUEENS CNTY. MAY 23, 2022)

Housing Maintenance Code Obligates Association to Maintain Common Areas

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

OUTCOME: Decided for Petitioner Condo Unit Owner in Part and for Respondent Condo in Part

WHAT HAPPENED: The estate of a condominium unit owner commenced a proceeding seeking an order to correct certain conditions in the building's common areas related to leaks and a vermin infestation, and for harassment by the association.

IN THE COURT: The condominium association sought dismissal of the Housing Part proceeding based on several theories, including the lack of a landlord-tenant relationship, lack of standing, and the inapplicability of the Housing Maintenance Code to condominiums.

The court held not only that the Housing Maintenance Code may be enforced against a condominium association for failure to maintain common areas and does not require that a person be in actual physical possession to seek an order to correct, but also that the condominium association's bylaws obligated the board of managers to maintain the building's common areas.

The court dismissed the estate's harassment claim, recognizing that the amendment to the Housing Maintenance Code specifically exempted cooperatives and condominiums from such claims, and denied the estate's motion for leave to amend the petition to include the individual occupant of the apartment, since there would be no merit in adding the individual petitioner since the court already found that the estate has standing to maintain the claim to correct the conditions.

TAKEAWAY

Condominium associations are included in the protections afforded by the Housing Maintenance Code and are not shielded from proceedings to compel repairs to be made, despite the lack of a landlord-tenant relationship with their unit owners. Common areas must be maintained and failure to do so can result in the issuance of violations and an order to correct.

REPAIRS

YORK RESTORATION CORP. V. BD. OF MGRS. OF THE HAYDEN ON THE HUDSON CONDO.

NO. 723540/2021 (SUP. CT. QUEENS CNTY. APR. 8, 2022) NYSCEF NO. 69

Court Dismisses Contractor's Claims Against Individual Board Members and Architect

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

OUTCOME: Decided in Favor of Individual Condo Board Defendants and Architect

York Restoration Corp. entered into a contract for Local Law 11 façade repair work with Hayden on the Hudson Condominium. York alleged that the condo board improperly stopped payment for York's work under its contract, and that the consulting architect brought in by the board to evaluate York's work had made unwarranted, defamatory statements about the quality of York's work. York sued the board of managers and the managing agent for various forms of breach of contract, the individual board members and the consulting architect for tortious interference with York's contract, and the consulting architect for slander.

York's claim against the individual board members was premised on the theory that the board members had hired the consulting architect solely to find grounds to break the condominium's contract, and not to provide a professional evaluation. The condominium moved to dismiss the tortious interference

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claim, asserting that the individual board members had not made decisions or taken action with respect to the contract except in their capacities as board members. (In other words, the board members were making decisions purely as the elected representatives of the condominium, and not in bad faith or for personal purposes.)

York opposed the motion to dismiss primarily based on the argument that when considering a motion to dismiss, the court must accept all facts as alleged by the non-moving party to be true, which would include the allegation that the board had retained the consulting architect in bad faith. However, the court found no evidence that the individual board members had acted in their individual capacities and would not accept mere speculation (that they had engaged the architect for improper reasons) in the absence of any evidentiary support. Accordingly, the complaint was dismissed against the individual board members.

The architect also moved to dismiss the tortious interference and slander claims against it. The architect argued that it had been engaged to give its professional opinions to its client. Accordingly, the architect's allegedly false statements were made to fulfill those duties, and not with the intention of injuring York, which gave such statements a qualified privilege even if they turned out to be incorrect. Furthermore, a "tortious interference" claim requires that the contract would not have been breached "but for" such interference. Since the architect was retained several months *after* the board stopped paying York, the architect could hardly be accused of causing the breach of contract. The court agreed on both counts and dismissed the claims against the architect.

The court declined to dismiss the assorted breach of contract claims against the condominium or its managing agents, or the claim for "account stated" based on the condominium's alleged failure to contest bills for work performed previously presented to the condominium in the regular course of business. (However, the court would allow the motion to dismiss the "account stated" cause of action to be made again after further discovery.)

TAKEAWAY

Plaintiffs frequently seek as many different grounds for their claims in their initial complaint as they can, on the theories that the more defendants, the more sources of potential payment; that defendants with differing interests might undermine each other for the benefit of the plaintiff; and that a court might (unexpectedly) agree with a creative claim. Condominium boards are especially juicy defendants, since they are comprised of volunteers who did not sign up to be sued, and the ongoing tension of litigation and potential financial drain of the lawsuit creates pressure from the community to find a way to settle. In this case, the plaintiff was casting about for ways to bring in individual defendants by speculating on the defendants' motives. However, the court determined that the facts of the case actually undermined the grounds for the plaintiff's more creative claims, and that unsupported speculation in a complaint did not meet the standard for pleading a necessary element of a cause of action. Thus, even viewing the assertions of the non-moving party in their most favorable light, the claims did not survive a motion to dismiss.

REPAIRS

MENKES V. BD. OF MGRS. OF 561 5TH ST. CONDO. NO. 524496/2020 (SUP. CT. KINGS CNTY. APR. 21, 2022) NYSCEF NO. 186

Court Denies Unit Owners Injunction That Would Represent Ultimate Relief

SQUIB BY DEBORAH E. RIEGEL, MEMBER, ROSENBERG & ESTIS

OUTCOME: Decided for Defendants Condo Board and Board Members

Condo unit owners in a four-unit building sued the board and individual board members for alleged water damage, lack of proper maintenance, and breach of fiduciary duty. The plaintiffs' original complaint asserted two causes of action against the board and the individual board members: breach of fiduciary duties and breach of contract. Each cause of action sought only money damages. They amended the complaint to expand their requests for relief

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to four causes of action including a cause of action for temporary, preliminary, and permanent injunctive relief related to the obligation to repair their unit so they could occupy it. The plaintiffs' claim stems from the allegation that the board failed to maintain the building and, as such, allowed water to infiltrate their apartment and cause damage, in addition to the fact that the board and its individual members acted in their own self-interests and in retaliation for the plaintiffs' attempts to force the board to properly repair and maintain the building.

The plaintiffs moved for a preliminary injunction compelling the board to comply with their obligations under the condominium bylaws to repair and maintain the building, including hiring an architect or engineer to plan and supervise repairs to the building to eliminate water incursion into the plaintiffs' unit, as well as a licensed contractor to implement such repairs; and retain both a licensed mold remediation company to remediate the plaintiffs' unit and a Certified Industrial Hygienist to confirm that all mold has been remediated.

The court denied the plaintiffs' motion and held that the relief sought represented the ultimate relief in the case. The court also found that the purpose of an injunction is to maintain the status quo, and that to grant the relief the plaintiffs sought would alter, rather than maintain it.

TAKEAWAY

A plaintiff has a heavy burden on a motion for injunctive relief to persuade the court that interim relief is necessary prior to trial in order to preserve the status quo. The burden is exceptionally higher where the injunction seeks to compel action, rather than restrain conduct. It is imperative that the party requesting an injunction makes the judge understand that there is an immediate and compelling reason to act—both from a factual and a legal perspective. Timing is also critical on a motion for a preliminary injunction. If it is seen as a tactic, rather than based on a genuine need for immediate intervention, it will likely fail.

SPONSOR

RFLP, LLC V. 255 W. 98TH ST. OWNERS CORP. 2022 NY SLIP OP 03354 (1ST DEP'T MAY 24, 2022)

Co-op Must Recognize LLC as Holder of Unsold Shares

SQUIB BY ANDREW P. BRUCKER, PARTNER, ARMSTRONG TEASDALE

OUTCOME: Decided for Plaintiff Shareholder

WHAT HAPPENED: The plaintiff LLC owned three units in a cooperative corporation that were occupied by non-purchasing rent-controlled and rent-stabilized tenants. The plaintiff had purchased the three units from an entity (referred to as the "new sponsor" in amendments to the offering plan) that had purchased the three units from the original sponsor. After the plaintiff's purchase, the LLC was referred to as the owner of "unsold shares" appurtenant to the three apartments.

Holders of Unsold Shares have special rights in cooperatives, as outlined in the proprietary lease. Among the rights is typically the fact that consent is not required when the Holder sells the apartment, nor does the Holder have to pay the transfer fee (a/k/a flip tax). In addition, when the Holder undertakes an alteration, no consent is required (and in fact, there was an alteration by the Holder in the cooperative and no consent was requested nor given). Thus, having the status of a Holder of Unsold Shares is extremely important to an investor.

IN THE COURT: The plaintiff brought an action against the cooperative, and requested that the court declare the plaintiff to be a Holder of Unsold Shares. The court granted the plaintiff's request, and the cooperative appealed. The Appellate Division of the Supreme Court (First Department), following a long line of cases, agreed with the lower court, and held that the plaintiff was indeed a Holder of Unsold Shares. The court also agreed that the cooperative would have to pay for any money damages suffered by the plaintiff due to the cooperative's refusal to recognize it as the Holder of Unsold Shares.

(**Takeaway** *on p. 22)*

TAKEAWAY

Decades ago, this issue was very hot, and the Attorney General even published an advisory in regard to this issue. In 2005, the court held that the Attorney General had no right to create additional requirements for a shareholder to have or maintain its status as a Holder of Unsold Shares. That court held (as this court held) that only the language of the proprietary lease and the offering plan should be reviewed, and if the line of ownership of the shares traces back to the sponsor, and if the owner of those shares (or its family) has never lived in the apartment, and the shares have always been considered "unsold shares," there is probably no way to consider the investor of multiple apartments as anything other than a Holder of Unsold Shares. No special designation from the sponsor or a subsequent successor sponsor is needed.

SUBLETS

SMITH V. PATRICK 2022 NY SLIP OP 31742(U) (SUP. CT. N.Y. CNTY. MAY 27, 2022)

Subtenant of Co-op Shareholder Not Entitled to ERAP-related Stay of Ejectment Action

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

OUTCOME: Decided for Plaintiff Co-op Shareholder

WHAT HAPPENED: The defendant entered into a one-year sublease to rent a cooperative apartment from the plaintiff shareholder. After the expiration of the sublease, the defendant continued to occupy the apartment. The defendant did not pay use and occupancy to the plaintiff.

The plaintiff commenced this action to eject the defendant from the apartment and for unpaid rent/use and occupancy.

In response, the defendant applied for Emergency Rental Assistance Program (ERAP) benefits to pay for his rent arrears. However, the defendant's ERAP application was denied. Thereafter, the defendant filed an ERAP Appeal Request. Based on the defendant's appeal, the defendant sought a stay of his ejectment from the apartment in this action.

The plaintiff opposed the defendant's application for a stay "because: (1) plaintiff is a shareholder of her apartment and shareholders are not eligible for ERAP benefits; and (2) plaintiff wants to occupy her one and only co-op unit as her primary residence, which is an exception to ERAP[.]"

IN THE COURT: The court denied the defendant's application for a stay and held that cooperative shareholders are not eligible for ERAP. The court directed the Sheriff to eject the defendant from the apartment. The court also granted the plaintiff a judgment for use and occupancy.

TAKEAWAY

Cooperative shareholders and their subtenants are not eligible for ERAP to pay outstanding maintenance for their cooperative apartments. Therefore, cooperative shareholders and their subtenants risk eviction if they fail to pay maintenance for their apartments.