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

ALTERATIONS

MANDRACCHIA V. RENOVATE-CREATE SOURCING AND PROCUREMENT CORP.

2024 NY SLIP OP 04439 (1ST DEP'T. SEPT. 12, 2024)

Shareholder Can't Recover from Co-op Defendants for Faulty Apartment Renovation

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

OUTCOME: Decided for Condo Defendants-Appellees

WHAT HAPPENED: In 2013, the plaintiff entered into an alteration agreement for a gut renovation of her apartment at 405 East 63rd Street, a cooperative managed by Douglas Elliman Property Management. The plaintiff hired an architect to develop a renovation plan, and submitted the plan to the cooperative, management, and the cooperative's architect. After several rounds of comments and revisions, the cooperative's architect approved the renovation plan.

The plaintiff hired a general contractor and its principal to supervise the renovation work. She alleged that she hired the contractors on the recommendation of the cooperative board president, who should have warned the plaintiff that the contractors were unlicensed and uninsured. In 2019, the plaintiff commenced an action seeking to recover monetary damages as a result of the allegedly substandard renovation done to the apartment.

The trial court granted summary judgment to the cooperative, the managing agent, and the cooperative's architect dismissing the plaintiff's claims under Multiple Dwelling Law §78, for breach of fiduciary duty, and for negligence. The plaintiff appealed.

IN COURT: The Appellate Division affirmed the dismissal of the plaintiff's claims. The plaintiff alleged that the cooperative and its managing agent had violated Multiple Dwelling Law §78 by failing to keep the apartment in good repair. The court said that while an owner's duty under Multiple Dwelling Law §78 to maintain the premises in good repair can't be delegated, here the plaintiff assumed contractual responsibility for the renovations and damages caused by her con-

(continued on p. 3)

NOVEMBER 2024 HIGHLIGHTS

ARBITRATION
Court Upholds Beth Din's Arbitration Award Favoring Condo

FIDUCIARY DUTY
Co-op Board Defeats Shareholder's Claims Asserting Improper Allocation of Shares

FORECLOSURE
Co-op Can Foreclose on Lessee's Apartment via a Non-Judicial Auction

INSURANCE
Court Allows Owners' Breach of Contract Claim Against Condo Board to Proceed

LABOR LAW
Super Claims Condo Denied Him Wages in Violation of Federal & State Labor Laws

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

CO-OP&CONDO CASE LAW TRACKER digest

ADVISORY PANEL:

Robert Braverman
Principal & Managing Partner, Braverman Greenspun

Andrew P. Brucker
Partner, Fox Rothschild

Dale Degenshein
Partner, Fox Rothschild

Michael P. Graff
Principal, Graff Dispute Resolution

Jeremy S. Hankin
Partner, Hankin & Mazel

Thomas P. Higgins
Partner, Higgins & Trippett

Richard Klein
Partner, Klein Greco & Associates

Michelle P. Quinn
Partner, Gallet Dreyer & Berkey

Stewart E. Wurtzel
Principal, Tane Waterman Wurtzel

CONTRIBUTORS:

David S. Fitzhenry
Partner, Moritt Hock & Hamroff

William J. Geller
Counsel, Braverman Greenspun

Helene W. Hartig
Founder & Principal, The Law Office of Helene W. Hartig

Kenneth R. Jacobs
Partner, Smith Buss & Jacobs

Lauren E. Lewis
Associate, Norris McLaughlin

Ingrid C. Manevitz
Partner, Seyfarth Shaw

William D. McCracken
Partner, Moritt Hock & Hamroff

Scott J. Pashman
Member, Cozen O'Connor

Lloyd F. Reisman
Partner, Belkin Burden Goldman

Eliot H. Zuckerman
Partner, Smith, Gambrell & Russell

TABLE OF CONTENTS

ALTERATIONS 1
Shareholder Can't Recover from Co-op Defendants for Faulty Apartment Renovation

Court Won't Dismiss Unit Owners' Counterclaims for Breach of Fiduciary Duty, Nuisance, Intentional Infliction of Emotional Distress, Injunction

ARBITRATION 5
Court Upholds Beth Din's Arbitration Award Favoring Condo

BUSINESS JUDGMENT RULE 7
Co-op Can Evict Tenant for Objectionable Conduct

CHARGES/FEES 7
Successor Sponsor Must Pay Assessment Despite Potentially Contradictory Language in Offering Plan

CHARGES/FEES 9
Court Denies Condo Board Summary Judgment for Recovery of Unpaid Common Charges

CONSTRUCTION DEFECTS 9
Principal of LLC Unit Owner Can't Recover Alternate Living Expenses

DISCRIMINATION 11
Condo and Managing Agent, But Not Board Members, May Be Liable for Doorman's Sexual Harassment of Resident

ESTATE 12
Late Shareholder's Niece Claims Co-op Unreasonably Withheld Consent to Transferring Apartment to Her

EVICTION/TERMINATION 13
Nonpayment Proceeding Brought by Condo Isn't Dismissed Due to Lack of Capacity or Standing to Sue

FIDUCIARY DUTY 14
Co-op Board Defeats Shareholder's Claims Asserting Improper Allocation of Shares

FORECLOSURE 16
Co-op Can Foreclose on Lessee's Apartment via a Non-Judicial Auction

INSURANCE 17
Unit Owners Claim Condo Board Breached Its Fiduciary Duty and Bylaws by Not Procuring Adequate Insurance

Court Allows Owners' Breach of Contract Claim Against Condo Board to Proceed

LABOR LAW 19
Super Claims Condo Denied Him Wages in Violation of Federal & State Labor Laws

MANAGEMENT 20
Unit Owner's Claims for Breach of Contract, Trespass, and Negligence Survive Motion to Dismiss

SERVICE OF PROCESS 22
Co-op Didn't Receive Shareholder's Complaint Because Secretary of State Had Incorrect Address

SPONSOR 22
Sponsor Wins Dismissal on Appeal of Condo's Claims for Defective Construction

Sponsors Seeking Indemnification by Contractors for Construction Defects Are Denied Summary Judgment

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

CO-OP&CONDO CASE LAW TRACKER digest

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 September 2024. For additional cases, visit https://coopcondocaselawtracker.com.

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

Volume 4, Issue 6

SUBSCRIPTIONS: **CO-OP & CONDO CASE LAW TRACKER DIGEST** is published by The Habitat Group. Annual subscription rate to the database at www.coopcondocaselawtracker.com and monthly digest: $498 for single user access; $1,800 for team access.

DISCLAIMER: Every reasonable effort has been made in this publication to achieve accuracy. The law changes constantly, however, and is subject to differing interpretations. Always consult your attorney, therefore, and act only on his/her advice. This publication is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. The publisher shall not be responsible for any damages resulting from any inaccuracy or omission contained in this publication.

©2024 by The Carol Group Ltd. All rights reserved. No part of **CO-OP & CONDO CASE LAW TRACKER DIGEST** may be reproduced, distributed, transmitted, displayed, published, or broadcast in any form or in any media without prior written permission of the publisher. To request permission to reuse this content in any form, including distribution in educational, professional, or promotional contexts, or to reproduce material in new works, please contact contact Carol J. Ott at 212-505-2030 or *cott [at] habitatmag.com.*

the HABITAT group

tractors. The court also said that the plaintiff could not maintain a Multiple Dwelling Law §78 claim against the cooperative defendants for damages caused by her own renovations.

The plaintiff alleged that the managing agent, Douglas Elliman, breached its fiduciary duty to her by signing off on defective construction work and failing to notify the plaintiff that the contractors were unlicensed. The court disagreed and said that nothing in the record indicated any breach of duty by the managing agent relating to the plaintiff's retention of the contractors or in Douglas Elliman's limited oversight of the renovation work, which was restricted to code compliance. In addition, the evidence showed that the cooperative did not require general contractors to provide proof of licensing.

The court also said that the cooperative was properly awarded summary judgment on its counterclaim for attorneys' fees based on the indemnification provision of the alteration agreement. The court said such indemnification was appropriate because the record demonstrated that the damage to the apartment was caused solely by the plaintiff's contractors.

The court also said that the plaintiff's claim for negligence against the cooperative's architect was properly dismissed because the record did not show a relationship between the plaintiff and the architect that was the functional equivalent of privity, or that the architect had sufficient control and authority over the project to support a duty of care to the plaintiff.

TAKEAWAY:

This case demonstrates how a well-crafted alteration agreement can protect a cooperative or condominium from legal liability and costs of defense when, as happens frequently enough, an apartment renovation is unsuccessful. Boards should have their alteration agreement forms reviewed by counsel, especially if such a review has not been conducted recently, to ensure that the alteration agreement contains appropriate protection for the building and the board and incorporates current developments in the law.

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

ALTERATIONS

BD. OF MGRS. OF PROMENADE CONDO. V. JACKMAN

(2024 NY SLIP OP 51228(U)) (SUP. CT. N.Y. CNTY. AUG. 20, 2024)

Court Won't Dismiss Unit Owners' Counterclaims for Breach of Fiduciary Duty, Nuisance, Intentional Infliction of Emotional Distress, Injunction

SQUIB BY LLOYD F. REISMAN, PARTNER, BELKIN BURDEN GOLDMAN

OUTCOME: Decided for Plaintiff Condo, Co-Defendant Unit Owners

WHAT HAPPENED: This is the most recent chapter in a saga that begin in 2014. As recounted in four prior *Co-op & Condo Case Law Digests*, the earliest lawsuit was commenced in 2014 by the defendant unit owners after the plaintiff board prevented the performance of unauthorized alterations, and resulted in the parties entering into a settlement agreement in 2018.

The settlement agreement provided that the condominium agreed to waive and release certain entities affiliated with the individual defendants (which entities owned other units in the condominium) from their obligations to pay certain past due amounts as consideration for the unit owner's agreement to complete the alterations by a date certain. The settlement agreement further provided that, if the defendant unit owners failed to comply with its terms, the board would be entitled to, among other things, record liens against the units, foreclosure on such liens, and seek a money judgment against the defendants.

In July 2022, the board's engineering firm issued a field report stating that the units were being heated in a manner not approved by the condominium, that the units were being supplied electricity in a manner not approved by the condominium, and, most importantly, that the alteration remains incomplete (despite the terms of the settlement agreement).

IN COURT: The board commenced the instant action seeking to enforce the terms of the settlement agreement, to wit, seeking to foreclose the liens recorded against the units and to recover a money judgment against the defendants.

The defendant unit owner responded by asserting 18 affirmative defenses and 10 counterclaims, the most relevant of which are: (1) a breach of fiduciary duty claim against the board and certain board members arising out of their intimidating and harassing conduct toward the defendants and their children; (2) a private nuisance claim alleging that the current board president intentionally caused a continuous and substantial interference with the defendants' right to use and enjoy the condominium and the units; (3) an intentional infliction of emotional distress claim alleging that the current board president's conduct toward the defendants and their children was "extreme and outrageous;" and (4) a request for a permanent injunction against the board and its related parties seeking to enjoin them from engaging in further intimidating and harassing behavior toward the defendants and their children.

The defendants' answer also included their telling of the history of this conflict, including allegations of unwarranted work stoppages and denial of access to the unit owners' contractors, threatening letters from the board's attorney, demands for payments from an individual board member, the placement of $90,000 of false charges on the defendants' account, and the refusal to allow the defendants to perform work in furtherance of the alteration.

The plaintiff board thereafter filed a motion to dismiss all of the defendants' counterclaims.

In its decision on the motion to dismiss, the court held that: (1) the defendants' breach of fiduciary duty claim was for the most part timely and sufficiently pleaded, having alleged that there was sufficient evidence of unequal treatment; (2) the defendants' private nuisance claim sufficiently alleged that the board president interfered with the defendants' use of the condominium's common areas, intimidated and made threats at the defendants, glared and yelled at their children, and tried to block access to the premises; (3) the defendants' intentional infliction of emotional distress claim sufficiently alleged that, among other things, the board president threatened the defendants' children that he was going to have a brawl with their father, the board president's wife attempted to

(continued on p. 5)

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

block the defendant from entering the building and repeatedly mocked him while do so, and the board president insulted the defendant and gave him a threatening look; and (4) the defendants' request for a permanent injunction raised substantive counterclaims against the board and certain board members, such that a permanent injunction could be granted against those individuals (but the court dismissed the balance of claims for a permanent injunction against certain other board members and the managing agent).

Thus, of the defendants' 10 counterclaims, eight survived the motion to dismiss and may proceed to trial. That will have to wait, as both the condominium board and the defendants have since appealed the decision.

TAKEAWAY:

While the facts in this case—especially under the 2018 settlement agreement—appeared to strongly support the board's position, the long history of conflict between the parties (dating back to 2014) suggests that the board could have explored alternatives to litigation. Instead of immediately resorting to legal action, the board could have considered implementing a formal dispute resolution process. This would help de-escalate conflicts with unit owners and provide a structured approach for resolving disputes before they reach court. Mediation or arbitration, for example, can be effective tools for resolving complex issues in a more collaborative way.

In addition, it is critical that board members conduct themselves professionally at all times, particularly in their interactions with unit owners and their families. Personal communication should always be respectful and avoid any language or behavior that could be perceived as threatening, intimidating, or harassing. If conflicts do arise, the board should address them through formal legal channels, not through personal or confrontational actions. By adopting these best practices, cooperative and condominium boards can better manage disputes, enforce their rules fairly, and avoid the risks of costly, protracted legal battles that could damage their reputation and relationships with residents.

ARBITRATION

WATERVIEW CONDO. LLC V. INDIG

2024 NY SLIP OP 33366(U) (SUP. CT. KINGS CNTY. SEPT. 24, 2024)

Court Upholds Beth Din's Arbitration Award Favoring Condo

SQUIB BY MICHAEL P. GRAFF, ESQ., ARBITRATOR/MEDIATOR

OUTCOME: Decided for Petitioner Condo

WHAT HAPPENED: The petitioner serves as a condominium board to a condominium complex (the "condo"). The respondent, Indig, purchased the commercial unit of the condominium pursuant to the condo's offering plan, which essentially constitutes a contract between the condo and its unit owners. A dispute arose between the condo and Indig concerning the validity, imposition, and computation of the condo's common charges, water charges, and insurance costs attributable to the commercial unit.

The issues in this case include the way such a dispute is to be resolved pursuant to the arbitration provisions of the condo's bylaws. Indig asserted that in 2002 the original owner of the commercial unit reached an agreement with the board outside of the terms of the offering plan whereby, instead of applying the condo book formular of 19.18 percent of the budget to determine the commercial unit's monthly common charges, the commercial unit paid one-half of the building's insurance and one half of the building's fire alarm and sprinkler costs in lieu of its monthly common charges. That formula was applied for 14 years without issue until 2016, pursuant to an agreement between the original unit owner and the sponsor. Then, when Indig applied to the board to build a ramp, the board denied the application, pointing out that he owed outstanding maintenance.

When it came to a forum to resolve the dispute, Indig asserted that the condo intentionally concealed a portion of the bylaws that, as a first option, permits arbitration

(continued on p. 6)

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

of any disputes before a single arbitrator in accordance with the rules of the American Arbitration Association (AAA).

Unaware of that provision, Indig agreed in writing to arbitrate the controversies concerning the dispute before a panel in a Jewish religious court (the Beth Din). Following the execution of that agreement, the parties submitted to arbitration their breach of contract dispute concerning annual common charges, water expenses, and insurance payment relating to Indig's commercial unit. The parties submitted their evidence before the Beth Din.

The arbitrators rendered an interim decision and award that Indig was responsible for common charges at the rate of 19.18 percent of the condo's total annual common charges, that Indig was entitled to receive a credit for prior payment concerning water, and the parties had to split the costs of installing a new water meter in the commercial unit. In addition, the interim award provided that the water and insurance charges will be assessed based upon the commercial unit's 19.18 percent ownership share, as modified. The award also provided that ancillary claims concerning the condo's trash disposal, maintenance, and parking spaces would be addressed later.

Thereafter, the arbitrators received further evidence and rendered a final award, dated Nov. 2, 2023, for common charges for the period between 2016 and 2021, of $131,954.22, which Indig paid. The condo's petition now seeks recovery of an additional $164,806.59, which would include insurance charges and common charges for 2022 through part of 2024 and other fees. The amount sought was calculated utilizing the 19.18 percent of such charges that the Beth Din previously determined were required to be paid by Indig.

IN COURT: The court noted that it was true that the bylaws permitted the parties to mutually choose any other dispute resolution option, but also noted that the bylaws allegedly sent to Indig omit pages 16 – 18—and that omission was clearly noticeable. The court found that he never demanded to receive a full copy. He was therefore charged with his own failure to read the entire document.

It is firmly established that the public policy in New York favors and encourages arbitration and alternate dispute resolution. Thus, in the motion to overturn the award a movant has a heavy burden to show, by clear and convincing evidence, corruption, fraud, or misconduct in procuring the award. Such showing was not made.

The award did not compute the amount to be paid over future years, but it did provide that Indig must pay 19.18 percent of the budget for future years, which included insurance charges, adjusted for higher commercial rates. It was stated in the bylaws that the condo is entitled to set and determine its own budget, so long as the budget is generally reasonable and fair. It also stated that Indig shall pay the difference between the building's actual insurance rates and what the insurance rates would have been if the commercial unit was a residential space. This was supported by the insurance provision of the bylaws, which provided that a unit owner may be assessed if the use of its unit causes insurance costs to increase. The court confirmed the award.

The court also discussed that an unincorporated association can be sued only by service upon its president, treasurer, or persons with the functional equivalent of such officers. However, this requirement was not jurisdictional, so that it may be corrected in the course of the proceedings. Therefore, the motion to dismiss on those grounds was denied.

TAKEAWAY:

Arbitration is generally the preferred forum for the resolution of disputes between co-ops or condominiums and tenants or unit owners. It is faster, more efficient, usually more economical, and private. The fact that the rules of evidence are more relaxed assists the parties to reach a just award. As in court litigation, it is important to make sure that all the claims are brought before the arbitrators.

It is also worth mentioning that when a party submits to litigation procedures in court, it thereby waive any chances it may have had to submit its claims to arbitration.

There is no explanation as to the reason why the parties submitted their dispute before a religious forum, the Beth Din, which usually will consist of rabbis or other authorities on Jewish law. Doubtless, the parties were part of a Jewish community, where submitting their disputes before a secular authority is discouraged. There is no basis to believe that in this case the outcome would have been different if submitted to a secular forum.

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

BUSINESS JUDGMENT RULE

WINDSOR TERRACE AT JAMAICA ESTATES OWNERS, INC. V. ADVANI

2024 NY SLIP OP 51189(U) (APP. TERM 2D DEP'T, AUG. 13, 2024)

Co-op Can Evict Tenant for Objectionable Conduct

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

OUTCOME: Decided for Plaintiff Co-op

WHAT HAPPENED: A cooperative corporation terminated a tenant's proprietary lease based on the tenant engaging in objectionable conduct, including repeatedly causing disturbances in the apartment, continuously causing excessive smoke and odors to emanate from the apartment, exceeding the permitted number of persons residing in the apartment, running an exterminating business from the apartment, failing to keep the apartment in good repair, failing to provide access to the apartment for the cooperative to assess repairs needed from a leak, and repeatedly contacting other residents and board members by posting and placing notices under residents' doors. Based on the termination of the lease, the cooperative filed an eviction proceeding against the tenant.

IN COURT: The cooperative filed a motion for summary judgment against the tenant, which the tenant opposed. The court found that the cooperative had properly followed the procedures required for termination due to objectionable conduct, and as such the decision was shielded from judicial scrutiny by the business judgment rule. The tenant did not raise an issue of fact as to whether the board did not act for the purposes of the cooperative, exceeded its authority, or did not act in good faith.

TAKEAWAY:
Although it can be a time-consuming and tedious process, terminating a tenant's proprietary lease based on their objectionable conduct may be the best tool available to a cooperative corporation to deal with a difficult tenant. Objectionable conduct occurs when a tenant repeats behavior after receiving notice from the cooperative that such conduct is improper. Undertaking the process is most appropriate when there is more than one type of offensive behavior that is unlikely to cease. Provided the cooperative acts properly and follows the right steps, it can use the objectionable conduct provision in the proprietary lease to remove a troublesome tenant.

CHARGES/FEES

6 W. 20TH ST. TENANTS CORP. V. DEZER PROPS.LC

2024 NY SLIP OP 04593 (1ST DEP'T. SEPT. 26, 2024)

Successor Sponsor Must Pay Assessment Despite Potentially Contradictory Language in Offering Plan

SQUIB BY WILLIAM J. GELLER, COUNSEL, BRAVERMAN GREENSPUN

OUTCOME: Decided for Plaintiff-Appellant Co-op

WHAT HAPPENED: The plaintiff is a Flatiron district cooperative established in 1978 in which units were originally offered for commercial use, but with the option to allow individual units to be converted to residential use under the "Loft Law" (New York State Multiple Dwelling Law §§280-287). The defendant (Dezer) is the successor to the co-op's sponsor and the holder of unsold shares as to a commercial unit.

The offering plan contained several clauses stating that the sponsor had no obligation to convert the property to residential use or pay for any such conversion, which

(continued on p. 8)

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

would be the sole responsibility of the co-op. In 2013, the co-op began the process to obtain a residential certificate of occupancy for the building, and then imposed several assessments to pay the costs of the work required for the residential conversion. Dezer paid the first installment of one of the assessments, and then refused to pay any other assessments for the residential conversion work.

The co-op brought a nonpayment proceeding in Civil Court over the unpaid assessments, and because its records were incomplete, named the individual principals of the sponsor as the respondent-tenants, with Dezer named as undertenant. Dezer counterclaimed for a refund of the assessment installment it had paid on the ground that it was the successor to the sponsor and therefore should not be required to pay for residential conversion under the offering plan clauses saying that the sponsor was not responsible for the residential conversion.

After a bench trial, the Civil Court dismissed the co-op's claims because the co-op could not establish that the individuals were the tenant, and also dismissed Dezer's counterclaims for a refund of the installment it had paid because it was a holder of unsold shares. The Appellate Term affirmed, and with respect to Dezer's refund claim, held that an offering plan clause required it to pay its "proportionate share of the cost of renovation required to be made to the building," in its capacity as holder of unsold shares. A motion for leave to appeal to the Appellate Division was denied.

Thereafter, the co-op sued Dezer in Supreme Court for the unpaid assessments, and Dezer counterclaimed for a refund of the assessment installment it had paid and to reform the offering plan, proprietary lease, and bylaws to provide that it did not have to pay any residential conversion costs. The Supreme Court denied the co-op's motion for summary judgment without explanation in a brief order.

IN COURT: The Appellate Division, First Department, reversed, granting summary judgment to the co-op and remanding for a hearing as to damages and attorneys' fees.

The court first addressed the absence of a signed proprietary lease, holding that because Dezer was undisputedly the holder of unsold shares, it was bound by the offering plan and form of proprietary lease. Though the court noted that failure to produce a contract would ordinarily require denial of summary judgment, the form proprietary lease in the record provides the relevant terms of the agreement, and thus "[t]he allegation that no proprietary lease was ever executed is insufficient to create a question of fact."

Next, the court found that the Civil Court holding in the nonpayment case, as affirmed by the Appellate Term, was res judicata. The court held that the Civil Court finding that Dezer was required to pay its proportionate share "addressed [Dezer's] general denial of its obligation to pay the assessment," which was therefore "conclusively litigated and decided against [Dezer]." As such, Dezer was barred "from raising a question of fact as to its liability for the disputed assessments . . . . "

Finally, the court rejected Dezer's counterclaim for reformation of the bylaws and proprietary lease to provide that Dezer is not obligated to contribute to residential conversion costs as time-barred because the clauses were drafted by Dezer's predecessor more than 40 years earlier.

TAKEAWAY:

This case provides some useful lessons on both procedural and substantive law. The underlying legal question is whether limits on the sponsor's responsibility in the offering plan carry over to the sponsor's role as holder of unsold shares after the co-op is established. This was answered by the Civil Court and Appellate Term, which held that a holder of unsold shares' obligation as a tenant-shareholder to pay its proportionate share of co-op expenses is not limited by the offering plan's delineation of what the sponsor may or may not be required to do in its role as sponsor.

The procedural issues, however, may be more relevant for the day-to-day management of co-ops. Most significantly, this case provides a clear path for a co-op to establish a tenant-shareholder's rights and obligations under the co-op's form of proprietary lease even where the co-op's signed copy of the lease may have been misplaced, as all too commonly happens.

The res judicata holding is a cautionary tale, warning that raising issues in prior litigation, even when they are side issues in lower court proceedings, may significantly limit the parties' efforts to obtain a different ruling in a later case. Finally, the statute of limitations ruling on the reformation claim shows that once parties have lived with co-op governing documents for a significant time, they should not be able to claim that they do not accurately reflect the parties' intentions.

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

CHARGES/FEES

THE BD. OF MGRS. OF 25 PRINCE ST. CONDO. V. NYC PRINCE HOLDINGS LLC

NO. 653646/2023 (SUP. CT. N.Y. CNTY. SEPT. 3, 2024) NYSCEF NO. 45

Court Denies Condo Board Summary Judgment for Recovery of Unpaid Common Charges

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

OUTCOME: Decided for Defendant Condo Unit Owner

WHAT HAPPENED: The plaintiff condominium board commenced this action to foreclose a lien for unpaid common charges owed by the commercial unit owner in this four-unit condominium. As part of its foreclosure complaint, the condominium also sought to enjoin permanently the unit owner from using the storage space in the building.

IN COURT: The court denied the condominium's motion in its entirety, finding that the condominium did not prove entitlement to an injunction preventing the unit owner from using the storage space. While the unit owner submitted substantial opposition with regard to the injunction claim, a review of the motion papers does not find any detailed factual assertions relating to its failure to pay common charges. Notwithstanding, the court denied that part of the motion for summary judgment for recovery of the outstanding common charges, finding that where there has been little or no discovery there are questions of fact as to what, if any, amounts are owed by the commercial unit owner.

TAKEAWAY:

While there were allegations of ambiguity in the declaration and offering plan relating to the use of the storage unit which may have warranted denial of summary judgment, it appears that the condominium submitted everything that was required to obtain summary judgment on its claim for common charges. No detailed opposition was submitted to the claim for common charges other than a general denial that monies were owed and that discovery was needed. The court's denial of that part of the motion is perplexing because the obligation to pay common charges is absolute and no real opposition was submitted. The order is being appealed. It's another case that demonstrates why litigation needs to be undertaken with the recognition that it may not go as planned.

CONSTRUCTION DEFECTS

NOCHI BLUE LLC V. BD. OF MGRS. OF FRANKLIN PLACE CONDO.

NO. 651571/2020 (SUP. CT. N.Y. CNTY. SEPT. 25, 2024) NYSCEF NO. 125

Principal of LLC Unit Owner Can't Recover Alternate Living Expenses

SQUIB BY DALE DEGENSHEIN, PARTNER, FOX ROTHSCHILD

OUTCOME: Decided, in part, for Condo Defendants

WHAT HAPPENED: The plaintiff, Nochi Blue LLC, owns a residential apartment in a mixed-use condominium at 5 Franklin Place in Manhattan and sued the condominium for construction defects. The condominium then sued the sponsor, Broadway 371. The condominium and sponsor each moved for summary judgment, in part.

Nochi was formed for the sole purpose of owning the condominium unit. It purchased the unit for $3.7 million from an entity that specifically stated it was not the sponsor under the offering plan.

Nochi's principal, Max Leventhal, moved into the unit in September 2018. He described a cold, strong wind coming in through the light

(continued on p. 10)

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

switch next to his bed. Other areas of the unit were similarly cold with wind and floors in the unit were warped. When Leventhal complained to building management, he was told that this issue was found in other areas of the building and that they were trying to repair the air infiltration.

In spring 2019, Leventhal began experiencing excessive humidity in the apartment, which caused visible water condensation on the walls. Board members said there were similar issues in other units. Nochi's counsel served the board with a notice that it was obligated to make repairs.

In February 2020, Leventhal vacated the unit because of the cold. Leventhal hired Thornton Tomasetti to investigate. It found cracks, holes, and open joints in the exterior walls; improperly installed or missing insulation; and thermal bridges at the floor and ceiling which resulted in cold near the exterior walls.

IN COURT: Nochi sued the board for breach of contract (the bylaws—failure to repair); breach of fiduciary duty; negligence; and injunctive relief to compel the board to remediate. The board sued the sponsor, and each made claims against the other.

The court reviewed the governing documents of the condominium, which provide among other things that the board must provide necessary services for the operation and maintenance of the common elements, and that it must make repairs to the common elements.

The offering plan provided that the sponsor shall correct patent construction defects, provided that the sponsor is notified by the board within six months of the first closing or, if the defect can be identified only by occupancy of a unit, within 60 days of the time the unit is sold or leased. Latent defects would be repaired if notice was given one year after the first closing, or closing of title to a unit.

The sponsor (which was sued by the board for, among other things, indemnification) claims that Nochi cannot recover since it did not provide timely notice under the offering plan. The court noted that sunset provisions such as those in the plan are typically enforceable; however, they are inapplicable to Nochi as Nochi did not sue the sponsor. The sponsor also claimed that Nochi failed to mitigate its damages; however, the court explained that this is an issue of fact for a jury to decide.

Nochi sought alternate living expenses. Both the board and sponsor argued that Leventhal, and not Nochi, incurred the expenses. Nochi tried to impose the doctrine of piercing the corporate veil in reverse, i.e., it claimed that the board dealt with Leventhal and Nochi interchangeably, and, in fact, he provided personal financials when he purchased the unit. However, the court discussed cases which provide that piercing the corporate veil may be invoked by one suing a corporation, but the doctrine may not be used in reverse for the benefit of the corporation or its shareholders. The rule against reverse piercing is not absolute, but the exceptions were not applicable here.

Finally, Nochi's application to recover common charges and real estate taxes was denied. As to common charges, case law is clear that one cannot recover common charges for derogation of a condominium's bylaws based on defective conditions. Moreover, Nochi cited no case law to support the contention that it could recover real estate taxes paid on the unit.

TAKEAWAY:

The court's discussion of whether Nochi could recover damages for monies incurred by its principal is instructive. It reminds parties and practitioners that, just because an individual considers his entity an alter ego, the law may not see it the same way.

Another issue—which we have seen before—is that the notice provisions in the offering plan are all but impossible to comply with. Not only is it short notice for a unit owner to determine if there is a defect, the sponsor is typically the sole member of the board, or comprises a majority of the board, during this time period.

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

DISCRIMINATION

CHARLIER V. 21 ASTOR PLACE CONDO.

NO. 22 CIV. 05903 (S.D.N.Y. SEPT. 3, 2024) ECF NO. 51

Condo and Managing Agent, But Not Board Members, May Be Liable for Doorman's Sexual Harassment of Resident

SQUIB BY ELIOT H. ZUCKERMAN, PARTNER, SMITH, GAMBRELL & RUSSELL

OUTCOME: Decided for Plaintiff, Condo Co-Defendants

WHAT HAPPENED: In relevant part, the plaintiff, an occupant of a residential condominium unit, asserted claims in federal court of sexual discrimination, retaliation, aiding and abetting, and interference under the federal Fair Housing Act, the New York State Human Rights Law, and the New York City Human Rights Law against the condominium, the board of managers of the condominium, the managing agent, and the president of the condominium.

The substance of the plaintiff's claims was that, shortly after she took occupancy, one of the building's doormen started to sexually harass her, both verbally and with uninvited physical appearances in and around her apartment. The plaintiff also asserted that the "building manager supervisor" witnessed the conduct, and that, in light of his supervisory position, his knowledge is imputed to his employers.

The defendants moved to dismiss.

IN COURT: The court reviewed the provisions of each of those laws separately. The court concluded that, under the federal and state laws, an employer could be vicariously liable for the improper conduct of one or more of its employees if that conduct is within the scope of employment, or if the employer is "negligent or reckless," or if the employer "knew or should have known about the improper conduct and failed to stop it." Under New York City law, the employer has vicarious/strict liability "without regard to the knowledge or conduct of the employer."

The court also held that an employer entity may be held vicariously liable, but that individuals who are principals, partners, or members of those entities will not be liable except for their own discriminatory conduct, or aiding or abetting such conduct, or retaliation against protected conduct. Based thereon, the court found that the condominium association and the managing agent were properly named as employers of the building staff, but that the board of managers of the condominium and the president of the condominium were not deemed to be employers and were dismissed from the action (query whether the court understood that the condominium is not a formal entity, but rather is an association that operates through its board).

TAKEAWAY:

Courts tend to take discrimination claims very seriously. Boards and managing agents should diligently and repeatedly instruct all staff members to not conduct themselves in a manner that may reasonably be deemed to constitute harassment (sexual or otherwise), and the awareness of any inappropriate conduct by any staff member must be immediately reported to a supervisor, the managing agent, or the board. Further, all persons in a supervisory position, promptly after being on notice of inappropriate conduct by a staff member, must immediately notify their supervisors and take necessary and appropriate actions to stop the inappropriate conduct.

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

ESTATE

STAUBER V. THE BD. OF DIRS. OF 8 E. 96TH ST., INC.

2024 NY SLIP OP 33257(U) (SUP. CT. N.Y. CNTY. SEPT. 17, 2024)

Late Shareholder's Niece Claims Co-op Unreasonably Withheld Consent to Transferring Apartment to Her

SQUIB BY WILLIAM D. MCCRACKEN, PARTNER, MORITT HOCK & HAMROFF

OUTCOME: Decided for Defendant Co-op Board

WHAT HAPPENED: Martin Cohen and Lynne Levine were married in 1987 and divorced in 2010. Upon their divorce, Lynne moved out of the co-op apartment they owned together, but remained an owner of the apartment as tenants in common with Martin. Martin became ill and died in 2018. Elizabeth Stauber, Martin's niece and only living relative, was appointed the executor of Martin's estate and sought to have Martin's interest in the apartment transferred to her (having previously agreed with Lynne to have Lynne's interest transferred to her). The co-op refused to approve the transfer, and Elizabeth sued the co-op to try to force the co-op to recognize her right to own the apartment.

IN COURT: After the co-op answered the complaint, but before discovery had been completed, Elizabeth filed a motion for summary judgment, contending that there were no issues of material fact in dispute preventing her from prevailing on her legal argument that she was the rightful owner of the apartment. The co-op opposed the motion, arguing among other things that the motion was premature, as the co-op had not been given an opportunity to depose Elizabeth about the co-op's position that its rejection of her was "reasonable."

The court agreed, holding that the co-op "must be afforded the opportunity to collect testimony and other evidence to support its position that the board acted reasonably in denying plaintiff's application." Accordingly, the court denied Elizabeth's summary judgment motion.

TAKEAWAY:

The central legal issue here is over the meaning of a lease provision known as the "Death of Lessee" provision. The Death of Lessee provision in this proprietary lease is a typical variant that provides that if a shareholder dies, "consent shall not be unreasonably withheld to an assignment of the lease and shares to a financially responsible member of the Lessee's family."

There are several potential interpretative pitfalls in this provision, two of which are at issue in this case. First, what is the meaning of the phrase "member of the Lessee's family"? Does a niece qualify? Complicating matters is that, while "family member" is not defined here, a different provision of this co-op's proprietary lease limited use of the apartment to shareholders and their "children, grandchildren, parents, grandparents, brothers and sisters." Does the fact that this other provision does not include nieces mean that "member of Lessee's family" should also be read to not include nieces? Or does the fact that the Death of Lessee provision not specifically list immediate family members imply an intent to read "family member" more broadly?

Second, the parties disagreed over what it means for the co-op to "not unreasonably withhold" consent. According to the co-op, this means nothing more than it could not act unreasonably in denying consent. In this case, the co-op contended that Elizabeth had engaged in a "pattern of disruptive behavior" and shown "an utter lack of judgment and inability to get along with others," which provided a basis for rejecting her application. According to Elizabeth, however, the reasonableness standard must be confined to the elements specifically identified in the text of the provision—whether she is "financially responsible" and whether she is a "member of the Lessee's family." Thus, in Elizabeth's view, the alleged behavior identified by the co-op is legally irrelevant because it has nothing to do with whether she is a financially responsible member of Martin's family.

By denying summary judgment in favor of additional discovery, the court deferred resolving these ambiguities. For co-op boards looking to avoid these problems in the first place, the lesson here may be to consider amending your "Death of Lessee" provision to resolve these two potential sources of conflict.

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

EVICTION/TERMINATION

LE PREMIER CONDO. V. FLEISCHMAN

2024 NY SLIP OP 51134(U) (CIV. CT. N.Y. CNTY. AUG. 30, 2024)

Nonpayment Proceeding Brought by Condo Isn't Dismissed Due to Lack of Capacity or Standing to Sue

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

OUTCOME: Decided for Petitioner Condo

WHAT HAPPENED: A condominium signed a two-year residential lease with an individual for use of one the apartments in the building. The term ended but the tenant did not leave, so the condominium filed a holdover petitioner in Housing Court, seeking possession of the premises.

After the tenant's initial motion to dismiss the petition on procedural grounds was denied, the tenant moved again, for summary judgment and dismissal of the proceeding. The tenant claimed that the condominium was an unincorporated association and therefore lacked both standing and the capacity to sue. New York law, the tenant's attorney claimed, did not allow an unincorporated association to file suit in its own name.

The condominium challenged the procedural propriety of the summary judgment motion on several grounds, and substantively averred that the signed lease between the condominium and the tenant should be dispositive of the issues of standing and capacity. The condominium argued that the tenant should be estopped from denying the condominium's capacity as landlord, based on the individual's two full years of paying rent to the condominium and living in the apartment. Moreover, the condominium stated, questions of title or ownership of property are not litigated in summary proceedings.

IN COURT: The court first rejected the condominium's procedural arguments against the summary judgment motion of the tenant, finding that the motion did not violate the "single motion rule of CPLR §3211(e). A party can file a pre-answer motion to dismiss, the court said, and then follow up with a motion for summary judgment later on other grounds.

Turning to the merits, the court acknowledged the general rule that an unincorporated association cannot sue, but opined that it was "not apparent" whether the condominium was an unincorporated association. Moreover, the lease itself said it was between "Le Premier Condominium" and the respondent-tenant, so the condominium had an interest in the claim for possession of the premises as well as authority to bring the proceeding. Motion denied and the case set for trial.

TAKEAWAY:

Practitioners may find the title of this squib curious, because condominiums do not generally bring holdover or nonpayment proceedings. Unlike a cooperative and its shareholders, the relationship between a condo and a unit owner is not one of landlord-tenant. But this was no usual condominium case. The individual litigant was not a unit owner, but was clearly a tenant. The question was whether the condominium was properly treated as the landlord under the lease. On the condo's side of the ledger was the written lease itself, with the condo's name listed as landlord, as well as the two-year history of the tenant paying rent to the condo. Still, the tenant's attorney was savvy, because a condominium that does not opt to incorporate is, in fact, an unincorporated association. New York law is clear that an unincorporated association does not have the authority to sue in its own name. An unincorporated association has no legal existence separate from its members.

It seems to this observer that the court could not bring itself to follow the logic of those principles and dismiss the proceeding. The court tried to cast doubt on whether the condominium was an unincorporated association, even though the tenant's attorney demonstrated that public records confirmed the condominium as unincorporated. The condominium dodged the issue by not addressing it, nor did it address whether it was the actual owner of the unit. The court let the condo dodge away, and it will be interesting to see if the decision survives an appeal, which has been filed.

(**Takeaway** *on p. 14)*

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

If one takes a dim view of "technicalities," this case may be viewed as a just result. Perhaps. But wise practitioners and condo boards would be well served by being cognizant of what a condo is under the law; what it can and cannot do; and who can act on its behalf. Then they should craft any agreements—including any leases—accordingly, to avoid a similar thicket.

FIDUCIARY DUTY

HAIM V. 875 PARK AVE. CORP.

2024 NY SLIP OP 04518 (1ST DEP'T. SEPT. 24, 2024)

Co-op Board Defeats Shareholder's Claims Asserting Improper Allocation of Shares

SQUIB BY DAVID S. FITZHENRY, PARTNER, MORITT HOCK & HAMROFF

OUTCOME: Decided for Defendant Co-op

WHAT HAPPENED: The plaintiff, a tenant-shareholder of the defendant apartment corporation, brought a claim seeking declaratory relief, unjust enrichment, breach of fiduciary duty, and accounting against the cooperative and the individual members of its board of directors. The plaintiff alleged that the shares allocated to her apartment were disproportionate to the size of the apartment when compared to other apartments in the building, and thus resulted in an unfair and overallocated assessment of the cooperative's shared expenses.

The documents reflecting the historic makeup of the building showed that the north wing of building originally had two apartments on each floor, with the exception of the ninth floor, which had three apartments. Ultimately, two of those three ninth-floor apartments were combined into a single apartment, resulting in the ninth floor also having two apartments; however, the layout of those ninth-floor apartments differed from that of the other two-unit floors in the building.

At the time that the building was converted to cooperative ownership in approximately 1947, the shares were allocated to each floor equally, with each unit in the same apartment line receiving the same number of shares, regardless of the actual size of the respective apartments. Specifically, all of the "AB" line apartments were allocated 610 shares, and all of the "E" line apartments were allocated 300 shares, despite Apartment 9AB having less interior square footage than other "AB" line units.

The plaintiff brought an action in New York County Supreme Court, arguing that the apartment corporation overallocated shares to her apartment, and that her shares did not bear a reasonable relationship to the value of the co-op corporation's equity and interest in the property. Consequently, the plaintiff claimed that the apartment corporation was unjustly enriched as a result of the lopsided maintenance charges allocated to her apartment, and also argued that such misallocation amounted to disparate treatment.

The plaintiff also alleged that the cooperative was not in compliance with Section 216 of the Internal Revenue Code (IRC), and therefore must be disqualified from being considered a "cooperative housing corporation" under the IRC. Adding bite to this argument, the plaintiff asserted that the co-op's shareholders (including herself) should effectively be prohibited from reaping the benefits of the IRC, which allows shareholders of cooperative housing corporations to deduct from their taxable income a portion of the co-op maintenance attributable to real estate taxes and mortgage interest. To this point, the plaintiff asserted that she would suffer damages as a result thereof.

The defendant apartment corporation and its board members brought a motion to dismiss, contending that the plaintiff's claims were time-barred because the plaintiff acquired her cooperative

(continued on p. 15)

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

shares approximately 20 years earlier. In addition, the defendant's motion argued that the plaintiff's action was barred by the doctrine of res judicata because the previous owner of her cooperative shares had brought a similar, unsuccessful action approximately 30 years earlier, whereby the court in that earlier case determined that there was no basis for a share reallocation. The decision in the prior case specifically noted that the sponsor of the cooperative allocated the shares therein, and not the co-op board. Perhaps more importantly, the court in the earlier case held that those claims were time-barred because the cooperative was formed way back in 1947, finding that they were brought "eons too late."

Despite the arguments of the defendants in the instant *Haim* matter, the lower court denied the defendants' motion to dismiss without giving any specific reasoning behind its determination. The defendants then appealed the lower court's denial of its motion to dismiss.

IN COURT: The Appellate Division, First Department reversed the holding of the lower court, thereby granting the defendant's motion to dismiss the plaintiff's action in its entirety. The court found that the plaintiff's causes of actions for which she sought equitable relief were barred by the six-year statute of limitations. Although the defendant had argued that the statute of limitations should have begun to run back when the cooperative was first created in 1947, the court chose not to specifically address that question, as it found that the plaintiff 's claims still would be time-barred even if the statute of limitations began to run back when she acquired her shares 20 years ago. Although the plaintiff asserted that the statute of limitations should not apply in her case because the improper allocation was a continuing wrong, the court failed to agree with her position on this issue, finding that the alleged improper share allocation was not an "ongoing unlawful [act]," but rather just the ultimate impact of the sponsor's decision to allocate such shares in this manner, an act that occurred three-quarters of a century earlier.

In addition, the court recognized that even if the plaintiff's claims had not been barred by the statute of limitations, such would have been impermissible by way of the defendant's res judicata argument, finding that while certain aspects of the plaintiff's instant claims and desired remedies differ somewhat from the prior case, the central controversy to each matter was virtually identical. Accordingly, the court determined that the ruling in the earlier case should not be disturbed.

Lastly, in addressing the plaintiff's argument that the improper allocation disqualifies the apartment corporation from "cooperative housing corporation" status under the IRC, the court held that the plaintiff, as a private citizen, did not have a private right of action to enforce the provisions of the IRC.

TAKEAWAY:

Although most cooperatives have share allocations related closely to the size of the apartments in the building, every so often, an anomaly will arise, which may cause a disgruntled shareholder to argue that their apartment is being over-assessed maintenance charges. However, such claims by shareholders may be time-barred, particularly when such shareholders acquire their cooperative apartments more than six years earlier. Notably, the court in the *Haim* case avoided the precise question as to whether the statute of limitations period began to run at the time of the cooperative's formation or at the time of the shareholder's acquisition of such shares, the court did note that it was not the board of directors, but rather the co-op's sponsor, who was the party responsible for the controversial share allocation.

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

FORECLOSURE

PETERS V. CATON TOWERS OWNERS CORP.

2024 NY SLIP OP 33307(U) (SUP. CT. KINGS CNTY. SEPT. 18, 2024)

Co-op Can Foreclose on Lessee's Apartment via a Non-Judicial Auction

SQUIB BY INGRID C. MANEVITZ, PARTNER, SEYFARTH SHAW

OUTCOME: Decided for Defendant-Respondent Co-op

WHAT HAPPENED: The petitioner, Jacqueline Peters, was the proprietary lessee of Apartment 2R in the Brooklyn cooperative apartment building owned by the respondent, Caton Towers Owners Corp., and the owner of 351 shares of the respondent. In a prior Article 78 proceeding between the same parties, the court determined that the respondent had properly terminated the petitioner's proprietary lease on objectionable conduct grounds, and that a notice of termination that the respondent had served on the petitioner effectively terminated her tenancy.

In the current proceeding, the petitioner sought: (1) a declaration that the sixth notice of termination that the respondent served on her was stale and ineffective; (2) a judgment vacating, annulling, setting aside, and declaring void and unenforceable the respondent's second notice of sale; (3) a declaration that the respondent's notice of sale and scheduling of an auction sale of her shares was not commercially reasonable and violated the UCC; (4) a preliminary and permanent injunction enjoining the respondent from selling her shares pursuant to the sixth notice of termination; and (5) all costs and legal fees she incurred in the proceeding.

The respondent sought an order dismissing the petitioner's petition, granting the respondent reasonable counsel fees in responding to the petition, and an order directing the petitioner to pay unpaid maintenance, assessments, and other charges for Apartment 2R, in the amount of $23,376.48, plus interest, and monthly use and occupancy in the amount of $1,012.40 pendente lite until a final resolution of the proceeding.

IN COURT: Based on the doctrine of collateral estoppel, the court denied the petitioner's requests for a declaration that the sixth notice of termination was stale and ineffective and for a permanent injunction enjoining the respondent from selling Apartment 2R pursuant to that notice. The court held that the two conditions of collateral estoppel were met: (1) "the issue of whether the last Notice of Termination was effective" was "necessarily decided" in the prior action between the parties; and (2) "the issue was determined in respondent's favor after the petitioner was provided with a full and fair opportunity to litigate the issue."

The court also held that, because the petitioner's proprietary lease had been terminated, the respondent was authorized to sell the petitioner's shares regardless of whether or not the petitioner had surrendered her shares to the corporation. The court found unavailing the petitioner's argument that it would not be commercially reasonable for her shares to be sold at a non-judicial foreclosure sale. The court further stated that it was not aware of any statutory or common law authority or any provision in the proprietary lease prohibiting the sale of the petitioner's shares at a non-judicial auction, and the petitioner did not cite any authority.

While the petitioner argued that no New York court has ever permitted a non-judicial foreclosure when the lessee's proprietary lease is terminated for objectionable conduct, the court noted that is "simply not true": *40 W. 67th St. Corp. v. Pullman*, 100 N.Y.2d 147, affirmed a First Department order that did just that. The court also relied on the business judgment rule, which provides that a court should "defer to a cooperative board's determination 'so long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith.'" Because the petitioner made no showing that the respondent's board of directors "acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith," the court concluded that the respondent was "not barred from conducting a private/non-judicial sale of the petitioner's shares."

However, the respondent's notice of sale scheduled the auction

(continued on p. 17)

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

sale for March 10, 2023, and thus that sale "cannot go forward as the scheduled sale date has long ago past." Accordingly, the court granted the petitioner's request for a preliminary injunction enjoining the respondent from taking any action in furtherance of its notice of sale, but only to the extent of enjoining the respondent from going forward with a sale of the petitioner's shares until the respondent serves the petitioner with a new notice of sale that meets "all the necessary requirements."

Finally, the court denied the petitioner's request for attorney's fees and costs.

With respect to the relief sought by the respondent, the court granted the respondent's request for an order dismissing the petition. The court also granted the respondent's request for fees incurred responding to the petition based on a provision in the proprietary lease that provides for the respondent to be reimbursed for its expenses, including reasonable attorney's fees, when the lessee is in default and the respondent defends or asserts a counterclaim in any action or proceeding brought by the lessee. The respondent's request for use and occupancy, however, was denied.

TAKEAWAY:
Cooperative shares appurtenant to a proprietary lease that has been terminated based on a non-monetary default, such as objectionable conduct, may be sold at a non-judicial foreclosure sale. In addition, litigants should be mindful that they do not get two bites at the apple; parties cannot relitigate issues raised and decided in a prior proceeding involving the same parties.

INSURANCE

WONG V. BD. OF MGRS. OF ONE SUNSET PARK CONDO.

2024 NY SLIP OP 51456(U) (SUP. CT. KINGS CNTY. SEPT. 20, 2024)

Unit Owners Claim Condo Board Breached Its Fiduciary Duty and Bylaws by Not Procuring Adequate Insurance

SQUIB BY HELENE W. HARTIG, FOUNDER AND PRINCIPAL OF HARTIG LAW

OUTCOME: Decided, in part, for Plaintiff Condo Unit Owners

WHAT HAPPENED: Following a substantial fire in 2019, all occupants of a 54-unit condominium were removed from their apartments and the entire structure was declared unsafe for habitation by the City of New York. Pursuant to a meeting of the unit owners on Jan. 14, 2020, unit owners owning approximately 75 percent of the common interests did not vote to restore the building, presumably because the insurance did not cover all of the replacement costs and unit owners were concerned about the costs related to the restoration of the interior of their units (which the condominium did not intend to pay).

Thereafter, on Sept. 10, 2020, several individual aggrieved unit owners sued the condominium board, alleging that because the defendant board of managers breached its contractual obligation under the bylaws by not procuring sufficient fire insurance coverage, they were entitled to several millions of dollars in damages equal to the shortfall.

While the discovery process was underway, the defendant board of managers moved for summary judgment dismissing the complaint on various grounds, including lack of standing and the business judgment rule. The plaintiffs, in response, cross moved to amend their complaint to expand the lawsuit to include all unit owners in a derivative action against the board of managers, to include a new cause of action for breach of fiduciary duty and to include the former board president and sponsor affiliates as individual defendants.

IN COURT: The Supreme Court allowed a derivative claim to proceed against the sponsor representatives on the board of managers, who had approved the allegedly insufficient insurance renewal policy. The court agreed with the plaintiffs that there was an issue of fact as to whether the insufficient insurance coverage was obtained to minimize the sponsor's common charges. If

(continued on p. 18)

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

that self-interest was proven, and the sponsor representatives on the board of managers were found to have prioritized the sponsor's economic interests over the condominium's insurance coverage needs, they faced potential liability.

In reaching its conclusion, the lower court also held that neither the board of managers nor its individual members would be presumed to have acted in good faith and to necessarily be protected by the business judgment rule because they relied on the opinions of their corporate counsel and insurance broker as to what constituted an adequate coverage amount. The submission of a report by the condominium's own architect, which confirmed that the replacement cost was over $10 million more than the insurance in place at the time of the fire was an additional basis for the court to hold that the sufficiency of the insurance coverage is not beyond judicial scrutiny.

TAKEAWAY:

Here, the court believed that if the evidence proved that the three sponsor-representatives on the board of managers were making business decisions based on their own financial needs (i.e., to save on common charges) rather than on the best interests of unit owners, they would also be acting in bad faith and with possible "unclean hands." As a result, they could not rely on the courts and simply assume that their decisions could not be challenged or were "beyond judicial scrutiny." Nor could they assume that they could obtain a "free pass" and be permitted to hide behind the business judgment rule if independent due diligence was not conducted prior to making financial decisions.

Towards this end, while counsel, insurance brokers, and other professionals could render opinions about the most prudent course of action and their interpretation of the condominium bylaws, it is ultimately the responsibility of each individual board member to conduct an independent investigation and act without divided loyalty or a personal agenda. Additionally, board members who ignore the clear language of condominium bylaws which, as here, mandate a specific minimum amount of insurance coverage, do so at their peril and risk liability based on "breach of fiduciary duty."

INSURANCE

LIN V. MOUNTAIN VALLEY INDEM. CO.

2024 NY SLIP OP 33309(U) (SUP. CT. KINGS CNTY. SEPT. 20, 2024)

Court Allows Owners' Breach of Contract Claim Against Condo Board to Proceed

SQUIB BY JEREMY HANKIN, PARTNER, HANKIN & MAZEL

OUTCOME: Decided, in part, for Defendant Condo

WHAT HAPPENED: A condominium suffered a fire resulting in the total loss of the building. Its insurer exercised its option to pay the total policy limit of $8.2M rather than rebuild. The plaintiffs, individual unit owners, commenced an action against the condo board and managing agent seeking damages for the value of their unit based upon their claim that the board and management purchased insurance with an inadequate limit. The plaintiffs' claims were breach of contract (i.e., the bylaws) and negligence. The condo and management moved for summary judgment dismissing the complaint.

IN COURT: The court granted summary judgment dismissing the complaint against management in its entirety and granted summary judgment dismissing the negligence claim against the condo, but allowed the breach of contract claim to continue.

The court found that there was no basis to impose liability against management who served only as an agent for the condo—a disclosed principle. The court found that there was no basis to sustain the negligence cause of action given that the bylaws expressly provided that members of the condo board shall have no liability to the unit owners for errors in judgment or negligence.

Finally, the court found that while the condo demonstrated that in December 2013 the $8.2M insurance policy was adequate, there was an issue of fact as to whether the condo

(continued on p. 19)

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

board consulted anyone regarding the adequacy of the policy limit each year thereafter when the policy was annually renewed. Therefore, it was impossible to determine whether the condo renewed its policy in 2018 in good faith and to further a legitimate interest of the condo so as to protect, under the business judgment rule, the condo board's decision to renew the policy at the $8.2M limit. As such, the court denied the condo's motion to dismiss the breach of contract cause of action.

TAKEAWAY:
Condo and co-op boards should review their insurance policy limits annually when up for renewal to confirm the adequacy of the policy limits.

LABOR LAW

SHALA V. OCEAN CONDOS.

NO. 23 CIV. 01637 (E.D.N.Y. SEPT. 27, 2024) ECF NO. 32

Super Claims Condo Denied Him Wages in Violation of Federal & State Labor Laws

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

OUTCOME: Decided for Plaintiffs

WHAT HAPPENED: Plaintiff Valdet Shala was employed as the resident superintendent of Ocean Condominiums for at least 14 years. Mejreme Shala assisted with the work from time to time during his tenure.

Valdet Shala claimed that he had not received applicable minimum wage, overtime, or "spread-of-hours" pay for his work in violation of the federal Fair Labor Standards Act (FLSA) and the New York Labor Law (NYLL). Co-plaintiff Mejreme Shala claimed that she was not compensated at all for her work, also in violation of the FLSA and the NYLL. They filed a claim in federal court.

The condominium and the managing agent, Newport Management, made a motion to dismiss the plaintiffs' claims. To defeat the motion the plaintiffs needed to show that assuming that the facts in the complaint were true, the complaint stated a claim for relief that was "plausible on its face," also taking into account alternative explanations for the defendant's actions that might make the claim unreasonable.

IN COURT: To make a claim under the FLSA, the plaintiff must show either that: (1) the employee was engaged in commerce or the production of goods for commerce; or that (2) the employer was an "enterprise" engaged in commerce and handling more than $500,000 of goods in commerce annually. To prove the latter, the plaintiffs characterized the condominium and Newport Management as a "joint enterprise" and asserted, "on information and belief," that together they handled more than $500,000 in goods moving in interstate commerce each year.

The court agreed that the condominium was an "enterprise," but questioned whether it was integrated with Newport. The court considered the interrelation of operations, common management, centralized control of labor relations, and common ownership, though, and determined that the condominium and Newport could be deemed an integrated enterprise, since Newport did all of the hiring for the condo, had common management, and provided complementary services to support the operations of the condo.

In deciding the NYLL claims, the court first considered whether the plaintiff fell under the "janitorial exemption" in the NYLL. If only one employee is performing janitorial services at a building, they are designated as the "janitor" for the building whether or not the building makes an official designation. The court declined to apply the exception at this time: even though the plaintiff called himself the "superintendent," the condo had never officially designated him as a "janitor," and (if the condo and Newport were indeed a joint enterprise) the enterprise(s) collectively employed 11 employees, more than one of whom might also be considered a "janitor" for the condo. In other words, the plaintiff was a "candidate" for such designation, but not a formal

(continued on p. 20)

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

designee. Therefore the exemption was denied.

In deciding the viability of the FLSA wage claims, the court also deemed it a question of fact whether the employee qualified for overtime and worked more than 40 hours per week. The Department of Labor considers the FLSA to preempt the NYLL, so the janitorial exemption does not apply to FLSA claims.

As a result, the court denied the motion to dismiss (except with respect to one minor claim) and ordered further discovery to ascertain whether the plaintiffs' various claims could be supported by the evidence.

TAKEAWAY:
Our labor partner advises that these claims are increasingly common in other types of businesses, especially using the "joint enterprise" theory. Community associations that employ only one staff member to render physical services in connection with building maintenance and operations need to make a clear designation of the staff member as the "janitor" for the building. Otherwise they run the risk of a sympathetic judge who groups the employees of the association with the employees of its managing agent to ascertain who actually provides the janitorial services for the building. In 2019, the federal Department of Labor issued an opinion stating that the FLSA standards for determining whether superintendents were entitled to overtime (based on hours worked) superseded the standards applied by the NYS Department of Labor (based on the "janitorial exemption"). In short, even if a building is complying with the state Labor Law standards for calculating overtime, it might still be in violation of federal labor law standards.

MANAGEMENT

POPESCU V. THE BD. OF MGRS. OF THE BELAIRE CONDO.

2024 NY SLIP OP 33152(U) (SUP. CT. N.Y. CNTY. SEPT. 5, 2024)

Unit Owner's Claims for Breach of Contract, Trespass, and Negligence Survive Motion to Dismiss

SQUIB BY LLOYD F. REISMAN, PARTNER, BELKIN BURDEN GOLDMAN

OUTCOME: Decided for Plaintiff Condo Unit Owner

WHAT HAPPENED: In May 2022, the plaintiff, a unit owner in the condominium, directed a real estate agent to enter her unit to evaluate it prior to showing it to prospective tenants. Upon entry, the agent unexpectedly discovered furniture and furnishings not belonging to the plaintiff, fingerprints on walls, and damage to the window blinds. The unit owner thereafter unsuccessfully attempted to contact the superintendent and managing agent of the building, and eventually called the police to report the alleged trespass only to have the superintendent deny the police access to the building.

The unit owner alleges that, for several weeks, no information was provided and her many calls and emails to management and board members were ignored. Her allegations also included claims that electric consumption in the unit had fluctuated, from approximately $11 per month when unoccupied up to as much as $740 for one or more months during the period when the unit was allegedly occupied without the unit owner's permission or knowledge. Furthermore, the plaintiff alleges that someone should have been aware of the activities in and involving the unit, insofar as anyone moving into or out of the building would be recorded by cameras in the building's common areas, and the use of the unit's keys should have been logged in the building's computerized logbook.

Shortly thereafter, in June 2022, the plaintiff learned that the condominium had filed a lien against the unit and that a foreclosure action had been commenced. Once again, the plaintiff's attempts to get information about the facts underlying these actions went unanswered. The plaintiff further alleges that her failure to timely pay any charges due was caused by the failure to properly notify her of a change in management, resulting in her failure to make necessary changes to her automatic payment information, such

(continued on p. 21)

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

that payments that had previously been made on a timely basis were no longer being paid.

IN COURT: The plaintiff commenced the instant action alleging: (1) breach of contract by the condominium board based on its failure to comply with the condominium's bylaws; (2) trespass by the condominium board and its managing agent based on entry into the unit without permission and for reasons beyond the scope of their duties and authority; and (3) negligence by the condominium board and its managing agent based on their failures to safeguard the use of the unit's key and to properly monitor the occupancy of the unit.

As is typical, the defendant responded to the plaintiff's allegations by moving for the summary dismissal of all of the plaintiff's claims. As to the breach of contract claim, the defendant argued that the claim should have been dismissed due to the plaintiff's failure to identify the specific provisions of the bylaws that were allegedly breached by the condominium board. As to the trespass and negligence claims, the defendant argued that the claims should be dismissed because they were duplicative claims to the breach of contract claim, such that the relief being sought is identical under all claims.

In response to the defendant's motion to dismiss all claims, the plaintiff: (1) identified the specific provisions of the bylaws upon which the breach of contract allegations were based; and (2) argued that the breach of contract allegations and the trespass and negligence claims were not duplicative in that they were clearly different causes of action, presenting different legal theories and different key facts. For example, the plaintiff argued that the breach of contract claim is based on a breach of duty of loyalty and/or engaging in self-dealing, whereas the trespass claim is based on an unlawful entry without the plaintiff's permission, without an emergency or exigent circumstance. The plaintiff noted further, as to the allegedly duplicative claims, that there is a possibility that a jury (or other arbiter) could determine that the board did not breach any contract but is nevertheless still liable under the negligence or trespass theory.

In its decision, the court largely sided with the plaintiff unit owner, noting that, in general, the court accords plaintiffs the benefit of every possible favorable inference and, further, that ambiguous allegations must be resolved in the plaintiff's favor. With regard to the plaintiff's breach of contract claim, the defendant's argument raised challenges to the plaintiff's factual allegations, which cannot be resolved on a motion to dismiss. (The court did dismiss the breach of contract claim against the managing agent on the basis that the unit owner is not a party to the agreement between the condominium board and the managing agent.)

As to the plaintiff's trespass claim, the court notes that this claim is sufficiently distinct from the breach of contract claim, in that "it arises out of the violation of a legal duty that springs from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract."

And, finally, as to the plaintiff's negligence claim, the court concluded that the plaintiff's allegations are sufficient to state a cause of action for negligence, having alleged "(1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom." The defendant has since filed a notice of appeal.

TAKEAWAY:

Silence can have serious repercussions. Property owners understandably react negatively upon discovering that their property has been utilized without authorization, particularly when such use results in damage. It is reasonable for these owners to direct their frustrations toward the individuals or entities responsible for managing and operating their property during the period of misuse. When faced with silence and dismissiveness rather than the courtesy, respect, and answers they deserve, property owners are likely to escalate their concerns.

In this particular case, had the board, superintendent, and managing agent responded more effectively to the serious allegations raised, the resulting lawsuit might have been avoided. Instead, the unit owner felt compelled to initiate legal action, with the surrounding circumstances reflecting poorly on the board and managing agent. Effective communication is essential. Even a simple acknowledgment that a concern is being taken seriously and that an investigation is in progress can make a difference. While such a response may not resolve all issues, it is certainly preferable to dismissiveness and a lack of transparency.

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

SERVICE OF PROCESS

GALATRO V. LAKE POINTE OWNERS, INC.

2024 NY SLIP OP 04375 (2ND DEP'T. SEPT. 11, 2024)

Co-op Didn't Receive Shareholder's Complaint Because Secretary of State Had Incorrect Address

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

OUTCOME: Decided for Defendant-Appellant Co-op

WHAT HAPPENED: Shortly after his purchase of a cooperative apartment in 2014, the plaintiff became aware of water intrusion into his apartment, for which condition he brought an action against the cooperative that was ultimately settled and a general release signed. While that action was pending, the plaintiff brought a separate action based on the alleged additional maintenance charged due to improper allocation of shares (516 shares allocated to the apartment in the offering plan but 518 shares allocated on the proprietary lease), and alleging constructive eviction for the 2014 water intrusion.

IN COURT: The plaintiff served the subsequent action on the cooperative corporation by delivering the summons and complaint to the New York Secretary of State. After the cooperative failed to answer, the plaintiff was granted a default judgment for $36,127.24 after inquest. The cooperative subsequently moved to vacate the default judgment and money judgment asserting a reasonable excuse for failure to appear and a meritorious defense. The trial court denied the motion.

On appeal, the court found that while service on the cooperative through the New York Secretary of State was proper, since the address on file with the Secretary of State was incorrect, the cooperative did not receive actual notice, and that the cooperative's failure to update its address was not a deliberate attempt to avoid service. The court further found that the cooperative had a meritorious defense to the suit, including the settlement and release signed in the prior action, and that the plaintiff had not been charged additional maintenance based on the clerical error in the allocation of shares. The default judgment was vacated and the plaintiff compelled to accept the cooperative's late answer.

SPONSOR

BD. OF MGRS. OF 37, 39 MADISON ST. CONDO. V. 31 MADISON DEV., LLC

2024 NY SLIP OP 04451 (2ND DEP'T. SEPT. 18, 2024)

Sponsor Wins Dismissal on Appeal of Condo's Claims for Defective Construction

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

OUTCOME: Decided for Defendant-Appellant Sponsors

WHAT HAPPENED: The board of managers of a small, 12-unit Brooklyn condominium sued the sponsor and developer of the condo for defective construction of certain parts of the common areas. The board also sued two of the sponsor's principals, individually. The complaint had four causes of action: breach of contract, unjust enrichment, breach of implied housing merchant warranty, and negligence. The complaint sought consequential damages on the first cause of action, which are damages occurring indirectly from a breach of contract.

After some discovery squabbles including a motion, the defendants moved to dismiss the

(continued on p. 23)

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

complaint based largely on the "Sponsor's Limited Warranty." That warranty was part of every unit owner's contract of sale, and it expressly precluded consequential damages and other liabilities of the sponsor. The trial judge, in a terse decision, denied the motion in full. The defendant sponsor appealed.

IN COURT: The appellate court ruled in favor of the sponsor, modifying the trial judge's order significantly. The first cause of action's claim for consequential damages was dismissed, and the second, third, and fourth causes of action were dismissed entirely. The appellate judges found that the trial court failed to give effect to the terms of the express, limited warranty, which compelled a dismissal of much of the plaintiff's lawsuit.

TAKEAWAY:
When parties sign a contract, the terms of that contract will generally define what legal obligations they owe to each other. Here, the condo's efforts to hold the sponsor responsible for negligence, unjust enrichment, and implied warranty were thwarted by the express, limited warranty. The limited warranty, made part of every unit owner's purchase contract, narrowly defined the sponsor's obligations to unit owners. Moreover, while the breach of contract claim stood, it was gutted by the express warranty's bar on consequential damages—a category that would include indirect harm caused by any breach. That four-page limited warranty attached to a unit owner's purchase agreement may seem like boilerplate lawyer-speak to the average person, but this case shows that New York courts will take the words used in the warranty seriously and give them effect.

SPONSOR

BD. OF MGRS. OF THE 51 JAY ST. CONDO. V. 201 WATER ST. LLC

2024 NY SLIP OP 33415(U) (SUP. CT. KINGS CNTY. SEPT. 18, 2024) NYSCEF NO. 416

Sponsors Seeking Indemnification by Contractors for Construction Defects Are Denied Summary Judgment

SQUIB BY LAUREN E. LEWIS, ASSOCIATE, NORRIS MCLAUGHLIN

OUTCOME: Decided for Third-Party Defendants

WHAT HAPPENED: In 2013, a joint venture between two New York City real estate developers (the "Sponsors") purchased a warehouse building for $45.5 million at 51 Jay Street, in the heart of DUMBO, one of Brooklyn's most coveted neighborhoods. Thereafter, the Sponsors and their contractors undertook a gut renovation and construction project, developing the warehouse into a condominium building. As described in the condominium's offering plan, the project involved completely renovating the existing three-story industrial/warehouse structure and adding four additional floors to create a seven-story building with a cellar level. Upon the project's completion, the building contained a total of 74 residential apartment units, 26 storage rooms, and one commercial unit. Among the residential units were 34 simplexes, 39 duplexes, and one townhouse, all of which were either studios or one-, two-, three-, or four-bedroom units, many having outdoor terraces.

The Sponsors marketed the condominium units as luxury residences, "finessed to a standard like nothing else around." The units were priced by the Sponsor to reflect their luxury status with prices ranging from $834,000 for a studio of 664 square feet to $5,995,000 for a four-bedroom penthouse unit of approximately 2,973 square feet of interior space and 2,944 square feet of outdoor terrace space. The marketing of the units for sale began in January 2015, prior to the project's completion.

According to the condominium association (the "Association"), the Sponsors were successful in creating a marketing buzz through news outlets and websites and by relying upon the Sponsors' own established reputation. According to the Association, the marketing strategies employed by the Sponsors were so effective that bidding wars soon ensued,

(continued on p. 24)

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

enabling the Sponsors to sell the units for even more than their initial offering prices. According to the Association, the offering plan was amended 17 times throughout the time that the units were marketed for sale, and the total value of the Sponsor's offering for the building eventually rose to $192,957,999 by late 2017, reflecting an increase in value of more than $7 million from the initial offering in 2015. According to the Association, less than five months after the first listing, more than half of all the building's units were sold or under contract, all while construction was still ongoing. The first closing on the sale of a residential unit occurred in January 2017 and over the next several years every one of the building's units were sold.

Soon however, there was trouble in paradise. According to the Association, shortly after the unit owners began their occupancies a flurry of construction defects and other conditions that deviated from what was offered for sale were discovered. The alleged conditions included: (1) strong "sewer smells" in bathrooms, allegedly the result of improperly installed and/or designed toilets and misaligned toilet flanges or drain lines that caused sewage to build up in sewer drainage pipes; (2) water leaks and mold growth throughout the building's common elements and within the units, causing damage to walls, ceilings, and floorboards; (3) cosmetic defects such as improperly installed wallpaper and carpeting that left bubbles, bulges, and misaligned seams; (4) air and water infiltration within unit windows; (5) a hallway not in compliance with the Americans with Disabilities Act; (6) excessive infiltration of noise into the units caused by improper soundproofing; (7) an unfinished and incomplete common lounge; (8) unstable and improperly installed bathtubs; and (9) clogged drain pipes and stained flooring resulting from improperly sealed shower floor tiles.

According to the Association, after the owners began reporting these conditions, the Sponsors made only a "halfhearted" effort at performing repairs in only some of the units, but not all, and never completed the work. The Association alleged that the Sponsors in fact caused more damage when they arranged water testing within the units' showers, which involved plugging the standup shower drains, filling the shower floor with water above the drain, and letting the water sit for hours. The Association claimed that this method of "testing" caused extensive water damage as leaky showers were filled with water and left for hours to drain into the walls and ceilings of other units below and adjacent to those being tested.

As a result, the Association commissioned its own forensic examination of the building's physical conditions, which according to the Association served to reveal that the defects experienced by the unit owners were merely the "tip of the iceberg." Among other things, the Association claimed the Sponsors had never obtained a permanent certificate of occupancy as required by the offering plan, and instead had obtained only 19 temporary certificates of occupancy. According to the Association the forensic examination also revealed a host of additional defects including: (1) firestopping and fire division deficiencies rendering the building noncompliant with building codes; (2) signs of "cost-cutting" and poor craftsmanship, including patchwork throughout the building's interior that was meant to but failed to stop water infiltration; (3) damage caused by the buildup of condensation and resulting leaks from uninsulated HVAC ducts, which were also not code compliant; (4) an improperly balanced and installed HVAC and exhaust system; and (5) various plumbing defects including improper installation of the building's hot water heater, sewer line, and gas piping.

In the interim, the Sponsors commenced their own lawsuit against their general contractor in January 2019, seeking more than $3 million in damages and averring that the general contractor's work was "entirely incompetent and inadequate."

The Association claimed that despite these admissions contained in the Sponsors' own lawsuit, the Sponsors had nonetheless, knowingly sold units to buyers while relying upon the misrepresentations contained within the offering plan and allowing the owners to move into the building in and prior to January 2018 without ever addressing or even acknowledging the defects that were the subject of the Sponsors' litigation against their general contractor.

IN COURT: About one year after the Sponsors commenced their lawsuit against the general contractor, the Association's board of managers commenced its own suit against the Sponsors and the Sponsors' principals, seeking redress for the unit owners' damages. The Sponsors, in turn, filed a third-party complaint naming their general contractor as well as the subcontractors as third-party defendants,

(continued on p. 25)

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com

and setting forth causes of action that included a claim for contractual indemnification.

The Sponsors moved for summary judgment against the general contractor and subcontractor on their indemnification claim. In support of their motion, the Sponsors relied solely upon the provisions contained within the general contract and subcontracts.

The court denied the Sponsors' motion.

The court noted that a plain reading of the indemnification provision in the general contract showed that any duty of the general contractor defendants to indemnify the Sponsors arose only where the claims, damages, losses, or expenses were "caused by the *negligent or intentional acts or omissions* [emphasis added] of the Contractor, a Subcontractor engaged by Contractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable . . . ." Similarly, the court noted that per the language of the subcontracts, indemnification would lie only where the relevant claims, liens, judgments, damages, losses, and expenses arose from "*[t]he act, failure to act, omission, negligence, breach or default* [emphasis added] by Subcontractor and/or its officers, directors, agents, employees, sub-contractors and suppliers . . . ."

Given that the Sponsors' motion was devoid of any evidentiary showings and solely based upon the plain language of the contracts, the court found that the Sponsors failed to present proof sufficient to demonstrate negligent or intentional acts of the general contractor, or that the alleged claims of the board of managers arose from an act, failure to act, omission, negligence, breach, or default of any of the subcontractor defendants. The court noted that while the Sponsors needn't, as a matter of law, establish they were free of fault to be entitled to summary judgment, they nonetheless had failed to make the requisite showing of any liability on the part of the general contractor or subcontractors as would be required for summary judgment.

TAKEAWAY:

New construction is sure to be enticing for obvious reasons, but the old adage "buyer beware" remains no less applicable, especially since, with new construction the sale will often occur ahead of the construction's completion.

If the buyer of new construction is ultimately not delivered what they were promised and paid for, construction defect litigation is sure to be an expensive, time-consuming, and arduous process involving many parties who will all be pointing fingers at one another. Tons of motion practice is likely to ensue, which will protract the litigation. As this case evinces, even contracts or subcontracts providing language that otherwise seems black and white, may still require determinations of fact necessitating a trial. While a plaintiff to a construction defects case may ultimately prevail in recovery of monetary damages against a sponsor, that is likely to occur only after years of costly litigation and in the meantime, the disappointed buyer will be left without immediate redress and will remain stuck in the new home that they were delivered rather than the one they were promised and paid for.

© 2024 by The Carol Group Ltd. Any reproduction is strictly prohibited. For more information, visit coopcondocaselawtracker.com