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BUSINESS JUDGMENT RULE

LEE V. METRO MGMT.

2024 NY SLIP OP 33687(U)(SUP. CT. QUEENS CNTY. AUG. 9, 2024)

As Modified By:
LEE V. METRO MGMT.

NO. 711855/2018 (SUP. CT. QUEENS CNTY. NOV 7, 2024) NYSCEF NO. 123

Court Dismisses Shareholder's Claim Against Co-op and Managing Agent for Neighbor's Harassing Conduct

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

OUTCOME: Decided for Co-op Defendants

WHAT HAPPENED: The plaintiff, Lee, is a shareholder in the Bell Apartments, a residential cooperative housing corporation complex located in Bayside, Queens, where she resides in Unit 1C. The plaintiff alleged that, between March 2015 and September 2018, she was the victim of a series of harassing interactions and assaults caused by defendant Deo and her children, who reside in Unit 1H in the same hallway as the plaintiff. The plaintiff alleged that she reported these incidents to the cooperative's board of directors and managing agent, but they failed to take any action. In August 2018, while the alleged pattern of harassment was ongoing, the plaintiff sued the offending neighbor together with the cooperative, the board, and the managing agent and its principal.

IN COURT: After discovery, all defendants moved for summary judgment. The court granted the motions. The court said that the plaintiff's claim for negligence against the cooperative, the board, and the managing agent defendants was dismissed because a landlord has no duty to prevent one tenant from attacking another tenant unless it has the authority, ability, and opportunity to control the actions of the assailant. Here, the pattern of harassment alleged by the plaintiff arose from a purely personal dispute between two individuals.

The court also said that the

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DECEMBER 2024 HIGHLIGHTS

CONSTRUCTION DEFECTS
Court Dismisses Most Claims Against Sponsor as Time-Barred

DISCRIMINATION
Cooperative Applicant Claims Discrimination for Service Animal

INSURANCE
Insurance Coverage for "Property Damage" Includes Alternative Living Expenses, Rent Abatement, and Attorney's Fees

LABOR LAW
HDFC and Managing Agent Successfully Defend Against Labor Law Injury Claims

PROPRIETARY LEASE
Shareholder Has Right to Use Separate Entrance to Unit, but Not the Land Around It

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plaintiff's claim for emotional distress was dismissed because the cooperative and managing agent defendants established that none of their conduct was sufficiently outrageous in character or so extreme in degree as to qualify as intentional infliction of emotional distress, and the plaintiff failed to satisfy the guarantee of genuineness requirement necessary to establish a claim for negligent infliction of emotional distress.

In addition, the court said that the plaintiff's claim for breach of fiduciary duty against the cooperative and managing agent defendants was dismissed because corporations do not owe a fiduciary duty to their shareholders, and there was no evidence that the managing agent's principal had participated in the board's allegedly wrongful conduct or had a bad faith motive.

The court at first denied the cooperative and managing agent defendants' motion for summary judgment dismissing the plaintiff's claim for breach of contract but granted their motion to renew, saying that their counsel's inadvertent failure previously to submit copies of the proprietary lease, bylaws, and house rules provided a reasonable justification for the omission. On renewal, the court said that the plaintiff's claim for breach of contract was dismissed because the cooperative and managing agent defendants established that their actions in denying approval for surveillance cameras in the plaintiff's hallway were protected by the business judgment rule. The court found no evidence that the defendants had acted outside the scope of their authority, in a way that did not legitimately further the interests of the cooperative association, or in bad faith.

The court also noted that, under the proprietary lease, the cooperative and the board, as lessor, shall not be responsible to tenants for the nonobservance or violations of house rules by any other lessee or person.

TAKEAWAY:

The court made a straightforward application of the facts to the law. The fundamental problem with the plaintiff's case was her inability to corroborate her allegations. According to deposition testimony in the record, the police believed that the plaintiff was making up her allegations and submitting false complaints.

The conduct alleged by the plaintiff about defendant Deo, or the conduct of the plaintiff herself if she engaged in a pattern of making false claims about another shareholder-tenant, might have sparked efforts by the board to terminate a shareholder's proprietary lease based on "objectionable conduct"; however, the record in this matter was silent on that issue and no related court actions were found.

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BUSINESS JUDGMENT RULE

BOARD OF MGRS. OF THE KINGS OAK TERRACE COOP. APTS., INC. V. KHOVAN

2024 NY SLIP OP 05088 (2ND DEP'T. OCT. 16, 2024)

Appeals Court Affirms Co-op Board's Fines Against Shareholder for Unauthorized Alterations

SQUIB BY HELENE W. HARTIG, FOUNDER & PRINCIPAL, THE LAW OFFICES OF HELENE W. HARTIG

OUTCOME: Decided for Plaintiff-Appellee Board of Managers

WHAT HAPPENED: Ihor Khovan and Olena Khovan, a divorced couple, live in different apartments at Kings Oak Terrace Cooperative Apartments in Brooklyn. They are on friendly terms, however, and in May 2022 Ihor did some renovations in Olena's apartment including removing walls, floors, and plumbing fixtures. The couple did not obtain permission from the board for these alterations, although Kings Oak's bylaws and occupancy agreement require board approval. The board notified the couple that each of them would be fined $25,000 for violating these rules. Subsequently, the board held a grievance proceeding at which Ihor appeared, and at the meeting the board reduced the fines to $15,000 per individual. The Khovan's agreed to pay through a payment plan, but later refused to pay. The board then filed suit in November 2022.

IN COURT: The Supreme Court granted the board's motion for summary judgment, and this decision was affirmed on appeal. The court's reasoning relied on the "business judgment rule," which requires courts to defer to cooperative board decisions as long as the board acts within its authority, in good faith, and for the cooperative's benefit. The court found that the board had established its case by showing the unauthorized alterations, its authority to assess fines, proper procedure in imposing the fines, and good faith in its actions. The defendants failed to raise any legitimate challenges to these findings.

TAKEAWAY:
A court will not give a defaulting shareholder a free pass and will not allow the revocation of a settlement agreement presumably made in good faith. A "do over" will also not be permitted by a court when, in the "glaring light" of hindsight, a delinquent shareholder changes his mind about a settlement agreement. A promise made by a shareholder to pay an agreed upon monetary amount for the violation of the cooperative's bylaws and occupancy agreement can be reasonably relied upon by a board of directors. That promise, if broken, can also be the basis for liability and a monetary judgment.

BYLAWS

HIRSCH V. MORNINGSIDE PARK CONDO.

2024 NY SLIP OP 33666(U) (SUP. CT. N.Y. CNTY. OCT. 15, 2024)

Court Won't Dismiss Unit Owner's Breach of Bylaws Claim Against Condo

SQUIB BY INGRID C. MANEVITZ, PARTNER, SEYFARTH SHAW

OUTCOME: Decided, in part, for Condo Defendants

WHAT HAPPENED: Plaintiff Eric Hirsch, the owner of a residential condominium unit, Unit 1, in the condominium building of defendant Morningside Park Condominium, commenced this action against the condominium, its board of managers, and the Andrews Organization, the managing agent for the condominium. The plaintiff acquired his unit in 2007 but never

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moved in, allegedly because of ongoing construction defects and plumbing issues. He alleged that his unit sustained damage from a wastewater backup in August 2015 and asserted claims for breach of contract (the condominium's bylaws), constructive eviction, return of common charges, and negligence.

The defendants moved for summary judgment on the theory that the damage to the plaintiff's unit was actually caused earlier, in February 2015, by the plaintiff's alleged failure to heat his unit, which the defendants contended caused pipes in a Packaged Terminal Air Conditioner (PTAC) device in the unit to freeze and burst. Under the condominium's bylaws, unit owners are responsible for care over PTAC devices, but the defendants are responsible for common elements, such as "hot and cold water, heat (including all pipes, ducts, wires, shoots, cables, and conduits used in connection therewith" and "[w]ater service pipes and sewer pipes."

IN COURT: The court denied the defendants' motion for summary judgment on the plaintiff's claim for breach of the condominium's bylaws. The defendants argued that the PTAC device failed because the plaintiff did not heat his unit in February 2015, but the court found that "[d]efendants have failed to provide any evidence that plaintiff failed to heat his apartment, much less that the PTAC froze and burst. " The defendants cited the plaintiff's deposition testimony, but the court found that "plaintiff says no such thing in the cited excerpt."

The court found that the defendants also failed to submit evidence establishing the PTAC device's failure was not caused by "other reasonable alternatives" given that the plaintiff submitted a report that had warned the condominium in 2011 that mechanized valves connected to the PTAC devices "must be replaced or else risk damage if pipes become too cold." The court held that it was premature to determine what caused the PTAC device to malfunction and whether the valves were common elements, as those were technical issues and the parties had not submitted any expert reports.

The court, however, granted summary judgment in favor of the defendants on the plaintiff's claims for constructive eviction, return of common charges, and negligence. The court dismissed the plaintiff's constructive eviction claim for two independent reasons. First, condominium unit owners like the plaintiff are not protected by the warranty of habitability, since they do not lease the premises. Second, the warranty of habitability applies only to a tenant living in the unit, and the plaintiff never moved into his unit and, therefore, could not be constructively evicted from it.

The court also rejected the plaintiff's claim seeking a return of common charges because unit owners are not permitted to withhold payment of common charges in derogation of the condominium's bylaws based on defective conditions in their unit or in common areas.

Finally, the court dismissed the plaintiff's negligence claim as duplicative of his breach of contract claim because it did not allege any duty independent of the alleged contractual obligations.

TAKEAWAY:

A party moving for summary judgment must make a prima facie showing that they are entitled to judgment as a matter of law and, only once that showing is made, does the burden shift to the party opposing the motion to produce admissible evidentiary proof that there are material issues of fact requiring a trial. Here, neither party submitted an expert report regarding the PTAC device that was alleged to have malfunctioned or regarding the mechanized valves connected to the PTAC device that were alleged to require replacement. Without any expert reports in hand, the court was not in a position to determine what caused the damage to the plaintiff's unit. Before moving for summary judgment, parties should ensure they have sufficient evidence, including expert reports if necessary, to support their position.

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COMMON ELEMENTS

ETKIN V. SHERWOOD RESIDENTIAL MGMT. LLC

2024 NY SLIP OP 33801(U) (SUP. CT. N.Y. CNTY. OCT. 8, 2024)

Court Dismisses Unit Owner's Claims Against Condo and Managing Agent Regarding Smoke and Balcony Conditions

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

OUTCOME: Decided for Condo Defendants

WHAT HAPPENED: Beginning in 2015, plaintiff Etkin noticed smoke odors infiltrating into unit 7A and the seventh floor of the defendant condominium. The smoke emanated from a fireplace in the penthouse unit located above 7A. Etkin claimed that the smoke caused him "physical discomfort" and complained several times to the defendant and its managing agent. Etkin also complained separately about concrete mortar and water "raining down" from the balcony of PHA above his unit, supposedly damaging the glass and metal railing of the 7A balcony.

IN COURT: In 2021, Etkin commenced legal action against the defendant condominium and managing agent both personally and derivatively (on behalf of the other unit owners), asserting: (1) breach of contract; (2) breach of fiduciary duty; (3) breach of contract (derivatively); (4) breach of fiduciary duty (derivatively); (5) private nuisance; (6) constructive eviction; (7) negligence; and (8) gross negligence. The defendants filed a motion to dismiss in lieu of an answer.

In a previous decision, the court dismissed both the breach of fiduciary duty claims and the negligence/gross negligence claims as duplicative of the breach of contract claims; the constructive eviction claim as inapplicable to condominiums; and the private nuisance claim against the managing agent, since it had no liability to a third party claiming a failure to perform under the management agreement with the condominium. However, the judge allowed the private nuisance claim to remain because there were questions of fact as to whether the claimed interference was "substantial, intentional, or unreasonable."

The condominium had also asserted that the plaintiff lacked standing to pursue a private nuisance claim with respect to the condition of a common element. The court ruled that the documentary evidence produced by the condominium did not utterly deprive the plaintiff of standing since questions of fact allegedly remained as to whether a limited common element was distinguishable "under the Offering Plan" from other common elements, such as hallways.

The defendants subsequently filed an answer, followed by a motion for summary judgment. In support of their motion the defendants produced evidence of ongoing efforts by the condominium to identify the source of the smoke conditions, and the plaintiff countered with its own engineering reports and photographs.

The new judge in the case dismissed the breach of contract claim against the managing agent. It ruled that because the plaintiff was not a party to the management agreement or a beneficiary of the management agreement (although it was included as an exhibit under the offering plan), it could not make a claim for a breach of those contracts.

With respect to the breach of contract claim against the condominium for failing to address the balcony and smoke conditions, the court determined that the mortar and water conditions on the balcony did not result from leaks or require "structural" repairs, and that the resulting white residue and staining on the 7A railings also required only "ordinary" repairs. Hence the repair of either condition was not the responsibility of the condominium.

As to the smoke condition, the court observed that under the condo documents, the HVAC filters, fireplaces, fireboxes, and flue were parts of a unit. Therefore, repairs to those components

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were the responsibility of the unit owner. Thus, the board did not breach the bylaws by failing to rectify conditions caused by defects in the fireplace belonging to the penthouse unit.

With respect to the private nuisance claim against the board, the court first recounted the elements of nuisance: whether the claimed interference was substantial, intentional, or unreasonable; interfered with the plaintiff's property rights; and was caused by another's conduct or failure to act. A claimed nuisance also would be characterized by a pattern of continuity or repetition.

Surprisingly, with respect to the balcony, the court focused entirely on the purported standing of the unit owner to assert a private nuisance with respect to problems with common elements. The court stated that "a plaintiff unit owner filing suit in their individual capacity for injury related to a common area lacks standing to bring such a claim." Since the balcony was a common element, apparently the plaintiff thus had no standing to bring a claim for defects in the balcony.

As to the smoke conditions, the court determined that based on the parties' submissions, the condominium was not responsible for the smoke conditions by its acts or failure to act. In support, the court pointed to a plethora of evidence showing that the condominium had tried for years to ascertain the cause of the smoke conditions, without success. The court also cited cases providing that "if one lives in a city he [or she] must expect to suffer the dirt, smoke, noisome odors and confusion incident to city life." (Presumably the court deemed the discomfort of the smoke condition one of those incidental inconveniences.)

TAKEAWAY:

While the decision certainly may be defensible in fact, some of the grounds cited seem questionable. For example, a unit owner does not lose the right to make a claim against the board for a condition in a common element that directly affects that owner. The cases on standing cited in the defendant's briefs relate to the rights of an individual owner to make a non-specific damage claim due to defects in common elements (such as against a sponsor for common element construction defects). Other cases hold that notwithstanding the absence of a landlord-tenant relationship between a condominium and a unit owner, if the condominium is the only entity capable of curing a particular condition affecting that owner, the unit owner has the right to demand that it do so.

Likewise, the court apparently considered the smoke condition that the unit owner complained of to fall into the category of an "inconvenience" rather than a potential health hazard or nuisance. Nothing in the filings would seem to lead to that conclusion. Apparently, the plaintiff and defendant had litigated repeatedly over numerous other issues for several years, though, which may explain the court's attitude.

CONSTRUCTION DEFECTS

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

2024 NY SLIP OP 04804 (SUP. CT. N.Y. CNTY. OCT. 3, 2024)

Appeals Court Affirms Breach of Contract and Fiduciary Duty Claims Against Sponsor Principals

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

OUTCOME: Decided for Plaintiff Condo Board

WHAT HAPPENED: In February 2023, the board of managers of the condominium association located at located at 570 Broome Street in Manhattan brought a lawsuit alleging, among other things, that the sponsor's individual principals failed to live up to promises made in the offering plan by delivering a building with several construction defects. In addition, the board alleged that while the principals served on (and controlled) the board, they deliberately understated the condominium budget and common charges to induce pur-

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chasers to buy apartments, then dramatically increased common charges and assessments after most sponsor-owned units were sold (and profits distributed to the sponsor's principals).

The defendants moved to dismiss these (and other) claims, but the motion court denied the motion and allowed these causes of action to proceed. The individual defendants appealed.

IN COURT: The appellate court unanimously affirmed. The appellate court noted that the plaintiff had alleged that the principals had made "specific" affirmative misrepresentations, as opposed to mere omissions in the offering plan. Moreover, this finding did not require the court to "[pierce] the corporate veil"—that is, hold individuals liable for acts committed by the corporate entity—because each of the individual defendants had allegedly made these representations in their individual capacities.

The court also found that the plaintiff had adequately pleaded the breach of fiduciary duty claims against the same individuals for their actions as board members. Among other things, the plaintiff had alleged that the individuals had breached their duty of loyalty by taking actions on behalf of the condominium association that benefited only the sponsor, and by extension, themselves.

TAKEAWAY:
In finding that the plaintiff's "allegations set forth a scheme independent of the Martin Act disclosure requirements," the appellate court perfunctorily rejected an argument that was fiercely contested at the lower court, and for which there is conflicting caselaw. This decision will assist condominium boards in asserting claims against individual principals of sponsors for breach of contract claims, even in cases where the alleged breaches of contract arguably overlap with representations made in the offering plan.

CONSTRUCTION DEFECTS

BD. OF MGRS. OF 87-89 LEONARD ST. CONDO. V. LEONARD ST. OWNER, LLC

2024 NY SLIP OP 33659(U) (SUP. CT. N.Y. CNTY. OCT. 15, 2024)

Court Dismisses Most Claims Against Sponsor as Time-Barred

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

OUTCOME: Decided for Sponsor Third-Party Defendants, Condo Third-Party Plaintiff

WHAT HAPPENED: Following conversion of a 150-year-old cast-iron building into a seven-unit condominium, the unit owners began to discover numerous defects in the construction after moving in. The unit owners claimed that the condominium was not constructed as promised, describing defects in the mechanical equipment, plumbing equipment, and electrical system, as well as poor workmanship and construction practices, and not complying with construction plans and building codes.

The conversion project began in 2012. The architect for the project issued a certificate in April 2014 that the building was built in accordance with the plans and guaranteed that no material facts were omitted or untrue. The architect later executed an insurance rider in which it agreed to provide indemnification for any claims made by anyone for personal injuries, property damage, and worker's compensation. In May 2015 the architect issued a second certificate after the plans had been updated, which, like the original certificate, was intended to be incorporated into the offering plan.

In February 2018 the first Certificate of Occupancy was issued, and by May 2018 all of the units had been sold by the sponsor.

IN COURT: The plaintiff board of managers sued the sponsor and the architect for breach of contract, breach of fiduciary duty, and constructive fraudulent conveyances. In turn, the sponsors brought a third-party action against the architect (and others) for breach of contract, indemnification, breach of contractual insurance procurement obligations, contribution, common law indemnification, and negligence. The architect filed a motion to

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dismiss the sponsor's action. The sponsor did not oppose the dismissal of the contribution and negligence claims. Since a claim for common law negligence requires an underlying negligence cause of action, which was conceded by the sponsor, that claim was also dismissed.

The court dismissed the claims for breach of contract and breach of contractual insurance procurement obligation as time-barred by the three-year statute of limitations for professional malpractice, holding that the time began to run from the issuance of the February 2018 Certificate of Occupancy.

However, the court declined to dismiss the contractual indemnification claim. Although it found that the insurance rider agreement did not create an obligation to indemnify the underlying claims as it was expressly limited to certain claims, the court reasoned that other unspecified indemnification agreements may exist, and thus the parties were entitled to discovery.

TAKEAWAY:
As in many areas, timing and due diligence are key in construction. Acting promptly when issues start to arise may ensure that those responsible are held accountable. Here, units had been purchased and were occupied prior to the issuance of the final Certificate of Occupancy, allowing for at least some opportunity to recognize deficiencies in the construction and, consequently, enabling the parties to timely bring their respective claims.

DISCOVERY

PASSARELLI V. THE BD. OF MGRS. OF BRIDGE TOWER PLACE CONDO.

2024 NY SLIP OP 33606(U) (SUP. CT. N.Y. CNTY. OCT. 11, 2024)

Plaintiff Couldn't Rely in Summary Judgment Motion on Photos that She Didn't Submit in Discovery

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

OUTCOME: Decided for Defendant Condo

WHAT HAPPENED: The plaintiff commenced this slip-and-fall case against the condominium board that owned the building adjacent to the sidewalk where the plaintiff fell. The plaintiff alleged that there was an unrepaired 1"⅝" inch high lip on the sidewalk on which she tripped.

IN COURT: The court denied the plaintiff's motion for summary judgment on liability, finding questions of fact existed as to the mechanics of the plaintiff's fall or what caused her to fall and the authenticity of the photographs depicting the area where the subject incident occurred.

The condominium had moved to preclude the plaintiff from relying on photographs of the accident location because the plaintiff did not produce in discovery photos relied upon in her summary judgment motion which were taken four years earlier. The plaintiff had claimed no prejudice as a result of the failure to disclose the photographs because the defendant knew exactly what the sidewalk's condition was because it was located in front of its building. No explanation was offered by the plaintiff for its failure to disclose the photographs. The court granted the condominium's motion and precluded the plaintiff from using those photographs at trial.

TAKEAWAY:
This case highlights the importance of searching the building's records for evidence that is responsive to discovery demands served on a party to litigation. The failure to do a diligent search and provide responsive documents can result in the preclusion of highly relevant material. When discovery demands come in and board members are required to search their computers for relevant documents, they must do so or face the possibility that evidence material to their claim or defense will never get before the court.

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DISCRIMINATION

HECHT V. 89TH ST. OWNERS CORP.

2024 NY SLIP OP 33539(U) (SUP. CT. N.Y. CNTY. OCT. 4, 2024)

Cooperative Applicant Claims Discrimination for Service Animal

SQUIB BY LAUREN E. LEWIS, ASSOCIATE, NORRIS MCLAUGHLIN

OUTCOME: Decided for Plaintiff Co-op Applicant

WHAT HAPPENED: In August 2022, a type 1 diabetic with a service dog set out to purchase a cooperative apartment located in a six-unit building with a strict no-dog policy. In order to be considered, the applicant was required to submit an application together with, among other things, three years of federal income tax returns. Prior to divulging information regarding her condition and service animal to the cooperative, the applicant entered into a contract of sale to purchase the apartment for $1.35 million, made an initial deposit of $135,000, secured a mortgage commitment for $715,000 from a lender, and subsequently submitted her application to the board for consideration and approval.

According to the board, while the applicant's tax documents claimed over $600,000 of income earned in 2020, the applicant failed to furnish a federal income tax return or otherwise establish any reported income in 2021, and thus failed to comply with the application requirements. The applicant alleged that her 2021 tax return would be forthcoming and had been delayed only as a result of certain revisions being undertaken to her 2020 tax return. The applicant claimed that she even offered to place one year's maintenance in escrow to defray any perceived risks related to her ability to pay maintenance or special assessments that may arise.

At some point thereafter, the board got wind of the applicant's service dog and began asking questions. In November 2022, the applicant wrote a letter to the board, explaining that her type 1 diabetes affected her blood sugar levels, particularly when asleep, which could lead to a diabetic coma, and further explained that she required a service dog that could perceive quick and drastic changes to blood sugar levels, faster than a blood sugar meter, and could alert her when she needed to stabilize her levels. As part of the letter the applicant provided a physician's diagnosis confirming her condition and her dog's certificate of registration from the American with Disabilities Act Service Animal Registry.

On Dec. 1, 2022, the board held an interview with the applicant that lasted nearly two hours. According to the applicant, rather than her finances, much of the interview focused on the dog, including whether any medical devices could obviate the need for the dog and what the applicant would do when the dog passed. The board then rejected the applicant's purchase application via email within a few minutes of the interview's conclusion.

IN COURT: The applicant commenced an action in state Supreme Court against the cooperative, the cooperative's board of directors, and the individual board members, alleging she was discriminated against and denied housing based upon her disability and requested accommodation to live with her service dog. The applicant asserted causes of action for discrimination under the Fair Housing Act (FHA), the New York State Human Rights Law (NYSHRL), and the New York City Human Rights Law (NYCHRL) and a cause of action for negligent infliction of emotional distress.

The defendants moved to dismiss the applicant's causes of action pursuant to CPLR 3211 §§(a)(1) (documentary evidence) and (a)(7) (failure to state a cause of action), contending among other things, that the board's decision to deny the applicant was based upon certain financial irregularities and not her disability, thus maintaining that their decision should be shielded from judicial review by the business judgment rule.

The court declined to dismiss the applicant's discrimination claims against the board or its individual members noting that, per the First Department's 2012 holding in *Fletcher v. Dakota Inc.*(2012 N.Y. Slip Op. 5338 (1st Dep't. Jul. 3, 2012)), in assessing "individual board member liability in the context of discriminatory acts . . . . [t]here is no principle of

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corporate law that director liability arises only where the director commits a tort independent of the tort committed by the corporation itself. On the contrary, it has long been held that a corporate officer who participates in the commission of a tort, like discrimination may be held individually liable."

Given that the defendant's motion relied solely upon an affirmation by a board member, and some email correspondence between board members and the applicant's broker, the court found that the defendants had not, by their motion, demonstrated unambiguous, authentic, and undeniable documentary evidence that their decision was free of discriminatory animus. The court noted that the emails established the board's concerns regarding both the applicant's tax and financial information as well as unease over the service dog, and ultimately determined that the defendants had not provided conclusive evidence that the service animal had nothing to do with their denial of the applicant's application.

The court declined to dismiss the applicant's discrimination claims, finding that the applicant adequately pled discrimination causes of action, which were, if proven, also sufficient to support an award for punitive damages, where the applicant demonstrated she was a member of a protected class, was qualified to purchase the apartment, and that the circumstances surrounding her denial gave rise to an inference of discrimination.

TAKEAWAY:
While the business judgment rule prohibits judicial inquiry into the actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes, its applicability has limitations. The business judgment rule is typically applicable only to a co-op's alleged breach of contract and does not protect an individual board member when their conduct sounds in tort, including discrimination.

FIDUCIARY DUTY

374-76 PROSPECT PLACE TENANTS ASS'N, INC. V. CITY OF NEW YORK

2024 NY SLIP OP 05082 (2ND DEP'T. OCT. 16, 2024)

Appellate Court Affirms Denial of City's Motion to Dismiss Tenant Association's TIL Claims

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

OUTCOME: Decided for Plaintiff Co-op Tenants Association

WHAT HAPPENED: Back in the 1980s, the city foreclosed on many tax-delinquent residential properties. To promote home ownership, the city created the "Tenant Interim Lease" program, known as TIL. Resident tenants of certain city-owned buildings could form an association, apply to the TIL program, and work toward having the building sold to the tenants as an HDFC, a type of cooperative for low- to moderate-income residents.

Tenants in a Brooklyn building in Prospect Heights engaged in this process and were accepted into the TIL program in 2001. Eight years later, the city tried to shift the building into a different program, the Affordable Neighborhood Cooperative Program (ANC). The city notified the tenants association that rents would be increased to fund renovation work; that tenants would be relocated for two years while renovations occurred; and that tenants would have no rights under the TIL program.

The tenants association objected to being moved from the TIL to the ANC program, and sued the city, asserting, among other claims, breach of contract, promissory estoppel, and breach of fiduciary duty. The city filed a motion to dismiss the claims, but the trial court denied the motion. The city appealed.

IN COURT: The appeals court affirmed the trial court in full, denying the city's appeal. The tenants association and the city entered into a contract once the

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city accepted the association into the TIL program. The tenants association stated a claim for breach of contract based on the city's efforts to remove the building from the TIL program and transfer the building to the ANC program, over the plaintiffs' objection.

As for the claim for promissory estoppel, when there is a clear and unambiguous promise, and an injury sustained in reliance upon that promise, a claim has been stated. Here, the tenants association relied upon the city's promises in the TIL program, and the tenants association faced injury when the city failed to live up to those promises.

Finally, the complaint stated a claim for breach of fiduciary duty against the city, which had undertaken a fiduciary obligation to the tenants association, under both the TIL contract and otherwise. That fiduciary obligation was breached when the city sought to subject the property to a different program.

TAKEAWAY:
The government is different from you and me. So it is not always easy to hold the government to legal standards that apply to individuals and corporations—but it can happen. Here, the appellate court found that the city's efforts to move the Brooklyn property from one program to another could not stand. The tenants had participated for years in the TIL program, and presumably were working towards creating an HDFC cooperative for themselves. The city's unilateral efforts to pull the property from that pathway were, for the time being, stopped. It remains to be seen if discovery or other evidence comes to light that renders the city's actions warranted by law.

INSURANCE

ATLANTIC MUT. INS. CO. V. GREATER N.Y. MUT. INS. CO.

2024 NY SLIP OP 05134 (1ST DEP'T. OCT. 17, 2024)

Insurance Coverage for "Property Damage" Includes Alternative Living Expenses, Rent Abatement, and Attorney's Fees

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

OUTCOME: Decided for Co-op Defendants-Appellees

WHAT HAPPENED: The Bakers, proprietary tenant-lessees of a penthouse apartment at 40 East 80 Apartment Corp., sustained damage and mold infestation to their apartment due to water seepage through the roof and walls over a six-year period. The Bakers recovered a judgment against the co-op and Penmark, the co-op's managing agent, based upon the co-op's negligence resulting in the property damage, remediation, and professional expenses. The judgment also ordered the return of late fees or penalties and required payment of attorney's fees. The court awarded 50 percent of the judgment against Penmark.

The co-op and Penmark tendered the Bakers' underlying claims against them to the plaintiff, Atlantic Mutual, which had issued an insurance policy providing that it would pay the sums the co-op and Penmark would be obligated to pay as damages because of bodily injury or property damage caused on the covered property. Atlantic tendered the defense and claims for damages claimed against the co-op and Penmark to its insurer, defendant Greater New York Mutual Insurance Co. (GNY), which then disclaimed coverage. Atlantic then sued GNY seeking a declaratory judgment against GNY after GNY disclaimed coverage for the judgment against the co-op and Penmark.

GNY asserted that the damages recovered against the co-op and Penmark were not "property damage" but were based upon claims for breach of lease, breach of the warranty of habitability, and violations of administrative housing codes. It argued that these were not "property damage" claims resulting from a defined "occurrence," nor for money damages for "personal and advertising injury" resulting from a covered offense.

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For this reason, the GNY policy did not provide coverage. Nor would a breach of contract amount to an "occurrence" under its policy.

Additionally, GNY argued that its policy does not provide coverage for damages resulting from a breach of the warranty of habitability. These do not substitute for a tort claim for "property damage." Nor does the policy extend to reimbursement for the insureds' payments or losses, nor cover alternative living expenses or loss of use of tangible property. GNY further argued that the judgment for an abatement of rent and late fees was likewise not a covered occurrence.

IN COURT: The motion court granted Atlantic summary judgment, holding that GNY must defend and indemnify the co-op and Penmark, including alternate living expenses ($228,116.07), rent abatement ($322,277.37), and pre-judgment interest ($430.732.19). The Appellate Division unanimously affirmed, finding for GNY's coverage of the co-op for the defense and indemnification. It ruled that GNY had the duty to cover the amounts awarded because "property damage" includes not only physical injury to tangible property but also alternative living expenses, rent abatement, and attorney's fees. The court found unavailing GNY's assertion that the co-op's and Penmark's liability arose out of a breach of contract claim.

TAKEAWAY:
This action was commenced in 2006. From all that appears in the record, 18 years of litigation, capped by a unanimous decision by the Appellate Division, suggests that all parties would have benefited by submission of the matter to mediation, or binding arbitration. Certainly, the significant elements of alternative living expenses, rent abatement, interest, and attorney's fees would not have reached the levels found here were the case resolved by other than litigation. These large sums could have accreted to the ultimate negotiated settlement of the claim, and reduced the anguish suffered by the Bakers.

LABOR LAW

JIMENEZ V. ST. NICHOLAS AVE. HOUS. DEV. FUND CORP.

2024 NY SLIP OP 34063(U) (SUP. CT. N.Y. CNTY. SEPT. 30, 2024)

HDFC and Managing Agent Successfully Defend Against Labor Law Injury Claims

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

OUTCOME: Decided for Plaintiff, Co-op Defendants, Third-Party Defendant

WHAT HAPPENED: In 2017, the plaintiff, while performing construction work in a cooperative apartment, was injured while using a table saw that lacked required protections. As a result, in 2018, the plaintiff initiated a lawsuit against the cooperative corporation and its managing agent, alleging violations of the New York Labor Law and negligence.

Specifically, the plaintiff invoked: (1) Labor Law §200, which mandates that property owners or general contractors provide construction workers with a safe work environment, reflecting a common-law duty of care; and (2) Labor Law §241(6), which requires property owners and general contractors to provide reasonable and adequate safety protection for workers, particularly in construction, excavation, or demolition contexts, with a non-delegable duty to protect workers from harm.

In 2020, two years after the lawsuit was initiated, the cooperative corporation and its managing agent (the co-defendants) filed third-party claims against the shareholder for whom the work was being performed. The co-defendants sought: (1) contractual indemnification based on the proprietary lease's indemnification obligations; (2) common-law indemnification based on the shareholder's negligent supervision of the worker in his apartment; (3) contribution for the damages based on the shareholder's negligence; and (4) breach of contract due to shareholder's failure to procure insurance.

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IN COURT: In response to co-defendants' claims against the shareholder, the shareholder moved for summary judgment seeking dismissal of all such third-party claims. The co-defendants likewise cross-moved for summary judgment in their favor on each such claim.

The court denied both the third-party defendant's motion to dismiss and the co-defendants' summary judgment motion regarding the contractual indemnification claim. The third-party defendant argued that the cooperative's indemnification claim was invalid due to a waiver of subrogation clause in the proprietary lease. However, the court found this argument unconvincing, noting that the cooperative's insurance policy required a waiver of subrogation only if such a waiver was included in a contract, and no evidence of such a contract was provided.

The co-defendants' instead argued that the indemnification provision of the proprietary lease required indemnification based on the shareholder's failure to comply with the provisions of the lease, which required the cooperative corporation's consent to the performance of the work. The court also found this argument unconvincing, and pointed out that there was conflicting testimony about whether the co-defendants were aware of the work being done, and whether that knowledge would have allowed them to take measures to prevent the plaintiff's accident.

The court granted the shareholder's motion for summary judgment and dismissed the common-law indemnification and contribution claims. The court found that the co-defendants failed to establish that the shareholder was negligent or that the shareholder had control over the work being performed in the apartment, which are necessary elements to support such claims.

The court also granted the shareholder's motion for summary judgment and dismissed the co-defendants' claim for breach of contract for failing to procure insurance. The court clarified that the proprietary lease did not contain any requirement for the shareholder to obtain insurance, thereby eliminating the possibility of a breach.

The plaintiff also moved for summary judgment on his Labor Law §241(6) claim, and the co-defendants cross-moved to dismiss the plaintiff's negligence and Labor Law §§200 and 241(6) claims, and also sought partial summary judgment on comparative fault.

The court granted the co-defendants' motion to dismiss the negligence and Labor Law §200 claims, noting that the plaintiff did not allege the co-defendants provided the tools or equipment, nor did the co-defendants have control over what was provided. However, the court found an issue of fact regarding the Labor Law §241(6) claim. The court determined that it was unclear whether the plaintiff would have used a blade guard had one been provided, and that the plaintiff's own conduct may have contributed to his injury. As a result, the court dismissed the claim to the extent it was based on the plaintiff's negligence and Labor Law §200.

The plaintiff and the third-party defendant shareholder have both filed appeals.

TAKEAWAY:

Several key lessons can be drawn from this case, whether by cooperative corporations, managing agents, shareholders, or contractors.

First, when engaging in construction or renovation work in cooperative apartments (or elsewhere), parties should be aware of insurance requirements, including have all applicable policies reviewed by qualified consultants. It is no longer sufficient to rely on a certificate of insurance or even an insurance declarations page, and written agreements are often required between the named insured and an additional insured. Property owners and contractors should also be aware of their responsibilities under the New York Labor Law, particularly regarding worker safety, and should confirm that contractor's insurance coverage does not exclude these types of claims.

Second, for common-law indemnification or contribution claims, parties asserting such claims must prove that the third party had control over the work and was negligent. In this case, the co-defendants failed to prove that the shareholder had control over the work, highlighting the importance of clearly establishing the chain of responsibility and authority for the work being done. Ideally, shareholders performing work should enter into an alteration agreement with the cooperative corporation so that this issue (and others) can be addressed.

Having clear documentation and evidence of agreements, insurance policies, and communications regarding the work being done is crucial. By understanding insurance requirements, indemnification rights, the nuances of Labor Law claims, and the importance of clear contractual terms, parties can take proactive measures to reduce exposure to liability in similar situations and be better prepared for litigation.

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PERSONAL INJURY

MCGRANE-MUNGO V. DAG HAMMARSKJOLD TOWER

2024 NY SLIP OP 33438(U) (SUP. CT. N.Y. CNTY. SEPT. 30, 2024)

Trial Is Needed to Determine Condominium's Liability for Sidewalk Slip-and-Fall Injury

SQUIB BY DANIELLA ZELEFSKY, COUNSEL, BRAVERMAN GREENSPUN

OUTCOME: Decided for Plaintiff, Defendant Condo

WHAT HAPPENED: Plaintiff Ana McGrane-Mungo claims that on July 3, 2018, she tripped over an uneven portion of sidewalk in front of the Dag Hammarskjold Tower Condominium, which was the condominium and its property manager's responsibility to maintain. Her expert opined that the uneven elevation in the sidewalk not only created a tripping hazard but also constituted a violation of New York City Administrative Code §19-152 since the defect was greater than a half inch in height.

The condominium, board, and property manager moved for summary judgment, arguing that a photograph included in the plaintiff's expert's affidavit identified the defect as less than a half inch in height, and therefore non-actionable (based upon First Department precedent). The movants disputed the credibility of the plaintiff's expert, claiming his recitations of the facts were inconsistent with the plaintiff's own testimony. In addition, the movants argued that they did not have notice of the defect and provided testimony from a handyman in their employ that he inspected the sidewalk daily and did not see any defects.

The plaintiff filed a cross-motion for summary judgment claiming that: (1) the sidewalk defect existed for months and therefore the movants had constructive notice of the defect; and (2) the movants failed to submit any expert affidavit and therefore could not meet their burden of showing the sidewalk defect was trivial.

IN COURT: Noting that the movants did not produce any expert affidavit, the court denied their motion for summary judgment due to the existence of triable issues of fact, including whether the sidewalk height differential constituted an actionable defect and whether the movants had notice of the defect.

The court similarly found triable issues of fact that precluded summary judgment for the plaintiff's cross-motion. The court questioned the credibility of the plaintiff's expert and his measurements and whether a statutory violation existed. The court advised that it could not determine the measurements of the defect from a photograph, and further argued that the plaintiff's expert provided no methodology as to how he measured the height of the defect.

TAKEAWAY:

In addition to conscientiously maintaining the sidewalks in front of their buildings, condominium boards and property managers would be well served to always hire their own experts in personal injury cases. It would have been prudent for the board in this case to hire its own engineer to review the plaintiff's materials and to provide its own expert affidavit. The court specifically noted that it could not glean from the images provided by the plaintiff whether a statutory differential existed, and was unable to tell how the plaintiff's engineer was able to spot a half-inch differential in a grainy photograph. Expert testimony and a written affidavit from a condominium's expert might have allowed the condominium to prevail at the summary judgment stage rather than proceed to trial.

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PROPERTY DAMAGE

BD. OF MGRS. OF SCHUMACHER CONDO. V. 304 MULBERRY ST. OPERATING CO., L.L.C.

2024 NY SLIP OP 33841(U) (SUP. CT. N.Y. CNTY. OCT. 28, 2024)

Court Grants Condo Summary Judgment on Developer's Liability But Not on Amount of Damages

SQUIB BY ANDREW P. BRUCKER, PARTNER, FOX ROTHSCHILD

OUTCOME: Decided for Plaintiff Condo

WHAT HAPPENED: Plaintiff Schumaker Condominium is located on Bleecker Street, in Manhattan, adjacent to a property that was going to be developed by defendant 304 Mulberry Street Operating Company, LLC. The developer hired a construction manager, a contractor (who sub-contracted the excavation work to another company), as well as an engineer who designed the plans for the excavation. All of these parties were named as defendants as well. The plaintiff and developer entered into a license agreement pursuant to which the developer would protect the plaintiff's building, including monitors, from damages during the excavation action and foundation work stage of the construction.

Within a year, and for the next two years, another engineer hired by the plaintiff to review the damage in the plaintiff's units, opined that the damage was caused by the excavation. Yet another engineer hired by the plaintiff came to the same conclusion.

None of the defendants hired an expert to dispute this claim, except for the developer's engineering firm, which hired an independent engineer who admitted to the court that the excavation caused movement of the defendant's building, which led to the damage; however, he claimed that the original plans prepared by the original engineer met all applicable standards, and that the damage may also have been caused by other outside factors.

IN COURT: The plaintiff made a motion for summary judgment for both liability and damages. The court noted that there is strict liability under Section 3309 of the NYC Building Code. The court noted that the defendants had a duty to protect the adjacent property from damage during the construction project, and that if damage results, the owner, construction manager, excavation subcontractor, and design professionals are strictly liable for damages.

The court noted that the damage was undisputed, and that the plaintiffs had provided expert testimony that the damage was caused by the excavation work, whereas the defendants either did not dispute this, or submitted a very weak expert opinion. The defendants failed to raise any issue of causation, and thus the court granted the summary judgment in regard to liability.

However, the court did not grant the motion in regard to the damages. The plaintiff submitted proof of damages which was contradictory, as there were four different bids for repairing the damages, and all were below the expert's opinion of the extent of the damages. Thus, the court determined that there must be a trial on the extent of the damages.

TAKEAWAY:

It is very common that when there is a new construction project, the adjacent building is damaged. Regardless of how carefully worded the access license agreement is, there will probably be damages and controversies which that license simply does not properly resolve. Careful documentation of the damages, and effective and experienced engineers, will help prepare the damaged party to obtain a quick resolution, and if not possible, will assist the court in determining the damages.

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PROPRIETARY LEASE

KORETZ V. 363 E. 76TH ST. CORP.

2024 NY SLIP OP 05185 (1ST DEP'T. OCT. 22, 2024)

Shareholder Has Right to Use Separate Entrance to Unit, but Not the Land Around It

SQUIB BY DALE DEGENSHEIN, PARTNER, FOX ROTHSCHILD

OUTCOME: Decided, in part, for Defendant-Appellee Co-op

WHAT HAPPENED: The plaintiff is a shareholder of the defendant cooperative corporation and owns the shares allocated to unit 1-A, a dental office. Prior to purchasing the shares, the plaintiff was the tenant of the unit. The plaintiff claimed he had exclusive use of an enclosed, private yard with a gate that allowed access to the unit from East 76th Street, and not through the main lobby of the building.

During façade work, the corporation demolished portions of the outdoor area and installed an accessible ramp along a portion of the private yard. The presence of the ramp does not prevent the plaintiff from accessing his unit through the 76 Street entrance. The question was whether the plaintiff had the right to use the yard leading to the separate entrance to his dental office. The plaintiff rented the unit from the cooperative before purchasing it. Shares had not been allocated to the unit in the initial offering and an appraisal was performed and relied on when allocating shares.

IN COURT: The court reviewed the appraisal and other information to address the plaintiff's argument that he paid a premium for the outdoor area, as evidenced by the appraisal and the share allocation as compared to other apartments. The defendant, for its part, asserted that nothing in the proprietary lease, or a supplement that was negotiated, gave the plaintiff exclusive use of any areas outside the unit. Rather, the supplement specifically stated that the plaintiff had the right to use the separate building entrance to the street.

The appellate court initially found that the supplement was ambiguous as to whether the plaintiff had the right to use the yard or just the street entrance. After discovery, the lower court determined that extrinsic evidence established that the parties intended to permit the plaintiff to have exclusive use of the entrance, but not the surrounding land, including the area where the ramp was placed. The appellate court affirmed.

TAKEAWAY:

Time and time again, I see disputes where a shareholder believes they have exclusive access to X area, while the cooperative corporation believes exclusive access does not exist, or it is for a smaller area than the shareholder believes. This case is a reminder that corporations and shareholders should prepare an agreed-upon drawing, or floor plan, so that disputes of this type are minimized.

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