CO-OP&CONDO
CASE LAW TRACKER
digest
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ALTERATIONS

LANE V. 880 FIFTH AVE. CORP.

NO. 158299/2018 (SUP. CT. N.Y. CNTY. OCT. 24, 2024) NYSCEF NO. 85

Letter Agreement Waiving Further Performance of Alteration Agreement Released Third-Party Defendants from Any Claims

SQUIB BY KRISTIN PENDERGRASS, COUNSEL, SEYFARTH SHAW

OUTCOME: Decided for Third-Party Defendants

WHAT HAPPENED: Plaintiff Robin Lane, the former tenant-shareholder of apartment 15C in the cooperative apartment building owned by defendant 880 Fifth Avenue Corporation, commenced this action against the co-op and members of its board of directors.

In 2012, the third-party defendants Fred Piumelli and Dianna Piumelli, the owners of apartment 16C in the building, performed alterations to their apartment, including the installation of a new toilet in the master bathroom. During the alterations, the third-party defendants' contractor improperly installed and/or improperly insulated a waste line pipe below the master bathroom, which caused the sound of water to become audible and disruptive in apartment 15C. The plaintiff alleged that the noise was so disruptive that she could no longer live in the apartment and that, after the co-op failed to remedy the problem, she was forced to sell the apartment for below market value.

The plaintiff asserted claims against the defendants for breach of the proprietary lease, breach of the warranty of habitability, and breach of fiduciary duty.

The defendants subsequently filed a third-party complaint against the third-party defendants for indemnification and contribution. The defendants alleged that the alteration agreement executed by the co-op and the third-party defendants in connection with the apartment 16C alterations included a provision requiring the third-party defendants to indemnify the defendants for damages or losses attributable to the alteration work, including all plumbing installed in connection therewith.

The defendants also alleged that the third-party defendants were obligated to indemnify them as a

(continued on p. 3)

JANUARY 2025 HIGHLIGHTS

DISCRIMINATION
Court Dismisses Claims Against Condo for Board President's Alleged Harassment

EVICTION/TERMINATION
Retroactive Provisions in Sponsor-Landlord's Lease Renewal Offer Rendered It Invalid

FIDUCIARY DUTY
Court Holds Board Members Personally Liable for Damages Owed to Commercial Unit Owner

PROPRIETARY LEASE
Parties' Continued Failure to Enforce Proprietary Lease Provision Is Deemed a Waiver

RECEIVERSHIP
Court Appoints Receiver in Dispute Over Control of Downtown Co-op Building

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

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Volume 4, Issue 8

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.

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matter of law because the plaintiff's claimed damages were caused by the negligence or acts and omissions of the third-party defendants and/or their agents.

IN COURT: The third-party defendants moved for summary judgment dismissing the defendants' claims, arguing that they had entered into a letter agreement with the co-op in 2016 at the conclusion of the apartment 16C alterations in which the co-op waived further performance of the alteration agreement and released the third-party defendants from any claims concerning complaints about noise.

The third-party defendants cited to language in the letter agreement which stated that by executing the letter agreement, the co-op "hereby waives and releases you from and against any and all claims, causes of action, demands, losses or damages arising directly or indirectly from the resolution of the 16C Complaints and performance of the Alteration Agreement," and defined the "16C Complaints" as including the noise complaints raised by the plaintiff.

In opposition, the defendants argued that their indemnification and contribution claims did not arise from the resolution of the plaintiff's noise complaints or the performance of the alteration agreement and, therefore, the release in the letter agreement did not apply.

The court agreed with the third-party defendants and dismissed all of the defendants' claims against them, finding that the section of the letter agreement at issue was "a standard release provision which applies to the main action," i.e., the plaintiff's complaint. The court also held that the third-party defendants had fulfilled their obligations under the letter agreement, the terms of the release were not ambiguous, and there was no evidence of duress, fraud, mutual mistake, or other grounds for setting aside a written agreement.

TAKEAWAY:

Courts interpret general release language in an agreement as covering claims for indemnification and contribution, not just direct claims by the releasor. Here, the co-op released any and all claims against the third-party defendants arising out of the alteration agreement or the plaintiff's noise complaints when they entered into the letter agreement, including its right to seek indemnification or contribution. When entering into agreements to resolve alteration-related disputes with shareholders or unit owners, co-op and condominium boards should ensure that any related disputes are also resolved or are exempted from the release. Parties should also consider specifically carving out claims for indemnification and contribution from release language. Otherwise, the co-op or condominium may be left holding the bag for damages caused by a released party.

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ARBITRATION

STEFANSKY V. KAUFMAN

2024 NY SLIP OP 51496(U) (SUP. CT. KINGS CNTY. NOV. 5, 2024)

Court Won't Compel Arbitration Where There Was No Written Agreement to Arbitrate

SQUIB BY DALE DEGENSHEIN, PARTNER, FOX ROTHSCHILD

OUTCOME: Decided for Condo Plaintiffs

WHAT HAPPENED: This case involves an access and license agreement between neighbors. The plaintiffs (at 1541 51st Street, Brooklyn) claim that the defendants (1545 51st Street, Brooklyn) breached the access agreement.

In November 2022, the defendants requested temporary access to the plaintiffs' building. In addition, the plaintiffs agreed to the temporary removal of a fence to facilitate work. The work was to take two weeks, after which per diem monies were to be paid.

The work took longer than expected and, according to the plaintiffs, the defendants owe the per diem. In addition, the plaintiffs assert that the defendants did not properly reinstall the fence. The plaintiffs sued for breach of contract, unlawful trespass, a permanent injunction, and money damages.

The pre-answer motion before the court is to stay the action pending arbitration in a Rabbinical Court.

IN COURT: In February 2023, the plaintiffs served defendants with a hazmana, a summons from a Rabbinical Court to arbitrate, and the matter was settled for some $8,900. However, it appears that someone on behalf of the plaintiffs informed the defendants that a plaintiff was not happy with the settlement. Indeed, the plaintiffs claimed the money was for certain, but not all, damages sustained. Accordingly, the parties agreed to have the matter heard and resolved by a specific Beth Din, another Rabbinical Court.

While the parties spent more than a year trying to find a convenient date for arbitration, the plaintiffs ultimately filed this action in Supreme Court. The defendants objected, arguing that it is "customary and required of observant Jews" that they have disputes heard in a Beth Din. Further, the defendants assert that judicial policy favors arbitration.

For their part, the plaintiffs claim that there is nothing in any agreement that requires arbitration and, further, that while discussions did take place, the plaintiffs never agreed to arbitration.

The court agreed that agreements to submit to arbitration are "[a]n effective and expeditious means of resolving disputes . . . [citation omitted]." Therefore, a written agreement to arbitrate is enforceable. However, a party seeking to compel arbitration must establish the existence of such an agreement. Moreover, the agreement to arbitrate must expressly and unequivocally refer to the subject matter. An agreement to arbitrate is not binding unless there is a "clear, explicit, and unequivocal agreement to participate [citation omitted]."

After reviewing the email communications, the court concluded that while the plaintiff was "amenable" to arbitrating, she never explicitly agreed to arbitrate. At best, she agreed to agree—which is not binding.

The court refused to grant the defendants' motion to compel arbitration or any other branch of the defendants' motion to dismiss.

TAKEAWAY:

While this case involves small houses in the Borough Park area of Brooklyn, it is instructive in any event. If parties intend to arbitrate—regardless of the custom and practice within their community—the agreement to arbitrate must be in writing, express and unequivocal. In fact, there are various sections of the decision where the court, almost casually, states that the parties entered into an "agreement." However, what appears to be a series of verbal agreements, or mere acquiescence, does not rise to the level required to mandate arbitration.

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COMMERCIAL UNIT

THE BD. OF MGRS. OF THE 900 PARK AVE. CONDO. V. PARK PARK ASSOC., LLC

2024 NY SLIP OP 34016(U)(SUP. CT. N.Y. CNTY. OCT. 31, 2024) NYSCEF NO. 61

Trial Needed to Determine Whether Governing Documents Make Commercial Unit Owner Solely Responsible for Garage Repair Costs

SQUIB BY HELENE W. HARTIG, PRINCIPAL, THE LAW OFFICE OF HELENE W. HARTIG

OUTCOME: Decided, in part, for Defendant Commercial Condo Unit Owner

WHAT HAPPENED: Plaintiff residential board of managers alleged that a concrete slab in the garage owned by the defendant caused structural damages, and that the defendant was responsible for the cost of repairs and future maintenance. The plaintiff alleged that the defendant, not the plaintiff, was liable because the language of the condominium bylaws and declaration did not classify the garage as a "common element," which shared expenses. The plaintiff further alleged that even if the court considered the garage to be a "common element," the defendant was nevertheless responsible for making repairs at its own cost because the defendant was negligent and compromised the structural integrity of the commercial unit.

The defendant denied responsibility for the alleged defective conditions and claimed that that there were disputed issues of fact that precluded summary judgment in favor of the plaintiff. The defendant also argued that the plaintiff's action was precluded by the statute of limitations.

IN COURT: The court held that the condominium bylaws and declaration must be reviewed in tandem to determine their meaning and intent. Because the parties' own experts had differing interpretations of the bylaws, it was not clear to the court what the parties intended and, thus, summary judgment was inappropriate at this preliminary stage.

The court also declined to hold that the concrete slab in the garage had damaged the residential unit or that the defendant had been negligent and, thus, responsible for the cost of repairs. The court further held that the defendant's previous repairs did not constitute an admission that it was responsible for performing subsequent repairs or maintenance.

Finally, the court dismissed the defendant's defense based on the expiration of the statute of limitations, holding that the plaintiff did not wait too long to pursue its claims. According to the court, "[t]here is no date after which the unit owners will not be bound to adhere to the declaration and the by-laws" and that, since the contract required "continuing performance over a period of time", each successive breach may begin the statute of limitations running anew."

TAKEAWAY:

A court will not impose liability on a commercial unit owner simply because it has made repairs in the past at its own expense and has allegedly admitted responsibility for maintaining its unit. Despite past practices between the parties, the court will carefully review the language in the condominium bylaws and declaration and reserve judgment until discovery is completed when the intent and meaning of these documents are sharply disputed (through expert affidavits or other submissions) or unclear.

Despite the seeming inequities, a residential condominium may, in appropriate circumstances, also be required to subsidize replacements, repairs, or renovations for the entire condominium, including the commercial unit. A condominium must also be careful not to run afoul of any relevant statute of limitations. While contracts between the parties many impose continuing obligations that extend the parties' obligations each time there is a breach, if a plaintiff waits too long to seek judicial assistance, the court may be hesitant to provide relief.

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CONTRACTS

CENT. CONST. MGMT. LLC V. DURHAM

2024 NY SLIP OP 34214(U) (SUP. CT. N.Y. CNTY. NOV. 19, 2024) NYSCEF NO. 316

Condominium's Failure to Prove Damages Results in Breach of Contract Award to Contractor

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

OUTCOME: Decided for Plaintiff, Defendant Condo Board

WHAT HAPPENED: In April 2017, the plaintiff, a contractor, entered into a contract with the St. Tropez Condominium to perform a façade repair project. The contract allowed the condominium to terminate "for cause" or "for convenience."

The condominium alleged that the plaintiff caused damage to the building's pool fence and pool deck, resulting in flooding and water damage. In May 2018, the condominium terminated the contract by written notices, each of which failed to specify whether the termination was for cause or for convenience.

Following the termination, the condominium ordered the removal of all materials, tools, and equipment from the building. While the plaintiff withdrew its workers from the property, it did not remove all of its equipment and materials. The condominium claimed additional costs for removing the plaintiff's equipment, and for delaying the resumption of the work by the condominium's replacement contractor.

In June 2018, the plaintiff notified the condominium that it was owed approximately $440,000 for work performed and accrued charges. The condominium's attorney responded in July, disputing the claim and asserting that the damages caused by the plaintiff exceeded the amount owed. The plaintiff commenced this lawsuit in October 2018 alleging, among other things, breach of contract and seeking the disputed amount.

IN COURT: In its response, the condominium responded that the plaintiff caused damage to several areas of its building and failed to timely remove its equipment and materials, resulting in additional damages. The plaintiff moved for summary judgment.

The court granted the plaintiff's motion for summary judgment, ruling that the condominium had breached the contract. The court also dismissed the condominium's counterclaims for breach of contract, abuse of process, and attorneys' fees. The court found that, regardless of how the contract was terminated, the plaintiff was entitled to the disputed amount, which had been itemized and presented to the condominium one month after the termination. Furthermore, the court ruled that both parties waived claims for consequential damages, including those related to termination, so the condominium could not support its claims for damages.

However, the condominium's negligence counterclaim survived dismissal, as it alleged that the plaintiff damaged the building during the demobilization.

Ultimately, the court concluded that the condominium failed to provide sufficient evidence to raise a triable issue of fact, relying solely on an affidavit from the board president and a letter from the condominium's former attorney. The court deemed the condominium's defense speculative and unsupported by documentary evidence (in addition to the waiver of consequential damages). The defendant has since appealed.

TAKEAWAY:

Contract language and facts matter. When terminating a contract, boards, property managers, and their attorneys should carefully assess whether termination for cause or convenience is more appropriate. These options can lead to different methods for calculating damages and determining any payments owed to the contractor. Additionally, before terminating, they should evaluate the underlying facts to ensure that claims for damages are substantiated.

Attorneys should also review contract documents to confirm the scope of any mutual waiver of consequential damages. Such waivers could unintentionally prevent an owner from asserting claims against a contractor. If attorneys believe this court's interpretation of the language was overly broad, they should consider narrowing the language in future contracts.

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DISCRIMINATION

KHATSKEVICH V. VICTOR

2024 NY SLIP OP 33909(U) (SUP. CT. N.Y. CNTY. NOV. 1, 2024)

Court Dismisses Claims Against Condo for Board President's Alleged Harassment of Personal Assistant

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

OUTCOME: Decided for Condo Defendant

WHAT HAPPENED: Plaintiff Yevgeniya Khatskevich sued Adam Victor and several other entities controlled by Victor for numerous counts of assault, discrimination on the basis of immigration status under the NYC Human Rights Law, retaliation, breach of contract, aiding and abetting various forms of sexual harassment and discrimination, and other related claims. She also named as a defendant the Manhattan Place Condominium, where Victor maintained his offices and served as the long-time president of the board of managers.

The plaintiff had been hired by Victor as an administrative assistant, but her role included assisting Victor and the employees of his various entities in executing his business plans, marketing, and other activities, some of which may have been criminal. During her period of employment, Victor had also engaged in numerous forms of sexual harassment. When she objected or sought a change in her duties, Victor threatened to have her deported. Her relationship continued for years until she extricated herself and commenced her lawsuit.

Khatskevich alleged that on Victor's instructions, from time to time her work included assisting the condominium staff and consultants with administrative tasks and condominium projects. She claimed Victor "controlled" the condominium, gave her instructions on behalf of the condominium, submitted invoices to the condominium for work that she performed, and in one case that he received (but pocketed) a $6,000 check supposedly made out to her by the condominium (but which she never actually saw). Therefore, she included the condominium as a defendant in the case.

IN COURT: The plaintiff asserted that under the New York City Human Rights Law, it was not necessary to show any employment or joint employment relationship in order to be liable for discrimination. It was sufficient that the person engaged in such discrimination be acting on behalf of the condominium, as Victor was in his capacity as board president, and that her work was performed (either as an employee or an independent contractor) in furtherance of condominium business.

The condominium made a motion to dismiss her claim against it in its entirety, asserting that Victor never had authority to employ or engage her to act on behalf of the condominium and that she had provided no evidence that she was ever employed by the condominium or had received payment from the condominium. Further, to the extent she was performing duties on Victor's behalf, there was no proof that he was doing so in his capacity as the president of the condominium (as opposed to the chief executive of his other entities). The court agreed.

The court found that Khatskevich had never consulted with anyone employed by the condominium, never made any inquiry to other board members, never sought any employment benefits (even though the condo employees were union members), and never received compensation directly from the condominium. Nor did the condominium have any degree of control over the terms of the plaintiff's employment, which might render them a joint employer. Since Victor was not an employee, the condominium also was not liable under the principle of respondeat superior. In addition, the plaintiff never furnished any evidence that the condominium aided or abetted the discrimination that the plaintiff alleged on Victor's part, or that it had assisted Victor in any of his retaliatory actions. Therefore, the condominium's motion for summary judgment was granted on all counts.

TAKEAWAY:

The details of Victor's abuse of his relationship with the condominium (as well as the plaintiff) are juicy but irrelevant. The condominium's adherence to the formalities of an employment relationship saved it from a messy situation.

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EVICTION/TERMINATION

AERO MGT. V. MOGHADASIAN

2024 NY SLIP OP 34062(U) (N.Y. CIV. CT. QUEENS CNTY. NOV. 20, 2024)

Retroactive Provisions in Sponsor-Landlord's Lease Renewal Offer Rendered It Invalid

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

OUTCOME: Decided for Respondent

WHAT HAPPENED: The sponsor and landlord of an apartment situated within a cooperative building offered its tenants of over 30 years a renewal of their month-to-month lease with a 35 percent increase in rent. The tenancy was subject to the Martin Act. The renewal lease was never executed by the parties. Accordingly, the sponsor-landlord issued a 90-day notice of termination of the tenants' occupancy of the apartment based on their failure to sign the renewal lease and thereafter commenced a summary holdover proceeding seeking their eviction.

IN COURT: The parties were unable to resolve the holdover proceeding in the resolution part of the housing court, so the case was transferred to the trial part for a trial date. Before the trial was scheduled, the parties and the court agreed that there were no issues of fact and that the case could be decided as a matter of law. Each side submitted a memorandum of law to support their position on four questions of law to be decided.

First, the court determined that, although the renewal lease offered by the landlord included a rent increase greater than 5 percent, the landlord was not required to issue a separate 90-day notice of termination based on such increase, as it had already issued a 90-day notice of termination based on the tenants' failure to renew the lease, thus meeting the requirements of RPL §226-c.

Second, the court determined that the lack of an end date of the monthly tenancy did not render the renewal offer made by the landlord invalid. The lease stated that the rent would not be increased for a period of one year as required by the Martin Act, thus the renewal offer was valid.

Third, the court determined that the renewal offer was invalid since it provided that the commencement date and appurtenant increase in rent were retroactive. To determine the validity of the renewal offer (since the Martin Act does not include failure to renew as an acceptable basis for termination of a lease) the court looked to other regulatory schemes for guidance. Under rent regulation, a landlord's failure to offer a tenant a timely renewal lease gives the tenant the option to set the start date of the renewal lease. Here, since the lease renewal offer included a start date four months before the offer was even made, the court held that the retroactive nature of the lease rendered it invalid.

Finally, although the issue did not need to be determined by the court, the court did find that a hearing would be necessary to determine the question of whether the rent increase was unconscionable under the Martin Act.

TAKEAWAY:

It is well known that summary eviction proceedings are driven by timing-specific regulations. Missing a notice period by even a day can render an eviction proceeding defective, requiring that it be done all over again. Compliance with statutory deadlines is paramount, including the additional strict requirements imposed under the Housing Stability and Tenant Protection Act. It is better to issue a new notice and potentially lose a few months than to rely on a possibly defective or untimely notice and face dismissal after an eviction case is pending for an extended period. Many courts have yet to recover from the backlog of cases since 2020, causing summary eviction proceedings to take a year or more to get to trial. If it's wrong, fix it early.

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FIDUCIARY DUTY

GILBERT V. WINSTON

2024 NY SLIP OP 34088(U)(SUP. CT. N.Y. CNTY. NOV. 19, 2024) NYSCEF NO. 285

Court Holds Board Members Personally Liable for Damages Owed to Commercial Unit Owner

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

OUTCOME: Decided for Plaintiff Residential Unit Owners

WHAT HAPPENED: For more than a decade, the Board of Managers of The Parc Vendome Condominium, a 587-unit complex located on 56th and 57th Streets in Manhattan, prevented the owner of the commercial unit, Parc 56 LLC, from realizing the value of its investment. The board refused to waive, or exercise, the board's right of first refusal with respect to a proposed commercial tenant. It refused to honor its alteration agreement with the commercial unit owner that became effective after the board did not timely object as required by the bylaws. It also refused to sign forms for filing with the Department of Buildings to amend the certificate of occupancy unless the commercial unit owner agreed to take on unknown costs associated with bringing common elements up to code that had no connection to the commercial unit.

The commercial unit owner eventually sued the board. In that action, the trial court and Appellate Division ruled that the board's answer should be stricken and summary judgment awarded to the commercial unit owner because the board had breached its fiduciary duties, acted in bad faith, taken frivolous positions, and attempted to perpetuate a fraud on the court. Among other things, the board evasively denied the existence of the $10,000 alteration fee paid by the commercial unit owner's predecessor, and insisted that that the obligations the board sought to impose on the commercial unit owner were taken from the governing documents when, in fact, the board took that language directly from a provision in an unadopted eighth amendment to the declaration. Proceedings to compute the commercial unit owner's damages are ongoing.

In this case, residential unit owners at the condominium sought to have the board members personally pay for the costs and damages caused by their bad-faith breaches of fiduciary duty and to prevent them from imposing those costs and damages on the unit owners through assessments or otherwise.

IN COURT: Both sides moved for summary judgment, and the court ruled in favor of the plaintiff unit owners. Applying the doctrine called collateral estoppel, the court said that the defendants are barred from once again litigating whether they acted in good faith or otherwise breached their fiduciary duties in the manner in which they conducted themselves in the underlying lawsuit and with respect to the commercial unit owner. The court also said that individual board members may be held liable where they have participated in the corporation's tort or otherwise acted in bad faith in the discharge of their duties. Here, the court said that the record included many examples where the individual defendant board members participated in or otherwise ratified multiple bad faith breaches of fiduciary.

In conclusion, the court ruled that both the costs incurred in defending the underlying lawsuit and the damages assessed are properly borne by the defendant board members, that summary judgment was appropriate, and no trial was warranted.

TAKEAWAY:

Board members do not expect to incur personal liability for their service. This case is an extreme example showing that it can happen where a board has been found to have deliberately failed to follow the governing documents and contractual requirements with improper motives. The court's ruling would seem to preclude the board members from receiving indemnification from the condominium under the bylaws, and might be excluded from coverage under the applicable directors and officers insurance policy. In the underlying suit, the commercial unit owner is seeking more than $11.5 million of damages. If upheld on appeal, the individual board members will be on the hook for the eventual award of damages and for the fees and costs of that litigation if not covered by insurance.

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LIENS

BD. OF MGRS. OF THE ALEXANDRIA CONDO. V. ADELMAN

2024 NY SLIP OP 33941(U) (SUP. CT. N.Y. CNTY. NOV. 1, 2024)

Condo Board Not Liable for Damages After Dishwasher Explodes in Owner's Unit

SQUIB BY MICHAEL P. GRAFF, ATTORNEY/MEDIATOR, GRAFF DISPUTE RESOLUTION

OUTCOME: Decided for Condo Board

WHAT HAPPENED: The dishwasher in Adelman's unit allegedly spontaneously exploded, resulting in a fire, toxic chemical fumes, smoke, and exhaust. By these claims, Adelman seeks money damages for personal injury and property damages. Adelman withheld paying common charges, and when the condo commenced this proceeding to foreclose on its lien for common charges, Adelman counterclaimed for damages.

IN COURT: In an earlier decision, the counterclaims were severed from the foreclosure action. The court reasoned that the counterclaims were not "inextricably intertwined" with the claim for condo common charges. The condo was not a cooperative apartment, and there was no warranty of habitability, so the purported defective conditions are not grounds to withhold common charges. Nor were the claims for personal injury and property damages related to his nonpayment of common charges.

In a later decision, the court held that as there was no dispute that Adelman, as owner of the apartment, owes common charges, the condo was entitled to summary judgment on its claim to foreclose on unpaid amounts, the amount to be determined by a referee. Also, the court severed and dismissed Adelman's affirmative defenses regarding the verification, clean hands, and abuse of process. It also dismissed the defense of prevention from the use and enjoyment of his apartment after allegedly being locked out.

Six years later, the case came before the court in this decision, and the court held as follows:

Whether the condo owed Adelman a duty of care in tort necessitated examination of the nature of a condominium. It is the bylaws that define the existence or absence of a duty of care. The bylaws provided that all maintenance of, or repairs to any unit, structural or non-structural, shall be made by the owner of the unit. Replacement of appliances after a fire causing damage is not the responsibility of the board. Also, members of the board shall not be liable to the unit owner for any mistake in judgment, negligence, or otherwise except for their own individual willful misconduct or bad faith. The board is not responsible for replacement of appliances as part of its duty. Therefore, the condo owned no duty of care to Adelman to keep his unit and appliance in reasonably safe condition. Therefore, the negligence cause of action failed.

The board does owe unit owners a fiduciary duty when it commits misconduct, and the unit owner suffered damages caused by that misconduct. However, the individual board members are protected by the business judgment rule absent allegations of tortious acts outside of legitimate condominium's purposes. The rule bars judicial inquiry into actions taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. Here, the condo demonstrated that its actions after the fire in Adelman's unit were taken without malice and in furtherance of its purposes.

The breach of warranty claim failed because the condo was not the seller of the dishwasher and made no express or implied representation as to it.

Adelman claimed the condo converted his washing machine when it moved it to a storage facility after the fire. However, he was informed of it and his right of possession was not interfered with.

Adelman's claim against the loss of use and quiet enjoyment of his unit was disposed of in the earlier decision. But he was not denied access and was at all

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times possessed of a key and the ability to access the unit.

Adelman's claim that the condo's actions after the fire constituted abuse of process failed; there was no proof of unlawful interference with his person or property.

Similarly, the elements of intentional infliction of emotional distress failed. The conduct of the condo was not shown to be "beyond all possible bounds of decency."

The court dismissed all counterclaims and denied Adelman's motion for summary judgment.

TAKEAWAY:
Typically, a condominium homeowner's policy of insurance covers damage to the appliances and other personal property of the unit owner in the event of fire, water damage, or other casualties. It is wise for the unit owner to secure such coverage and for the board to require that the unit owners (and their tenants) maintain such coverage.

PROPRIETARY LEASE

DE FEX V. ZADUMIN

2024 NY SLIP OP 34008(U) (SUP. CT. KINGS CNTY. NOV. 12, 2024)

Parties' Continued Failure to Enforce Proprietary Lease Provision Is Deemed a Waiver

SQUIB BY PETER T. SALZLER, ASSOCIATE, BRAVERMAN GREENSPUN

OUTCOME: Decided, in part, for Co-op Defendants

WHAT HAPPENED: The plaintiff, the former president and treasurer of the 2606 Cropsey Ave, Inc. co-op in Brooklyn, brought various claims against the co-op and its current president relating to alleged breaches of the proprietary lease involving improper collection of parking rental fees and a failure to produce audited financial statements prepared by an independent CPA from 2007 onward as required by paragraph 5 of the lease.

The defendants brought counterclaims alleging various financial misdeeds by the plaintiff from his time on the board, including accepting payment for unapproved services to the co-op that were never provided, and that the plaintiff also failed to cause the board to provide audited financial statements prepared by an independent CPA when he was on the board from 2011 to 2017.

IN COURT: Both parties moved for summary judgment. The plaintiff's motion was denied on its face because he failed to submit an affidavit from a person with knowledge of the underlying facts of the motion and instead merely submitted an attorney affirmation and an unsigned and unsworn "affidavit" from the plaintiff.

The court then addressed the defendants' motion for summary judgment to dismiss the plaintiff's breach of contract claim, which, in part, sought specific performance by the co-op of its obligation to comply with paragraph 5 of the lease. In reviewing the claim, the court found that all parties to the lease waived the right to have the co-op's financial statements certified by an independent CPA due to the co-op's failure to comply with this lease provision for decades. The court noted that there was no evidence that the co-op ever produced statements that complied with the lease and that such a course of conduct established a waiver of the lease provision.

For the same reason, the court held that the defendants' counterclaim that the plaintiff breached the lease and/or his fiduciary duty by failing to comply with paragraph 5 of the lease when he served on the board was also waived.

TAKEAWAY:
Parties' course of conduct can establish a waiver of certain provisions of a proprietary lease. This case did not address the application of a "no-waiver clause" that is standard in proprietary leases, but practitioners should be mindful that a long-term course of conduct can act as a waiver of the right to enforce certain claims.

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RECEIVERSHIP

MONARI V. LU

2024 NY SLIP OP 34038(U) (SUP. CT. N.Y. CNTY. NOV. 14, 2024)

Court Appoints Receiver in Dispute Over Control of Downtown Co-op Building

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

OUTCOME: Decided for Plaintiffs, Defendants

WHAT HAPPENED: The decision in this case is only one of several in an ongoing dispute between and among shareholders of the Church Street Apartment Corporation as to who are the properly elected and duly authorized directors of the co-op.

The main point of dispute is a purported shareholders' meeting held in May 2023. The meeting was called on behalf of the five plaintiffs, and at said meeting, the attendees allegedly voted to remove the two defendants from the co-op's board. The plaintiffs then moved for a preliminary injunction preventing the defendants from holding themselves out as directors or officers of the co-op. In the alternative, the plaintiffs sought the appointment of a receiver.

IN COURT: The court denied the preliminary injunction because the plaintiffs were not able to establish a likelihood of success on their claim that the May 2023 meeting was properly noticed. On the contrary, it appeared from the available record that there were "multiple areas of disputed fact" about the validity of the meeting, so the court refused to issue the injunction.

However, the court did grant the alternative relief of the appointment of a temporary receiver. A receiver was deemed necessary because of the uncertainty generated by the dispute over control of the co-op's affairs. Until the court decides the substantive claims as to who are the duly authorized directors and officers of the co-op, there is a risk that unless a receiver is appointed, no one would be allowed to act on behalf of the co-op. As the court put it, a temporary receiver is appropriate where "there is a danger that the property will be materially injured or lost during the pendency of this action."

TAKEAWAY:

Disputes over control over a co-op or condo's board of directors are not uncommon, particularly in smaller buildings like this one where corporate formalities are less likely to be strictly observed. In this case, the court protected the parties from the worst risks of a protracted control dispute, as a receiver can ensure that the co-op's bills are paid and essential services are provided for. It goes without saying, however, that co-op and condo boards should manage their internal affairs so as to avoid bona fide disputes over board elections, as a temporary receiver is an expensive and inefficient way to run a building (not to mention the costs and strife involved in the underlying dispute itself).

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REPAIRS

TOPILIN V. ISLAND HOUSE TENANTS CORP.

2024 NY SLIP OP 34021(U) (SUP. CT. N.Y. CNTY. NOV. 8, 2024)

Court Denies Shareholder's Motion to Stop Foreclosure of Fire-Damaged Apartment

SQUIB BY ANDREW P. BRUCKER, PARTNER, FOX ROTHSCHILD

OUTCOME: Decided for Co-op Defendants

WHAT HAPPENED: The plaintiff purchased an apartment in a Manhattan cooperative, with a loan from her credit union. A fire broke out in 2017, soon thereafter, and the premises and the plaintiff's personal belongings suffered heavy damage, leaving the unit uninhabitable. Though the proprietary lease required insurance, the plaintiff admitted that she never obtained any insurance.

In early 2018, although there was no obligation to do so under the proprietary lease, the co-op defendant offered to repair the apartment from the insurance proceeds it had received, provided the plaintiff signed a release. The plaintiff refused the offer, padlocked the unit, and refused to pay her maintenance. The apartment remained in its damaged state for more than six years.

In 2022, the lender received a notice that the plaintiff was in arrears, and the lender commenced paying the maintenance (to protect its collateral). In March 2023, the lender declared the loan in default. At around the same time, the plaintiff commenced an action seeking an order directing the co-op to correct violations in the apartment, and on the same day brought an action against the co-op, seeking damages for negligence and breach of contract, and seeking money damages for property damage (and a maintenance abatement). The lender then issued a notice of sale pursuant to Article 9 of the Uniform Commercial Code.

IN COURT: The action was dismissed on technical grounds, and the plaintiff then commenced the current action against both the co-op and the lender with 14 causes of action, including breach of contract, breach of fiduciary duty, declaratory judgment, etc. But before service was made, the plaintiff filed an order to show cause seeking various types of injunctive relief, and the court granted a temporary order prohibiting the sale of the apartment. Both defendants opposed the motion prohibiting the sale, and cross-moved to dismiss the complaint.

Typically, a motion to dismiss will not be granted if the pleading states a cause of action and there are factual allegations that manifest any cause of action, and in so evaluating the pleadings, the allegations will be presumed to be true. But, as noted by the court, when bare legal conclusions and factual claims are flatly contradicted by evidence submitted, the court need not make that presumption. In this case, the court held that the breach of contract claim fails, as the plaintiff admitted she had not paid maintenance for many years (nor debt service since 2023), and the breach of fiduciary duty fails, as there was no wrongdoing. As for the declaratory judgment, the court held there was no bona fide controversy, as the fire took place years before, and any actions are now time-barred. Similarly, five other causes of actions failed due to the statute of limitations. The remaining causes were also dismissed.

Based on the foregoing, the plaintiff's motion to stop the foreclosure sale was denied, and the court vacated the temporary stay of the sale, which now could take place.

TAKEAWAY:

Courts will not give a party the benefit of the doubt if the facts presented to the court are not clear and consistent, and furthermore, bare legal conclusions will not convince the court that a motion for summary judgment (or a motion to dismiss) will be granted. Clear and concise papers submitted to the court are essential for winning any motions prior to trial. Further, prior to bringing any action, the party and its counsel must consider when the cause of action arose, because bringing an action beyond the statute of limitations will result in a dismissal, regardless of how worthy the cause of action may be.

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REPAIRS

BD. OF MGRS. OF VLY POINTE CONDO. V. MBN MGMT. CO.

2024 NY SLIP OP 51605(U) (SUP. CT. SCHENECTADY. CNTY. NOV. 13, 2024)

Condo's Lawsuit Against Easement Holder for Maintenance Costs Survives Motion to Dismiss

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

OUTCOME: Decided for Plaintiff Condo

WHAT HAPPENED: An upstate residential condominium apparently got tired of paying all the costs necessary to maintain a roadway, which required upkeep, patching, and snow plowing in winter. The condo sued an adjacent commercial property owner, which had been granted an express easement over the roadway for ingress and egress to its business. The deed given to the commercial owner required it to "repair" any damage to the easement, but the deed made no mention of "maintenance" or similar costs relating to the easement.

The commercial owner moved to dismiss the complaint based on the deed's language, while the condo countered that under the common law, all users of an easement shall share ratably in the cost of maintenance unless there is an express agreement to the contrary.

IN COURT: On a motion to dismiss, the court had to give the allegations of the complaint every possible favorable inference. In construing the language of the deed, the court found that the interpretation urged by the commercial owner was not indisputable. One could harmonize the deed's terms with the condominium's theory seeking maintenance payments from the commercial owner. As such, because the language of the deed did not utterly refute the condo's legal theory, dismissal in favor of the defendant was not appropriate at this stage of the proceedings. Motion denied.

TAKEAWAY:
They say a tie goes to the runner in baseball, and perhaps it is a useful concept when considering a motion to dismiss. A movant seeking dismissal on documentary evidence must utterly and conclusively demonstrate that the plaintiff has no claim. Here, the language in the deed allowed for two different results, one favoring the plaintiff and another favoring the defendant. The tie goes to the condominium, which can continue to prosecute its claim for maintenance against the easement holder.

STOCK/SHARES

322 W. 47TH ST. HDFC V. LOO

2024 NY SLIP OP 34155(U) (SUP. CT. N.Y. CNTY. NOV. 26, 2024) NYSCEF NO. 507

Decade-Old Dispute Over Whether Tenant Is Shareholder Can Proceed to Trial

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

OUTCOME: Decided for Plaintiff

While the main part of this decision was simply the denial of a motion for summary judgment, the import of this case is to continue to highlight the complexities and expense of litigation.

This is a long-standing dispute previously reported in 2021 involving the same building but a different shareholder. Here, the defendant claims to be a

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shareholder; the cooperative claims he never completed his purchase and is therefore still a tenant subject to eviction. Even though the shareholder has a proprietary lease and the transaction was reflected on the New York City Automated Registration Information System (ACRIS), the cooperative claims that the shareholder never complied with all closing requirements, including paying New York City its share of the flip tax, and the fact that individuals who signed the lease on behalf of the cooperative lacked authority to do so.

This was the second set of summary judgment motions brought in this proceeding (which the court allowed because additional facts came to light during discovery), but the court denied both motions anyway on the grounds that issue of fact existed as to the validity of the transfer. The result is that this case, which was commenced in 2014 and has been aggressively litigated, will continue and proceed to trial.

TAKEAWAY:

This case highlights the risks and expenses inherent in litigation and why boards should try to avoid it whenever possible. The second attempt by both parties for an expedited decision by summary judgment was denied, so the decade-old litigation continues.

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