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ACCESS

FIRST AND RIVER LLC V. THE BD. OF MGRS. OF THE HORIZON CONDO.

2024 NY SLIP OP 34319(U) (SUP. CT. N.Y. CNTY. DEC. 5, 2024)

Property Owner Gets Attorneys' Fees in RPAPL 881 Proceeding Brought by Neighbor for Access to Perform Elective Renovations

SQUIB BY STEVEN SLADKUS, PARTNER, SCHWARTZ SLADKUS REICH GREENBERG ATLAS

OUTCOME: Decided, in part, for Petitioner

WHAT HAPPENED: The petitioner, First and River LLC, owns a building adjacent to the Horizon Condominium, which is governed by the respondent, The Board of Managers of the Horizon Condominium. The petitioner's building adjoins and abuts the west façade of the respondent's building.

The petitioner planned to perform elective renovations to its building, which it commenced without notifying the respondent and without installing protections to protect the respondent's building from damage. The petitioner's demolition work exposed portions of the west façade to the elements, resulting in the petitioner's seeking to waterproof portions of the respondent's west façade without the petitioner's consent or knowledge. The waterproofing material, which the petitioner essentially trespassed to install, was not sufficiently applied.

The respondent presented the petitioner with a stop-work order and, subsequently, the petitioner sought court intervention to access the respondent's building pursuant to Real Property Actions and Proceedings Law (RPAPL) §881.

IN COURT: The petitioner brought a special proceeding pursuant to RPAPL §881, seeking an order and judgment granting the petitioner, inter alia, a license to access the respondent's building while it performed the elective renovation work on its building. In considering the petitioner's application, the court was mindful of reasonably limiting the scope of the petitioner's access to the respondent's building.

The court granted the petitioner access to the respondent's building but limited the scope of such access to: (1) installing protections

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FEBRUARY 2025 HIGHLIGHTS

COMMON ELEMENTS
Condominium Not Required to Allow Electric Vehicle Charging at Common Element Electric Outlets

PARKING
Unit Owner Waited Too Long to Claim Fraud Regarding Ownership of Parking Space

PERSONAL INJURY
Court Won't Dismiss Garage Employee's Injury Claim Against Condo Board

PROPRIETARY LEASE
Shareholder's Romantic Partner Can't Inherit Apartment as "Spouse"

SPONSOR
Construction Defects, Fraud Claims Can Proceed Against Sponsor But Not Its Principals

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on the respondent's building, that are required by law; and (2) repairing the waterproofing on the respondent's building that the petitioner had previously damaged.

Additionally, the court ordered the petitioner to reimburse the respondent its professional fees and partial attorneys' fees, and to pay the respondent a $4,000 monthly license fee each month until completion of the petitioner's project. Lastly, as it relates to insurance and indemnification, the court ensured that the full risk was shifted to the owner seeking a temporary license (the petitioner), as required by the governing statute.

TAKEAWAY:

In accordance with several recent First Department decisions, this case continues a discernable trend of courts beginning to grant attorneys' fees to respondents in RPAPL §881 proceedings where a petitioner's work is elective and not mandatory (i.e., required by law). Tellingly, the court's decision and order began by expressing the court's frustration that the parties had not come to a license agreement on their own:

> **This is a Matter that more closely resembles a trespass to property with damages, plus less than good faith negotiations by the Petitioner in relation to the parties' adjoining structural wall. Nonetheless, the matter before the Court is an application pursuant to Real Property Actions and Proceedings Law (RPAPL § 881) to ensure the safety on and around the Respondent's property during the pendency of Petitioner's "Project." After consideration of the facts presented in evidence and the testimony at four separate hearings, the Court was unable to bring next-door neighboring parties to a mutually acceptable agreement.**

The court noted that the petitioner's trespass onto the respondent's building without the respondent's consent was an additional factor in granting the respondent its attorneys' fees. While courts have, in the past, been reluctant to grant a respondent its attorneys' fees in these types of applications, this decision indicates that there are contributing factors to be considered, which may lead to an award of attorneys' fees.

The takeaway is that in circumstances such as these, a party seeking access to an adjacent property to perform improvements to its own property—especially an elective project—is well advised to negotiate a license agreement consensually whenever possible before resorting to a special proceeding that may go all the way to a hearing (here, four hearings) and result in judicially imposed terms no more palatable than what could have been negotiated, plus the cost of carrying some or all of the attorneys' fees of both sides.

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ALTERATIONS

LEE V. JAY HOUS. CORP

2024 NY SLIP OP 34432(U) (SUP. CT. N.Y. CNTY. DEC. 17, 2024)

Issues of Fact Exist as to Whether Co-op Board Approved Shareholder's Alterations

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

OUTCOME: Decided for Co-op Defendants

WHAT HAPPENED: Approximately seven years prior to the action, the plaintiff shareholder presented alteration plans for her apartment to the apartment corporation's board of directors, as well as the other shareholders in the building. Those alteration plans described the construction of additional interior space on the roof deck appurtenant to the shareholder's apartment. Operating under the belief that such alteration plans had been unconditionally approved by the co-op board, the shareholder proceeded to obtain the approval of the New York City Landmarks Commission and ultimately completed the work.

Several years after the shareholder's alterations were completed, she sought to sell her cooperative apartment to a third-party. The co-op board conditioned its approval of the sale upon: (1) additional shares being allocated to the apartment; (2) the shareholder agreeing to amend the building's certificate of occupancy to account for the new addition on the roof; and (3) the shareholder assuming all costs related to building's compliance with the Façade Inspection and Safety Program (FISP) (formerly known as Local Law 11), as it was the board's contention that the new addition on the roof could now possibly subject the building to FISP requirements. Unwilling to agree to these conditions, the plaintiff's prospective buyer terminated the contract of sale.

The plaintiff asserted that the co-op board had previously approved the alterations in question without any conditions. Although no written alteration agreement was ever entered into by the shareholder and co-op board, the plaintiff claimed that the board had waived the requirement for a written agreement, opting for an informal, verbal approval instead. The co-op board countered the plaintiff's argument, contending that the terms of the proprietary lease require a written agreement with respect to any alterations.

The plaintiff brought this action against the defendant co-op board, claiming breach of contract claims, breach of fiduciary duty, and tortious interference with a contract. In addition, the plaintiff also sought a declaratory judgment, asking the court to hold that the board's conditions to the sale amounted to an unreasonable restraint on alienation, as well as injunctive relief barring the co-op board from imposing any such conditions on the future sale of the apartment. The plaintiff then brought a motion for summary judgment with respect to its causes of action seeking a declaratory judgment and injunctive relief.

IN COURT: The plaintiff moved for summary judgment based upon the documentary evidence. While it was apparent that no formal written alteration agreement existed between the shareholder and co-op board, the plaintiff submitted affidavits from individuals who served on the co-op board at the time in question. In their respective affidavits, those prior board members each confirmed that the subject alterations had been approved without any conditions. In one affidavit, the former board president even indicated that the minutes of their co-op board meeting would have reflected such approval had it not been destroyed in a flood.

The court questioned the arguments presented by the plaintiff, pointing out that the disproportionate size of the plaintiff's apartment would suggest that an additional share allocation was warranted pursuant to the Business Corporation Law. However, the court also scrutinized some of the defendant co-op board's positions, questioning the board's arguments that the shareholder should be solely responsible for

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FISP compliance.

Ultimately, the court denied the plaintiff's motion for summary judgment, holding that the absence of a formal written alteration agreement was enough to present a material issue of fact. Although the court accepted the affidavits of the former board members, it held that such merely amounted to witness testimony, and therefore the defendant co-op board is entitled to cross-examine such witnesses and conduct related discovery.

TAKEAWAY:

In New York, it is well-established law that summary judgment is appropriate only when there are no disputed material facts in the matter. In the instant case, the absence of a written alteration agreement was enough to raise a triable issue of fact, despite the former board members providing sworn statements corroborating the plaintiff's assertions. Despite best intentions, the forgoing of formalities is often risky, as shown by the instant case. Both unit owners and boards are best suited to follow the letter of their governing documents and to properly memorialize any agreements in writing. Even though the parties may be in full agreement as to a matter at the time, it is vital that both sides consider how such issues may be handled in the future, particularly bearing in mind that the board may be comprised of different individuals when an issue arises in the future.

BUSINESS JUDGMENT RULE

195 N. VILL. AVE., LLC V. 195 APTS., INC.

2024 NY SLIP OP 06037 (2ND DEP'T. DEC. 4, 2024)

Appellate Court Reverses Lower Court's Denial of Petition Challenging Co-op Board's Denial of Conversion Application

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

OUTCOME: Decided for Plaintiff Proprietary Lessee

WHAT HAPPENED: The petitioner/plaintiff in this case was the proprietary lessee of a "professional unit" in a 79-unit cooperative corporation in Rockville Centre. The proprietary lease provided that the lessee could apply "at any time for a revised Certificate of Occupancy permitting utilization of the [unit] for dwelling purposes" rather than professional purposes and that the co-op will "not unreasonably withhold its consent to any physical alterations of the [unit] required to obtain the amended Certificate of Occupancy." And that is just what the petitioner/plaintiff did, submitting architectural plans showing a conversion to residential use for the approval of the co-op board.

However, the co-op denied the application. The denial letter justified the denial by asserting that the proposed conversion "would increase the risk & liability of the Co-op on numerous levels: proprietary lease governance and maintenance obligations, property insurance, budget (affecting maintenance of all shareholders), and other issues and concerns for years to come."

The lessee then filed this hybrid Article 78 proceeding to review the board's determination and for damages. The co-op moved to dismiss the proceeding, arguing, among other things, that its decision was protected by the business judgment rule, and also augmenting its denial letter with a list of 19 separate reasons for denying the conversion, including reasons relating to the age of the building, potential issues with the foundation, and costs pertaining to potential damages, insurance, repairs, maintenance, and flooding.

The motion court granted the co-op's motion to dismiss. In doing so, it rejected the argument that the board's decision was protected by the business judgment rule, and also acknowledged that on a motion to dismiss, the court was constrained to consider documentary evidence that "conclusively establishes a defense to the asserted claims as a matter of law." Nevertheless, the court found that the additional documentary evidence provided by the co-op constituted factual support for the determination by the board that the conversion would impact the shareholders, and thus, the board "did not unreasonably deny petitioner's application."

The petitioner/plaintiff appealed.

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IN COURT: The Appellate Division, Second Department reversed and reinstated the petition. The appellate court found that the lower court had made several procedural errors. First, because the documentary evidence did not "utterly refute" the petitioner's claim and the co-op had not filed an answer, the lower court should not have considered the merits of the action. Second, and in any event, the lower court should not have considered the additional evidence offered by the co-op beyond the denial letter itself, because in Article 78 proceedings, judicial review "is limited to the grounds presented . . . at the time of [the board's] determination." The proceeding was thus remanded for the co-op to answer the petition.

TAKEAWAY:

The appellate court's decision puts the co-op in a potentially difficult posture on remand. For one thing, both courts rejected the co-op's argument that its denial of the application was protected on business judgment. As the appellate court explained, it is well settled that where a proprietary lease provides that a board's actions in giving consent to alterations are to be reviewed under a reasonableness standard, "the board's actions are not protected by the business judgment rule." However, the co-op's perfunctory denial letter made little if any effort on its face to justify the board's decision as being "reasonable."

This is a potentially serious problem, because, as the appellate court explained, reviewing courts are not supposed to rely on "grounds not mentioned" at the time of denial. Thus, on remand, the co-op may not be able to rely on the 19 separate reasons for its denial of the conversion, because none of them were presented in the denial letter itself.

The lesson for co-op boards is to be very careful about the applicable legal standard of review for board decision-making. When protected by the business judgment rule, board decisions do not necessarily need to justify themselves (beyond establishing that the decisions were within the scope of the board's authority and made in good faith). For decisions governed by a "reasonableness" standard, however, boards need to make sure that their decisions clearly articulate all of the reasons for their determinations.

COMMON ELEMENTS

BABIC V. YAKUBOV

NO. 519849/2022 (SUP. CT. KINGS CNTY. DEC. 5, 2024) NYSCEF NO. 96

Condominium Not Required to Allow Electric Vehicle Charging at Common Element Electric Outlets

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

OUTCOME: Decided for Plaintiffs, Condo Board Defendants

WHAT HAPPENED: In 2022, the defendant condominium notified unit owners that a new rule had been adopted to prohibit the use of electric outlets in the common parking area for charging personal electric vehicles, and thereafter locked the outlets to prevent their use. The outlets in question were conventional 120V outlets installed in a common area, such that their usage was paid by all unit owners. Thus, the rule was intended to prevent individuals from incurring electric charges for their personal benefit, where such costs would have to be paid by all unit owners.

The plaintiff unit owners allegedly flouted the rule and continued to use the common outlets to charge their electric motorcycle, including outlets in the basement hallway and the service entrance lobby. The plaintiffs alleged that the condominium selectively enforced the rule, effectively targeting them by locking the outlet closest to their parking space. The plaintiffs thereafter commenced the instant action, asserting, among other things, that the condominium violated Section 339-ll of the Condominium Act by adopting the rule and effectively prohibiting the use of the outlets for the charging of electric vehicles.

IN COURT: In a case seemingly of first impression, the court parsed Section 339-ll of the Condominium Act, which was adopted in 2019

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to encourage the installation of electric vehicle charging stations in condominiums. Section 339-ll invalidates any prohibition or unreasonable restriction on "the installation or use of an electric vehicle charging station within an owner's unit or in a designated parking space, including but not limited to, a deeded parking space, a parking space in an owner's exclusive use common element, or a parking space that is specifically designated for use by a particular owner..."

The court concluded that the condominium's rule did not violate Section 339-ll, inasmuch as the condominium's rule applied only to outlets installed in the common element walls of the parking area. Specifically, the plaintiffs did not allege (1) any prohibition in "[a]ny ... deed, contract, security instrument, or other instrument affecting the transfer or sale of any interest in the property, and any by-laws," or (2) that any of the electric outlets subject to the condominium's rule were located "within [plaintiffs'] unit or in [plaintiffs'] designated parking space, including, but not limited to, a deeded parking space, a parking space in [plaintiffs'] exclusive use common element, or a parking space that is specifically designated for use by [plaintiffs]."

In addition, the court noted that an additional cause of action may exist for a breach of Section 339-ll when a unit owner can demonstrate that a condominium refused to allow the installation of an electric charging station in the common elements or in an exclusive use common element. In the instant case, however, the plaintiffs failed to allege that they had made any such request. Accordingly, the court dismissed plaintiffs' claims based on an alleged breach of Section 339-ll. The only claim that survived the defendants' motion to dismiss was the plaintiffs' claim that the condominium took possession of the plaintiffs' wires and cords without returning them.

TAKEAWAY:

Boards, managing agents, and attorneys should note this court's interpretation of Section 339-ll of the Condominium Act, particularly regarding a board's authority to regulate certain outlets and its limitations. Unit owners should also be aware of their statutory obligations, which require them to seek approval and to agree to perform specific duties (an agreement that will bind successor owners), including maintaining liability coverage.

DISCRIMINATION

TANNER V. ROCHDALE VILL. INC.

NO. 23-CV-09090 (E.D.N.Y. DEC. 20, 2024) ECF NO. 26

Court Dismisses Shareholder's Discrimination Claim Against Co-op

SQUIB BY ANDREW P. BRUCKER, PARTNER, FOX ROTHSCHILD

OUTCOME: Decided for Defendant Co-op

WHAT HAPPENED: Rochdale is a housing cooperative in Jamaica, Queens, and Tanner was one of its shareholders. Tenner submitted a maintenance request regarding water damage in his bathroom in 2019. The board of Rochdale did not respond, nor did they set up any meetings, which Tanner had requested. Rochdale began eviction proceedings against Tanner in 2020.

In January 2023, Tanner filed a complaint against Rochdale, making various claims, all related to the condition of the apartment and the board's refusal to properly operate the cooperative. In March 2023, the court dismissed Tanner's complaint, and noted that the issues should be addressed in the pending landlord/tenant matter (which Rochdale had commenced in 2020).

Tanner then filed a lawsuit against Rochdale in Federal Court, making numerous claims, including discrimination. Rochdale responded with a motion to dismiss.

IN COURT: The court dismissed Tanner's claims based on the fact that he failed to state a claim. The court determined that the complaint did not include sufficient factual allegations to even give rise to an inference of discrimina-

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tion. Tanner made only vague and speculative claims, including the fact that the allegation was "based on information from [a] confidential source."

Tanner also made a claim under the American with Disabilities Act. However, this was dismissed, as this law prohibits discrimination on the basis of disability in public accommodations, and Rochdale is a private housing development, and a recent decision from the Second Circuit stated that "the term 'public accommodation' does not include residential facilities or apartment buildings."

It should be noted that since Tanner appeared *pro se*, the court permitted Tanner to file an amended complaint.

TAKEAWAY:
Once again, a New York court has dismissed a complaint where there was a lack of specificity. If a plaintiff brings an action, and makes vague and speculative claims, without factual statements to back up those claims, courts in New York will often grant a defendant's motion to dismiss.

LABOR LAW

SINGH V. BD. OF MGRS. OF THE RENAISSANCE CONDO.

NO. 718786/2019 (SUP. CT. QUEENS CNTY. OCT. 23, 2024) NYSCEF NO. 118

Injured Worker Gets Summary Judgment Against Condo on Labor Law §240(1) Claims But Not §241(6) Claims

SQUIB BY INGRID C. MANEVITZ, PARTNER, SEYFARTH SHAW

OUTCOME: Decided, in part, for Plaintiff

WHAT HAPPENED: Plaintiff Sukhdev Singh commenced this personal injury action against the Board of Managers of the Renaissance Condominium and The Renaissance Condominium. The plaintiff is a mason who alleges that, while working on the exterior of the condominium's building in Long Beach, N.Y., he stepped on a scaffolding platform that broke and collapsed, causing him to fall and suffer injuries. At the time of the accident, the plaintiff had disconnected his harness while climbing stairs because the connecting rope was "short." The plaintiff moved for summary judgment against the defendants on his causes of action under New York Labor Law §240(1) and New York Labor Law §241(6).

IN COURT: The court granted summary judgment against the defendants on the plaintiff's Labor Law §240(1) cause of action. Labor Law §240(1) imposes strict liability on owners and contractors for injuries sustained due to the lack of adequate safety devices protecting workers engaged in certain elevated work sites.

As a preliminary matter, the court held that the plaintiff was protected by Labor Law §240(1) because he was engaged in brick replacements within the context of a "major construction project" that involved "removal and repair of the roof, brick removal, window replacement and balcony repair." The court then held that the plaintiff established *prima facie* entitlement to summary judgment because his deposition testimony indicated that: (1) he was exposed to an elevation-related risk; (2) the platform of the scaffold, which served as a safety device, "suddenly and unexpectedly broke and collapsed"; and (3) the platform's inadequacy was the proximate cause of the accident.

The defendants argued that the plaintiff was the "sole proximate cause" of his own injuries, but the court rejected this argument because there was no evidence that "Plaintiff was given immediate, specific instructions to utilize another safety devise [sic] at the time of the Accident." The court also held that the plaintiff's comparative negligence, if any, was not a defense because the plaintiff had demonstrated that Labor Law§240(1) was violated and that violation was "a proximate cause of his fall."

The court, however, denied the plaintiff's motion for summary judgment on his Labor Law §241(6) cause of action. Labor Law §241(6) imposes vicarious liability on owners and contractors for injuries sustained due to violations of the Industrial Code. The plaintiff relied

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on the following Industrial Code provisions: (1) 12 NYCRR 23-5.1(c), which provides that scaffolding must be constructed to "bear four times the maximum weight required to be dependent therefrom or placed thereon when in use"; (2) 12 NYCRR 23-5.1(e)(2), (3), (4), which provides for maximum permissible live loads for scaffolding planking; and (3) 12 NYCRR 23-5.3(d)(2), which sets specific standards for the construction of scaffolds for work performed by stone masons.

The court held that the plaintiff was required to show that: (1) these sections applied under the circumstances; (2) the defendants violated the sections' specific commands; (3) these violations alone or considered together with other undisputed factual evidence, constitute negligence; and (4) the violations caused the plaintiff's injuries. The plaintiff argued that these Industrial Code sections were violated because the platform broke and collapsed. But the court held that fact, "standing alone," was "insufficient to establish that the subject Industrial Code sections were violated." As a result, the plaintiff did not establish *prima facie* entitlement to summary judgment.

The court also denied the plaintiff's summary judgment motion with respect to additional Industrial Code sections because the plaintiff did not allege those sections were violated in his complaint or bill of particulars, and the plaintiff did not make a formal application for leave to serve a supplemental bill of particulars post-note of issue.

TAKEAWAY:
It is crucial for condominiums to have appropriate insurance in place when hiring contractors for any building project. Insurance is particularly important for façade work or other projects where contractors' employees will be working at heights, because Labor Law §240(1) imposes strict liability on condominiums for injuries to workers that result from the failure of safety devices, like scaffolding platforms.

MEDIATION

MINKOFF V. EXECUTIVE RISK INDEM. INC.

NO. 656253/2018 (SUP. CT. N.Y. CNTY. DEC. 11, 2024) NYSCEF NO. 319

Court Denies Unit Owner's Request to Direct Parties to Mediation

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

OUTCOME: Decided against Plaintiff Unit Owner

WHAT HAPPENED: Allegedly, because of the condo turning off the water supply to her Sub-Zero refrigerator, the plaintiff's luxury condo unit was so severely damaged that it became uninhabitable. She alleged she was required to move to a premises with all the facilities of like kind and quality to her luxurious apartment, with all its amenities, including kitchen, laundry, and other amenities, while her apartment was restored. Under her renter's interruption policy, she claimed entitlement to a hotel providing kitchen facilities, laundry service, and space as she had become accustomed to. Moreover, due to conditions of her health, she claimed she needed to convalesce in the Four Seasons Hotel in Beverly Hills, at a cost of $20,611,49 per month, and that the condo dragged its feet in restoring the apartment on account of her age and gender, and the insurance company breached is policy requirements in refusing to reimburse her for the expenses she was incurring.

IN COURT: The defendants moved for summary judgment on the claims made, and the plaintiff moved to amend her complaint to assert a claim for unlawful discrimination on account of her gender.

While these motions were pending, the plaintiff moved the court for an order directing the parties to mediation pursuant to 22 NYCRR 160.2 of the Rules of the Court. The defendants opposed that motion. That rule provides that a court shall refer each civil dispute pending before it to an appropriate alternate dispute resolution (ADR) process at the earliest time possible. The rules further provided that all civil actions shall be presumptively

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eligible for early referral to ADR process unless otherwise excluded. The court put aside that the question of referral to ADR was raised six years after filing the request for judicial intervention, hardly "at the earliest practicable time." The court also noted the absence of any rule for opting out of any such referral.

The court noted the authoritative decision of *Carnegie Assocs. Ltd. v. Miller*, 2012 NY Slip Op 02422 (1st Dep't. April 3, 2012), in which the appellate court held that with respect to a mandatory mediation in the Commercial Division case, sanctions for failure to comply with court directive are unavailable. Therefore, the court held that it would be an improvident exercise of discretion to direct mediation in this action, absent the consent of all parties, "given that the herein action is a non-Commercial Division case, wherein the rule is simply that all cases are presumably 'eligible' for early referral."

TAKEAWAY:
The motion papers indicate the court was aware that the parties were miles apart in their positions in this case. The demands of the plaintiff appeared beyond the pale. There is little doubt that the court, in its exercise of discretion, was influenced that referral of this case to mediation would result in a waste of time of counsel, the parties, and the mediators, who devote much time and effort, largely *pro bono*, to assist in bringing about a reasonable resolution of disputes and relieve the courts of portions of their mountainous case load. This writer believes that had either party requested mediation early in the proceedings, or if the court was able to conclude that the interests of the parties might be furthered by referral to mediation, the decision would have been otherwise. The courts generally favor mediation, and so should the parties.

PARKING

GIYAR V. 861 LLC

2024 NY SLIP OP 34478(U) (SUP. CT. KINGS CNTY. NOV. 29, 2024)

Unit Owner Waited Too Long to Claim Fraud Regarding Ownership of Parking Space

SQUIB BY MANU LEILA DAVIDSON, PARTNER, BOYD RICHARDS PARKER & COLONNELLI

OUTCOME: Decided for Condo Board Defendants

WHAT HAPPENED: A unit owner's rights concerning her use and occupancy of a parking space was at the heart of this dispute. The plaintiff, who purchased her condominium in 1997, claimed that she was defrauded regarding the parking space at the time of her purchase. She stopped paying rent for the space when she allegedly discovered the fraud. She commenced the action in 2015—close to two decades after her alleged discovery of the claimed fraud. She owed $14,000 for use and occupancy of the space.

The plaintiff's complaint demanded a declaratory judgment of exclusive ownership of the parking space without interference from the defendants, that she had no obligations to pay rent or fees to the defendants for use and occupancy of the parking space, and that the defendants may not interfere with her use of the space. She also sought damages for an alleged breach of contract and breach of fiduciary duties, an accounting of the condominium's financial affairs, and attorneys' fees. The court entered a temporary restraining order enjoining the defendants from taking any actions related to the plaintiff's unit and parking space.

The defendants asked the court: (1) to dismiss the complaint for failing to prosecute the action; (2) to vacate the temporary restraining order; and (3) to direct the plaintiff to vacate the parking space or fine the plaintiff $500 per day until she vacated the space, as well as for a judgment in the amount of unpaid rent for the parking space and $125 per month until the parking space is vacated. The defendants also sought sanctions against the plaintiff's counsel for filing a frivolous lawsuit with costs and disbursements.

The plaintiff cross-moved for contempt against the defendants

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for allegedly violating the terms of an order entered by the court, for sanctions, and to enforce a settlement agreement. Alternatively, the plaintiff asked the court to grant her leave to conduct discovery and file a note of issue.

IN COURT: The defendant's procedural argument, failure to prosecute, resulted in the court's evaluation of the merits of the plaintiff's claims. The court dismissed the fraud claim because the action was commenced after the statute of limitations expired.

The court explained that "[t]he statute of limitations for a fraud actions is six years from the date the fraud is committed, or two years from the time a plaintiff discovers, or could with reasonable diligence have discovered the fraud, whichever is later." In this case, the facts established that the plaintiff bought her unit in 1997 and that she entered into an agreement to lease the parking space from the defendants in 1997. Under that agreement she agreed to pay rent at $50 per month, and she did so for 17 years. The court found that the plaintiff could, with reasonable diligence, have discovered the alleged fraud.

The defendants also sought a judgment based on adverse possession. An adverse possession claim is established if the claimant can demonstrate that use of the property "was (1) hostile and under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the required period." The plaintiff's exclusive use of the parking space, which she believed that she owned, for 17 years satisfied these requirements.

The court rejected the plaintiff's arguments against dismissal in their entirety, denied her cross motion, and granted the defendants' motion. The temporary restraining order was vacated. The plaintiff was ordered to vacate the parking space and to pay $125 per month if she did not vacate it. The court also entered a judgment against the plaintiff in the amount of $14,000 for her use and occupancy of the parking space, but declined to grant the defendant's sanctions for filing a frivolous action.

TAKEAWAY:
Disputes between boards and unit owners are always driven by the facts and often rise and fall on the documents that govern the parties' relationship because they form the contract(s) that allocate the parties' respective obligations to each other. As such, good record keeping is fundamental to managing the affairs of a building. Here, the facts were stacked against the plaintiff. Not only did she wait too long to commence her action against the defendants, but the documentary evidence also established that she entered into an agreement to rent the parking space and did so for nearly two decades.

PERSONAL INJURY

GERMAN V. 333 RECTOR GARAGE, LLC

2024 NY SLIP OP 06152 (1ST DEP'T. DEC. 10, 2024)

Court Won't Dismiss Garage Employee's Injury Claim Against Condo Board

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

OUTCOME: Decided for Plaintiff

WHAT HAPPENED: While working in the commercial parking garage of a residential condominium building, an employee of the garage operator suffered substantial injuries when he slipped and fell on water in the garage. The water appeared to have come from a leak in the ceiling drainpipes.

IN COURT: The plaintiff employee filed a personal injury complaint against the operator of the garage, the board of managers of the condominium association, and its managing agent based on negligence. The board of managers and the garage operator filed cross-claims against each other. The court granted the garage operator's motion for summary judgment to dismiss the complaint against it as well as the board's cross-claim.

However, the court denied the

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motion for summary judgment to dismiss the complaint filed by the board of managers. The court found that the board did not establish that it did not have a duty to maintain the accident site in accordance with its governing documents. Although the board offered the testimony of an expert and its managing agent that there were no pipes above the accident site, the court found that this testimony did not eliminate issues of fact. The board also failed to identify which of the drainpipes did not service the entire building so as to constitute "general common elements," and as such, it failed to establish that it had no duty to maintain the pipes that caused the accident.

Finally, the board failed to show that it did not create the dangerous condition. Since the board did not meet its burden to eliminate material facts to warrant summary judgment, the burden did not shift to the plaintiff to raise one.

TAKEAWAY:
The threshold to be met to be granted summary judgment dismissing a complaint is necessarily high, since it eliminates a claimant's ability to "have their day in court." The facts must be so clearly in the movant's favor that there is nothing left to be determined. Such facts are generally established during the discovery phase of litigation, where parties should be as specific as possible, with an eye toward having to prove their side, whether at trial or in a motion. Ambiguity and lack of precision will likely result in the finding of an issue of fact.

PERSONAL INJURY

R.W. V. PARKCHESTER S. CONDO., INC.

NO. 802836/2022E (SUP. CT. BRONX CNTY. OCT. 25, 2024) NYSCEF NO. 48

In Lead Paint Case, Bronx Court Finds Condo Has No Counterclaim for Mother's Conduct Under Split Department Precedent

SQUIB BY WILLIAM J. GELLER, COUNSEL, BRAVERMAN GREENSPUN

OUTCOME: Decided for Plaintiff

WHAT HAPPENED: The infant plaintiff, R.W., had lived in an apartment in the Parkchester South Condominium in the Bronx since he was 2 years old. The complaint, brought by R.W.'s mother individually and on her son's behalf, alleges that R.W. suffered injuries from ingesting lead paint in the apartment.

In response, the condominium asserted a counterclaim, alleging that there was no chipping paint or plaster in the apartment when it was rented. The condominium claimed that the mother caused the dangerous conditions by damaging the apartment or painting it with lead paint and exacerbated R.W.'s injuries by failing to obtain proper medical treatment. The condominium sought indemnification and contribution from the mother, claiming she was responsible, in whole or in part, for R.W.'s injuries.

IN COURT: The mother moved to dismiss the counterclaim for failure to state a cause of action, arguing that the condominium had a non-delegable duty to abate lead paint hazards, and that parental negligence is not actionable in lead paint cases.

The condominium responded by arguing that discovery was required regarding the infant's medical conditions and the multiple residences at which he had resided, and that the counterclaim did not allege negligent supervision, but rather that the mother created or exacerbated a hazard for which she could be held liable.

The Supreme Court, Bronx County, first interpreted the counterclaim not to be that the mother had painted the apartment with lead paint, which had been banned in New York City since the 1960s, but that the mother had exposed existing lead paint by disturbing painted surfaces. The court also noted that both parties agreed that a claim for negligent parental supervision was not actionable.

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The court then examined two directly conflicting Appellate Division cases addressing the legal sufficiency of the condominium's counterclaim. The court first noted that a 1999 Second Department case sustained counterclaims in a lead paint case alleging that the mother caused the injury by painting the apartment herself and failing to seek medical attention, finding that such claims could result in a finding of comparative negligence.

The court then contrasted a 1998 First Department case dismissing counterclaims alleging a parent's violation of her statutory duty to keep her apartment clean and sanitary and for failure to obtain medical care. The First Department held that those allegations fell within the nonactionable tort of negligent supervision, and rejected dicta in a prior case suggesting that a claim based on the mother's actions in creating the hazardous conditions could be sustained.

The Bronx court dismissed the counterclaims, finding that the First Department case constituted controlling precedent.

TAKEAWAY:

The obvious takeaway here is that it sometimes matters in which county an action is brought where the Appellate Division departments have conflicting precedent. Although this decision was on a fairly obscure issue, some departmental splits on more regularly litigated points can remain unresolved for years, if they get resolved at all, and trial courts are bound by the holdings of the department in which they sit.

As a practice point, where there is a split and the adverse precedent is controlling, it can be worthwhile during motion practice to make a short argument point mentioning the split and briefly suggesting the favorable case is better reasoned and should be adopted. This can preserve the argument on appeal or for later proceedings if the split is resolved in your client's favor while the case is pending.

More generally, this case highlights that more than six decades after lead paint was banned in New York, it still remains a serious problem in the city's older housing stock. Even if the condominium's counterclaim had been sustained, it likely would have had difficulty in demonstrating that the injuries were caused in whole or in part by the mother's conduct, particularly in a jury trial in the Bronx.

PROPRIETARY LEASE

MATTER OF MCCABE V. 511 W. 232ND OWNERS CORP.

2024 NY SLIP OP 06290 (DECEMBER 17, 2024)

Shareholder's Romantic Partner Can't Inherit Apartment as "Spouse"

SQUIB BY DALE DEGENSHEIN, PARTNER, FOX ROTHSCHILD

OUTCOME: Decided for Defendant Co-op

This case made its way to the Court of Appeals, which affirmed the Appellate Division in a 5-2 decision, with two judges filing different dissenting opinions. The question here was a matter of first impression for the Court of Appeals. It affirmed that the board's refusal to consider McCabe a spouse did not constitute housing discrimination based on marital status.

WHAT HAPPENED: Burrows was the shareholder, and McCabe owned a separate apartment in the building. McCabe lived with Burrows in Burrows' apartment from 2006 until his death in 2019. In 2018, Burrows and McCabe asked the co-op board to add McCabe as a shareholder. The board requested a marriage license, domestic partnership certificate, or other proof that McCabe was Burrows' spouse, relying on the provision of the lease that stated that the board must consent to an assignment, transfer, or bequest, except in the case of a spouse.

McCabe and Burrows did not have a marriage license or domestic partnership certificate, and McCabe was never added to the shares. Burrows bequeathed the apartment to her.

Eight months after Burrows' death, the board served McCabe with a notice to cure on the ground that Burrows was deceased and she was occupying the apartment without the co-op's consent. The proprietary lease had a common provision: "If the Lessee shall die,

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consent shall not be unreasonably withheld or delayed to an assignment of the lease and shares to a financially responsible member of the Lessee's family (other than the Lessee's spouse as to whom no consent is required.)"

The board invited McCabe to produce evidence that she was Burrows' family member to complete the request for an assignment of the shares. McCabe argued that she should be treated as a spouse. When McCabe failed to produce familial information, the board invited her to apply as any prospective purchaser would. She did, and the board rejected her application.

McCabe brought this action, claiming that the board's refusal to transfer the shares and lease was a violation of several discrimination statutes as she was the "equivalent of a spouse" and should have been treated as such. The board responded that McCabe was not a spouse and that, even if she were considered to be a family member (which she was not), she still would have been rejected because she did not demonstrate that she was financially responsible as required by the lease.

IN COURT: Supreme Court dismissed the proceeding, reasoning that the board's failure to consider her a spouse was not because she was unmarried, but rather because she was not married to a particular person. Thus, the court concluded, there was no discrimination. The lower court also found that even if she were a family member, the board had sufficient grounds to reject her application. The Appellate Division affirmed.

In considering whether the board discriminated based on marital status, the Court of Appeals noted that the New York City Human Rights Law includes a provision that the statute must be "liberally construed for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of this title, have been so construed."

The Court reviewed its prior interpretation of "marital status" and noted that its consideration had been the same under New York State and City laws. However, the Court did not look at the city statute since the liberal construction provision was added. McCabe argued that the board discriminated because, as the "equivalent of a spouse," she should have been treated as a spouse.

The Court painstakingly, and in great detail, reviewed the legislative history, entirety of the city law and other applicable city laws. The majority discussed that marital status protection addresses those denied access to housing because the individual is single, married, divorced, or widowed. It determined that McCabe's situation was not actionable as marital status discrimination, noting that the City Council has broadened the scope of the statute on numerous occasions, and could amend it to address McCabe's situation.

One dissenting judge determined that Burrows and McCabe, together, were discriminated against as a couple based on their unmarried status and that such a finding would further the statutory intent to prohibit differential treatment of married and unmarried couples. The other dissent was similar—but for the fact that McCabe was not a spouse, the board would have approved her as owner of the shares.

TAKEAWAY:

This is an important decision in determining the scope of marital status discrimination under the city statute which, as noted, by its own terms must be broadly and liberally construed. Boards and practitioners must be mindful—as the dissents demonstrate, there can be uncertainty as to the requirements set forth in the discrimination statutes. For those who want a thoughtful and detailed analysis of the issue, read the decision.

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PROPRIETARY LEASE

LEE V. METRO MGMT.

NO. 711855/2018 (SUP. CT. QUEENS CNTY. NOV. 25, 2024) NYSCEF NO. 125

On Second Try, Shareholder Obtains Dismissal of Claims that Her Children Harassed and Assaulted Neighbor

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

OUTCOME: Decided for Defendant Co-op Board

WHAT HAPPENED: A cooperative shareholder sued her neighbor, the co-op, the board, and the managing agent in 2018. The plaintiff shareholder claimed that her neighbor's two children assaulted, harassed, and humiliated her. The children, who were aged 2 and 3 when the events allegedly occurred in 2015, were said to have been permitted to engage in harassment without adult supervision by spitting on the plaintiff; posting harassing notes on the plaintiff's door; kicking the plaintiff; ringing the plaintiff's doorbell in the morning and night; and pushing all the buttons on the elevator.

The plaintiff asserted three claims against her neighbor, who was the mother of the two children, for negligence, intentional infliction of emotional distress, and breach of the co-op's house rules. [The dismissal of claims against the co-op, the board, and the managing agent was addressed in the December 2024 *Co-op & Condo Case Law Digest*.]

The defendant shareholder moved for summary judgment and dismissal of the three claims against her, asserting that the alleged tortious actions were intentional, not negligent. Because the statute of limitations for intentional torts is one year, the filing of the complaint almost three years after the purported events was too late. The defendant shareholder further argued that the plaintiff alleged no damages, and that New York did not recognize a claim for "harassment."

The court granted the motion in part and dismissed the first two claims as time-barred and lacking damages. But the court denied dismissal of the third claim for alleged breach of the co-op's house rules because the defendant shareholder had failed to attach a copy of the proprietary lease and house rules to the motion papers.

The defendant shareholder immediately filed a second motion, to renew the dismissal motion, and this time she attached the proprietary lease with house rules. The court granted the renewal motion, reviewed the house rules incorporated into the proprietary lease, and found that the plaintiff had no standing to assert a claim based on a purported breach of the proprietary lease. The proprietary lease was a contract between the co-op and the defendant shareholder alone, and the plaintiff was not a party to that lease.

IN COURT: A motion to renew is based on new facts or evidence that were unknown or unavailable to a movant on a prior motion. The movant must provide the court with a reasonable justification for failing to introduce the new information. Here, the court accepted the explanation of the defendant shareholder that the proprietary lease and house rules were not available to her at the time of her first motion, but then became available when the other defendants, in a separate motion, filed the documents in the lawsuit.

Turning to the merits of the motion to renew and dismiss, the court found that a proprietary lease with its house rules is a contract between a shareholder and the co-op. A stranger to that contract, even a different shareholder like the plaintiff, has no standing to enforce those house rules against another shareholder. The remaining claim was therefore dismissed.

TAKEAWAY:

It's interesting that the court excused the defendant shareholder's failure to attach a copy of the proprietary lease to her first motion. She was a shareholder, so surely she should have had her lease. Also, the case had been pending for six years, so she could have gotten a copy from the property manager or through discovery. Perhaps the court's leniency was prompted by the court's view of some of the allegations of the complaint itself, which were unserious. Seeking redress for youngsters pushing all the buttons in the elevator is beneath the dignity of our judicial system. Unimpressed by the complaint or not, the court cut the defendant some slack and then disposed of the lawsuit for a sound legal reason: You can't enforce your neighbor's lease.

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SPONSOR

THE BD. OF MGRS. OF THE BLACKFRIARS CONDO. V. AG EBENEZER LLC

2024 NY SLIP OP 34304(U) (SUP. CT. N.Y. CNTY. DEC. 3, 2024)

Construction Defects, Fraud Claims Can Proceed Against Sponsor But Not Its Principals

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

OUTCOME: Decided in Part for Plaintiffs, Defendants

WHAT HAPPENED: In 2016, the plaintiff, First Ebenezer Baptist Church, sold the property located at 2457 Frederick Douglas Boulevard in Manhattan to the defendant, AG Ebenezer LLC, to be the sponsor of a new eight-unit building to be known as the Blackfriars Condominium being developed by the defendant Almat Group, LLC. The church would be granted the deed to the commercial unit called the community space, and would be entitled to certain payouts and proceeds of residential unit sales.

In 2023, the plaintiffs brought suit alleging a host of issues and wrongs connected to the building, including significant construction defects, failure to preserve tax-exempt status for the church, failure to obtain J-51 tax benefits to lower the carrying costs for unit owners, and failure to honor financial commitments. The defendants moved to dismiss certain parties and claims.

IN COURT: The court granted dismissal of all claims alleged against the individual defendants. The court said that a condominium sponsor's principals may not be held liable for a claim premised solely on alleged violations of the offering plan and certification, but might be held liable for breach of fiduciary duty for actions taken while serving on the board of managers during the initial period of sponsor control. Here, the court said that none of the plaintiffs' causes of action adequately met those standards, and that the complaint failed to distinguish actions the individuals took independently from actions taken by the entire board on behalf of the sponsor.

On the other hand, the court said that the complaint adequately alleged enough misconduct against the sponsor-developer LLC defendants, including undercapitalization, for the board and the church to state causes of action for breach of fiduciary duty. In addition, the court said that the complaint adequately alleged fraud against the sponsor based on affirmative offering plan misrepresentations about the tax and common charges burdens for unit owners and the physical conditions of the church's community space. Such misrepresentations were not preempted by the Attorney General's jurisdiction to enforce the Martin Act, and were not barred by the offering plan's disclaimers of reliance on other advertisements or statements.

The court also said that the complaint stated a cause of action for breach of contract against the sponsor for mandatory injunctive relief to correct construction defects to the extent that allegations as to fire rating requirements, sewage backups, and mold presented health and safety risks. The sponsor did not seek to dismiss the plaintiffs' claims for breach of contract for money damages. The plaintiffs dropped their negligence claim by not arguing for it in their briefs.

TAKEAWAY:

This decision may not be the last word as to which claims will survive dismissal because a motion for re-argument and an appeal are pending. While the plaintiffs are presently allowed to pursue their claims for injunctive relief and damages for breach of contract, breach of fiduciary duty, and fraud, it is unclear whether the sponsor LLC will have any assets against which to recover any judgment that may be obtained. Win or lose, this is a bad situation for a church that was already facing financial challenges when it entered into a joint venture to develop a condominium and for the eight unit owners who must share the burden of substantial legal fees while confronting serious ongoing defects in the building.

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STOCK/SHARES

MILLER V. MILLER

2024 NY SLIP OP 34277(U) (SUP. CT. N.Y. CNTY. DEC. 3, 2024)

Court Dismisses Case Against Co-op Caught in Middle of Family Squabble

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

OUTCOME: Decided for Defendant Co-op

WHAT HAPPENED: The cooperative ended up in the middle of an intra-family fight regarding ownership of shares. The plaintiff is the occupant of the apartment at issue. The defendants are his half-brother and father.

The plaintiff had lived in the apartment with his grandmother who was the owner of the apartment. When the grandmother died, the father, as executor of the estate, moved the half-brother into the apartment with the plaintiff but promised that he would transfer the shares to the plaintiff. He then subsequently told the plaintiff that the shares would go to his half-brother but that the plaintiff would be allowed to live in the apartment for the rest of his life if he provided the financial resources to allow his brother to become the shareholder of the apartment. According to the complaint, he did so.

Four years after the shares were transferred to his half-brother, the half-brother served notice on the plaintiff terminating his right to occupy. The plaintiff commenced this suit alleging fraudulent misrepresentation, unjust enrichment, and a constructive trust against his father, half-brother, and the cooperative.

IN COURT: The cooperative's motion to dismiss the complaint was granted. The court dismissed the fraudulent misrepresentation claim against the cooperative because the plaintiff did not allege any misrepresentations by the cooperative. The unjust enrichment claim was dismissed because there was no indication that there was a sufficiently close relationship between the cooperative and the plaintiff to support such a claim, and, more importantly, there was no allegation that the cooperative was enriched at the plaintiff's expense.

Finally, the claim for a constructive trust was dismissed because there was no allegation that the cooperative made any promise to that plaintiff that would support the imposition of such a trust. The court also found that even though title to the shares was disputed among the family members, the cooperative was not a necessary party to the proceeding because it would not be inequitably affected by any judgment rendered in this action.

TAKEAWAY:

This is one of those cases that there was nothing the cooperative could do to avoid being caught in litigation. It properly moved to be dismissed when the complaint made clear that there was no cause of action that could survive against it. But because the claim was brought by an individual who was not a party to a proprietary lease with an attorney's fee provision, there is no indication that the cooperative will recover its fees. It was wise to get out of the case as soon as practicable.

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