CO-OP&CONDO
CASE LAW TRACKER
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ATTORNEY FEES

MATTER OF 320 W. 87, LLC V. 320 W. 87TH ST., INC.

2025 NY SLIP OP 30168(U) (SUP. CT. N.Y. CNTY. JAN.10, 2025)

Holder of Unsold Shares Gets Attorneys' Fees from Co-op that Tried to Charge Flip Tax on Holder's Sales

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

OUTCOME: Decided for Petitioner/Plaintiff Sponsor

WHAT HAPPENED: This litigation originated over a dispute over the petitioner/plaintiff's status as a sponsor/holder of unsold shares, and whether the sponsor was required to pay a flip tax when it sold apartments; seek approval from the respondent/defendant's board of directors for any sales, sublets, or renovations; or otherwise comply with rules applicable to regular tenant-shareholders and not to holders of unsold shares.

The court found in favor of the holder of unsold shares and against the co-op, and entered a declaratory and injunctive relief so that the co-op would not be able to try to charge the sponsor for flip taxes or otherwise encroach on its rights under the proprietary lease.

The sponsor then sought an award of attorneys' fees based on a provision of the proprietary lease authorizing an award of attorneys' fees based on a finding that either party "be in default" under the lease. The co-op opposed the application for two reasons. First, even though the court had determined the co-op was not entitled to charge flip taxes, there had been no finding that it was in "default" under the lease. Second, the sponsor had not pleaded a separate cause of action for attorneys' fees and had not submitted any invoices or other evidence when it had moved for summary judgment.

IN COURT: The court ruled against the co-op and referred the matter to a Special Referee for an inquest to determine the proper amount of attorneys' fees to be awarded to the holder of unsold shares. The court found that "by invoicing the plaintiff improperly and

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Purchaser Forced to Close Condo Purchase Transaction Despite Unfinished Work in Unit

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Court Grants Unit Owner Preliminary Injunction Barring HVAC Removal Until It Can Be Replaced

NUISANCE
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STOCK/SHARES
Co-op Not Required to Repurchase Shares for Hallway Space Shareholder Didn't Use in Alteration Project

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CO-OP&CONDO CASE LAW TRACKER digest

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demanding that it be entitled to withhold consent to, and charging the plaintiff for, subletting the subject apartments, among other things" the co-op "failed to perform covenants and agreements under the lease." Accordingly, the sponsor was entitled to an award of reasonable attorneys' fees and disbursements.

TAKEAWAY:
The co-op found itself in trouble by mistakenly asserting that the sponsor was not an individual person, which is a condition required to qualify as a holder of unsold shares under the cooperative's offering plan and proprietary lease, even though the offering plan did not actually require a holder to be an individual. It is unclear whether the co-op's position was simply an error, or perhaps a calculated gamble to gain leverage over the sponsor and force it to sell apartments. Regardless, co-ops must be very careful in dealing with holders of unsold shares and understand that their proprietary leases likely provide for very different treatment than average tenant-shareholders. Attempting to charge a holder a flip tax will not only result in a loss in court, but will also require the board to pay the sponsor's attorneys' fees as well.

BUSINESS JUDGMENT RULE

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

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

Appeals Court Reinstates Shareholder's Hybrid Article 78 and Breach of Contract Claims

SQUIB BY RICHARD J. SHORE, COUNSEL, NIXON PEABODY

OUTCOME: Decided for Plaintiff/Petitioner Co-op Shareholder

WHAT HAPPENED: The plaintiff/petitioner owned the shares to a subterranean "professional unit" previously used as a pediatric office. The proprietary lease permitted that the shareholder of the professional unit may apply to revise the Certificate of Occupancy to permit the residential use of the unit and the co-op will "not unreasonably withhold its consent to any physical alterations of the [unit] required to obtain the amended Certificate of Occupancy."

When the plaintiff/petitioner applied to convert the unit to residential use, the board denied the proposed conversion, stating that it "was not required to provide a reason for its denial and that there may be certain reasons for its denial that it would not divulge." The denial letter further stated that the proposed conversion would "increase the risk and liability of the co-op in the areas of 'proprietary lease governance and maintenance obligations, property insurance, budget.'"

IN COURT: The defendant/respondent cooperative moved to dismiss. The Supreme Court, Nassau County, denied the motion. However, the court nevertheless

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proceeded to consider the merits of the petition, denied the petition, and dismissed the action.

The Second Department reversed and found that the consideration of the petition on its merits, where the co-op had merely moved to dismiss, was a procedural error. The Second Department also held that the lower court had improperly substituted its judgment for that of the board – in an Article 78 proceeding the court is not permitted to "surmise . . . or speculate . . ." and may rely only on the stated reasons set forth by the board in reaching its determination. As such, the Appellate Division found that it was improper to rely on or consider grounds for denial of the shareholder's application that were not explicitly set forth in the denial letter.

The Second Department also held that the business judgment rule does not apply as the proprietary lease specifically provided that the cooperative will "not unreasonably withhold its consent", and thus the reasonableness standard applies.

TAKEAWAY:

This is a reminder that boards must articulate the reasons for its decisions. Too often boards fail to articulate the reasoning and justifications behind decisions; doing so subjects the cooperative to potential Article 78 challenges to its decision-making. This is especially true where the decision is governed by a reasonableness standard, as opposed to the typical business judgment rule.

Also, procedurally, moving to dismiss an Article 78 hybrid proceeding may not have been the best course; instead, answering the petition along with affidavits and evidence on the Article 78 and answering and moving for summary judgment on the breach of contract claim may have avoided the reversal of the denial of the petition on the procedural grounds articulated by the Appellate Division.

CONTRACTS

11 W 116TH ST. LLC V. SECOND PROVIDENCE BAPTIST CHURCH, INC.

2025 NY SLIP OP 30210(U) (SUP. CT. N.Y. CNTY. JAN. 16, 2025)

Purchaser Forced to Close Condo Purchase Transaction Despite Unfinished Work in Unit

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

OUTCOME: Decided, in part, for Plaintiff

WHAT HAPPENED: In 2014, the plaintiff, a developer of a newly constructed condominium known as "The Patagonia," acquired title to the property located at 11-13 West 116th Street, New York, N.Y., from the defendant, Second Providence Baptist Church, Inc. As part of the acquisition agreement, the plaintiff was obligated to create a condominium at the property, whereby a community facility unit would be included as part of such condominium, known as the "Church Unit," and title to that Church Unit would be transferred to the defendant upon the plaintiff's substantial completion of the premises.

When the condominium was completed and the plaintiff sought to transfer the Church Unit to defendant, the defendant conducted an inspection of the premises and created a punch list of outstanding items requiring completion or repair. Although the defendant accepted possession of the Church Unit in or about September of 2023, it still refused to accept title to the Church Unit, arguing that defects still existed at the premises, and therefore it should not be required to close the transaction until such time that the outstanding work was completed.

The plaintiff contended that it had made several unsuccessful attempts to access the Church Unit in order to address the punch list work, but the defendant denied the plaintiff access in connection therewith. In addition to adding new demands to the list, the defendant now claimed that it no longer trusted the plaintiff's contractors, and therefore such contractors would not be permitted to perform

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the work in question. Rather, the defendant demanded a $700,000 payment from the plaintiff so that the defendant could have its own contractors perform the work instead. Ultimately, the plaintiff brought this action seeking injunctive relief from the court, requesting an order compelling the defendant to accept a deed for the Church Unit.

IN COURT: The court examined the existing agreements between the parties, specifically the original purchase and sale agreement from 2014, as well as an affidavit provided by the head pastor of the Second Providence Baptist Church back in 2022. While the purchase and sale agreement provided that the premises must be delivered in a condition that is "substantially in accordance" with the plans and specifications described therein, it was the pastor's affidavit that drew much of the court's attention.

Specifically, the pastor's affidavit contained language whereby the defendant agreed that the "significant completion" of the Church Unit would be signified by the issuance of a temporary certificate of occupancy, and that the defendant would take title to the Church Unit within 90 days after a temporary certificate of occupancy is issued for the unit. Further, in his affidavit, the pastor expressly waived any claims for "additional scope of work, expenses, and costs beyond those" contained in the punch list, and therefore the defendant was barred from adding new demands to the punch list.

Accordingly, the court found that the plaintiff had sufficiently satisfied the prerequisites for the closing, and therefore ordered the defendant to accept a deed to the Church Unit. In addition, the court noted that the plaintiff remains obligated to complete the punch list work, and therefore ordered the defendant to allow the plaintiff access to the unit so that such work may be performed.

TAKEAWAY:

With respect to new construction condominiums, sponsors often have language in their sale contracts requiring purchasers to close when the unit is merely substantially complete, with the contract expressly providing that punch list items may be completed by the sponsor after the time of closing. Often, a question arises as to whether the existence of certain defects or outstanding items are sufficient to render a unit incomplete, or whether such unit is to instead be deemed "substantially complete" despite the existence of a post-closing punch list.

In the instant matter, the court looked to the sales contract and related agreements of the parties, wherein the purchaser had expressly acknowledged that the issuance of a temporary certificate of occupancy would satisfy the seller's "substantial completion" condition precedent to closing.

While this case involved the sale of a non-residential unit and was not made pursuant to an offering plan, we should expect courts to also analyze the transaction documents with respect to unit sales being made pursuant to an offering plan, where the language of the offering plan itself may speak directly to the issue at hand.

CONTRACTS

CARRELL V. 1228 MADISON DEV. LESSEE, LLC

2025 NY SLIP OP 50075(U) (SUP. CT. N.Y. CNTY. JAN. 14, 2025)

With One Notable Exception, Almost All of Shareholders' Claims Over Allegedly Defective $25M Apartment Dismissed

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

OUTCOME: Decided, in part, for Defendants

WHAT HAPPENED: In 2020, the plaintiff contracted to pay $25 million for a triplex apartment located in a newly constructed Upper East Side cooperative. After construction was completed and the deal closed two years later, the plaintiff found that the apartment failed to meet expectations.

In 2024, the plaintiff sued the sponsor, the architect, and

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the engineer, claiming that the apartment was defective and unfit for residential use. The plaintiff filed a claim for breach of contract against the sponsor, alleging that the apartment failed to meet the standards set forth in the cooperative's offering plan and the contract of sale. The plaintiff also filed fraud, negligent misrepresentation, and negligence claims against all three defendants. Finally, the plaintiff asserted professional malpractice claims against the building's architect and engineer.

All three defendants separately moved to dismiss the complaint, and the court consolidated the three motions for disposition in one order.

IN COURT: Accepting all of plaintiff's allegations as true for purposes of the motion to dismiss, the court found that the plaintiff sufficiently alleged a claim for breach of contract against the sponsor. The plaintiff alleged the existence of a contract (the contract of sale), performance by the plaintiff (the payment price), breach by the sponsor (failure to deliver an apartment in conformity with the contract and offering plan), and damages.

But all of the plaintiff's other claims were dismissed. The fraud claims were deemed to be merely duplicative of the contract claim against the sponsor, and the negligent misrepresentation claims failed to allege a special relationship with the defendants that gave rise to a duty of care. The negligence claim was dismissed against all defendants for lack of a special relationship, and the court noted that the negligence claim against the sponsor was essentially duplicative of the claim for breach of contract, too.

Finally, as for the architect and engineer, the plaintiff failed to allege privity with either professional, contractual or otherwise, that would give rise to a duty of professional care. Neither the architect nor the engineer was alleged to have created any dangerous condition in the apartment; at most, they failed to correct conditions that others had created. This was insufficient to hold either the architect or the engineer liable.

TAKEAWAY:
The plaintiff paid a lot of money for a triplex in the exclusive Carnegie Hill neighborhood in Manhattan. As the plaintiff tells it, the apartment was far from luxurious, and instead it was a mishmash of building code violations ranging from inaccessible HVAC to an overly narrow interior staircase. Windows and hardware were of poor quality, said the plaintiff, walls were not plumb, corners were not squared off, and pavers on the terraces were misaligned. If the plaintiff's allegations are true, perhaps the plaintiff will get recompense against the sponsor under the contract of sale. Still, the plaintiff's efforts to haul the architect and the engineer to the courthouse failed, as did the more expansive tort claims alleged against the sponsor.

ELECTIONS

REBOH V. 173-74 OWNERS CORP.

2025 NY SLIP OP 30040(U) (SUP. CT. N.Y. CNTY. JAN. 7, 2025)

Court Dismisses Most of Pro Se Plaintiffs' Claims, But Not Their Challenge to Board Election

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

OUTCOME: Decided for Defendant Co-op

WHAT HAPPENED: This is a case where the court had to address the sufficiency of a complaint drawn by pro se plaintiffs against the cooperative, individual board members, and its managing agent. The complaint, as is the case with many pro se pleadings, was inartfully drawn, and the court had to analyze the factual allegations to determine whether the plaintiffs asserted valid claims or whether they were insufficient and should be dismissed. The plaintiffs' claims related to damage to their units, the election of directors, and access to the cooperative's books and records. In

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the course of its decision, the court highlighted many basic rules of law that are worth bearing in mind.

IN COURT: Most notable, however, was that part of the court's decision addressing the plaintiffs' claim that the election should have been conducted by cumulative voting and not straight voting. The right to cumulative voting was set forth in the cooperative's bylaws but not in its certificate of incorporation as Business Corporation Law §618 mandates. The court did not dismiss the challenge to the election (but did not determine its validity either) but wrote "[i]t is logical to this Court that, providing it does not contradict the certificate of incorporation, the voting procedures laid out in the bylaws should be binding."

The claim against the managing agent was dismissed because the complaint did not allege that the agent had any individual responsibility to the plaintiffs nor did it allege any affirmative acts of wrongdoing or negligence by the agent.

The plaintiffs' claim for breach of the covenant of quiet enjoyment was dismissed because the plaintiffs did not allege any degree of ouster from the premises or that they abandoned the premises in whole or in part.

The plaintiffs' claim for breach of the proprietary lease because the cooperative did not enforce certain provisions against other shareholders (i.e., the carpeting requirement) was also dismissed. The court held that the plaintiffs lacked standing to assert the claim, that they were not third-party beneficiaries of the cooperative's lease with other shareholders, and that the lease expressly provides that the cooperative "[s]hall not be responsible to the Lessee for the nonobservance or violation of House Rules by any other lessee or person."

The plaintiffs' claim for breach of fiduciary duty against the corporation was dismissed because the corporation does not owe a fiduciary duty to its shareholders. However, the claim was allowed to proceed against several directors who were individually named in the suit.

To the extent that some of the plaintiffs' claims were deemed in the nature of derivative claims on behalf of the cooperative (for example, that a board member utilized the co-op's attorney for personal work), the claim was dismissed because the plaintiffs did not plead that a demand was made on the cooperative or that such a demand would have been futile.

The plaintiffs' claims to inspect the cooperative's books and records was dismissed because they did not plead that they made a demand to inspect those records.

The plaintiffs' claim for attorneys fees was dismissed because: (1) they were pro se plaintiffs and did not incur legal fees; and (2) the lease did not have a legal fee provision, so the plaintiffs would need to show that "defendants acted with disinterested malevolence, intentionally seeking to inflict economic injury on plaintiffs by forcing them to engage legal counsel" in order to state a claim. They did not do so, and the claim was dismissed.

TAKEAWAY:

The most notable part of the court's decision was the part addressing the cumulative voting claim. Business Corporation Law §618 expressly requires that cumulative voting be set forth in the certificate of incorporation (unlike a corporation formed under the Not-For-Profit law, which allows the right to be set forth in either the certificate of incorporation or the bylaws). Unless and until an appellate court upholds the court's rationale that a provision in the bylaws is sufficient, cooperatives should not conduct an election by cumulative voting unless the right is clearly set forth in the certificate of incorporation as the likelihood of a successful challenge to the election is high.

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EVICTION/TERMINATION

ROCHDALE VILL., INC. V. WRIGHT

2025 NY SLIP OP 30059(U) (N.Y. CIV. CT. QUEENS CNTY. JAN. 3, 2025)

Court Denies Summary Judgment to Co-op that May Have Accepted Rent After Sending Termination Notice

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

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

WHAT HAPPENED: This case involved a summary holdover proceeding based on a notice to cure and a notice of termination. The respondent, Tracey Wright, is a shareholder of a Mitchell-Lama cooperative. The court addressed two main motions: the shareholder's motion to amend her answer and motion for summary judgment on one of her affirmative defenses. The motion to amend asked the court to allow the answer to reflect that the cooperative is governed by Mitchell-Lama housing regulations and adding a defense based on the acceptance of rent during the "window period" after the termination of the tenancy and before the commencement of the holdover proceeding.

IN COURT: Concerning the motion to amend, the court granted the amendment, finding that it was timely, did not prejudice the cooperative, and was not patently insufficient or devoid of merit. Specifically, the court, following Second Department precedent, held that the acceptance of rent during the window period may invalidate a notice of termination.

The shareholder argued in her motion for summary judgment that the cooperative's notice of termination was facially defective and attempted to refute an allegation made in the termination notice; namely, that the shareholder failed to provide access for repairs. The cooperative opposed the motion, claiming the notice of termination sufficiently alleged the shareholder's failure to cure the objectionable conduct described in the notice to cure.

The court determined that the notice of termination was sufficient and satisfied the requirement that a predicate notice must be reasonable in view of the circumstances. The notice not only reiterated the allegations in the notice to cure, but it also informed the shareholder that her lease would be terminated if she failed to cure the default. It alleged specific facts demonstrating the shareholder's failure to cure; namely, her refusal to grant access to perform repairs in her apartment and to return tools to a contractor.

The motion for summary judgment was denied because the parties' submissions demonstrated that there were questions of fact, which precludes summary judgment under New York law.

TAKEAWAY:

The termination of a lease is a significant action that a cooperative may take when shareholder engages in objectionable conduct. If taken to conclusion it will result in the shareholder being evicted from their apartment. For this reason, a notice of termination must adhere to the procedures described in the lease to allow the tenant to cure the default described in the notice. A defective predicate notice is a defense against a summary holdover proceeding. Accepting rent after the termination notice is sent and before the holdover proceeding is commenced is also a defense and can vitiate a termination notice.

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FIDUCIARY DUTY

ROTH V. BD. OF MGRS. OF 299 W. 12TH ST. CONDO.

2025 NY SLIP OP 30003(U) (SUP. CT. N.Y. CNTY. JAN. 2, 2025)

Court Dismisses Unit Owner's Nuisance and Breach of Fiduciary Duty Claims Against Condo

SQUIB BY MICHAEL SAVINO, PARTNER, BRAVERMAN GREENSPUN

OUTCOME: Decided for Defendant Condo Board

WHAT HAPPENED: The plaintiff alleged that another unit owner was using their unit for commercial rather than residential purposes. Once the plaintiff notified the defendant condominium, the condominium requested further information and investigated the claims. It was determined that the unit was not being used for commercial purposes. Following the investigation, the plaintiff then further complained that he was being retaliated against because of his complaints, in that a leak from the plaintiff's apartment was being investigated.

IN COURT: The defendant provided evidence that they set up a camera with audio to investigate the plaintiff's claims, and the defendant's attorney wrote a letter to the unit owner regarding the plaintiff's complaints. The investigation did not reveal abnormal foot traffic or noise. The plaintiff also complained of children occasionally screaming, loud door slams, and an assistant speaking on the phone in the hallway. The court held that in a multi-unit pre-war building in the West Village, these alleged interferences are not so substantial or unreasonable in character to give rise to a nuisance claim. These noises are incidental to normal occupancy. Moreover, there is no evidence that any of the noise or smells were intentional in origin, nor were the noises or smells caused in any way by the defendant.

TAKEAWAY:
Following complaints, the board's thorough and prompt investigation was sufficient to defeat the plaintiff's claim of a breach of fiduciary duty. Further complaints of certain noises are not actionable as such are incidental to living in a condominium in New York City.

FRAUD

BIALES V. 10 E. END AVE. OWNERS, INC.

2025 NY SLIP OP 50074(U) (SUP. CT. N.Y. CNTY. JAN. 9, 2025)

Court Allows Fraud, Breach of Fiduciary Duty Claims to Stand Against Co-op, Management Company, and Directors

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

OUTCOME: Decided in Part for Plaintiffs, Co-op Defendants

WHAT HAPPENED: The plaintiffs are the owners of the stock and the proprietary lessees for apartment 6J in the building located at 10 East End Avenue in Manhattan. The building is owned by defendant 10 East End Avenue Owners, Inc., and managed by defendant Wallack Management Company, Inc. The plaintiffs and their children resided in the apartment from 2007 until they were displaced in September 2020 due to the presence of toxic levels of mold, asbestos, and other toxic pollutants present in the apartment.

Prior to 2018, water intruded into the plaintiffs' apartment through the exterior walls, façade,

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pipes, and other sources, but the leakage was not known and allegedly could not have been known to the plaintiffs. In March 2019, the plaintiffs first reported to the building that they had discovered a black substance behind the furniture of the children's bedroom. In September 2020, as part of work the building was doing, a pipe in the master bedroom of the apartment caused a massive flood that added to the toxic pollutants and floor damage allegedly present in the apartment.

The plaintiffs alleged that they justifiably relied on the defendants' assertions that no harmful pollutants existed in the apartment and, after the presence of the pollutants was confirmed, the defendants' representations that they were working to investigate, mitigate, and remediate the water infiltration, damage, and harmful pollutants when, in fact, they were not.

The plaintiffs sued the co-op, the management company, the co-op board of directors, and several individual board members. All defendants moved to dismiss.

IN COURT: The defendants requested dismissal based on the plaintiffs' failure to serve the defendants within 120 days of case commencement as required by statute. The court agreed that not all defendants were timely served, but that the plaintiffs were entitled to a retroactive extension of time in the interest of justice.

The defendants also argued that causes of action for negligence and constructive eviction were brought beyond the statute of limitations. The court disagreed, saying that the negligence claim was timely brought within three years of the September 2020 flooding incident, and that while constructive eviction claims are governed by a one-year statute of limitations, the allegations that the defendants failed to repair ongoing leaks constituted a continuing wrong, and so satisfied the statute of limitations.

However, the court said that the individual board members could not be sued for constructive eviction as they were not parties to the lease, had no landlord-tenant relationship with the plaintiffs, as required, and there was no authority to hold the individuals liable on a theory of aiding and abetting constructive eviction.

With respect to the fraud claims the court said that, at the pleading stage, the plaintiffs had sufficiently alleged that they reasonably relied on misrepresentations made by the defendants and the defendants had not shown that it was unreasonable of the plaintiffs to rely on the defendants' greater expertise in addressing water leak-related problems.

With respect to the claims of negligence and breach of fiduciary duty, the court said that the plaintiffs had adequately alleged for pleading purposes that the individual co-op board defendants had failed to comply with their statutory duty of care. The court dismissed the cause of action for attorney fees, saying that is not a distinct cause of action even if attorney fees comprise a portion of the plaintiffs' damages.

TAKEAWAY:

Co-op board directors do not normally anticipate that they may be sued individually based on actions taken or inaction by the board. If there is a lawsuit, the individual board members typically expect their actions to fall within the protection of the business judgment rule. In this case, however, the court said that the individual defendants did not dispute that the complaint alleged conduct by the members of the board that would, at a minimum, constitute participation in alleged tortious conduct by the co-op. Furthermore, the court said that, at the pleading stage, the plaintiffs were not required to identify specific acts of wrongdoing by specific directors. The case will now proceed into discovery where the veracity of the complaint allegations will be fleshed out.

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INJUNCTION

BLEICH V. THE BD. OF MGRS. OF 13 HARRISON ST. CONDO.

2025 NY SLIP OP 30182(U) (SUP. CT. N.Y. CNTY. JAN. 17, 2025)

Court Grants Unit Owner Preliminary Injunction Barring HVAC Removal Until It Can Be Replaced

SQUIB BY ANDREW P. BRUCKER, PARTNER, FOX ROTHSCHILD

OUTCOME: Decided, in part, for Plaintiff

WHAT HAPPENED: The plaintiff owned one of the two condominium units in the 13 Harrison St. Condominium, a four-story building located in Manhattan which consists of only two units. The plaintiff's unit (Unit 1) had a 25 percent interest in the condo, while the other unit (Unit 2), which had a 75 percent interest, was owned by a company solely owned by an individual who was the president of the condo.

The president sought to alter the building's roof to create additional residential space for his unit, which would require removal of HVAC equipment servicing the plaintiff's unit, and the plaintiff sought a preliminary injunction to stop the project. In addition, the plaintiff alleged a breach of fiduciary duties.

A key fact to this dispute is that the plaintiff's HVAC unit did not have a permit and was in violation of DOB regulations. The bylaws prohibited the use of unlawful equipment and further stated that violations of the law may be eliminated "by . . .the Unit Owners, or the Board of Managers".

IN COURT: The court held that the board had a right to remove the HVAC in light of the fact that it was illegal. Further, the court held that the declaration stated that the "main roof area" was a limited common element that "shall be exclusively used . . .by the owner of Unit 2", and specifically allowed modifications of the roof at that owner's expense. Therefore, the proposed alteration (and removal of the HVAC) might be permissible under normal circumstances.

However, the court was quite concerned that the board did nothing about the HVAC for over a decade and only now was interested in removing it for the benefit of the other unit owner who wanted to complete its renovations. The court noted that there may have been a breach of the board's fiduciary duty to the plaintiff not only because of this, but also because the condo board seemed to exclude the plaintiff from the board, failed to give them notices of meeting (or provide meeting minutes), and even violated the bylaws by allowing third parties to use the unit (without a lease).

The court held that there would be irreparable harm if the HVAC equipment was removed, and that there was a likelihood of success by the plaintiff. Finding that the equities tipped in the plaintiff's favor, it granted the preliminary injunction. The court ordered the parties to cooperate in good faith to find a solution to the HVAC issue, and enjoined the board from removing the HVAC equipment and undertaking the work on the roof until a replacement of the plaintiff's HVAC is installed.

TAKEAWAY:

The fact pattern of this litigation was rather interesting, in that while technically the board was in the right, it would be impossible for the judge not to be sympathetic to the unit owner. The board did nothing in regard to equipment, even though it knew that it was in violation of the law, and acted only when it benefited another owner. This was bad faith.

In addition, in this two-unit condominium, the majority owner acted in bad faith, as he seemingly never had board meetings and never provided minutes. In essence, based on his ownership (and control of the board), the owner of Unit 2 froze out the plaintiff from any decision making.

There are at least two good lessons to be learned here: Boards should always act in good faith when taking action, and a board cannot ignore owners of a minority interests. A board, no matter how small, owes a fiduciary duty of good faith and fair dealing to all of its unit owners, even if there's only one.

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INJUNCTION

CYMBALSKY V. 522 SHORE ROAD OWNERS, INC.

NO. 2:23-CV-03104 (JAN. 8, 2025) ECF NO. 61

Shareholder's "Unclear" Federal Claims Summarily Dismissed

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

OUTCOME: Decided for Co-op Defendants

WHAT HAPPENED: In early 2022, in a related litigation in Nassau County Supreme Court, the cooperative commenced an action seeking to obtain access to the shareholder's apartment so that it could be "[c]leaned of the extreme unsanitary and hoarding condition . . . . " That litigation was complicated by the COVID pandemic, the shareholder's medical condition resulting in hospitalization, and the involvement of Adult Protective Services on behalf of the shareholder. In January 2023, the Supreme Court denied the cooperative's motion for a temporary restraining order and a preliminary and permanent injunction. The shareholder was at all times a *pro se* litigant.

IN COURT: Following the Supreme Court's denial, the shareholder (again *pro se*) commenced the instant action in April 2023 alleging RICO violations, violations of the Fair Housing Act, various constitutional claims, and unlawful debt collection against the cooperative, its board of directors, managing agent, and attorney.

A primary focus of the shareholder's claims was the prior litigation brought by the cooperative in Nassau County Supreme Court. The shareholder sought: (1) to recover exemplary damages; (2) $5,000 for lost silver and cash; (3) $500,000 to "protect value decline . . . . "; and (4) permission to have a chair in the lobby for him to sit in and to allow his own lounge chair to remain on the pool deck during the summer.

The defendants thereafter moved to dismiss all of the plaintiff's claims for failure to state any plausible cause of action upon which relief could be granted.

The court, in reviewing the shareholder's claims noted that *pro se* plaintiffs are held "to less stringent standards than formal pleadings drafted by lawyers" and that courts reviewing *pro se* complaints must "construe the complaint broadly, and interpret it to raise the strongest arguments that it suggests." Notwithstanding that deference, the court granted the defendants' motion to dismiss all claims, with prejudice, noting that the exact nature of the shareholder's claims was unclear and difficult to discern, and ultimately concluding that the shareholder failed to state a claim against any defendant under any theory of liability.

TAKEAWAY:

You never know when you are going to be on the receiving end of a federal case, and boards should maintain insurance for claims like these. Hopefully claims such as these do not convince boards to shy away from the legitimate exercise of their authority, especially when doing so is in the interest of the entire community.

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INJUNCTION

SNIR V. FLUENCY LLC

2025 NY SLIP OP 30122(U) (SUP. CT. N.Y. CNTY. JAN. 9, 2025)

Court Denies Unit Owners Preliminary Injunction Barring Noisy Nightclub from Operating

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

OUTCOME: Decided for Defendants

WHAT HAPPENED: Situated above a restaurant and nightclub that leased the commercial space in a condominium building, the owners of a residential unit in the condominium repeatedly complained to the condominium's board of managers about the loud music and crowd noise from the club. Due to COVID-19 restrictions in place at the time the unit was purchased, the club was not operating, thus the purchasers did not perceive the noise level generated by the club. Once it resumed operations, the noise occurred almost daily and most significantly on weekends. Adding soundproofing to their floors and ceiling in their unit did not reduce the impact of the noise on the residential unit owners.

IN COURT: After the condominium association declined to bring legal proceedings against the club, the plaintiff unit owners filed an action against the operator of the club and the board of managers of the condominium association seeking a permanent injunction and money damages as a result of the noise emanating from the club. The plaintiffs alleged that the sound level exceeded the New York City Administrative Code and was a violation of the condominium bylaws.

Days after commencing the action, the plaintiffs filed an order to show cause for a preliminary injunction to prohibit the club from operating. The court denied the request because the plaintiffs had failed to show a likelihood of success on the merits of their private nuisance claim, since they had not established that the noise exceeded the permitted decibel level. The court also noted that the purpose of a preliminary injunction is to maintain the status quo until a final determination can be made and not to decide the ultimate rights of the parties, which was the relief the plaintiffs were seeking.

Six months later, the plaintiffs filed a subsequent order to show cause for the same relief, but this time submitting a report from an acoustic consultant as well as other alleged proof of the unreasonable noise. However, the court found that the plaintiffs had again failed to make a prima facie showing of the probability of success, finding deficiencies in the plaintiffs' proffered evidence. In support of their application, they had offered their own decibel-level measurements as well as photographs of large crowds in front of the club, both of which the court found to be inadequate. Even their expert report was rebutted by the defendants' expert, casting a sharp disagreement as to whether the club was actually violating the administrative code and justifying the denial of the request for a preliminary injunction.

TAKEAWAY:

Noise is a fact of life in New York City, the "city that never sleeps." But when that noise intrudes on one's ability to sleep, the natural reaction is to do what it takes to make it stop. Such efforts must include a careful balancing of what is permitted and what is tolerated. A preliminary injunction is an ideal way to get quick results, but obtaining one is often a tall order and requires a sufficient showing of irreparable injury, a balancing of the equities, and the likelihood of success on the merits of the claim. Garnering the evidence to support each element is essential to reaching the goal.

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NUISANCE

BREITERMAN V. 89TH & MADISON OWNERS CORP.

2025 NY SLIP OP 30176(U) (SUP. CT. N.Y. CNTY. JAN. 16, 2025)

Court Dismisses Tenant's Nuisance Claims Regarding Construction During Pandemic

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

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

WHAT HAPPENED: The plaintiff lived in a rent-controlled apartment in a condominium at 45 East 89th Street in Manhattan. He sued the defendants on account of construction noise associated with the renovation of other apartments, asserting claims of trespass, negligence, and breach of the covenant of quiet enjoyment, among others. The defendants are the building landlord, management company, owners of the plaintiff's apartment, and about 40 other rental apartments in the building.

During the COVID-19 pandemic the plaintiff was primarily confined in his apartment while studying for a PhD. As the COVID-19 lockdown eased, the construction, a complete demolition and renovation on the floor of the plaintiff's apartment, became so loud he claimed it was like living next to a "[h]eard [sic] of stampeding elephants." This disrupted and delayed the plaintiff's PhD studies. What happen next precipitated this lawsuit.

The plaintiff entered one of the units under construction and started yelling about the noise. The building's resident manager went into the plaintiff's unit and admonished him for his behavior. The plaintiff asserted the manager's entry constituted a *trespass*.

Subsequentially, the buildings attorney sent the plaintiff a "cease and desist" letter, which the plaintiff claims grossly exaggerated his behavior, and constituted *defamation* when the letter was published to his landlord and others involved in the building management.

The plaintiff also alleged that the defendants failed to post Notices of the Safe Construction Bill of Rights (NYC Admin. Code §§27-2009.2[b][1] *et seq*.), and the Notice of Tenant Protection Plan (NYC Admin. Code §§28-120.1.3 *et seq*.). The latter notice informs tenants whom to contact concerning construction noise complaints. The plaintiff claims that this failure constituted a breach of duty towards him, and negligence, and because of this negligence the plaintiff suffered a "kind of mental breakdown." He was unable to get his PhD work done, resulting in damages, affecting him for the rest of his life.

The plaintiff maintains that the defendants' conduct also violated his covenant of quiet enjoyment.

IN COURT: The plaintiff sufficiently pleaded trespass by the resident agent entering his apartment without justification or permission. Actual damages resulting from the trespass was not required. Even if the damages were *de minimis*, the plaintiff is entitled to nominal damages.

The plaintiff argued that the facts in the attorney's letter were exaggerated to the point of falsity, resulting in defamation. The defendant countered that the statements were true, were privileged, and that there was no "publication," by sending a copy to the plaintiff's landlord and others in the community of interest. The court held that a privilege exists when the publication was made to parties that shared common interest in the subject matter, i.e., the landlord, managers, and attendees at the board meeting. Therefore, the letter was not defamatory.

The plaintiff claimed the defendants breached a duty to the residents by their failure to post the notices required by New York City. Summonses were issued by New York City for that failure. The plaintiff claimed that failure constituted negligence and resulted in damage to his career. The defendants argued that failure to post the notices was not a duty they owed the plaintiff, and that standing alone did not cause the damages claimed. The court thus dismissed this claim.

The plaintiff claimed the

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conduct of the defendants created an actionable nuisance. The court held that nuisance can be actionable when there was an invasion of the private use and enjoyment of private property that is intentional, unreasonable, reckless, and continuous. It found that the pleadings failed to show that the defendants' renovations were unreasonable in character, as the defendants had the right to undertake them. Nuisance claims caused by noise are generally sustained when other issues are present, such as debris or property damage, or that the noise exceeds permitted sound levels, none of which were alleged here. The claim was therefore dismissed.

The claim of the breach of the covenant of quiet enjoyment required that the plaintiff had been evicted, either actually or constructively. Constructive eviction required an abandonment of the premises. Other than leaving the premises for two days to study at a hotel, the plaintiff did not allege that he abandoned the premises. Thus, there was no sufficient claim of the breach of the covenant.

A notice of appeal was filed by the plaintiff, who also has a motion pending to reargue the motion and to amend the complaint.

TAKEAWAY:

Noise and other nuisance claims are very vexing to litigate. Admissible evidence of noise generally requires an expert, such as an acoustic engineer, making a study to measure the noise over time and show that it exceeds some recognized standard, such as by reference to the city's noise code.

While one may sympathize with the plaintiff because he lacked the money to relocate during the construction, the court, relying on the binding precedent of *Duane Reade v. Reva Holding Corp.*, 30 AD3d 229, at 237 (2006 NY Slip Op 04921 (1st Dep't. Jun. 15, 2006)), held that if there was no ouster, it was bound to require abandonment of the premises to sustain an action for breach of the covenant of quiet enjoyment. Lack of means to abandon the premises, while sympathetic, is legally insufficient to satisfy this requirement.

PERSONAL INJURY

DE PAZ V. LEMX CORP.

2025 NY SLIP OP 30194(U) (SUP. CT. N.Y. CNTY. JAN. 16, 2025)

Court Won't Dismiss Injured Worker's Claims Against Condo and Managing Agent

SQUIB BY DALE DEGENSHEIN, PARTNER, FOX ROTHSCHILD

OUTCOME: Decided for Plaintiff and Defendant/Third-Party Plaintiff

WHAT HAPPENED: The plaintiff was working for a subcontractor of third-party defendant LEMX at the 30 East 85th Street Condominium. When the plaintiff removed a metal pipe from a sidewalk shed, it touched a live electrical wire, which sent shock waves through the plaintiff so that he fell. According to a representative of the managing agent, LEMX was responsible for the lighting, which should have been disconnected prior to dismantling the sidewalk shed.

The condominium and its agent (also a defendant) moved for summary judgment on their cross-claims against LEMX for indemnification and contribution, arguing that there is no evidence that the condominium or agent were actively engaged in any of the work that caused the accident, or that they were affirmatively negligent. The condominium and agent also argued that they are entitled to judgment on their breach of contract claim because the subcontractor (the plaintiff's employer) did not provide the condominium and agent with insurance. LEMX argues there are issues of fact regarding who had access and control to the electrical power, and further that it—LEMX—had the requisite insurance.

IN COURT: The court found that there were issues of fact as to the negligence of the condominium, its agent, and LEMX, which makes a

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ruling premature. The court found that it was not clear who had access to the power supply and who could make sure it was turned off.

Regarding the condominium's claim that LEMX failed to procure insurance, the court denied this motion because the condominium would have had to demonstrate that it was not named as an insured on any policies issued. The condominium did not annex to its motion any insurance policy that did not name it, nor did it demonstrate that coverage was denied.

TAKEAWAY:
There are a couple of issues here. The first, non-legal, point is that this case demonstrates the importance of contractors and building staff communicating with respect to work being performed. Separately, we have seen more and more situations where contractors are employing subcontractors who have not met the building's requirements for insurance and, presumably, indemnification. In fact, the building rarely knows the subcontractor is even working on the job until there is an incident. While it may be a burden on the building staff, if it is feasible to do so, the managing agent should provide building employees with a list of approved subcontractors for that job, workers should be checked into the building when they arrive, their company affiliation should be recorded, and, if the company is not one that has provided proper insurance and indemnification to the condominium (as set forth on the list sent by the managing agent), the worker should not be permitted in the building.

PERSONAL INJURY

H.G. V. LINDSAY PARK HOUS. CORP.

NO. 500016/2018 (SUP. CT. N.Y. CNTY. JAN. 3, 2025) NYSCEF NO. 222

Court Won't Dismiss Case Against Co-op for Allegedly Failing to Abate Lead-Paint Condition

SQUIB BY MICHAEL SAVINO, PARTNER, BRAVERMAN GREENSPUN

OUTCOME: Decided for Neither Party

WHAT HAPPENED: The infant plaintiff lived in a low-income housing development and was found to have elevated blood lead levels. This triggered an investigation to identify the source of the infant's lead poisoning. The investigation revealed an illegal concentration of lead-based paint. A Commissioner Order to Abate Nuisance (COTA) was issued.

The defendant co-op failed to remediate the lead condition and was issued a violation for failure to comply with the terms of the COTA. A final notice was issued, and when the co-op failed to comply, the issue was referred to the New York City Department of Housing Preservation and Development's Emergency Repair Program, which engaged a remediation company to abate the lead. The plaintiff continued to live in the apartment and continued to test positive for elevated lead levels. The Supreme Court action followed.

IN COURT: Both the plaintiff and defendant moved for summary judgment, and the court denied both motions.

In order to show an entitlement to summary judgment relating to lead exposure, a plaintiff must establish that the landlord—in this case the co-op—had actual or constructive notice of the condition for a period of time that, in the exercise of reasonable care, it should have been remedied. The co-op offered evidence that created triable issues of fact as to whether the co-op was aware of the presence of children in the apartment and the dangers of lead paint, and whether the co-op took reasonable precautionary measures to remedy the lead. In addition, the co-op raised triable issues of fact relating to causation as to whether the plaintiff's neurocognitive deficits were proximately caused by the lead exposure in the subject apartment.

TAKEAWAY:
In a case involving lead exposure of a tenant, it is critical to engage a remediation contractor as soon as notice of the condition exists. In addition, investigation is critical, as issues of fact were found in this case because deposition testimony established that the infant ate paint chips from an area that tested negative for lead, the parents established that they would remove chip paint chips from the infant's mouth, and the parents allowed the infant to play in areas where lead was discovered but would wash the infant's hands.

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SPONSOR

BD. OF MGRS. OF ASTON CONDO. V. BLDG. 389 LLC, 2025 NY SLIP OP 00269 (1ST DEP'T. JAN. 16, 2025)

Appeals Court Reinstates Condo Board's Fraud-Based Claims Against Sponsor

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

OUTCOME: Decided, in part, for Plaintiff-Appellant Condo Board

WHAT HAPPENED: The plaintiff board of managers alleged liability against the defendant sponsor based upon the sponsor's purported construction defects, breach of hot water heater warranties, fraudulent conveyance, and fraudulent inducement.

At the preliminary stage of the proceeding, the sponsor, citing language in the offering plan requiring specific notice of liability within the first six months after the first occupancy of a unit, moved to dismiss. The sponsor also alleged that all of the plaintiff's fraud-based claims against it were precluded because they were not pleaded with sufficient particularity. Additionally, the sponsor sought dismissal on the basis that the plaintiff had neglected to prosecute its claims and were thus deemed to have abandoned them.

IN COURT: The Appellate Division held that because the board of managers' notice was untimely, its cause of action based on alleged construction defects was properly dismissed. The court cited language in the offering plan specifically stating that if notice was not timely given, the sponsor is "[c]onsidered to have discharged any obligation it may have with respect to construction defects."

However, the appellate court reinstated the plaintiff's breach of contract claim, which had been dismissed by the lower court, for the allegedly insufficient hot water heater warranties. According to the court, the language requiring notice of construction defects within the first six months after the first occupancy of a unit was inapplicable to claims regarding the inadequate water heaters, which were governed by a different section of the offering plan and by basic contract law principles.

All of the plaintiff's fraud-based claims were similarly reinstated because they were based on the sponsor's alleged breach of contract. Additionally, in its pleadings, the plaintiff had carefully detailed the "badges of fraud" that could potentially result in liability, and support an arguably viable claim.

Finally, the court held that the sponsor's motion for dismissal based on neglect to prosecute was properly denied because the parties had previously engaged in active settlement discussions. The sponsor's own voluntary participation in said discussions negated and/or belied its claims of abandonment by the plaintiff.

TAKEAWAY:

It is critical to expeditiously retain counsel to review the precise language of an offering plan and timely notify the sponsor of any alleged construction defects. This, in turn, may avoid summary dismissal based on a technicality. A careful review of the language of an offering plan may also support alternative causes of action that should be included in the pleadings that will not be barred by a statute of limitations. Detailed descriptions in a complaint of a sponsor's specific alleged improper actions may also successfully avoid summary judgment, and the attendant dismissal of fraud-based claims at a preliminary stage of a legal proceeding. A board of managers should also cite settlement discussions between the parties as persuasive evidence that a sponsor was aware that a board of managers did not intend to abandon its causes of action.

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SPONSOR

THE BD. OF MGRS. OF THE 135 W. 52ND ST. CONDO. V. 135 W. 52ND ST. OWNER LLC

2024 NY SLIP OP 34539(U) (SUP. CT. N.Y. CNTY. DEC. 31, 2024)

Court Dismisses Virtually All Construction Defect Claims Brought Against Sponsor, Its Principals, and Successors

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

OUTCOME: Decided for Condo Sponsor Defendants

WHAT HAPPENED: The 135 West 52nd Street Condominium was converted from a 46-story luxury hotel into a residential condominium building by the sponsor, 135 West 52nd Street Owner LLC, pursuant to an offering plan. The plaintiff, The Board of Managers of the 135 West 52nd Street Condominium, brought this action against the sponsor, the sponsor's principals, and the successor sponsors on behalf of the condominium's unit owners for alleged construction defects in the condominium building that were created during the conversion process.

IN COURT: The defendants all moved to dismiss the complaint as against them, with the exception of the breach of contract claim brought against the sponsor. The plaintiff subsequently moved for an order of attachment against the sponsor and the successor sponsors. The court granted the defendants' motions to dismiss in their entirety, leaving the breach of contract claim against the sponsor as the sole remaining cause of action, and denied the plaintiff's motion for attachment.

Specifically, the court dismissed the breach of contract and breach of warranty claims against the successor sponsors, noting that a successor sponsor may not be held liable for construction defects that are attributable to an original sponsor, and against the sponsor principals, holding that a sponsor principal could not, pursuant to the corporate veil-piercing theory, be held liable merely for actions taken on behalf of a sponsor.

The court also dismissed the plaintiff's claim for breach of warranty against the sponsor, as well as the plaintiff's claims for breach of the implied covenant of good faith and fair dealing, unjust enrichment, and claims sounding in fraud against the defendants, as duplicative of the surviving breach of contract claim against the sponsor.

Not only did the court find that the plaintiff's fraud claims were duplicative, but notably, the court held that they were also subject to dismissal because the plaintiff: (1) lacked standing as a private litigant to bring such claims, which are predicated on alleged omissions in filings, due to their preemption by the Martin Act; and (2) failed to meet the particularity requirements of CPLR §3016(b), which requires pleading in detail the allegations underlying these causes of action, including that a defendant participated in, or had knowledge of, any alleged fraud.

Additionally, the court found significant that the offering plan and purchase agreements contained a specific disclaimer of oral representations and a merger clause, thus barring extra-contractual representations to support a misrepresentation claim.

The court also dismissed the plaintiff's claims against the defendants for violating General Business Law (GBL) §§349 and 350, which concern deceptive consumer practices and false advertising, as not relevant to the matter because the sale of condominium units does not satisfy the threshold requirement of a broad impact on the public at large. The court further dismissed these claims, which are based upon allegations that the sponsor omitted facts about alleged defective building conditions, as barred by both the Martin Act and precluded by the aforementioned contractual disclaimer provisions. Further, the court noted the failure to particularize allegations against the defendants.

Likewise, the court dismissed the plaintiff's claim pursuant to 15 U.S.C. §1701, the Interstate Land Sales Full Disclosure Act, which concerns unimproved land, holding that it simply did not apply.

Lastly, the court dismissed the plaintiff's cause of action seeking

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a permanent mandatory injunction directing the defendants to use "best efforts" to obtain a permanent certificate of occupancy in light of the fact that the plaintiff's claim could be adequately remedied by money damages through its breach of contract claim against the sponsor.

Given prior disclosure, via an amendment to the offering plan, that the ownership of the condominium unit sought to be attached, as well as the dismissal of all causes of action against the defendants, except for the breach of contract claim against the sponsor, the court denied the plaintiff's motion for attachment.

TAKEAWAY:

Sometimes less is more and discretion is the better part of valor. When a condominium's board of managers is commencing an action to seek redress for construction defects in its condominium building, it should exercise caution and consider whether improperly naming successor sponsors and sponsor principals as parties might subject it to unnecessary motion practice. In a case such as this one, where the construction defects were solely created by the sponsor, or on behalf of the sponsor, naming the successor sponsors and the sponsor principals was improper and led to all claims against those parties being dismissed.

Moreover, although the plaintiff properly named the sponsor as a defendant here, this case reaffirms that there is no private right of action for fraud against a sponsor where the fraud and misrepresentation rely entirely on alleged omissions in filings required by the Martin Act. If one is going to assert fraud claims against a sponsor, to avoid preemption there must be an independent allegation of wrongdoing, pled in requisite detail, that separates misrepresentation claims by purchasers of condominium units from the remedies available to the Attorney General.

STOCK/SHARES

KUSKIN V. 2 HORATIO OWNERS, CORP.

NO. 656280/2023 (SUP. CT. N.Y. CNTY. JAN. 13, 2025) NYSCEF NO. 36

Co-op Not Required to Repurchase Shares for Hallway Space Shareholder Didn't Use in Alteration Project

SQUIB BY KRISTIN PENDERGRASS, COUNSEL, SEYFARTH SHAW

OUTCOME: Decided, in part for Co-Defendants, Plaintiff Co-op Unit Owner

WHAT HAPPENED: Plaintiff Judith Kuskin, the tenant-shareholder of apartments 2A, 2B, and 2C in the cooperative apartment building owned by defendant 2 Horatio Owners Corp., commenced this action against the co-op and its managing agent, FirstService Residential Services. On either Aug. 9 or Oct. 9, 2020 (the handwritten date could not be deciphered), the plaintiff and the co-op entered into an alteration agreement for the plaintiff to combine her three apartments.

On July 26, 2021, the plaintiff and the co-op entered into a separate purchase and sale agreement for the plaintiff to purchase 89.5 square feet of common hallway space and 10 additional shares in the co-op, to facilitate the apartment combination work and allow the hallway space to be incorporated into the combined apartment.

The plaintiff commenced the alteration work on April 11, 2022, and the work was completed on Jan. 13, 2023. During the course of the work, it was determined that the plaintiff could not use a portion of the purchased hallway space. The plaintiff and the co-op reached an agreement in principle for the co-op to repurchase almost 30 square feet of the hallway space and some of the shares, but did not execute a written agreement to that effect.

After the completion of the alteration work, the co-op assessed a $2,250 penalty against the plaintiff for not completing the work within the time allotted under the alteration agreement. The plaintiff objected to the penalty, as well as the co-op's intent to charge closing costs in connection with its repurchase of hallway space and shares. The plaintiff filed suit, asserting

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claims against the defendants for a declaratory judgment that the $2,250 penalty was improperly imposed, a declaratory judgment that the co-op was required to close on the repurchase of the hallway space without closing costs, and breach of contract.

IN COURT: The defendants moved for summary judgment dismissing the plaintiff's claims, alleging that the penalty was authorized by the alteration agreement and there was no enforceable agreement for the co-op to repurchase the hallway space and shares. The defendants also moved for summary judgment dismissing all claims against the managing agent, arguing that none of the claims asserted against it were proper because it was acting as a disclosed agent for the co-op.

The court agreed with the defendants regarding the repurchase of hallway space and shares, and dismissed the plaintiff's second declaratory judgment claim. The court held that neither the co-op's bylaws nor any other legal authority obligated the co-op to repurchase the hallway space or shares, or to proceed with a closing on the repurchase with different closing costs from any other purchase.

However, the court declined to dismiss the plaintiff's claims regarding the $2,250 penalty, holding that there was a triable issue of fact regarding how much time the plaintiff had to complete the alteration work under the alteration agreement. The court also dismissed all of the claims against the managing agent, as all of its actions as alleged by the plaintiff were undertaken as the agent of the co-op.

TAKEAWAY:

In the absence of an express written agreement or specific bylaw provision, a cooperative corporation is not obligated to repurchase common area space or shares from a tenant-shareholder who previously purchased but was unable to use such space in connection with an alteration. Here, although the co-op had agreed in principle to repurchase unused hallway space and shares from the plaintiff, in the absence of a final agreement or applicable bylaw provision, it had no obligation to do so or to waive its standard closing costs.

Cooperative corporations and tenant-shareholders should consult the corporation's bylaws to determine what terms govern the sale and later repurchase of common area space and cooperative shares. To the extent that the bylaws are silent on such issues, parties should consider including repurchase terms in any purchase and sale agreement for common area space and additional shares, to avoid a future dispute regarding the terms of repurchase by the corporation.

YELLOWSTONE INJUNCTION

BARSKY V. SHERMAN SQUARE REALTY CORP.

2025 NY SLIP OP 30139(U) (SUP. CT. N.Y. CNTY. JAN. 13, 2025)

Court Grants Shareholder *Yellowstone* Injunction Barring Co-op from Terminating Lease During Habitability Dispute

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

OUTCOME: Decided for Plaintiff Co-op Shareholder

WHAT HAPPENED: Plaintiff Leona Barsky demanded that her cooperative corporation mitigate alleged leaks, mold, and lack of heating in her apartment. The court granted a preliminary injunction requiring the defendant to retain experts to assess the scope of the claimed conditions pending a trial. However, the cooperative subsequently sent a notice of default to Barsky due to her failure to pay maintenance charges, late fees, and the co-op's legal fees billed during the dispute. Barsky argued that she was entitled to withhold maintenance due to claimed breaches of the warranty of habitability, and the cooperative argued that she was not entitled to withhold maintenance under those circumstances.

Barsky then filed a motion seeking a "*Yellowstone*" order barring

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the cooperative from holding her in default and terminating her lease until the merits of her claim were decided by the court. The cooperative asserted that such an order was improper, since she always had the right to cure a claimed default under Real Property Actions & Proceedings Law (RPAPL) §753(4) (giving a residential tenant in default 30 days to cure the default before a warrant of eviction would be issued after a court decision that they had breached their lease), and that the proper forum for determining the dispute was Housing Court, not Supreme Court.

IN COURT: The court observed that in order to obtain a *Yellowstone* injunction, the plaintiff must show that: (1) it holds a commercial lease; (2) it received a notice of default (or the equivalent) threatening termination of the lease; (3) it requested the relief before the grace period for curing the default had expired; and (4) it was prepared to, and had the ability to, cure the default without having to vacate the premises.

As to the first element, the court stated, "A *Yellowstone* injunction can be issued to stay termination of a residential proprietary lease, particularly when RPAPL §753(4) is not available." The scope of the risk of termination to the moving party was irrelevant in deciding whether to grant the injunction, so long as it was a potentially irreparable injury. The court found that the threat of eviction after termination of a lease constituted the type of "irreparable injury" that a *Yellowstone* injunction was intended to address, even if the threat was not imminent. Further, RPAPL §753(4) was inapplicable since it represented a form of protection granted to tenants after a final judgment of possession had been granted, but no judgment of possession had yet been requested.

As to the second, third, and fourth elements, the court determined that the plaintiff had received a notice of default; she had requested relief before the grace period for cure had expired; and that she was prepared to cure the default by putting maintenance charges into escrow pending a final determination. The court also cited one case in which RPAPL §753(4) relief was insufficient to protect the plaintiff because it required that the plaintiff undergo the burden of an eviction proceeding, which in and of itself might be deemed an "irreparable injury." Accordingly, the court granted the *Yellowstone* request.

TAKEAWAY:

Although the result seems reasonable, the court appeared to gloss over the rationale for applying the *Yellowstone* principles to a residential case. The cases it cited in support of applying *Yellowstone* all dealt with the types of defaults that literally could not be cured within the statutory grace period granted under RPAPL §753(4), such as making repairs or removing an illegal structure. (In one case, *Yellowstone* relief was actually denied because the alleged default was resolvable and curable within the statutory grace period.) In contrast, in this case the claimed default was purely monetary, so it was subject to cure within the statutory grace period.

More likely the court saw no reason to deny the same relief to a residential tenant as it would have to a commercial tenant since a preliminary injunction had already been granted in the case and payment of rent was clearly intertwined with the likelihood of success on the merits.

In another case just decided in February, *Wharton-Bickley v. 388 Broadway Owners LLC*, 2025 NY Slip Op 00802 (1st Dep't. Feb. 11, 2025), the First Department also upheld the issuance of a *Yellowstone* injunction despite the landlord's claim that it should not apply to a residential lease. Ironically, the case related to a live/work space that the tenant was claiming was residential but the landlord claimed was commercial. In that case, the trial court had granted a preliminary injunction to the tenant but struck the TRO barring lease termination, ostensibly because the RPAPL §753(4) remedies would be available to the tenant. The appeals court stated that the nature of the lease was ambiguous, and that since *Yellowstone* relief is equitable in nature it should be construed broadly. The court in the *Barsky* case might have implicitly applied the same principles.

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