CO-OP & CONDO
CASE LAW TRACKER
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BOOKS & RECORDS

MATTER OF DIBELLA V. BD. OF DIRS. OF HALF MOON BAY HOMEOWNERS ASSN., INC.

2025 NY SLIP OP 00444 (2ND DEP'T. JAN. 29, 2025)

Appellate Court Orders Board Member Be Given Access to Condominium Documents

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

OUTCOME: Decided for Petitioner-Appellant in part

WHAT HAPPENED: A board member filed a petition against the board of directors of a condominium that sought two categories of relief. First, the petitioner sought to set aside and annul the board of directors' decision to pave and make other changes to a pedestrian walkway without the approval of the homeowners of the condominium. Second, the petitioner sought to compel the production of books and records that were denied to her.

The board immediately moved to dismiss the petition, claiming that an identical petition to annul the board's walkway decision had been dismissed a year earlier. Moreover, the board claimed that documents had been provided to the petitioner.

The trial court granted the board of directors' motion in full and dismissed the petition. The petitioner appealed.

IN COURT: The appellate court affirmed the trial court's dismissal of the claims relating to the prior decision about paving and changing the pedestrian walkway. But the appellate court reversed the trial court on the document issue. A board member faces potential liability for improper management during her term as a director, and so she must keep herself informed as to the policies and business affairs of the entity, as well as the acts of the entity's officers. New York recognizes that board members of a condominium possess an absolute, unqualified right to inspect the books and records of the condominium. While some documents were given to the petitioner, others were withheld, and a factual dispute over the scope of the documents given to the petitioner existed. As such, it was an error to dismiss the petition insofar as it sought access to condominium documents.

(**Takeaway** *on p. 3)*

APRIL 2025 HIGHLIGHTS

DEFAMATION
Sponsor and Condo Board Found Liable for Using Litigation as a "Weapon" to Silence Unit Owners

NUISANCE
Condo Must Replace HVAC System Causing Nuisance to Owners and Incurring Violations

PERSONAL INJURY
Condo, Managing Agent Not Responsible for Unit Owner's Injury Relating to Faulty Installation of Her Refrigerator

REPAIRS
Condo Board Denied Summary Judgment in Recovering Costs Related to Leak

SPONSOR
Court Won't Dismiss Unit Owner's Breach of Contract Claims Against Sponsor

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CO-OP&CONDO CASE LAW TRACKER digest

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TAKEAWAY:
A review of the appellate record shows that there is a long history between the litigants over the pedestrian walkway issue. Yet even in that context, the appellate court emphatically enforced the rule that a director who serves on a board must be given free and broad access to all of the entity's books, records, and documents. Boards and board members should take note.

BUSINESS JUDGMENT RULE

HUBSHMAN V. 1010 TENANTS CORP.

2025 NY SLIP OP 30453(U) (SUP. CT. N.Y. CNTY. FEB. 5, 2025)

Shareholder's Rooftop Rights Expired Under Original Lease, But Her Breach of Fiduciary Duty Claims Survive

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

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

WHAT HAPPENED: Since 1979, Hubshman, now 91 years of age, resided in a penthouse apartment that was built with an historic rooftop garden in a residential building overlooking the Metropolitan Museum of Art in New York. The original proprietary lease that governed the apartment expired in September 2024. The terms provided that the lessee had exclusive use of the garden, and should the garden need to be removed for building maintenance, the co-op was responsible for replacing the garden as it was. The original lease also prevented the co-op from removing any of Hubshman's rights respecting the garden without her consent.

Over the years the garden was destroyed and rebuilt several times involving cases of allegations of water leaks originating from the building façade, not the garden. In two prior cases the courts found that the co-op breached the terms of, and confirmed Hubshman's right under, the original lease, and enjoined the co-op from accessing the roof garden.

As the expiration of the original lease drew near, the co-op corporation decided to remove several of the garden protections, and the majority of the shares were cast in favor of ratifying a new lease. Hubshman filed this action seeking a declaratory judgment and injunction related to the garden.

IN COURT: The court granted a temporary restraining order (TRO) staying the co-op's alterations to the provisions relating to Hubshman's garden rights under the new lease. Hubshman then moved for a preliminary injunction extending the TRO during the pendency of the litigation. The co-op cross-moved to dismiss the action. The court denied the motion for a preliminary injunction, and granted, in part, the cross-motion to dismiss the complaint.

The court noted that the offering plan providing for the garden rights stated that the original lease will

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be for a term ending Sept. 30, 2024, "[b]ut may be extended by vote of the shareholders." By the explicit terms of the offering plan, the original lease expired in 2024. Therefore, the provisions relating to garden rights also expired in 2024. Pursuant to the bylaws the establishment of a new lease was a valid prerogative of the co-op board. The challenges to the validity of the new lease that are based upon alleged procedural failures surrounding shareholder meetings and votes run counter to the express language of the bylaws.

Hubshman's first cause of action, requesting a declaratory judgment that the new lease was adopted in violation of the bylaws, was dismissed. No provision of the bylaws that required the co-op to renew the original lease, adopt a new lease, or even to remain a co-op when the original lease expired.

While the co-op board's actions are subject to the business judgment rule [see *Levandusky v. One Fifth Ave. Apartment Corp.*, 75 N.Y.2d 530, 542 (1990)], this rule has limitations, including that the co-op may not act in bad faith or in breach of its fiduciary duty in adopting a new lease. Hubshman alleged in her complaint that the co-op "acted in bad faith and in breach of its fiduciary duty." She alleged that the co-op's acts were a determined and targeted vendetta against her rights under the original lease as it pertains to the garden.

The court held that the facts she pled must be taken to be true, accorded every possible favorable inference, and fit within a cognizable legal theory, as required in motions to dismiss. A breach of a fiduciary duty can be predicated on the unequal treatment of a shareholder. Therefore, to that extent the action for a declaratory judgment against the co-op survived the motion to dismiss.

To the same extent the second cause of action for a permanent injunction staying the enactment of a new lease also survived the motion to dismiss.

Hubshman's remaining causes of action were dismissed. She alleged that the new lease violated a settlement agreement pertaining to the original lease, but that lease had expired pursuant to its terms. She brought an Article 78 proceeding: (1) challenging the failure to give notice of a shareholders meeting, but that failure was waived by her appearing at the meeting; and (2) challenging that the bylaws do not require that a new lease be adopted after the expiration of the old proprietary lease. The original lease does not require that a special, rather than an annual, meeting be held to determine whether to continue as a residential building. But this did not relate to the board's adoption of the new lease, nor the shareholder ratification vote.

Under Business Corporation Law §606 if a shareholder attends a meeting "without protesting prior to the conclusion of the meeting the lack of notice of such meeting," they waive the right to notice.

Hubshman alleged that the notice of the annual meeting was not properly mailed to her. She instructed the managing agent that notices were to be mailed to her address directly, rather than electronically. Dismissal of this cause of action was held to be premature.

Hubshman's motion for a preliminary injunction failed to establish the essential element of irreparable harm. Any damage caused to her garden by actions of the co-op could be expensive but could be remedied, as it was in the past. Therefore, that motion was denied.

TAKEAWAY:

While the claim that Hubshman had rights under the expired lease were dismissed, the claims based upon her standing as a shareholder alleging breaches of a fiduciary duty were not conclusively refuted and therefore survived. Following pretrial discovery, a motion for summary judgment or a trial may resolve this claim for one side or the other. The history of board action against Hubshman being overturned by the courts supported her claim of a vendetta and breach of a fiduciary duty. But there is still a problematic chance of her ultimate success.

A motion to reargue is pending. An appeal by the co-op and the board is pending. The matter has been referred to mediation.

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CONSTRUCTION DEFECTS

BD. OF MGRS. OF 45 E. 22ND ST. CONDO. V. 45 E. 22ND ST. PROP. LLC

2025 NY SLIP OP 30444(U) (SUP. CT. N.Y. CNTY. FEB. 4, 2025)

Court Orders Proceeds of Unit Sale Be Held in Escrow While Dispute Over Defects Is Decided

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

OUTCOME: Decided for Plaintiff Condo Board

WHAT HAPPENED: The plaintiff board of managers alleged liability against the defendant sponsor based upon various alleged manufacturing and design defects, and misrepresentations in the offering plan. The plaintiff also sued various other individuals and entities, including the defendant architect, who had designed the subject premises, a condominium of approximately 80 units located in the Flatiron district of Manhattan.

In July 2023, the NY County Supreme Court directed that the proceeds of the sale of unit 52AB, which were in excess of $9 million, be held in escrow until such time as the pending issues regarding the alleged manufacturing and design defects were resolved. Thereafter, in 2024, the board of managers moved for injunctive relief, alleging that all of the sales proceeds should remain safeguarded in an escrow account (pursuant to a previous court order) because the defendant sought to improperly transfer its assets, which could presumably include any sales proceeds that were released. According to the plaintiff, this, in turn, would make the defendant judgment proof and make any recovery impossible.

The defendant vigorously opposed the plaintiff's application, claiming that the plaintiff had "orchestrated a scheme to strip the sponsor . . . of assets and render it insolvent" so that a million dollars in remedial work could not be completed.

The defendant architect moved to dismiss, claiming that it should be removed from the proceeding because it was not involved with the escrow dispute or subject to the requested injunction.

IN COURT: Justice D'Auguste agreed with the plaintiff, and held that, pursuant to the court's previous order, the sponsor could not distribute the proceeds of the sale of unit 52AB. Its ruling was based on the plaintiff's presentation of clear, convincing, and extensive evidence that there were numerous uncorrected construction defects and deviations. The evidence submitted by the plaintiff that the sponsor had violated its obligation to construct the subject premises in accordance with all laws and codes, and the Department of Buildings (DOB) plans and specifications, also persuaded the court that the escrowed funds should not be released prior a final adjudication and that the "balance of the equities" favored the plaintiff.

The court also refused to dismiss the case against the architect because the architect could be held liable if it was ultimately determined that the building was improperly designed and that the architect had violated the DOB's building codes.

To assure that the sponsor would be made whole in the event it prevailed in the underlying litigation, the court directed that the plaintiff post an undertaking of $500,000 for damages and costs that the sponsor could incur as a result of the ongoing restraining order.

TAKEAWAY:

Even before a hotly contested litigation is fully adjudicated, a court may effectively punish a defaulting sponsor by depriving it, for an extended time period, of substantial profits from a sale of one or more of its units. When a court suspects inequity or impropriety, it will also step in and protect a board of managers against an allegedly unscrupulous sponsor. To assure a positive result, counsel for a board of managers should carefully review the offering plan and relevant documents, and present cogent evidence of a sponsor's wrongdoing to the court before a trial is scheduled so that the court can direct appropriate, albeit punitive, relief. While a $500,000 undertaking may also seem daunting, it is a small price to pay compared to the risk that the sponsor's assets will be prematurely transferred, and/or inaccessible to the plaintiff, making any victory meaningless.

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DEFAMATION

GLEN HARBOR HOLDINGS, LLC V. WIENER

2025 NY SLIP OP 50090(U) (SUP. CT. SUFFOLK CNTY. JAN. 15, 2025)

Sponsor and Condo Board Found Liable for Using Litigation as a "Weapon" to Silence Unit Owners

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

OUTCOME: Decided for Defendant Condo Unit Owners

WHAT HAPPENED: In this case, a condominium developer attempted to use the court system to muzzle two dissident unit owners—and the effort backfired spectacularly. The condominium development in question was a luxury new development on the North Shore of Long Island. The two unit owners, a married couple, purchased their apartment in 2022, and almost immediately began loudly and publicly complaining about the sponsor and management.

The sponsor and developer (and sponsor-controlled condo board) sued the couple for private nuisance, public nuisance, tortious interference with prospective economic advantage, breach of contract, injunctive relief, defamation, defamation per se, slander, and for legal fees, seeking $1 million in direct damages and $2.5 million in punitive damages.

In its complaint, the sponsor characterized the couple's actions as "outrageous, malicious and scurrilous conduct" designed to "harass, defame and torment the Plaintiffs, the property manager of the Condominium and other unit owners of the Condominium" that has caused "current and future owners angst and has or will result in a loss of value to the sold and unsold units."

The plaintiffs then listed 30 separate bullet points to illustrate its case. Among other things, the couple (mostly the husband) allegedly: "relentlessly challenged board/management decisions and protocols, forcing the staff and residents to bear witness to his persistent public objections and opinions;" "tried to fracture the staff and turn them against their manager, board and sponsors;" "hang[ed] out at the front desk every night and chews the ear off the evening concierge which, essentially holds the concierge hostage;" "walk[ed] around with a camera photographing and recording employees making them feel uneasy;" "ruined the ambiance of the Condominium and its common areas by stalking and loitering in the common areas and spewing hatred and lies about the manager and the Condominium" and made "threats of going to the Attorney General."

In the face of this onslaught, the sponsor and board evidently expected to earn a decisive victory against the unit owners or, at the very least, force the couple to moderate their behavior.

Instead, the defendants moved to dismiss the complaint in its entirety.

IN COURT: The court granted the defendants' motion and dismissed the complaint and ordered the plaintiffs to pay the couple's legal fees and additional damages.

What is remarkable about this case is that the plaintiffs appeared to recognize almost as soon as the defendants filed their motion to dismiss that the sponsor and board were destined to lose and spent most of their opposition papers trying, unsuccessfully, to head off the impending disaster, including by trying to unilaterally withdraw most of its causes of action. What happened to bring about such a reversal?

In their motion to dismiss, the defendants identified the complaint as a "casebook definition of a strategic lawsuit against public participation, or 'SLAPP.'" SLAPP suits function by using civil litigation as a weapon by powerful actors to silence critics by foisting unsustainable legal fees onto them, irrespective of the legal merits of the claim. As the defendants' brief explained, "[t]he purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism."

SLAPP suits were seen as such a problem that many states, including New York, have instituted robust anti-SLAPP legislation in recent

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years. Under Section 76-a of the New York Civil Rights Law, any litigation that is "brought to intimidate or silence a person who has spoken out about a matter of public interest" can be immediately dismissed unless the plaintiff can prove that its claims have a substantial basis in law, flipping the usual burden of proof on a motion to dismiss.

Here, the allegations in the plaintiffs' complaint brought it squarely within the scope of Section 76-a. Those 30 bullet points described the defendants speaking out about matters of public interest (namely, the management and operation of the condominium association) which the plaintiffs evidently intended to silence in the litigation. As the court put it, "[t]he thrust of the complaint is the plaintiffs' gripes about defendant David Wiener telling plaintiffs and building residents about building-related issues . . . . [T]he true nature of this action is plaintiffs' dislike of defendants' public participation," which is not permitted by Section 76-a.

In its opposition to the motion to dismiss, the plaintiffs appeared to recognize that they had badly overreached, and dropped a footnote on the first page of their brief conceding that upon review of the anti-SLAPP laws, they were withdrawing most of their claims. But by then it was too late.

TAKEAWAY:

Most co-op and condo boards, management companies, and board attorneys are familiar with shareholders or unit owners who incessantly complain about everything to do with how the co-op or condo is being operated. Sometimes those complaints have merit; often, however, the complaints lack foundation or any sense of proportionality.

In this case, it is clear that the sponsor and condo board believed that the couple (and especially the husband) had crossed the line from legitimate, fair, and productive criticism to toxic, antisocial, and indefensible behavior. However, what the plaintiffs failed to recognize in time is that in New York, when individuals criticize management about matters of public interest (a broad concept that encompasses co-op and condo affairs), litigation should not be used as a tool to silence those voices unless very stringent pleading and evidentiary requirements can be met from the outset.

EVICTION/TERMINATION

MATTER OF KAPLAN V. NEW YORK CITY DEPT. OF HOUS., PRES. & DEV.

2025 NY SLIP OP 30232(U) (SUP. CT. N.Y. CNTY. JAN. 21, 2025)

Son of Deceased Mitchell-Lama Shareholder Can't Prove Succession Rights to His Father's Apartment

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

OUTCOME: Decided for Respondents

WHAT HAPPENED: Matthew Kaplan, a "cooperator" (tenant-shareholder) in a Mitchell-Lama cooperative, died on July 11, 2020. His son Mark claimed succession rights under New York City Department of Housing, Preservation & Development (HPD) regulations because he had resided in the unit as his primary residence for at least one year before Matthew's death. HPD required documentary proof of primary residence as of July 11, 2019, in the form of a voter registration, tax return, credit card statements, and other evidence of primary residence. HPD twice denied Mark's succession rights on the basis of the evidence presented, and Mark filed an Article 78 proceeding asserting that the HPD determination was arbitrary and capricious.

IN COURT: The court stated that in Article 78 proceedings, it would generally defer to the determination of the administrative agency. It noted that Mark had not presented a NY voter registration and had provided only a W-2 rather than a tax return. His NY driver's license was issued a month before his father's death, and his credit card statements, while showing purchases in New York during the relevant period, still showed his North

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Carolina address (so he could have been visiting or living elsewhere in New York as of July 2019). While the court acknowledged supporting affidavits submitted by other residents, it noted that they were not the type of documentary evidence that HPD demanded. Accordingly, HPD's determination was upheld.

TAKEAWAY:
When dealing with a bureaucracy, you need to comply as closely as possible to its documentary requirements. An institutional reviewer does not want to risk a reprimand for approving an application based on criteria that differ from those set by that agency. (Such a privilege is reserved for those much higher up the ladder.) The same admonition might apply as well to applications submitted by prospective purchasers of a co-op or condo unit being reviewed by a managing agent rather than HPD.

INDEMNIFICATION

HANGAN V. EDGEWATER PARK OWNERS COOP., INC.

2024 NY SLIP OP 06275 (1ST DEP'T. DEC. 12, 2024)

Appeal Affirms Denial of Summary Judgment to Dismiss Claims

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

OUTCOME: Decided for Co-defendants

WHAT HAPPENED: In 2019, the plaintiff alleged she was injured when she fell in a hole in a field after attending an event hosted by one of the defendants, Edgewater Park Athletic Association (EPAA). The field was owned and managed by Edgewater Park Owners Coop., Inc. (EPOC), but was being used by EPAA in connection with its lease of a nearby building from EPOC. The plaintiff claimed that inadequate lighting and field maintenance contributed to her fall. She sued EPOC, EPAA, and EPOC's landscaping company.

The instant decision is an appeal of a 2023 decision which, among other things, denied: (a) EPAA's motion for summary judgment and dismissal of the plaintiff's complaint; and (b) EPOC's landscaping company's motion for summary judgment and dismissal of all claims, cross-claims, and third-party claims against it.

IN COURT: On appeal, the court affirmed the denial of EPAA's motion for summary judgment dismissing the complaint against it. EPAA failed to prove it had no duty to maintain the field. EPAA not only leased a building from EPOC, but also used the surrounding property for its event and was responsible for the lighting. The court also found factual issues regarding the timing of the event's conclusion, which impacted EPAA's potential liability.

The court also affirmed the denial of EPAA's motion to dismiss EPOC's cross-claims for common-law indemnification and contribution due to EPAA's failure to establish that it was not negligent in providing inadequate lighting for the event.

In addition, the court also affirmed the denial of EPAA's motion to dismiss EPOC's contractual indemnification cross-claims. The lease rider's indemnification provision extended beyond the leased building to include EPAA's use of the premises, including the field. Since the provision did not attempt to indemnify EPOC for its own negligence, it was enforceable under General Obligations Law §5-321.

TAKEAWAY:
Insurance and indemnification have been, and will likely continue to be, hot button issues for cooperatives and condominiums alike. Boards need to make sure that the terms of the contracts (including leases) they enter into include necessary risk transfer language that has been approved by their insurance consultants. And if circumstances change, such that the underlying agreement does not contemplate current use, then strong consideration should be given to entering into a new agreement to capture all activities (and to properly allocate associated risks). Here, for example, EPOC and EPAA should have entered into a side agreement pursuant to which they allocated the risk associated with EPAA's use of the field for its event.

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NUISANCE

IORIO V. BD. OF MGRS. OF 225-227 E. 24TH ST. CONDO.

NO. 161359/2021 (SUP. CT. N.Y. CNTY. FEB. 25, 2025) NYSCEF NO. 316

Condominium Must Replace HVAC System Causing Nuisance to Owners and Incurring Violations

SQUIB BY C. FLETCHER CORLEY, ASSOCIATE, BRAVERMAN GREENSPUN

OUTCOME: Decided in part for Plaintiff Unit Owners

WHAT HAPPENED: The plaintiffs own the fifth-floor unit in the 225-227 East 27th Street Condominium. The unit includes part of the building's roof. In June 2022, the plaintiffs filed a complaint against the condominium's board of managers and the individual members of the board alleging that the condominium's HVAC units (and a wine refrigerator condenser) were improperly installed, causing excessive noise, vibrations, and leaking into the unit. The nuisance conditions caused by the HVAC units had persisted for years, and several NYC agencies had issued violations resulting from these conditions.

The plaintiffs seek relief for a total of 17 causes of action, including, inter alia, breach of contract, breach of fiduciary duty, injunctive relief mandating that the board take steps to mitigate the HVAC conditions, and violations of the New York City Human Rights Law stemming from alleged disparate treatment by the board and board members.

In response to the complaint, the defendants interposed their answers. One of the individual board members also filed three counterclaims against the plaintiffs: (1) breach of contract; (2) negligence; and (3) breach of the covenant of quiet enjoyment.

On Oct. 17, 2023, the plaintiffs moved, by order to show cause, for a TRO and preliminary injunction staying and enjoining the defendants from the following: (1) intruding on the plaintiffs' limited common elements without the plaintiffs' prior permission; (2) failing to comply with the law and disallowing repairs and maintenance on the HVAC condensers positioned on the building's roof where the plaintiffs' unit is located; (3) communicating with the plaintiffs in an intimidating manner; (4) restricting access to the condominium's books and records; (5) taking retaliatory action against the plaintiffs for engaging in protected activities; and (6) having contact with equipment that only serves the plaintiffs' unit, except for restoring such equipment ("Motion Seq. 001").

On April 9, 2024, the plaintiffs further moved, by order to show cause, for a preliminary injunction enjoining the defendants from, during the pendency of the action, using their HVAC condensers to the extent the condensers continue to operate in violation of New York City and State legal requirements ("Motion Seq. 002").

IN COURT: The court first noted that, after conferencing with the parties, oral argument and a determination of the above orders to show cause were held in abeyance pending the parties' submission of proposed orders. The defendants' proposed order reflects the board's agreement to replace and modernize the condominium's HVAC equipment serving all units and common areas, except the plaintiffs' unit.

The court denied Motion Seq. 001 without prejudice, except to the extent the relief sought in Motion Seq. 001 and Motion Seq. 002 overlapped. The court granted Motion Seq. 002. Specifically, the court ordered the defendants to replace the condominium's HVAC condenser systems "diligently and with all practicable speed" by working with an acoustical engineer, an architect, a code compliance expert, a mechanical engineer, and a structural engineer.

The court further ordered the defendants to prepare plans for the installations, provide such plans to the plaintiffs, consider all of the plaintiffs' experts' input, respond to such input, and submit and resubmit plans to all relevant municipal agencies. The defendants are required to install new HVAC condensers on or before June 30, 2025. They are also required to complete all additional construction on or before

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Dec. 31, 2025. Specifically, the replacement and modernization of such HVAC equipment will also include the rebuilding of dunnage, replacing interior equipment as needed, installation of acoustical treatments, and ancillary work including the installation of ladders and platforms. The condominium and its unit owners will bear the costs of the HVAC replacement and modernization pursuant to the condominium's governing documents.

The defendants' counsel was further instructed to submit affirmations signed by an individual party in their personal capacity setting forth progress made in complying with the court's order. These affirmations are to be submitted every six weeks. To the extent an affirmation shows no progress, the court directed that a rebuttable presumption that the defendants are not in compliance with the court's order is created, unless the lack of progress is caused solely by a factor outside of the board's control (i.e., waiting for a municipal agency, waiting for construction materials, waiting for resolution of a labor dispute, etc.). The plaintiffs, however, must take reasonable steps to determine the cause of any delay before moving for contempt.

The court ordered the plaintiffs not to unreasonably interfere with the defendants' compliance with the order and to provide access upon proper notice as required by the condominium's governing documents. In the event a dispute arises, the parties must confer with each other and no motion or order to show cause can be served until 10 days after the aggrieved party has informed the other party of such dispute.

TAKEAWAY:

The court imposed an onerous burden on a condominium board regarding the replacement and modernization of a building's HVAC system, which the court directed be completed approximately 10 months after the date of the order. The court further mandated check-ins every six weeks from the board's attorneys regarding the progress of the construction and created a rebuttable presumption of non-compliance in the event no progress is documented between check-ins. This process creates a rigid framework for the board's attorneys with potentially disastrous consequences should the attorneys make an error or disregard the process. It is worth noting, however, that the condominium board essentially agreed to the work prior to the court's determination of the motions and submission of the order, so the implications of this order on similar issues may be limited.

PERSONAL INJURY

WOLFE V. ORSID REALTY CORP.

NO. 152779/2020 (SUP. CT. N.Y. CNTY. FEB. 7, 2025) NYSCEF NO. 317

Condo and Managing Agent Not Responsible for Unit Owner's Injury Relating to Faulty Installation of Her Refrigerator

SQUIB BY DALE DEGENSHEIN, PARTNER, FOX ROTHSCHILD

OUTCOME: Decided for Condo Defendants

WHAT HAPPENED: The plaintiff alleged that she suffered injuries when a refrigerator within her apartment fell on her. She claimed that the refrigerator's anti-tip mounting bracket was installed upside down. It was apparently installed seven years before the accident. In addition to the condominium and its managing agent, several contractors and suppliers were named defendants in the suit.

IN COURT: The condominium and agent (collectively, "condominium") moved to dismiss the complaint. They argued that the plaintiff owned the unit and that the condominium had no duty with respect to the refrigerator or the bracket. Moreover, the condominium bylaws placed maintenance and repair obligations on the plaintiff. The condominium also argued that it did not install the anti-tip bracket or the refrigerator.

The plaintiff argued that the building's superintendent oversaw a reinstallation of the bracket during a gas line project; however, the plaintiff

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conceded that the bracket was not moved during the project. The plaintiff, who was not present while the gas line work was being performed, had no actual knowledge as to whether the super supervised the work of the contractor who performed the gas project, and the super testified that he did not perform the work.

The managing agent also argued that the complaint should be dismissed as against it because it was an agent for a disclosed principle, i.e., the condominium. While the court did not discuss this theory, based on the above, it granted summary judgment and dismissed the complaint as against the condominium and the agent.

TAKEAWAY:
This case discusses the various claims of the plaintiff and defendant contractors and suppliers, but focusing on the issues concerning the condominium, this case serves as a reminder that there may issues if a building employee performs work for an individual apartment owner.

PERSONAL INJURY

MANKO V. DORMITORY AUTH. OF THE STATE OF N.Y.

2025 NY SLIP OP 30308(U) (SUP. CT. N.Y. CNTY. JAN. 16, 2025)

Court Won't Dismiss Case Involving Pedestrian's Trip-and-Fall Injury on Condo's Sidewalk

SQUIB BY INGRID C. MANEVITZ, PARTNER, SEYFARTH SHAW

OUTCOME: Decided for Plaintiff

WHAT HAPPENED: The plaintiffs, Laura Manko and John Manko, commenced this action seeking damages for personal injuries allegedly sustained by Laura when she tripped and fell in front of a CUNY school building on Fifth Avenue between 34th and 35th Streets in Manhattan. In their complaint, the plaintiffs allege that Laura tripped and fell over a raised section of pavement (base stone plinth) within a window bay, causing her to fall into and onto metal spiked anti-loitering loafer rails outside the window, injuring her arm.

The deposition testimony of Laura and John reflected that, at the time of Laura's trip and fall, the sidewalk was crowded, and that the raised plinth was the same color as and only slightly higher than the rest of the sidewalk, making it hard to notice.

Defendants New York Resource Center Condominium (named in the action as President in his/her capacity of the Board of Managers for the New York Resource Center Condominium) and George Comfort & Sons Inc. moved for summary judgment on the grounds that there were no statutory or common-law grounds for the plaintiffs' negligence claims. In their moving papers, which included expert reports, photographs, and affidavits, the defendants argued that the base stone plinth and loafer rails were safe and complied with applicable New York City Building and Administrative Codes, and that no additional visual cues, warnings, guards, or handrails were needed.

The plaintiffs' submission in opposition to the motion included reports from their own expert, who opined that the loafer railings were dangerous, that the base stone plinth was a trip hazard, and that the defendants failed to act reasonably by not erecting barriers near the base stone plinth or loafer rails. In addition, the plaintiffs submitted a report from an engineer and safety expert in the field of roadway and sidewalk surfaces and conditions who opined that the raised base stone plinth and pointed metal anti-loitering loafer railings were dangerous and hazardous to pedestrians as they were an unwarned of and unmarked tripping hazard.

IN COURT: The court denied the defendants' motion, finding that there were triable issues of fact precluding summary judgment. In its decision and order, the court set out the general requirements for a defendant to establish entitlement to summary judgment in a trip-

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and-fall case: "[T]he defendant must establish that it maintained the premises in a reasonably safe condition and that it did not create a dangerous or defective condition on the property or have either actual or constructive notice of a dangerous or defective condition for a sufficient length of time to remedy it."

Moreover, the court held that "[w]hether a dangerous or defective condition exists on property so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury."

The court concluded that there were questions of material fact that cannot be determined as a matter of law regarding "whether [the] defendants allegedly caused and/or permitted unsafe conditions in the area where Laura Mauro [sic] fell," and that the plaintiffs' description of the sidewalk conditions and circumstances surrounding Laura's trip and fall also present "a triable issue of fact concerning whether a statutory violation existed at the location where Laura Manko fell."

Ultimately, the court reasoned that dismissal is inappropriate because the parties' "conflicting expert affidavits raise issues of fact and credibility that cannot be resolved on a motion for summary judgment," including "whether the raised base stone plinth and loafer rails created a safety hazard breaching [the] defendants' duty of care."

TAKEAWAY:
Sidewalk trip-and-fall cases often go to trial because they are fact-specific and questions of fact cannot be resolved on a summary judgment motion. Since property owners are responsible for keeping the sidewalks on their properties safe and compliant with applicable codes, it is important that property owners keep a very close eye on the sidewalks and promptly repair any conditions that could cause a pedestrian to trip and fall.

REPAIRS

BD. OF MGRS. OF THE PALADIN V. CORNFELD

NO. 151578/2024 (SUP. CT. N.Y. CNTY. FEB. 6, 2025) NYSCEF NO. 55

Condo Board Denied Summary Judgment in Recovering Costs Related to Leak

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

OUTCOME: Decided for Defendant Condo Unit Owner

WHAT HAPPENED: The defendant is the owner of a residential condominium unit that was alleged to be the source of a water leak in the building. Specifically, the plaintiff condominium board claimed that the leak emanated from the defendant's shower. However, the defendant disputed the board's allegations, contending that water leaks were a systemic problem throughout the building and not exclusive to the area in question. In further support of her argument, the defendant pointed out that the suspect shower was hardly used, and thus the timing of the water leak incidents confirmed that her shower could not be the source.

In addition to the board's gripes relating to the water leak, it had also demanded that the defendant remove an illegal dryer vent that existed within her unit. It is worth noting that the defendant recognized the presence of this illegal vent, but the condominium board also acknowledged that the vent had been installed by a previous owner of the unit, and not the defendant. Interestingly, the condo board did not accuse the unit owner of breaching the condo bylaws by way of such installation, but rather that the unit owner was violating the bylaws by not removing the dryer vent.

The condo board claimed that it had repeatedly sought access to the defendant's unit in the months that followed in an attempt to inspect the unit's purported leak, as well as the dryer vent, but was consistently denied. The defendant disputed the veracity of the plaintiff's claims, rejecting the board's allegations relating to the

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timing, nature, and extent of such requests. Much to the contrary, the defendant maintained that she had always promptly responded to every request in which the board had properly sought access.

The plaintiff condominium board brought an action against the defendant unit owner, pursuing monetary damages, along with a declaratory judgment ordering the defendant to provide the condo board and its contractors access to the unit in order to perform any necessary repairs. The plaintiff's breach of contract claim was based in the argument that the defendant defaulted in her obligations under the condo bylaws by continuing to maintain a leaky shower pan, failing to remove the illegal exhaust vent, and denying the condo board access to her unit.

The court granted the plaintiff's request for a preliminary injunction allowing for such access to the unit; however, the breach of contract claim was not adjudicated as part of the preliminary motion, but was rather addressed as part of the plaintiff's instant motion.

IN COURT: The plaintiff brought a motion for summary judgment, seeking the recovery of its costs and expenses arising from the defendant's breach of the condominium bylaws, along with attorneys' fees. In support of its position, the plaintiff argued that the condominium's governing documents require a defaulting unit owner to reimburse the condo board for costs and expenses stemming from such default, and therefore the plaintiff should be entitled to summary judgment as a matter of law.

The defendant argued that summary judgment was improper (or at the very least, premature), pointing to issues of fact that remain disputed. Specifically, the defendant disagreed with the plaintiff's claims that she had breached the condominium bylaws, asserting that the plaintiff had not proven that her shower was the source of the leak, nor had the plaintiff proven that she failed to provide required access to her unit.

Also, because it was undisputed that the defendant had not installed the vent, the board could not argue that the defendant had breached the bylaws by way of such illegal installation. Rather, the board could only point to the defendant's failure to remove the illegal vent as being a default under the bylaws. However, the defendant presented evidence to the court showing that she had already contacted contractors in an attempt to arrange for the removal of the vent. Accordingly, the defendant contended that her inability to remove the illegal dryer vent was not a breach of her duties, as she had made good faith efforts to do so and must be allowed appropriate time to remedy the situation.

The court agreed with the defendant, noting the continued existence of genuine material issues of fact, the presence of which being sufficient to defeat the plaintiff's summary judgment motion.

TAKEAWAY:

Although the governing documents of a condominium or cooperative may entitle the board to recovery of its costs when a unit owner defaults under its obligations, it is important to remember that the underlying breach claims must still be proven before summary judgment can be granted. In the case at bar, the board and unit owner disagreed as to the underlying facts of the matter. Because the appropriate review standard for a summary judgment motion requires the court to view any disputed factual issues in a light most favorably to the non-moving party, the board was unable to succeed. Although the board presented the condominium bylaws as documentary evidence proving that it was entitled to the recovery of its costs, that did not resolve the actual questions of fact in the case, specifically, whether the unit owner had actually breached any of her obligations.

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SPONSOR

168 PLYMOUTH, LLC V. 168 PLYMOUTH ST., LLC

2025 NY SLIP OP 30565(U) (SUP. CT. N.Y. CNTY. FEB. 13, 2025)

Court Won't Dismiss Unit Owner's Breach of Contract Claims Against Sponsor

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

OUTCOME: Decided for Plaintiff, Defendants

WHAT HAPPENED: The plaintiff 168 Plymouth, LLC purchased a penthouse unit in a condominium. The plaintiff brought this action for alleged construction defects in the condominium building, asserting claims of breach of contract, breach of warranty, and negligence against the sponsor of the condominium, breach of fiduciary duty against the sponsor-affiliated board members, and negligent misrepresentation against the sponsor's director of marketing and sales.

IN COURT: The defendants all moved to dismiss the complaint as against them. The court granted the defendants' motions to dismiss in their entirety, except it denied the sponsor's motion to dismiss the breach of contract and breach of warranty claims against it.

The court refused to dismiss the plaintiff's breach of contract and breach of warranty claims because the sponsor failed to refute the fact that the plaintiff had properly notified the sponsor of the alleged defects. Upon receiving such notice, the sponsor had an obligation to repair all defects, which it failed to do. And while the sponsor claimed that it should have been relieved of its obligation to correct the defects because the plaintiff had performed its own work in the subject areas, the court found that argument unavailing. Notably, the court found that the sponsor could even be held liable for money damages, although the contract contained a provision limiting the unit owner's remedies to repairs, because of the sponsor's failure to promptly repair the defects after receiving proper notice.

While the court upheld the breach of contract and breach of warranty causes of action, it dismissed all remaining causes of action. The court dismissed the negligence cause of action as duplicative of the breach of a contract claim. Moreover, the court dismissed the breach of fiduciary duty cause of action because allegations concerning the board's mismanagement of the condominium are recoverable only by the condominium, not a particular unit owner.

Finally, the court dismissed the negligent misrepresentation cause of action because it relied on promises of future conduct and because the "No Representations" provision in the contract prevented the plaintiff from relying on extracontractual representations.

TAKEAWAY:

In a construction defect case, a condominium unit owner's primary recourse is a cause of action against that condominium's sponsor entity. As demonstrated in this case, so long as a unit owner properly notifies its condominium's sponsor of such defects in accordance with the terms of the offering plan, a sponsor has an enforceable obligation to correct, repair, and/or replace the defect if provided for in the offering plan. A sponsor's failure to do so could result in liability pursuant to a breach of contract and/or breach of warranty claim, which could even result in money damages against the sponsor.

Further, while a plaintiff may find it attractive to assert claims against sponsor-affiliated board members, it is important to evaluate whether a plaintiff actually has standing to assert such claims individually. As seen in this case, claims such as breach of fiduciary duty against sponsor-affiliated board members concerning the mismanagement of the condominium almost always must be brought by the board of managers, as opposed to an individual unit owner.

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