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ALTERATIONS

HAGBERG V. 442 WILLOUGHBY CONDO. ASS'N

2025 NY SLIP OP 30740(U) (SUP. CT. KINGS CNTY. FEB. 27, 2025)

Court Denies Condo Board's Summary Judgment Bid in Alteration Dispute

SQUIB BY PETER T. SALZLER, ASSOCIATE, BRAVERMAN GREENSPUN

OUTCOME: Decided for Plaintiff Condo Unit Owners

WHAT HAPPENED: The plaintiffs bought the second-floor unit in a three-unit condominium located at 442 Willougby Avenue in Brooklyn in March 2021 and immediately began an alteration to install new flooring, windows, and appliances. Upon removal of the floorboards, the plaintiffs discovered sagging floor joists and other issues, which began a protracted dispute between the plaintiffs and the board over the scope of the alteration work and the board's approval of it. Over the next year, the board demanded various inspections and reports and placed other conditions on the plaintiffs to allow them to continue their work. After unsuccessful mediation, the plaintiffs brought the action against the board and the two board members, alleging that the board was prohibiting them from performing required work to make the unit habitable and that the board's refusal to allow the renovations to proceed was undertaken in bad faith and motivated by personal animosity against them.

IN COURT: The defendants moved for summary judgment to dismiss the plaintiffs' remaining causes of action for declaratory judgment and breach of fiduciary duty against the board members. The declaratory judgment causes of action sought declarations that: (1) the plaintiffs were entitled to make certain plumbing repairs to bring the unit up to code; and (2) the plaintiffs' Department of Buildings (DOB) approved building plans were sufficient under the bylaws to allow the plaintiffs to proceed with their work.

The court found that issues of fact existed in relation to the declaratory judgment causes of action to the extent that the board's demands on the plaintiffs and refusals to allow the work to

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

MAY 2025 HIGHLIGHTS

BYLAWS
Appellate Court Upholds Ruling Invalidating Condo Board's Window Replacement Policy
Court Denies Motion to Dismiss Condo Board's Water Charge Claims

ELECTIONS
Court Upholds Board Election Delayed Several Years by COVID Difficulties

MOTION PRACTICE
Co-op Properly Paid Evicted Shareholder the Surplus from the Sale of Her Shares

PROPRIETARY LEASE
Co-op Terminates Proprietary Lease for Failure to Maintain Insurance

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CO-OP&CONDO CASE LAW TRACKER digest

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proceed went beyond the board's authority under the bylaws. The court also denied summary judgment on the breach of fiduciary duty cause of action and found that the plaintiffs raised issues of fact regarding their allegations that the board breached fiduciary duties owed to the plaintiffs, including but not limited to, deliberate delay tactics and unequal treatment.

TAKEAWAY:
Although boards must oversee alterations to ensure that they are properly performed, boards must also ensure that unit owners are treated equally and that they do not needlessly delay or stall renovations to units. Here, if the plaintiffs' allegations are proven at trial, the board will have delayed an alteration for years for no apparent benefit to the condominium. Given that the board's summary judgment motion was denied, the case appears ripe for settlement.

APPEALS

ORLITSKY V. 33 GREENWICH OWNERS CORP.

2025 NY SLIP OP 01192 (1ST DEP'T. MAR. 4, 2025)

Appeals Court Won't Dismiss Shareholder's Claim that Board Improperly Accessed Apartment

SQUIB BY DALE DEGENSHEIN, PARTNER, FOX ROTHSCHILD

OUTCOME: Decided for Appellant, Appellee

WHAT HAPPENED: The plaintiff, a shareholder, sublet his apartment from 1999–2018. At some point, the board of directors demanded that the plaintiff submit renewal packages. The plaintiff didn't, so the co-op commenced a landlord/tenant proceeding to terminate the lease based on the plaintiff's default. That proceeding was settled by stipulation and the subtenant moved out.

Separate and apart, the building experienced a gas leak, requiring a building-wide shutdown of gas service. It took a year to restore service, in part because of required testing. The board kept the shareholders generally informed, and the contractors and plumbers required periodic access to all apartments. The plaintiff did not live in the apartment and it was often vacant. The building entered the plaintiff's apartment, using its spare key, several times, pursuant to the paragraph of the proprietary lease that permits access if the shareholder is not at home in order to make or facilitate repairs. The plaintiff had received email notice each time the key was removed from the building's key log system.

The plaintiff sued, claiming that the board acted improperly when it refused to permit the renewal of the sublease and that the board's entry into the apartment was improper. There were several causes of action based largely on the facts above.

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IN COURT: The co-op made a motion to dismiss prior to discovery taking place. After the lower court issued its decision, which dismissed some claims but not others, both parties appealed.

The appellate court dismissed any breach of lease claims against the co-op as to the sublet as there was no limitation of the right of the board to grant or withhold consent for any reason. As to trespass, the lease does not place repair obligations on the co-op with respect to the alleged trespass.

The court refused to dismiss the plaintiff's breach of fiduciary duty claims, finding that the business judgment rule did not compel dismissal as there was a question of fact as to whether the board acted in good faith.

Similarly, the plaintiff's trespass claim was not dismissed as discovery was required to determine what, if anything, the co-op gained from the trespass.

The plaintiff brought claims for breach of the warranty of habitability and constructive eviction (the plaintiff claimed the apartment was being used as a construction staging area and that when he went to the apartment it contained garbage, food, and equipment, and fixtures were damaged). The court dismissed these claims—the plaintiff did not live in the apartment and visited only occasionally and there was no indication that the plaintiff was ousted from the apartment.

TAKEAWAY:
We will follow this case as it addresses an issue co-op boards are faced with every day. Many proprietary leases say that the board and its agents can enter an apartment in the absence of the shareholder in order to make or facilitate repairs. But, in the absence of an emergency, how many boards just enter apartments under circumstances similar to this? Interestingly, the court did not note whether the plaintiff was asked for access and refused to permit it.

BUSINESS JUDGMENT RULE

SZTYBEL V. THE BD. OF MGRS. OF HERITAGE TOWER CONDO.

NO. 60680/2024 (SUP. CT. WESTCHESTER CNTY. OCT. 16, 2024) NYSCEF NO. 37

Court Dismisses Unit Owner's Claims Against Individual Condominium Board Members

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

OUTCOME: Decided for Defendant Condo Board Members

WHAT HAPPENED: The plaintiff owns two units in the Heritage Tower Condominium located in White Plains, N.Y. The 12-story residential building was built in 1972 and has 119 apartment units. In 2019, the board began an exterior waterproofing and restoration project that included balcony demolition, concrete balcony reconstruction, and railing replacement for the entire building. According to the plaintiff, the new balconies suffered from construction defects such as cracking and improper sloping that permitted water to pool and to infiltrate into interior spaces. The plaintiff alleged that he incurred damages because the board of managers failed and refused to investigate his complaints about the balcony construction and to make the necessary repairs. As a result, water leaked into the plaintiff's units and allegedly rendered them uninhabitable.

The plaintiff sued the board of managers and all nine members of the board individually. He sought damages for breach of contract, negligence, breach of the warranty of habitability, declaratory judgment, breach of fiduciary duty, waste, private nuisance, and violations of Real Property Law §339-cc, which, with certain exceptions, imposes a duty on condominium boards to promptly repair damage to the building.

IN COURT: The individual board member defendants moved to dismiss all claims asserted against them on the ground that they cannot be held personally liable for the alleged claims against the board. The plaintiff contended that, on a

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motion to dismiss, all of the allegations of the complaint must be deemed true, and that the business judgment rule did not shield the individual defendants from claims of breach of fiduciary duty.

The court granted the motion and dismissed all claims asserted against the individual board member defendants. The court said that, in reviewing a condominium board's actions, courts should apply the business judgment rule, under which the court's inquiry is limited to whether the board acted within the scope of its authority under the bylaws and whether the action was taken in good faith to further a legitimate interest of the condominium. Absent a showing of fraud, self-dealing, or unconscionability, the court's inquiry is so limited and the court will not inquire as to the wisdom or soundness of the business decision.

The court also said that individual board members and officers may not be subject to liability absent allegations that they committed separate tortious acts. Here, the court said, the complaint did not allege any specific independent tortious acts undertaken by the individual defendants. Because the complaint did not allege that the individual defendants acted tortiously other than in their capacity as members of the board, the complaint failed to state a cause of action against them.

TAKEAWAY:
In an action brought by a condominium unit owner against the board of managers, suing the board members individually is unlikely to be successful without specific allegations that board members did something wrong personally and outside the proper scope of their board duties. For example, allegations that individual board members were benefiting from unequal treatment or were engaging in unlawful discrimination might suffice. Moreover, in a case involving the alleged failure of the board to repair or maintain the building, suing the board of managers as such should be sufficient to trigger any general liability or director's and officer's insurance that may be available to satisfy the claim.

BYLAWS

MANGOLD V. BD. OF MGRS. OF MEADOW COURT CONDO.

2025 NY SLIP OP 01191 (1ST DEP'T. MAR. 4, 2025)

Appellate Court Upholds Ruling Invalidating Condo Board's Window Replacement Policy

SQUIB BY DAVID S. FITZHENRY, MORITT HOCK & HAMROFF

OUTCOME: Decided for Plaintiff-Appellee

WHAT HAPPENED: The condominium board adopted a policy whereby it required unit owners to replace their windows. The plaintiff, a unit owner, challenged the policy because the condominium declaration expressly provided that windows were part of the individual units, and not common elements. Accordingly, the court determined that the condo board had exceeded its authority by instituting this policy.

In addition, the court found fault with the condo board's attempts to amend the condominium bylaws in order to grant the condo board the authority to force unit owners to replace their windows. Again, the court held this amendment to be of no force and effect because the condo declaration still provided that the windows were part of a unit (and not common elements), and thus the condo board lacked the power to exert such control over the windows.

Finally, because the condo board lacked the authority to force unit owners to replace their windows, the court also voided the agreement between the condo board and Skyline, the company that it had engaged to perform the window replacement work for each unit owner.

In the instant matter, the defendant condominium board sought an appeal of the lower court's rulings.

IN COURT: The Appellate Division upheld the lower court's ruling with respect to the determination that

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the condo board lacked the authority to cause unit owners to replace their windows. The Appellate Court specifically noted that the condo board's decision could not be defended based upon the business judgment rule because the board's president had acknowledged that the existing windows were still in good condition, and thus there was no evidence supporting that the board's actions were in the interest of the condominium.

Although the Appellate Court upheld the majority of the lower court's determinations, it did reverse the ruling whereby the board's contract with Skyline was cancelled. Rather, the Appellate Court held that such agreement remained in effect, but only with respect to those unit owners who wished to proceed with the window replacement within their units.

TAKEAWAY:
This case highlights the importance of a building's governing documents, as something as mundane as the definition of "unit" can have ripple effects into the reaches of the board's powers. To this point, boards must be certain that the governing documents afford them the proper authority to take certain actions, even when such actions are supported by the overwhelming majority of unit owners.

BYLAWS

STILLPOINT MEADOWS PH-62, LLC V. RESIDENTIAL BD. OF MGRS. OF THE 62 COOPER SQUARE CONDO.

2025 NY SLIP OP 50426(U) (SUP. CT. N.Y. CNTY. MAR. 13, 2025)

Condo Can Charge Unit Owner for Work Needed Beneath Owner's Terrace During Roof Replacement

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

OUTCOME: Decided for Plaintiff, Condo Board Defendants

WHAT HAPPENED: Plaintiff Stillpoint Meadows PH-62, LLC owned a penthouse unit at 62 Cooper Square in Manhattan. The terrace appurtenant to the plaintiff's unit was a "residential limited common element." The 62 Cooper Square Condominium needed to replace its roof. To do so, the paver stones installed on top of the roof membrane below the terrace first needed to be removed (and subsequently reinstalled).

The condominium demanded that the plaintiff bear the cost of removing the paver stones, but the plaintiff refused. The condominium ultimately removed them itself and back-charged the plaintiff $32,000 for the cost. When the plaintiff refused to pay, the condominium charged late fees of $100 per month (later increased to $1,000 per month) and interest, eventually totaling more than $80,000.

The plaintiff commenced an action against the condominium and its individual board members alleging breach of fiduciary duty, asserting that: (1) the board breached its fiduciary duty under the bylaws by imposing the assessment against plaintiff; and (2) the assessment and associated late fees and interest were imposed in bad faith in retaliation due to the plaintiff's refusal to sell a portion of the plaintiff's unit to the board (to install a handicapped elevator) in an unrelated dispute. The plaintiff also sought a declaratory judgment that the assessment of the paver replacement charge and the late fees and interest was improper, and a separate injunction, made on a "derivative" basis, requiring the board to issue the annual "interested director" statements required under Business Corporation Law (BCL) §727 .

IN COURT: The condominium made a motion to dismiss the complaint, claiming that: (1) the plaintiff had to file an Article 78 proceeding, and the statute of limitations for filing had passed; (2) the statute of limitations for filing a breach of fiduciary duty claim had passed; (3) no claim of bad faith had been made against individual board members, and the board's "collective" action to impose the charge was protected by the business judgment rule with respect to back-charging the plaintiff and charging the additional fees; and (4) the plaintiff could not mix a derivative and direct claim in

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the same complaint.

The court first dealt with the two procedural defenses. It determined that an Article 78 proceeding could be commenced against a condominium if the condo were incorporated, but was not the exclusive remedy in either case. (The court appeared to confuse the incorporation of the board with incorporation of a condominium association.) It also decided that the breach of fiduciary duty claim accrued not when the plaintiff was notified that it would be charged, but when an invoice was actually rendered, since no damages were sustained until that point. Since the action was commenced within three years after the invoice was sent, it fell within the three-year statute of limitations for breach of fiduciary duty claims.

The court then considered whether the assessment of a paver-replacement charge by the board constituted a breach of fiduciary duty to the unit owner. Surprisingly, the court asserted that prior courts had never directly considered whether condo boards even owed a fiduciary duty to unit owners. Rather than doing so itself, though, the court decided that even if a fiduciary duty were owed, the paver-replacement charge had been validly imposed against the unit owner, and in good faith, so the board had not breached its fiduciary duty.

The court focused on two sections of the bylaws. The first bylaw stated that if a residential limited common element "benefits only certain Residential Unit Owners, then the costs of . . . repair, replacement and restoration thereto . . . shall be borne solely by the Residential Unit Owners who benefit from the Residential Limited Common Element . . . ." The bylaws' clause continues, "In addition, except as otherwise provided in the By-Laws, such Residential Unit Owners shall be responsible for the **normal** operation, maintenance and repair . . . of any such . . . Residential Limited Common Element . . . at their sole cost and expense." [Cited from bylaw 6.1.2, Emphasis added.]

In contrast, the second section provided that "all **normal** maintenance, repairs and replacements of any Terrace shall be made by the Residential Unit Owner having access to such Terrace at such Unit Owner's own cost and expense... [On the other hand,]...any structural or extraordinary repairs or replacements to such Terrace [including leaks not stemming from unit-owner negligence] shall be made by the Residential Board and the cost and expense thereof shall be charged [to all residential unit owners as a common expense.]" [Emphasis added.]

Obviously, the two sections appear to allocate the responsibility for "structural or extraordinary repairs" differently. The court avoided having to reconcile that contradiction by deciding that the replacement of the paver stones in this case was "normal" rather than "structural or extraordinary."

The court stated that removal of "lightweight" paving stones "does not affect or alter the structure of the terrace." Nor was removal and replacement an "extraordinary" repair, if "extraordinary" meant "unusual or unanticipated" as opposed to "infrequent." Owners might well expect the roof to be replaced due to wear and tear, or pavers to be removed to deal with roof leaks, even if infrequently.

The court also decided that the plaintiff's pleadings did not sufficiently support an allegation of bad faith on the part of the board to justify a breach of fiduciary duty claim. The plaintiff was claiming that the board had changed its position only after plaintiff had refused to sell a portion of its unit to the board to install a handicapped access elevator for the building. To show that the board had changed its position, the plaintiff relied largely on prior or concurrent statements from the managing agent that the condominium would be "responsible" for removal of the pavers, and the condominium's financial statements, which stated that the roof membrane work (which included removal of the pavers) was an expense of the condominium charged to all owners.

The court decided that the word "responsible" in management's statement was ambiguous, in that it could make the condo responsible only for the work, but not for both the work and its cost. The court also did not consider the financial statement either to bind the board or to represent the board's definitive position before it had assessed the plaintiff in alleged retaliation.

The plaintiff also asserted that the decision to assess late fees of $100 per month (increased to $1,000 per month) was retaliatory, thus a breach of fiduciary duty. However, the court ruled that the plaintiff had not shown in its pleadings that the imposition of the fees and interest fell so far outside of the board's discretion such that the board's action automatically would be deemed retaliatory.

The court dismissed the causes of action against the individual board members in their entirety. Prior cases had established that

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individual board members could not be liable for a breach of fiduciary duty unless they had taken action individually outside of their duties as board members. Thus, individual board members could not be held liable for a "collective" action taken by the board.

Second, the plaintiff had sought a separate declaration from the court that the late fees and interest had been improperly imposed. Although the court did not think that the fees were retaliatory, the court refused to grant the condominium's motion to dismiss that cause of action. According to the court, neither party had argued whether those types of fees (regardless of the motives for their assessment) could be properly imposed under the bylaws. "Absent clear positions from the parties on the scope of the board's authority on this issue, the court declines to go on a spelunking expedition in the bylaws to try to figure out the answer."

The plaintiff had also made a separate "derivative" demand that the court compel the board to issue the "interested director" statements required under BCL §727. Although the court allowed the plaintiff's derivative claim to be made in the same complaint as the "direct" action, the claim was dismissed on other grounds, in that any demand for injunctive relief needed to be supported by a cause of action on which the demand could be based.

TAKEAWAY:

This writer was surprised by much of the court's reasoning, although the documents supporting the pleadings might have furnished a more plausible basis for the result. For example, I would not have considered "extraordinary" simply to mean "unanticipated"; I would also have taken into account the level of effort that would be required on the part of the unit owner to perform the work and the expertise needed to do so. (Also, in cooperatives "normal" maintenance of terraces refers to sweeping, clearing drains, possible minor caulking and the like, not replacing tiles.)

On the other hand, the court emphasized the "light weight" of the paving stones; perhaps they were lying on some surface other than the membrane itself or were removable without risking damage to the membrane, likening them more to easily removable decorative tiles.

I also think that parsing "responsible" (as in "I am responsible for removing the pavers") so as to separate doing the work from paying the cost not only goes against customary contract interpretation but also represents the kind of "creative" legal argument that judges usually dislike.

Interestingly, the court felt free to review the bylaws to explore the merits of the issue of who should pay for the work in order to reach a conclusion on the breach of fiduciary duty claim, but declined to review the bylaws to ascertain whether the board had the concurrent authority to impose the associated fines and late fees. Likewise, it declined to decide the "derivative" claim although it could just as easily have considered its merits simply by reviewing the relevant statute.

The court's analysis may lead to many more disputes over what is considered a "normal" obligation of a unit owner, and what an owner or a board may be "responsible" for under the bylaws.

BYLAWS

BD. OF MGRS. OF GRACELINE COURT CONDO. V. MALCOLM SHABAZZ DEV. CORP

NO. 653548/2024 (SUP. CT. N.Y. CNTY. MAR. 18, 2025) NYSCEF NO. 26

Court Denies Motion to Dismiss Condo Board's Water Charge Claims

SQUIB BY JAMES CUTTING, ASSOCIATE, BELKIN BURDEN GOLDMAN

OUTCOME: Decided for Plaintiff Condo Board

WHAT HAPPENED: In 2017, the defendant acquired a commercial condominium unit in the condominium. The condominium's bylaws required the commercial unit to pay submetered water charges. However, contrary to provisions set forth in the condominium's bylaws and unbeknownst to the condominium board, a water submeter measuring the commercial unit's water usage was not installed until 2023. The plaintiff board thereafter commenced this action against

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the commercial unit owner seeking recovery for six years of unpaid water charges and costs related to installing the water submeter. The board alleged that, due to defects in the commercial unit's water cooler compressor, substantial water was wasted, resulting in additional charges being improperly borne by the condominium. The complaint included claims for breach of contract and unjust enrichment.

IN COURT: In response to the board's allegations, the commercial unit owner filed a pre-answer motion to dismiss the entire complaint, alleging that documentary evidence conclusively rebuts all of the allegations. The commercial unit owner's basis for dismissal was, essentially, that the commercial unit owner did not have an obligation to install the water submeter and that the plaintiff executed a release in 2013 precluding the current claims.

The court denied the commercial unit owner's motion to dismiss, finding that:

- The condominium bylaws explicitly required the commercial unit owner to pay for submetered water usage, and the lack of clarity in the bylaws regarding who should install the submeter did not constitute grounds for dismissal at this stage.
- The 2013 release provided by the commercial unit owner did not apply, as it pertained exclusively to a separate dispute involving construction issues, not water billing disputes, and even if it were applicable, it covered only claims arising before April 22, 2013; and, accordingly, the statute of limitations did not bar the plaintiff's current claim seeking payment for charges accrued within the permissible six-year window prior to filing (and not for charges accrued before).
- While the unjust enrichment claim duplicated the breach of contract claim, dismissal would be premature because uncertainty remained regarding whether the bylaws would adequately address water charges incurred before installation of the submeter.

As a result of the court's decision, the defendant was ordered to serve its answer to the original complaint. The defendant, however, has since appealed the decision in its entirety.

TAKEAWAY:
Condominium boards should ensure strict compliance with bylaw provisions relating to submetering and billing practices, especially when commercial units are involved. Boards should proactively enforce submeter requirements to properly allocate utility charges and avoid costly disputes, including periodically inspecting all meters and submeters intended to measure and allocate usage within the building to ensure functionality (let alone their existence). Additionally, any general releases executed during litigation or settlements should be appropriately tailored and carefully reviewed to ensure clarity regarding future liabilities, and avoid unintended implications for unrelated claims.

CONSTRUCTION DEFECTS

PS 90 BD. OF MGRS. V. L&M DEV. PARTNERS

NO. 654603/2017 (SUP. CT. N.Y. CNTY. MAR. 20, 2025) NYSCEF NO. 422

Court Finds Sponsor Defendants Liable for Breach of Contract in Construction Defects Case

SQUIB BY MANU LEILA DAVIDSON, PARTNER, AND ALEXANDER J. DAVIS, ASSOCIATE, BOYD RICHARDS PARKER & COLONNELLI

OUTCOME: Decided for Plaintiffs on Liability; Second Third-Party Defendant, in part

WHAT HAPPENED: This case arose from a construction project to convert part of a former public school into a luxury, multi-use condominium building. Based on multiple defects in the construction, including cracks in the condominium's masonry, an unvented fire pump room, and improperly sealed windows, the condominium's board of managers commenced an action for breach of contract, breach of implied warranty, negligence, and negligent misrepresentation against the sponsor (West 147th Associates LLC), the developer (L&M West 147th Development

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LLC), and the general contractor (L&M Builders (GC). (Collectively, the L&M entities and the W147 entities are referred to as the defendants.)

IN COURT: The court granted a motion for unit owners to intervene as plaintiffs in the board's complaint in which they asserted breach of contract and unjust enrichment claims with respect to their individual unit (the board and intervenors are referred to as the plaintiffs). And, as is common in construction disputes, multiple third-party claims were also asserted in the action. The defendants asserted two separate third-party actions against Gamon Construction Co. Inc. and Finest Window Inc. for common law and contractual indemnification, negligence, and breach of contract. Gamon, in turn, asserted a third-party complaint against Finest Window.

The decision and order at hand concerned the court's resolution of three summary judgment motions and two cross motions seeking the same relief. The plaintiffs' motions sought summary judgment with respect to the defendants' liability for breach of contract. The defendants' motion sought summary judgment for contractual indemnification against Gamon. Finest Window sought dismissal of all claims asserted by the defendants.

The plaintiffs argued that the offering plan required delivery of the building in conformity with the law and various technical specifications. The court determined that the record before it supported substantial defects in the construction of the building (i.e., cracks in terra cotta and brick masonry, deterioration of masonry, window deterioration, exterior and interior leaks, and an unventilated fire pump room). Notably, the defendants did not dispute the existence of defects; rather, they argued the defects were not attributable to them, and at most that the defects were merely punch list items or "minor construction defects." The court rejected these arguments, finding that the experts' reports demonstrated substantial deviations from the offering plan. The court granted the plaintiffs' motions because the defendants delivered the building to the plaintiffs in a deficient condition.

The defendants also moved for summary judgment against Gamon and cross moved for summary judgment against Finest Window for contractual indemnification based upon the language contained in their respective subcontracts. The court denied the motion for contractual indemnity because the language in both subcontracts was clear that both Gamon and Finest Window agreed to indemnify the defendants for claims "*arising from any act, omission, negligence, breach of the Subcontract Documents, of or by the Subcontractor . . . excepting only the negligence of the Contractor* [i.e., the defendants] [emphasis in the original]." To establish a prima facie case for contractual indemnity, the defendants had the burden of demonstrating that there was a clear expression or implication from the language of the subcontracts to indemnify them. The court held that the defendants failed to satisfy this burden because the indemnity clauses excluded claims based on the contractors' negligence and, here, the plaintiffs asserted negligence claims against the defendants. The court denied summary judgment because the questions of the defendants' negligence were not challenged at summary judgment and required a trial to determine whether the negligence exclusion in the subcontracts was triggered.

Concerning Finest Window's motion for summary judgment, it sought dismissal of all claims asserted against it by Gamon and the defendants. The court granted the motion on all of Gamon's claims because Gamon failed to demonstrate that Finest Window launched an instrument of harm or that Gamon suffered any damages as a result of the defective window installation. As for the defendants' negligence claim against Finest Window, the court held that Finest Window did not owe an independent duty outside of the contractual obligations owed pursuant to its subcontract, and thus granted this branch of Finest Window's motion.

The court also dismissed the defendants' and Gamon's claims for common-law indemnification reasoning that in the primary action, the plaintiffs never alleged in their complaint that the defendants were vicariously liable for Finest Window's defective installation; rather, only sought to hold the defendants liable for their own negligence. Similarly, the court noted that there was no allegation that Gamon was vicariously liable for Finest Window's actions or omissions.

Finally, the court denied Finest Window's motion seeking to dismiss the defendants' claims for breach of contract for the failure to procure insurance because Finest Window failed to submit any evidence to show that it procured and maintained insurance as required in the subcontract.

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TAKEAWAY:
Construction defect actions are always fact specific, and presenting documentation of the defects and facts supporting breaches of contract is crucial to bringing a successful action. Here, the plaintiffs substantiated their claims with documentation and expert reports showing that the defendants failed to deliver the condominium's building in conformity with the terms and conditions of the condominium's Offering Plan. Contract actions, whether based on a condominium's offering plan, construction contracts, or any agreement that is the subject of a dispute, are also driven by the language of the operative agreements. Here, the condominium's offering plan obligated the sponsor to, among other things, construct the building in a manner that was consistent with applicable laws and filed plans and to correct or cause to correct any construction defects in the building. The subcontracts also limited the extent to which the subcontractors would be responsible for indemnifying the defendants. As such, the operative agreements must be carefully examined before starting a contract-based lawsuit.

CONVERSION

REAL WORLD HOLDINGS LLC V. 393 W. BROADWAY CORP.

2025 NY SLIP OP 01303 (1ST DEP'T. MAR. 6, 2025)

Appeals Court Affirms Dismissal of Shareholder's Claims of Conversion

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

OUTCOME: Decided for Defendant-Appellee Co-op

WHAT HAPPENED: The plaintiff is the owner of an apartment in the defendant co-op located at 393 West Broadway. It claims to have paid to own roof rights above the apartment, although it never received shares to the roof rights. The individual defendants are members of the board of directors and/or shareholders of the co-op.

In this over decade-long dispute, the plaintiff filed its fifth amended complaint claiming that the board members leveraged their power for financial gain and retribution and have effected a conversion of the plaintiff's ownership rights in the co-op when it purportedly issued shares of stock that did not exist and denied the plaintiff's right to renovate structural defects and live in its apartment, all while collecting maintenance and assessments of millions of dollars. During that time, the plaintiff claimed that:

- A board member has had major repairs and doled out favors in exchange for proxies and votes.
- It was charged for work it claimed was not its responsibility and was unlawful.
- The defendants conditioned consideration of the plaintiff's renovation plans upon making payments the plaintiff considered improper and refused such consideration when the payments were not made.
- While offering replacement windows to all other shareholders in connections with façade work the defendants ignored the plaintiff's request for the windows.
- The defendants also refused to replace the alarm and sprinkler system in the plaintiff's apartment, despite doing so throughout the building.
- The co-op also refused to remediate asbestos dumped there by the co-op.

Therefore, the plaintiff claimed that the defendants have intentionally affected a complete conversion of its rights. The plaintiff claimed that the defendants' purpose was to force the plaintiff to sell its apartment to engender a flip tax of $1.2 million or more to enrich the co-op.

Further, the plaintiff claimed that the defendants, motivated by a desire to retaliate against it, demanded some $150,000 to pay for then unnecessary roof repairs, which was the responsibility of all shareholders, and threatened to terminate the plaintiff's proprietary lease. The plaintiff claimed that the co-op's actions constituted an abuse of power discriminatorily against the plaintiff.

Also, the plaintiff complained that the board sent emails to all shareholders calling members of the plaintiff LLC "liars." The board then filed an amendment to the

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certificate of incorporation divesting and leaving a cloud upon the plaintiff's rights to the roof, in favor of the defendants, and refusing to issue the shares supporting those rights. The board also served notice of termination threatening to remove such rights.

IN COURT: Among the 25 causes of action pleaded in the complaint, the plaintiff sought damages for conversion and defamation. The defendants moved to dismiss these two causes of action.

The motion court held that the conversion claim was duplicative of the claim for breach of contract claim. The appellate court affirmed and went further, holding that a claim for conversion was really one for interference with one's rights of ownership and possession of real property, the apartment and roof area, to which the plaintiff's rights would exist through a proprietary lease. The claim must fail because no claim for conversion will lie for interference with an interest in real property. Those rights would be covered by the proprietary lease. Written agreements governing the leasehold rights preclude a claim for conversion, which a quasi-contract claims. Also, the same matter was disposed of in an earlier decision. The law of the case doctrine is a doctrine that precludes the court from reconsidering matters that are not demonstrably different from a decision in the motion court's prior order.

The cause of action for defamation based upon a writing describing the plaintiff's arrears would be barred by the applicable statute of limitations, since the statement was made in 2021, and the action was untimely when brought in 2023, more than one year later. Here, a similar statement was again published in 2022. The doctrine of republication, which would extend the statute of limitations, was held to be inapplicable when the republication was made to the same audience and in the same content. In this case, the 2022 statement involved arrears of double the original amount. Therefore, it was not considered a republication, but a new event of defamation.

The issue of the truth of facts in the statement was in dispute, so that the court found the dismissal of the claim inappropriate. The fact that the statement was published to board members and subject to a qualified privilege as made to persons who have some common interest in the subject matter may also defeat a claim of defamation. However, when there is a claim, as here, that the defendants acted with malice in an effort to harm the plaintiff's reputation, that qualified privilege can be overcome. The decision by the motion court not to dismiss the defamation claim was not discussed in the appellate court's decision.

TAKEAWAY:

This case has been in litigation for 10 years, over 637 documents were filed and served, and 24 remaining causes of action remain to be tested by a motion for summary judgment or tried, with further appeals possible. So the case is nowhere near completion. Additionally, and not yet considered by the court, there are 26 affirmative defenses and five counterclaims. Another 10 years of time and resources may be required to litigate the matter. It seems obvious that there are alternatives to litigation that would be in the best interest of the parties. Clearly, there are deep-seated personal issues and important substantive issues present here that would be hard to resolve. The jurisdictional limitations in the court's toolbox may preclude an outcome that will satisfy the needs and interests of all the parties involved. They may be better, quicker, and more economically and privately resolved in mediation or arbitration.

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ELECTIONS

JAZWINSKI V. JUSTICE COURT MUTUAL HOUS. COOP.

2025 NY SLIP OP 50282(U) (SUP. CT. QUEENS CNTY. MAR. 5, 2025)

Court Upholds Board Election Delayed Several Years by COVID Difficulties

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

OUTCOME: Decided for Co-op Respondents

WHAT HAPPENED: This case involves a co-op that did not hold an annual election for several years, purportedly due to COVID difficulties. By the time the co-op did finally hold an annual meeting in October 2023, the terms of all of the seven then-serving board members had expired.

The co-op's bylaws had contained a provision setting up "staggered" terms. That is, the way the building was intended to be run was that at the first annual meeting, there would be three classes of directors, with the first class serving one year, the second class serving two years, and the third class serving three years. At subsequent meetings, any directors up for election would uniformly serve three-year terms. Thus, for every election following the first annual meeting, there would be only a subset of directors (two or three directors, depending on the year) on the ballot, and the terms of board service would be staggered.

However, the bylaws did not specifically address the circumstances that arose here, where no elections had been held for several years. For the October 2023 meeting, the co-op board decided that four director positions would be put up for election, with two seats for a three-year term, one for a two-year term, and one for a one-year term, thereby "allow[ing] the current directors to serve similar terms relative to each other while also phasing in the staggered election of directors."

The petitioners, two shareholders in the co-op who had run for but not been elected in the October 2023 election, had a different interpretation. According to the petitioners, the co-op should have put all seven positions up for election and staggered the terms just like had been done at the first annual meeting.

Notably, if all seven seats had been put up for election, the two petitioners would have been elected to the board.

IN COURT: The court sided with the co-op and dismissed the petition. The court found that the bylaws did not specifically address the current circumstances, and the petitioners' interpretation would have impermissibly applied the provision of the bylaws regarding the initial annual meeting to the October 2023 annual meeting and election of directors.

Instead, because the petitioners did not allege any fraud or lack of notice, the court found that the business judgment rule should be applied and deferred to the board's decision to put only four seats up for staggered terms.

TAKEAWAY:

This decision is one of many examples of courts being very reluctant to overturn co-op board elections and seizing on any available arguments to uphold board election procedures.

In this case, the court rightly pointed out that the bylaws did not address the situation here and nothing in the text of the bylaws required putting all seven seats up for election. It is equally true, however, that the text of the bylaws also did not contain any language permitting four seats to be put up for a vote.

Thus, the court's finding that the petitioners "failed to demonstrate that, by holding four of the seven director positions up for election, the cooperative acted beyond the scope of its authority" seems a bit to be begging the question. Was it outside the board's scope of authority to put four seats up for election when nothing in the bylaws specifically allows the board to do so? Why or why not? The decision does not really say.

That is not to say that the court came to the wrong conclusion in the end, only that it was faced with an interpretive dilemma and it did not necessarily need to defer to the board's judgment of what the bylaws required. Nevertheless, the court ultimately agreed with the board's view, and upheld the election.

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ELECTIONS

2187 UNITS, LLC V. STRINGFELLOW

2025 NY SLIP OP 01331 (1ST DEP'T. MAR. 11, 2025)

Court Won't Set Aside Results of Co-op Board Election

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

OUTCOME: Decided for Co-op Respondents

WHAT HAPPENED: The petitioners here are various shareholders of a residential cooperative housing corporation and the successor sponsor/developer of the cooperative. They commenced this special proceeding against the respondents, who are various members of the cooperative's existing and newly elected board, to set aside the results of the cooperative's annual election of its board of directors.

IN COURT: The petitioners filed this special proceeding in New York Supreme Court, Bronx County, pursuant to Business Corporation Law §619, seeking to set aside the recent election of the cooperative's board of directors and to direct that the cooperative hold a new election. The trial court denied the petition and the First Department affirmed. The First Department held that the petitioners failed to demonstrate that there was any failure to provide timely notice of the annual meeting and the election pursuant to Business Corporation Law §605(a), and that there were no relevant irregularities in such notice or in how the cooperative's annual meeting was conducted.

TAKEAWAY:
This case confirms the reluctance of courts to interfere with board elections without a clear and unquestionable violation of the relevant governing statutes, including, for cooperatives, the Business Corporations Law and governing documents, or other evidence of distinct irregularities.

FIDUCIARY DUTY

1110-1130 STADIUM OWNERS CORP. V. BRONX 1 LLC

2025 NY SLIP OP 50361(U) (SUP. CT. KINGS CNTY. MAR. 21, 2025)

Individual Board Members Not Liable for Breach of Fiduciary Duty or Discrimination

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

OUTCOME: Decided for Plaintiffs, Defendant

WHAT HAPPENED: The plaintiff apartment corporation, which owned two apartment buildings in the Bronx, and five individual members of the plaintiff's board of directors, alleged that the defendant holder of unsold shares failed and/or refused to sell shares to reduce its proportionate share of ownership. As a result, the apartment corporation was "non viable".

The defendant interposed an answer that included a counterclaim based upon the plaintiff's supposed breach of its contractual obligations under the standard proprietary lease. These obligations included maintaining the building in good repair, managing it as a first-class building, and providing tenants and shareholders with essential services such as heat and hot water. No particulars were included in the initial pleadings identifying the negatively affected apartments or any examples of poor maintenance.

The defendant also interposed a counterclaim for breach of fiduciary duty, disparate treatment, and discrimination against the five individual plaintiffs. Again,

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no particulars were included, and there was no description of any independent wrongful act that would result in liability for any of the individual plaintiffs.

Upon receipt of the plaintiffs' motion to strike the defendant's counterclaims for lack of sufficient particularity, the defendant submitted a detailed affidavit from its managing agent describing the poor communication and cooperation between the parties and the devastating effect of the reduction in services on the defendant's tenants, many of whom were elderly and infirm. No details whatsoever were ever provided regarding the alleged improper actions of the individual plaintiffs.

IN COURT: The court held that the plaintiffs had sufficient notice of the transactions, occurrences, and series of occurrences that were relied upon by virtue of the managing agent's supplemental affidavit. According to the court, the defendant did not need to identify the specific provisions of the proprietary lease that they were relying on in its cause of action for breach of contract. The defendant's conceded failure to initially identify affected apartments or to cite specific examples of reduced services did not mandate dismissal of its breach of contract action.

However, because there were no actions alleged to have been taken by individual board members other than in their capacity as board members, they could not be subject to liability for breach of fiduciary duty, discrimination, or disparate treatment. The court further reiterated that, absent claims of fraud, self-dealing, unconscionability, or other acts of misconduct, which were not alleged here, the court was limited in its inquiry as to whether the individual plaintiffs' actions were made in good faith and in furtherance of the legitimate interests of the apartment corporation. Inasmuch as the business judgment rule insulated the individual plaintiffs from any liability, dismissal of the defendant's insufficiently pleaded counterclaim based on breach of fiduciary duty was mandated.

TAKEAWAY:

The proprietary lease is a contract. As such, even with lack of notice, should a board of directors not provide essential services to all residents and not communicate and/or cooperate with investors, including holders of unsold shares, it could face liability for its breach.

Similarly, if a court believes that a board of directors is not acting properly and negatively impacting the ability of holders of unsold shares to sell or rent apartments or to provide services to its nonpurchasing tenants, it could permit a managing agent to remedy otherwise fatally defective pleadings by the submission of detailed affidavits and/or exhibits.

At the same time, provided that decisions are made in good faith and for a legitimate corporate purpose, the courts will consistently shield individual board members from unsubstantiated claims of breach of fiduciary duty. In order to avoid dismissal, it must be specifically alleged in the pleadings what independent tortious acts an individual board member committed separate and apart from the collective actions they have taken on behalf of their constituents.

MOTION PRACTICE

LEKHNER V. HOUSE INC.

NO. 655904/2024 (SUP. CT. N.Y. CNTY. MAR. 17, 2025) NYSCEF NO. 37

Co-op Properly Paid Evicted Shareholder the Surplus from the Sale of Her Shares

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

OUTCOME: Decided for Defendant Co-op

WHAT HAPPENED: In September 2022, the cooperative brought a nonpayment proceeding based on the shareholder's failure to pay maintenance, assessments, and other charges totaling over $40,000. The shareholder answered, a trial was held, and a money judgment and judgment of possession were granted to the cooperative in December 2023.

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The shareholder was evicted in February 2024, and the apartment shares were sold in August 2024 after the shareholder was sent a Notice of Disposition of Collateral. The surplus from the sale remaining after satisfaction of the money judgment and other charges by the cooperative was paid to the shareholder. In housing court, the shareholder attempted unsuccessfully to vacate the judgment and the sale.

IN COURT: Unhappy with the outcome and the amount of equity returned, the shareholder commenced an action against the cooperative for breach of contract and promissory estoppel (based on the Notice of Disposition of Collateral) and violation of Real Property Actions and Proceedings Law (RPAPL) §702 (which defines what can be collected in a summary proceeding). The shareholder then sought a default judgment against the cooperative, and the cooperative filed a cross-motion to dismiss the complaint.

While the court overlooked the irregularities in the service of the complaint in the interest of justice and since there was no prejudice to the cooperative, it could not overlook the improper way that the shareholder served the motion, which she did personally. A party may not perform service of its own motion. Accordingly, the court denied the shareholder's motion for a default judgment.

In contrast, the court granted the cooperative's motion to dismiss the complaint. The cooperative correctly demonstrated that the amount of the surplus was properly calculated and returned to the shareholder, warranting dismissal of the complaint based on the doctrine of res judicata since the claims had already been litigated in housing court, and based on documentary evidence since the shareholder had already been issued a check for the surplus from the sale.

TAKEAWAY:
The concept of "if at first you don't succeed, try, try again" does not work once you've already had your day in court. Changing venue and re-framing an argument as a different claim does not give a litigant repeated and successive changes to argue an unsuccessful point. Defendants will be quick to raise defenses of claim and issue preclusion and documentary evidence which courts will generally grant if a matter has already been fully litigated and decided. It is important to actively participate in litigation, whether as the plaintiff or the defendant, to ensure that your interests are fully represented and protected.

PROPRIETARY LEASE

71ST STR.-LEXINGTON CORP. V. FRANKEL

NO. 653548/2023 (SUP. CT. N.Y. CNTY. MAR. 7, 2025) NYSCEF NO. 84

Co-op Terminates Proprietary Lease for Failure to Maintain Insurance

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

OUTCOME: Decided for Plaintiff Co-op

WHAT HAPPENED: An Upper East Side cooperative had a long-running dispute with the adult son of a former shareholder. When the shareholder died, the son sought to become the owner of the apartment, but the co-op declined to consent to the transfer. Litigation ensued; a stipulation was signed; and the son subsequently filed a motion to hold the co-op in contempt of court for allegedly violating a provision of the stipulation.

Meanwhile, the co-op separately required all the apartment owners in the building to prove that they had homeowner's insurance as mandated by the proprietary lease. The son at first ignored the co-op's request for insurance information, but later he confirmed the absence of insurance. The co-op served a notice of default upon the son, and after he failed to cure the default, the co-op terminated the proprietary lease due to the lack of insurance.

The co-op then filed the instant lawsuit against the defendant son, asking the court to declare that the proprietary lease was duly terminated, and to award the co-op its attorneys' fees. The defendant

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son answered the complaint and asserted numerous defenses. The co-op moved for summary judgment on its claims; for dismissal of the defenses; and for fees. The defendant opposed the motion.

IN COURT: The court first analyzed whether the notice of default over the lack of insurance was sufficiently specific and found that it was. The co-op reasonably apprised the defendant of the nature of the default, and the defendant did not establish that he had any insurance.

The court next found that the terms of the proprietary lease plainly created a conditional limitation for a default of this nature. Upon a shareholder's failure to obtain insurance as mandated by the proprietary lease, the co-op could, and did, issue a notice of termination. The defendant son further argued that the claim was barred by the statute of limitations, the co-op's waiver, and the doctrine of laches. The court found that the co-op's claim was timely, and that the issuance of monthly rent bills did not constitute a waiver of the underlying default. Nor did laches apply, as the defendant failed to show any injury, loss of evidence, or other disadvantage due to the co-op's purported delay in taking action.

Finally, the defendant claimed the case was dismissible under a provision of the Real Property Law that barred a landlord from serving a notice of default as retaliation against a tenant who sought to secure enforcement of his rights. While the co-op served the notice of default within months of the son's contempt motion in the first litigation, that contempt motion was not the kind of tenant activity protected by the statute. The statute protects tenants from retaliation if they seek to enforce rights under a lease or seek to obtain remedies under protective statutes that govern habitability or repair to a dwelling place. Here, the son's contempt motion sought to enforce his rights under a stipulation, not the lease, and the contempt motion did not relate to any statutory protections regarding the condition of the premises.

Because the breach by the defendant was significant given the importance of insurance, and because the cooperative duly followed the notice and other provisions of the proprietary lease, summary judgment was granted; the affirmative defenses were dismissed; and the court declared that the proprietary lease had been duly terminated by the co-op. Attorneys' fees were awarded against the son in the amount of just under $60,000.

TAKEAWAY:
Insurance is critically important to a cooperative and its shareholders, and New York judges know it. Insurance is a requirement in the most common forms of proprietary leases in use in New York City; insurance protects property from loss or damage; and insurance guaranties there are sufficient funds to compensate those harmed by fire or other casualty. If a shareholder does not have insurance and refuses to obtain insurance after notice, the shareholder can get removed from the cooperative community, as happened to the defendant here. As a bonus, the defendant also was compelled to pay his co-op's attorneys' fees. Don't be like the defendant, make sure you have insurance.

SUCCESSION RIGHTS

ERON V. VILL. E. TOWERS, INC.

2025 NY SLIP OP 30703(U) (SUP. CT. N.Y. CNTY. MAR. 3, 2025)

Shareholder's Great Niece Doesn't Have Succession Rights to Mitchell-Lama Apartment

SQUIB BY ANDREW P. BRUCKER, PARTNER, FOX ROTHSCHILD

OUTCOME: Plaintiff's Motion Denied

WHAT HAPPENED: Village East Towers, Inc., is a Mitchell-Lama cooperative in Manhattan, created under Article II of the New York State Private Housing Finance Law. Barry and Mary Tolman became Village East shareholders in 1979. Barry passed away, and Mary resided in the apartment until she was admitted to a nursing home in 2020.

Eron, the niece of Mary's

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daughter, moved into the apartment in 2014 while she was in school, and lived with Mary for a number of years. In 2023, Eron filed an application for succession rights (since the shareholder was now no longer in residence). In a Mitchell-Lama co-op a family member who has lived with the shareholder can, under certain circumstances, succeed to the shareholder's rights (and herself become a shareholder) after the shareholder has died or moved. Succession ultimately rests on the decision of a hearing officer at the NYC Department of Housing Preservation and Development (HPD), which is the supervisory agency of NYC-sponsored Mitchell-Lamas.

Eron's application was denied by the hearing officer based on the fact that she did not prove she was a "family member" as defined in the Mitchell-Lama law. While the definition includes "niece" (along with the other obvious relatives), Eron is the great niece of the shareholder, and so by definition, Eron was not a family member. However, the law also states that an applicant can qualify as a family member if they can prove an "emotional and financial commitment and interdependence". The law then provides a long list of evidence that may be considered.

IN COURT: Eron brought an Article 78 proceeding to vacate the determination of the (HPD). The determination, by a hearing officer, held that Eron was not entitled to succession rights, and Eron claimed that based on the evidence, the hearing officer was wrong in her decision. Eron had shown that she was listed on the income affidavits, submitted photos of them together at family functions, and submitted affidavits from other family members stating that they shared a familial relationship. However, the hearing officer determined this was not enough, as attending family functions would be normal for any two relatives. The hearing officer held that the two lacked financial and emotional commitment and interdependence.

The court held that in order to succeed in an Article 78 proceeding, one must show that the administrative decision was arbitrary and capricious, or lacked a rational basis. The court held that the decision of the hearing officer, denying succession, was supported by a rational basis, and thus the determination must be sustained.

TAKEAWAY:

In order to establish succession rights, careful consideration should be paid to objective facts, as well as the emotions. Intermingling certain funds in joint bank accounts certainly would have helped, as would have sharing credit cards, and a Power of Attorney between the two. Further, in order to succeed in an Article 78 proceeding, the party must show that the prior governmental decision was arbitrary and lacking in a rational basis. This is a rather tough standard, and the court is not authorized to re-hear the case, but rather may only determine the rationality of the prior decision.

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