CO-OP&CONDO
CASE LAW TRACKER
digest
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ALTERATIONS

AVRAHAMI V. 235 W. 108TH ST. OWNERS CORP.

2025 NY SLIP OP 02126 (1ST DEP'T. APR. 10, 2025)

Co-op that Won Case Can't Get Attorney Fees Because Shareholder Wasn't in Default

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

OUTCOME: Decided, in part, for Defendant-Appellee Co-op

WHAT HAPPENED: The plaintiff shareholder tenant leased his apartment in 2007. At the time, its master bedroom had a whirlpool bath, which he claims was a reason why he entered into the lease. There was no prior documentation that addressed the use of whirlpool baths in the apartment. The plaintiff used the whirlpool tub for years without any problem, complaint, or objection.

At some point in 2017, the superintendent, who lived below the plaintiff, noticed a gap between the bathtub and the wall tiles above it. They were wider than usual, indicating that the tub had sunk. The plaintiff consulted with contractors for repair work and informed the board that repairs would be made, and that the superintendent would oversee the work. However, the board informed the superintendent that the building's rules prohibited whirlpool tubs and that the tub had to be replaced with a standard tub.

The plaintiff sued the board for a declaratory judgment, breach of contract, negligent misrepresentation, breach of fiduciary duty, and unjust enrichment. The board answered, denying the plaintiff's material allegations and asserted defenses, including one based upon the business judgment rule, and asserted counterclaims for a declaratory judgment and attorneys' fees.

IN COURT: Motions for summary judgment were decided in the motion court, then proceeded to the appellate division where they were subject to two appeals.

In the motion court, the co-op argued that its decision to stop the plaintiff from reinstalling the whirlpool tub in its apartment was a good faith decision, made in the interest of the co-op; therefore, it is entitled to summary judgment, as its decision is protected by the

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JUNE 2025 HIGHLIGHTS

BUSINESS JUDGMENT RULE
Business Judgment Rule Does Not Protect Bad Faith Actions of Board of Directors

BYLAWS
Preliminary Injunction Bars Defendants from Controlling Condominium's Board

FRAUD
Fraud Claims Against Sponsor and Principal Survive Motion to Dismiss

SALES
Co-op Sellers Didn't Need to Replace Operational Windows Before Closing

SUCCESSION RIGHTS
Family Member Cannot Be Evicted from Father's Apartment

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CO-OP&CONDO CASE LAW TRACKER digest

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business judgment rule. The plaintiff argued in opposition that the defendant's decision is not covered by the business judgment rule because that rule does not protect bad faith, arbitrary conduct, or capricious decisions.

The co-op argued that it is entitled to summary judgment because its decision was made in good faith and in the interest of the co-op. It was based upon past practices, where the board had prohibited whirlpool tub use on concerns regarding noise and vibration from the pump. It also notified the plaintiff that the lease advised the plaintiff that whirlpool tubs were forbidden in the building. Also, in an alteration agreement signed by the plaintiff in connection with a prior issue, the plaintiff acknowledged that the board did not allow the installation of whirlpools. The plaintiff agreed to such by his signature. It was conceded the original whirlpool tub had been sinking at the same time that there was a water leak from it into the apartment below.

The motion court found that the board made a good-faith decision to prohibit the plaintiff from reinstalling the prohibited tub. The plaintiff argued that a whirlpool tub existed in another apartment in the building. The motion court held that the existence of another whirlpool tub, which did not leak, is insufficient to raise a triable issue of fact as to an allegation that the board deliberately singled the plaintiff out for harmful treatment or selective enforcement. Accordingly, the motion court found that the co-op board met its burden demonstrating that all the plaintiff's claims are insulated from judicial scrutiny under the business judgment rule and must be dismissed.

The motion court then held that the co-op was entitled to judgment on its counterclaim for attorney's fees pursuant to the proprietary lease. There, it was provided that if the lessee shall at any time be in default and the lessor is required to defend any action based upon the default, the expense thereof to the lessor shall be paid by the lessee. It ordered that the co-op's counterclaim for recovery of attorney's fees was granted.

On the plaintiff's appeal to the Appellate Division, decided on Nov. 26, 2024, the decision against it by the motion court was affirmed, both on its liability and the counterclaim for attorney's fees. The absence of an express rule prohibiting whirlpool tubs was found not to be controlling. The plaintiff had no vested right to replace the whirlpool tub with one of like "kind and quality." The lease stated that if a shareholder removes a fixture, it must either restore or "replace them with other of a kind and quality customary in the Building and satisfactory to the Lessor."

Moreover, the argument that other shareholders had whirlpool tubs in their apartments was unavailing. The plaintiff's tub was damaging the building. The was no evidence that the other tubs were causing damage. In addition, the plaintiff sued the co-op rather than the individual board members, further warranting dismissal of the claim that the plaintiff was treated differently in violation of a fiduciary duty. It affirmed the grant of attorney's fees in the co-op's counterclaim for "defending, or asserting a counterclaim in, any action brought by the lessee . . . ."

On a further appeal to the Appellate Division, decided April 10, 2025,

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the court again affirmed the motion court's decision dismissing the plaintiff's complaint, but modified the judgment as to liability on the co-op's counterclaim of attorney's fees, to the extent of dismissing the counterclaim. The plaintiffs' claims for declaratory relief based upon the co-op's refusal to permit him to reinstall a "Jacuzzi"-like whirlpool tub after the tub began sinking due to water leaks emanating from it was properly dismissed.

The court improperly granted summary judgment as to the plaintiff's liability on the co-op's counterclaim for attorney's fees. Under the default clause of the lease, a prerequisite of such an award for attorney's fees is that the lessee be in default, which was not the case here. The co-op's claim against the plaintiff seeks declaratory relief declaring that the plaintiff is not entitled to install or reinstall the tub. The co-op did not allege that plaintiff is in default, and it was undisputed that the plaintiff removed the tub and had not reinstalled it.

TAKEAWAY:

Not every dispute between co-ops and lessees imposes attorney's fees in favor of the prevailing party. Attention must be paid to the exact language of the attorney's fees clause. In this case, with the motions, trials, and multiple appeals, the attorney's fees may well have been in the mid-six figures. However, pursuant to the American system of justice, each party pays its own attorney's fees, unless otherwise provided by a statute or contract. Here, the contract provided that for the lessee, although the losing party, was not liable for the lessor's attorney's fees.

This case is also a lesson on the power of the business judgment rule. Overcoming the rule is doable, but it requires a showing of breach of contract, bad faith, breach of a fiduciary duty by the board members, bad faith or dishonest judgment, acting outside of their authority and acting not legitimately in furtherance of the corporate purpose, on the part of the board members, and the board members must be named as defendants in the action.

APPEALS

IN RE KASOWITZ

2025 NY SLIP OP 02131 (1ST DEP'T. APR. 10, 2025)

Attorneys' Fees Clause in Co-op's Proprietary Lease Was Unconscionable and Unenforceable

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

OUTCOME: Decided, in part, for Plaintiff-Appellant

WHAT HAPPENED: In 2008, Alphonse Fletcher signed a multimillion dollar Note and Security Agreement with Chase Bank when he purchased multiple apartments at The Dakota. Chase signed a standard form Recognition Agreement with The Dakota at the time.

Several years later, Mr. Fletcher commenced legal action against The Dakota alleging damages due to discrimination after his request to purchase another apartment in the building had been rejected. The Dakota eventually defended that claim successfully after protracted litigation; it also prevailed in certain unrelated claims against Fletcher arising in connection with his share ownership.

It appears that The Dakota had expended millions in legal fees in defending the Fletcher discrimination action and asserting its unrelated claims, as well as legal fees for certain unrelated disputes between Fletcher and the co-op. Ultimately these totaled more than $4.5 million through 2020.

Meanwhile, in 2015 Fletcher's former law firm, Kasowitz Benson Torres & Friedman, obtained a judgment for their own unpaid fees of over $2,748,000 and sought to foreclose on Fletcher's apartment to pay the fees. Both The Dakota and Chase claimed prior entitlement to the sales proceeds; however, they disagreed as to who had lien priority. Chase eventually took an assignment of the Kasowitz Benson judgment, leaving Chase and The Dakota as the sole creditors.

At issue was a clause in the

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Proprietary Lease providing that The Dakota would be entitled to attorneys' fees "[i]f the Lessee shall at any time be in default hereunder, and the Lessor shall take any action against the Lessee based on such default, **or if the Lessor shall defend any action or proceeding (or claim therein) commenced by the Lessee.**" [Emphasis added.] Based on this clause, The Dakota claimed entitlement to the full amount of their legal fees as arising under the Proprietary Lease.

The trial court ruled in favor of The Dakota, notwithstanding its acknowledgment that most of the fees did not arise due to a default by Fletcher. Among other reasons, the court asserted that: (i) The Dakota had a perfected "cooperative security interest" under the New York Uniform Commercial Code (UCC), so it maintained lien priority; (ii) the Proprietary Lease clause was not unconscionable, since it did not expressly provide that The Dakota would have the right to collect attorneys' fees even if it did not prevail (moreover, the issue was moot because The Dakota had prevailed); and (iii) in any event, Chase had lost the chance to plead unconscionability as a defense because it had not asserted the defense earlier in the Fletcher action.

The issue of whether Chase had a proper chance to make its claims in the prior actions had been litigated up to the Court of Appeals. That court ruled that Chase had not yet had a chance for a full and fair hearing on its lien priority claims. Apparently, the trial court felt that Chase could have claimed unconscionability at some other point, so it lost its chance now.

IN COURT: The First Department reversed. To begin with, it stated that the clause at issue logically would be understood to allow The Dakota to collect legal fees even if it did not prevail; in fact, the lease clause "explicitly provides for attorneys' fees" that would need to be paid whenever a tenant-shareholder sued The Dakota, even if default was not an issue. Since clauses allowing collection of legal fees should be interpreted strictly, such a clause was unconscionable on its face and therefore unenforceable, regardless of whether The Dakota actually prevailed in the litigation. The court stated that to enforce such a provision would dissuade persons with legitimate claims from pursuing litigation at all because of the potential monetary impact, even if the landlord was in default. The appeals court apparently did not think that Chase had lost its chance to make a claim at an earlier date either.

The court did grant lien priority for $592,189.69 of fees unrelated to the Fletcher discrimination action (and which presumably did arise out of a default). Otherwise, the Chase lien was deemed superior under the Recognition Agreement.

TAKEAWAY:

The trial court supported a counterintuitive interpretation of a lease clause in order to reach the result. I believe that many judges would have disparaged the construction favored by the trial court as too "cute" or "creative." The Appellate Division rightly construed the clause as it was (almost certainly) intended to be understood by its drafters.

Some cooperatives and condominiums have amended their documents to provide that if an owner even makes an inquiry that the association believes it needs to engage counsel to answer, the owner will be responsible for the legal fees incurred by the association in responding. The charges would be imposed regardless of the basis for or propriety of the inquiry. One wonders whether that type of clause might also be considered unconscionable for similar reasons.

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BOOKS AND RECORDS

IN RE HOLTZMAN V. WATERFALL APTS. INC.

NO. 160001/2024 (SUP. CT. N.Y. CNTY. MAR. 26, 2025) NYSCEF NO. 11

Shareholder Suing for Access to Books and Records Didn't Establish Standing

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

OUTCOME: Decided for Respondent Co-op

WHAT HAPPENED: The petitioner commenced an Article 78 proceeding seeking an order to enforce her right as a shareholder to access certain books and records of the WaterFall cooperative pursuant to her proprietary lease and §624(c) of the Business Corporation Law (BCL), as well as attorney's fees and costs.

The petitioner alleged that she became a shareholder in 2019 when she purchased shares allocated to her apartment and that the board refused to grant her access to inspect and copy: (i) the cooperative's financial statements from January 2022 to the present; (ii) records maintained by the board during the same time frame; and (iii) copies of annual fiscal reports reflecting corporate financial affairs for the calendar years 2023 and 2024. She sought the records to verify how the cooperative's funds were being spent. The cooperative objected to the demand on the grounds that it was overly burdensome and unnecessary for the purposes stated in the petition.

IN COURT: Although §624 of the BCL grants a "shareholder of record" rights to review a corporation's books and records, the court dismissed the petition because the petitioner failed to meet the burden of proof required to establish her relationship to the corporation, her capacity as a shareholder, or any documentation conferring inspection rights on the petitioner. She did not produce a Certificate of Membership, a Certificate of Incorporation, corporate bylaws, or a duly executed proprietary lease between her and the cooperative. Rather, the proprietary lease was a blank template.

TAKEAWAY:

Standing to commence an action or proceeding is a threshold question in every legal proceeding. It ensures that courts are deciding cases in which there is a genuine controversy between parties who have a real interest in the outcome. It safeguards that courts are not deciding hypothetical cases. This case demonstrates that mere allegations are not enough to establish standing to review a corporation's books and records. Documentary evidence creating the right of inspection is crucial.

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BUSINESS JUDGMENT RULE

GUZMAN V. BD. OF MGRS. OF THE AMHERST-CORTLANDT CONDO.

NO. 160614/2017 (SUP. CT. N.Y. CNTY. APR. 28, 2025) NYSCEF NO. 189

Court Dismisses Unit Owner's Claim That Condo Board Breached Settlement Agreement

SQUIB BY ANDREW J. BRAVERMAN, ASSOCIATE, BRAVERMAN GREENSPUN

OUTCOME: Decided for Condo Board Defendants

WHAT HAPPENED: After the board recorded a lien against the plaintiff's unit for unpaid common charges, the plaintiff sued, alleging the lien violated a 2008 settlement agreement resolving three earlier disputes. Specifically, the plaintiff alleged that the board failed to comply with the notice provisions of the settlement agreement, which required that all notices from the condominium be sent to a designated Yahoo email address. According to the plaintiff, the board did not send notice to that address prior to recording the lien.

IN COURT: The defendants moved for summary judgment seeking dismissal of the plaintiff's claims. In support of their motion, the defendants argued that: (i) the 2008 settlement agreement was expressly limited to the three prior disputes between the parties and had no bearing on the current litigation; and (ii) the board's decision to record a lien for unpaid common charges was a good faith exercise of its authority under the business judgment rule.

The court agreed, holding that the agreement did not limit the board's authority going forward and that enforcing common charge obligations was a legitimate exercise of the board's discretion.

TAKEAWAY:
A condominium board's enforcement of common charge obligations is protected under the business judgment rule so long as the board acts within its authority and in good faith to further the condominium's legitimate interests.

BUSINESS JUDGMENT RULE

CAPACCHIONE V. 8 W. 13TH ST. TENANTS CORP.

2025 NY SLIP OP 31130(U) (SUP. CT. N.Y. CNTY. APR. 4, 2025)

Business Judgment Rule Does Not Protect Bad Faith Actions of Board of Directors

SQUIB BY STEVEN D. SLADKUS, PARTNER, AND MADISON N. KELLEY, ASSOCIATE, SCHWARTZ SLADKUS REICH GREENBERG ATLAS

OUTCOME: Decided for Plaintiff Co-op Shareholder

WHAT HAPPENED: The plaintiff is a shareholder of a residential cooperative housing corporation. The defendants are the cooperative and its board of directors. In 2014, there was a leak in the plaintiff's apartment, which required repairs. The plaintiff retained an engineer to design renovation plans, which the plaintiff submitted to the board to review. The board allegedly reviewed and approved the plaintiff's plans both before the renovations commenced and again a second time during the renovations through a third-party auditor. The renovations were completed in 2016 without issue.

In 2022, the plaintiff decided to sell her apartment. After she had secured a potential buyer, the defendants informed the plaintiff for the first time that they did not

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approve a portion of her renovations. Accordingly, the defendants refused to review the prospective buyer's application, which prevented the plaintiff from selling her apartment.

IN COURT: The plaintiff filed a complaint against the defendants seeking a declaratory judgment and monetary damages based on breach of fiduciary duty, tortious interference with contract, and slander of title. The defendants filed a pre-answer motion to dismiss the complaint, arguing that the plaintiff had failed to state viable claims because the board's actions were protected by the business judgment rule.

The court held that the plaintiff had sufficiently alleged that the defendants acted in bad faith, thereby excluding the board from the protection of the business judgment rule. Specifically, the court noted that the plaintiff asserted numerous factual allegations that demonstrated that the board had in fact previously approved all portions of the plaintiff's renovation plans. Having found that the complaint sufficiently challenged the applicability of the business judgment rule because of the bad faith allegations, the court thereafter determined that all of the causes of action were pleaded sufficiently to defeat a pre-answer motion to dismiss.

TAKEAWAY:
Where a cooperative's board of directors acts within the scope of its authority and in good faith, courts will typically not substitute their own judgment for a board of directors' judgment. However, courts will not afford a board of directors the protection of the business judgment rule where the pleadings sufficiently allege that the board of directors acted in bad faith.

BYLAWS

MULBERRY CONDO. ASSOCS., INC. V. LEONG

2025 NY SLIP OP 50644(U) (SUP. CT. N.Y. CNTY. APR. 9, 2025)

Preliminary Injunction Bars Defendants from Controlling Condominium's Board

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

OUTCOME: Decided, in part, for Plaintiff Condo

WHAT HAPPENED: After a dispute arose over management of a commercial condominium building in Little Italy, a group of unit owners took action to replace the existing board of managers. The group possessed two-thirds of the common interests of the condominium, so they executed a written consent to remove the four occupied seats on the seven-member board; to replace those four members with four new members; and to select three members to take the three other seats, which were vacant. The new board then elected a new board president.

The condominium itself (which was incorporated) objected to the actions of the majority group, maintaining that the written consent was unauthorized by the bylaws. The condominium sued the defendant group and the nominal new president. The plaintiff sought a preliminary injunction to bar the defendants from acting as a new board; to prevent the nominal president from undertaking actions on behalf of the condominium; to reimburse condominium funds that had been disbursed; and for attorneys' fees.

IN COURT: The court found that the defendants had authority to issue the written consent to remove the four sitting board members. As majority owners of the condominium, a provision of the bylaws allowed them to remove board members without the necessity of calling a meeting and a vote by all unit owners. The court also found that the defendants had authority to select three persons to fill the vacant seats on the board. The bylaws gave the majority owners the power to fill those vacant seats.

But the court found that the defendants did not have authority to appoint replacement members to fill the other four seats. The bylaws stated that only sitting board members had authority to fill board seats vacated by removal—that authority

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was not vested in unit owners. Nevertheless, the three new members appointed by the defendants to fill the vacant seats could not properly appoint new board members to fill the vacant four seats. Under the bylaws, no board action was authorized without a quorum of board members, a quorum being a majority of the seven seats. The three members did not constitute a quorum, so they could not undertake the board action necessary to fill the vacant four seats.

As such, the court issued a preliminary injunction enjoining the defendants from representing that they constituted the new board; enjoining the individual appointed as nominal president from undertaking any actions as president, or holding himself out as president; and requiring defendants to reimburse the condominium for any funds expended. The court denied the plaintiff's request for attorneys' fees as unauthorized by the bylaws.

TAKEAWAY:

It's a challenge to sum up a complicated case like this, but it seems fair to make two points. First, the provisions of a condominium's bylaws need to be carefully examined and followed, as New York's Condominium Act mandates strict compliance. This is particularly true when control of the board is at issue. Given the importance of control, any variance from the bylaws will give a court pause—and an opportunity to undo actions perceived to be unauthorized by the bylaws.

Second, while litigation is not entirely a random casino where outcomes are purely dictated by luck, there is an inherent unpredictability that ought not be underestimated. The judge in this case supported almost everything the defendants did in attempting to control membership of the board, and yet the plaintiff was able to stop the defendants from taking control. Surprised? Don't be. Once a dispute is placed in the hands of a judge, the die has been cast. Alea iacta est, as a smart guy once noted. Play the litigation game—but only if you must.

EVICTION/TERMINATION

MUT. REDEV. HOUSES, INC. V. GELLER

2025 NY SLIP OP 50593(U) (SUP. CT. N.Y. CNTY. APR. 10, 2025)

Court Denies Summary Judgment to Co-op that Dragged Its Feet in Eviction Case Against Shareholder

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

OUTCOME: Decided for Defendant Shareholder

WHAT HAPPENED: The cooperative's attempt to evict an 80-year-old resident, which dates back to at least 2004, is a textbook example of what can go wrong when you are not diligent in the prosecution of your claim.

In 2004, New York City's Department of Housing Preservation and Development granted defendant Geo Geller succession rights to his deceased aunt's apartment in Penn South. Several years after the decision, the cooperative required him to transfer the apartment to himself, pay outstanding charges, and purchase the unit as a successor. The cooperative claims to have provided him all necessary paperwork in 2010; by 2013, Mr. Geller had still not taken the steps necessary to effectuate the transfer and denied having been given a copy of the bylaws, which he requested.

In 2015, on the cooperative's application, the public administrator was appointed representative of the estate of Mr. Geller's aunt and surrendered the apartment to the cooperative. Mr. Geller was still in occupancy. In 2019, the cooperative commenced an ejectment action to remove Mr. Geller from the apartment, claiming he failed to comply with the transfer requirements and/or pay use and occupancy since 2013 (though Mr. Geller claims that he tendered payments, but the cooperative would not accept them).

In intervening litigation, the New York Supreme Court ruled in 2017 that the defendant's right to succeed to the apartment was extinguished because of his failure to complete the transfer process.

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In the current ejectment action, the cooperative moved for summary judgment, claiming that Mr. Geller had no right to remain in the apartment and owed significant arrears in use and occupancy. He raised numerous affirmative defenses and, upon retaining counsel in 2024, moved to amend his five-year-old answer to assert a claim of adverse possession to the apartment.

IN COURT: Because of his pro se representation, the court excused the delay in asserting the claim and found that all of the elements of a claim for adverse possession had been pleaded (in occupancy over 10 years, hostile to landlord's interest, open and notorious, and that possession is exclusive) and allowed the claim to be asserted. The court denied the cooperative's request for summary judgment on its claim for ejectment, finding triable issues of fact existed as to the claims of adverse possession and whether at some point intime, the defendant actually became a shareholder (it did not help the cooperative's cause that in a prior proceeding in housing court, the court papers filed by the cooperative referred to Mr. Geller as a shareholder).

The cooperative also sought summary judgment on its claim for approximately $142,000 of unpaid use and occupancy, which the court denied, finding there were issues of fact as to whether the cooperative refused prior payments from Mr. Geller and whether and how much he may owe for use and occupancy.

The court also preserved Mr. Geller's laches defense so the question of whether there was any unreasonable or inexcusable delay by the cooperative since 2004 could be determined.

Equitable defenses relating to equitable estoppel and unclean hands were also preserved so the court can determine whether the cooperative's alleged failure to provide the defendant with its bylaws in 2010 constituted a concealment of material facts or immoral conduct.

The court also allowed Mr. Geller's claim for frivolous litigation to remain, finding that he resided in the premises for 32 years without issue and the cooperative waited "many years to bring actions in the Housing Court and Supreme court after the Housing Court already dismissed Plaintiff's eviction action against the defendant."

TAKEAWAY:
The court was clearly displeased with the cooperative's slow, inconsistent, and multiple prosecutions of the defendant and was more than reluctant to see an 80-year-old individual removed from his long-standing home, especially where serious questions about the cooperative's conduct were raised. The court's decision finding multiple issues of fact certainly means the parties face many years of litigation ahead of them. It is not clear why the cooperative moved as slowly as it did, but the lesson is clear—if you are bringing an action, make sure you prosecute it with all deliberate speed. Here, the length of time the actions were pending resulted in numerous defenses and claims for the defendant which probably did not need to be.

FRAUD

THE BD. OF MGRS. OF 280 ST. MARKS AVE. CONDO. V. ESCORIAL

280 SMA, LLC, 2025 NY SLIP OP 31375(U) (SUP. CT. N.Y. CNTY. APR. 1, 2025)

Fraud Claims Against Sponsor and Principal Survive Motion to Dismiss

SQUIB BY DAVID S. FITZHENRY, MORITT HOCK & HAMROFF

OUTCOME: Decided for Plaintiff Condo Board

WHAT HAPPENED: The plaintiff in this matter is the Board of Managers of the St. Marks Avenue Condominium, which brought an action against the condominium's sponsor, Escorial 280 SMA, LLC, and the sponsor's principal, David Berger. The plaintiff alleged that the building was not constructed in a manner required by the offering plan, in violation of existing building codes, and resulting in numerous construction defects. The plaintiff's causes of action included claims for breach of contract, breach of warranty, negligent misrepresentation, and fraud.

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IN COURT: The defendants moved to dismiss the fraud and misrepresentation claims, arguing that such claims were preempted by the Martin Act because only the New York State Attorney General's Office can bring an action against a sponsor for violations of the Martin Act. Specifically, the defendants cited *Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership*, 12 N.Y.3d 236, 243 (2009), which held that there is no private right of action with respect to fraud claims arising out of a sponsor's omission of material information in an offering plan. In addition, defendant Berger argued that, as the sponsor's principal, he was not personally liable for claims arising out of the offering plan, and that his execution of the certification in the offering plan was merely a requirement pursuant to the regulations promulgated by the Attorney General's Office.

While the defendants argued that their alleged failure to disclose certain construction conditions was merely a claim that they had omitted material information from the offering plan, the plaintiff countered by asserting that the defendants had affirmatively misrepresented information contained in the offering plan, and that such misstatements were not merely omissions. As part of its claims, the plaintiff contended that the sponsor and principal actually had knowledge of the defective construction, and that the defendants' certification providing that they had "no knowledge of any material defects" amounted to an affirmative misrepresentation. In addition, the plaintiff said that the offering plan amendments that expressly provide that there have been no material changes of facts or circumstances was an affirmative misrepresentation of the sponsor because of the defendants' actual knowledge of the defective conditions at the property.

The court agreed with the board of managers, distinguishing the instant case from the *Kerusa* case in that the *Kerusa* case involved a sponsor omitting information from the offering plan that pertained to certain design defects, but that the current matter speaks directly to a question of whether or not the sponsor had actual knowledge of the construction defects and yet intentionally did not disclose the same in the plan. In this regard, it was the defendants' sworn statement within the offering plan confirming that no material information had been omitted while knowing such statement to have been false. Guided by this rationale, the court denied the defendants' motion to dismiss.

TAKEAWAY:

This case presents a slippery slope for sponsors and their principals, as the condo board claimed that the sponsor had omitted information from the plan, but that such was not merely an omission of material information from the offering plan, but instead was actually an affirmative misrepresentation due to the sponsor having actual knowledge of the construction defects. Accordingly, because the sponsor and principal knew about the construction defects and continued to certify that "there have been no material changes of facts or circumstances" with respect to the offering, the failure to disclose the defective conditions was actually an affirmative misrepresentation.

I would suggest that practitioners, sponsors, and boards keep a close eye on the status of this case. As of the date of this article, the defendants have filed a Notice of Appeal, so there may be more to come on this case.

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MOTION PRACTICE

EHRENBERG V. 490 W. END AVE. APTS. CORP.

2025 NY SLIP OP 31228(U) (SUP. CT. N.Y. CNTY. APR. 9, 2025)

Court Dismisses Most of Shareholder's Many Claims Against Co-op Relating to Elevator Installation

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

OUTCOME: Decided for Plaintiff, Defendant

WHAT HAPPENED: The shareholder and proprietary lessee of the penthouse apartment of a West End Avenue cooperative building had lived in her apartment in relative peace since 2011—that is, until 2017 when the cooperative replaced the overhead mechanism of the passenger elevator.

The mechanism is attached to two walls of the apartment, including the bedroom wall. To facilitate the installation, the walls were broken through, causing significant damage to the apartment and her personal property. Moreover, when the allegedly improved elevator was put into operation, it created extreme noise, extensive vibration, and flying plaster in the apartment. After just a few days' use, the cables rattled loudly and caused the bedroom wall to collapse.

The cooperative made minimal efforts to address the shareholder's concerns or to make repairs, and only in response to complaints she had made to government agencies and the violations they issued. The noise and vibration from the elevator not only caused property damage, but also diminished the shareholder's peaceable possession, use and enjoyment, and value of her apartment.

IN COURT: Getting no relief from the noise and vibration and no response from the cooperative, the shareholder filed a complaint against the cooperative corporation as well as its managing agent, claiming that they had failed to properly maintain the building and had negligently allowed certain conditions to interfere with her use and enjoyment of her apartment. The cooperative and the managing agent collectively moved to dismiss the amended complaint.

The managing agent argued that, as the cooperative's disclosed agent, it was not responsible for the shareholder's claims. The court agreed and dismissed the managing agent from the action entirely.

The cooperative's motion was partially granted, with the court dismissing half of the causes of action in the amended complaint, specifically, the claims for personal injury, property damage and expenses, breach of the covenant of quiet enjoyment, disparate treatment, breach of fiduciary duty, and attorneys' fees, leaving the shareholder's claims for breach of contract, negligence, and breach of the warranty of habitability intact.

The cooperative sought to dismiss the negligence claim as duplicative of the breach of contract claim. In order to sustain a negligence cause of action, a plaintiff must show that the cooperative has a duty to maintain the building separate from its obligations under the contract. The court declined to dismiss the negligence claim prior to the completion of discovery, especially since the shareholder asserted a statutory duty to maintain the premises in the amended complaint.

Since the shareholder failed to identify any personal injury she had sustained that was not time-barred, her claim was dismissed. The court also dismissed the shareholder's claims for property damage and expenses and for attorneys' fees because they are not valid causes of action but are part of the relief being sought. The shareholder's claims for breach of quiet enjoyment and disparate treatment were dismissed because she failed to substantively oppose their dismissal. The court easily dismissed the breach of fiduciary duty claim since the cooperative does not owe a fiduciary duty to its shareholders, only its board of directors does.

TAKEAWAY:

When filing a lawsuit, it is very tempting to assert as many claims as one can think of and, like throwing spaghetti at a wall, see what

(**Takeaway** *continued on p. 13)*

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sticks. This tactic is sure to invite a motion to dismiss groundless or unsubstantiated causes of action, which leads to additional attorney's fees and delays. Of course, if there is a sufficient or colorable claim it should be made, but care should be taken when including a laundry list of causes of action simply because the facts can be contrived to fit them. A dismissal motion may still be filed, even with an artfully and carefully written pleading, but adding causes of action "just in case" comes at the risk and expense of money and time.

NUISANCE

ZELMANOVICH V. EASTMORE OWNERS CORP.

2025 NY SLIP OP 31322(U) (SUP. CT. N.Y. CNTY. APR. 11, 2025)

Court Allows Shareholder's Discrimination Case Against Co-op to Proceed

SQUIB BY DALE DEGENSHEIN, PARTNER, FOX ROTHSCHILD

OUTCOME: Decided for Defendant, Sponsor

WHAT HAPPENED: The plaintiff owned the shares in the co-op appurtenant to her apartment for 14 years. In 2021, the board received complaints about her dog barking. The complaints were from an upstairs neighbor, who is a sublessee of a non-resident shareholder. The plaintiff stated that her dog is a medically prescribed emotional support animal.

The cooperative corporation attempted to evict the plaintiff and terminate her shares on the ground that her dog barks excessively. The plaintiff brought an action in the Supreme Court for violations of the Fair Housing Act and various discrimination statutes. She also sought an injunction from the co-op moving forward to terminate her lease.

The co-op moved for judgment dismissing the complaint. To be successful, it would need to show that there are no issues of fact in dispute.

IN COURT: The co-op argued that the plaintiff did not assert that there is a "reasonable accommodation" that would allow the unfettered barking of her dog, to the detriment of her neighbors. Moreover, the co-op argued, the plaintiff had not identified any "reasonable accommodation" that could be made. The co-op also asserted that it had an obligation to all shareholders, not just the plaintiff. There were audio tapes and logs of complaints about the dog's non-stop barking. The co-op also argued that it should not be enjoined from proceeding to evict the plaintiff because the plaintiff was clear that she had no intent of curing her breach. Finally, the co-op sought legal fees in accordance with a sanctions statute, arguing the plaintiff's claims were meritless.

The plaintiff opposed the motion and moved for sanctions. The plaintiff claimed that a controversy exists as to whether she breached the lease. She also claims that accommodations could be made to minimize transfer of noise from her apartment short of removing the dog. She also presented sworn testimony from neighbors denying that the dog causes excessive noise or any other disturbance.

The court denied all motions, finding that, at this early stage of the proceeding, the plaintiff had pleaded sufficient facts to allow her to proceed. There were prior decisions of the court (and the appellate court) that the co-op sought to rely on in support of dismissal. However, the court found that it could not rely on them because each of those decisions dealt with discrete issues.

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TAKEAWAY:
This decision is made after the appellate court ruled that the co-op could not terminate the plaintiff's lease prior to a determination on the merits as to whether the dog's barking is as disruptive as alleged and whether the co-op discriminated against the plaintiff. The case raises the question of whether boards should seek to terminate a tenancy if, as it appears here, all of the complaints came from one resident. Further, to the extent that plaintiff claimed the dog was a reasonable accommodation animal, the plaintiff and the co-op should have communicated with one another to determine if there was some accommodation that could be made. At this point, it appears that a case which began four years ago—seeking eviction because of the disturbance caused by the plaintiff's dog—will continue. In addition, there is a matter between the parties pending in landlord/tenant court, and we await a final resolution of that matter.

RECEIVERSHIP

FG&N TRUST V. 165 HOUS. CORP.

2025 NY SLIP OP 02129 (1ST DEP'T. APR. 10, 2025)

Court Affirms Appointment of Temporary Receiver to Oversee Repairs to Co-op's Roof

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

OUTCOME: Decided for Plaintiff-Appellee

WHAT HAPPENED: The West Village co-op building at the center of this litigation is a converted warehouse building only steps from the Hudson River. Its most distinguishing feature is a massive duplex penthouse apartment formerly owned by the co-op's sponsor. The sponsor created the distinctive layout of the penthouse by, among other things, cutting out a section of the building's roof to create a central courtyard and installing glass floors in the apartment and marble pavers on the roof terrace.

The co-op and the sponsor previously were in litigation regarding the penthouse's share allocation. The litigation was only resolved in 2018 when the current owner, a trust created by Hamdi Ulukaya, the billionaire founder of Chobani yogurt, bought the apartment.

Mr. Ulukaya reportedly has never moved into the building, which perhaps is just as well, because in 2021, the penthouse roof suffered significant damage during the storm formerly known as Hurricane Elsa.

According to the co-op, the roof damage was caused by a "large and heavy" planter installed by the prior owner falling over during the storm. Whatever the reason, the co-op's insurance carrier disclaimed coverage, and the co-op sued the carrier in federal court to force the carrier to pay for the repairs. The litigation dragged on. Although some temporary repairs were done, a permanent repair has been delayed for several years.

Eventually, Mr. Ulukaya's trust filed a lawsuit against the co-op and its individual board members seeking damages for the loss of use of the apartment. After the defendants answered, the trust moved for the appointment of a temporary receiver to repair the roof, raise money for the repair work, and to that end, to exercise "all powers and authority granted to the Coop's Board of Directors as necessary" to do so.

The motion court granted the receivership application, and the co-op appealed.

IN COURT: The appeals court affirmed the order appointing

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a temporary receiver. The court cited "the clear evidentiary showing that the roof was severely damaged and in need of extensive and immediate repairs, and that plaintiff's apartment was uninhabitable due to the roof damage." Further, the court noted that the co-op's own reports characterized the damage as a "cancer" that had been "metastasizing for a prolonged period of time." Under the circumstance, the court decided that the delays cited by the co-op were no excuse, and affirmed the receivership appointment.

TAKEAWAY:
There are general and specific lessons to be learned from this litigation. Generally, co-op board members should understand that not only do they owe fiduciary obligations to maintain their building in good repair, but if they fail to do so, for whatever reason, the courts have the drastic power to appoint a receiver that fully usurps the board's powers for a given issue. That should be frightening, because not only are receivers themselves expensive (certainly compared to board members, who receive no compensation at all), but receivers may not understand or be sympathetic to the needs of a cooperative to keep a tight rein on repair costs or be sensitive to the financial capabilities of their shareholders. Indeed, that is one of the arguments made in this case, that the receivership application was nothing more than an attempt to "strong arm everyday families into selling their homes so that [the penthouse owner] can use the proceeds to construct a private terrace" for his apartment.

The co-op's arguments might have been more successful if it had developed a better record of its efforts for the court. For example, the co-op referred to the federal court litigation with its carrier, but it never went into detail as to the big and small ways that litigation had stymied efforts to get the work done. Similarly, the co-op had asserted in its papers that the co-op had done initial emergency repair work in 2021, and "[s]ince that time, there has been no further water infiltration into the subject unit and the shoring remains in place, supporting the existing roof structure." However, those statements were not supported by any factual detail or supporting affidavits, and so the courts never gave the co-op the benefit of the doubt as to the urgency of the repair work or the co-op's efforts to performing such work.

SALES

OSTRAGER V. CHAFETZ

2025 NY SLIP OP 00919 (1ST DEP'T. FEB. 18, 2025)

Co-op Sellers Didn't Need to Replace Operational Windows Before Closing

SQUIB BY KRISTIN PENDERGRASS, COUNSEL, SEYFARTH SHAW

OUTCOME: Decided for Defendant Co-op Sellers

WHAT HAPPENED: Plaintiffs Glenn F. Ostrager and Stacey Greenfield Ostrager, the prospective purchasers of apartment 9D in the cooperative apartment building located at 14 East 75th Street in Manhattan, commenced this action against defendants Randall Chafetz and Lisa Strauss-Chafetz, the then-tenant-shareholders of the apartment.

On approximately May 4, 2023, the plaintiffs and defendants entered into a contract of sale for the plaintiffs to purchase the shares and assume the proprietary lease associated with the apartment. In connection with the contract, the plaintiffs made a down payment of $465,000, which was held in escrow by the defendants' attorney. The rider to the contract provided that, on the closing date, all windows in the apartment would be "in good working order" and the HVAC units would be "in working order."

The closing was initially scheduled for July 31, 2023, but was adjourned at the defendants' request to Aug. 25, 2023. After the plaintiffs performed a pre-closing

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walkthrough of the apartment on Aug. 23, 2023, they told the defendants that they would not close as scheduled because seven of the windows and two of the HVAC units in the apartment were not in good working order. On Aug. 30, 2023, the defendants sent the plaintiffs a written notice scheduling a "Time of The Essence" closing for Oct. 2, 2023.

On Sept. 11, 2023, the plaintiffs sent the defendants a counter-notice, demanding that the defendants remedy the alleged window and HVAC unit issues and scheduling a "Time of The Essence" closing for Oct. 16, 2023. In response, the defendants objected to the plaintiffs' demands, but agreed to adjourn the "Time of The Essence" closing to Oct. 16, 2023. On Oct. 10, 2023, the plaintiffs sent the defendants a notice of termination, alleging that the defendants had anticipatorily repudiated the contract by refusing to replace the windows and HVAC units.

The plaintiffs then filed suit, asserting claims against the defendants for breach of contract and seeking an order of specific performance directing the defendants to repair the allegedly defective windows and HVAC units and proceed with a closing, or, in the alternative, return the plaintiffs' down payment. The complaint also named the defendants' transactional attorney as a party based on his status as escrow agent.

IN COURT: The defendants moved to dismiss the complaint for failure to state a cause of action and based on documentary evidence, citing to the report from the plaintiffs' architect attached to the complaint, which noted that the windows and HVAC units were functional. The defendants also moved for summary judgment, pursuant to CPLR 3211(c), awarding them the down payment based on the plaintiffs' breach of the contract. The plaintiffs then filed a separate motion, by order to show cause, seeking a temporary restraining order and preliminary injunction to prevent the defendants from selling the apartment to a third party.

The lower court granted the defendants' motion in its entirety, dismissing the plaintiffs' claims and holding that the architect's report reflected that although the windows and HVAC units might benefit from repair or replacement, they were in working order, as required by the contract. Based on its dismissal of the plaintiffs' claims, the lower court also awarded the down payment to the defendants and declined to sign the plaintiffs' proposed order to show cause.

On appeal, the First Department affirmed the lower court's decision in its entirety. The First Department held that for something to be in "good working order" means for it to "be operational and adequately performing its intended function," and that condition of the windows and HVAC units in the apartment as described in the plaintiffs' architect's report satisfied this standard. The First Department also held that the lower court did not abuse its discretion in releasing the down payment to the defendants, or in denying the plaintiffs' motion for a preliminary injunction.

TAKEAWAY:

Standard terms used to describe the required condition of an apartment at closing often have specific legal definitions, and courts will enforce contracts of sale in accordance with those definitions. Here, although the plaintiffs' architect opined that several of the apartment's windows and HVAC units would benefit from repair or replacement, his determination that they were functional demonstrated that they were "in good working order," as required by the contract. Parties to contracts of sale should be cognizant of the meaning of such terms when specifying the condition the property must be in at the time of closing, and if a purchaser has a particular requirement in mind, it should be described in detail in the contract, rather than presuming that general terms will suffice.

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SUCCESSION RIGHTS

50 BROMPTON OWNERS, INC. V. FREEMAN

2025 NY SLIP OP 50481(U) (APP. TERM 2D DEP'T. MAR. 20 2025)

Family Member Cannot Be Evicted from Father's Apartment

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

OUTCOME: Decided for Defendant

WHAT HAPPENED: The plaintiff apartment corporation terminated the proprietary lease of the long-term defendant shareholder. The plaintiff's basis for eviction was that the shareholder had permitted his son and ex-wife to occupy his unit without the board of directors' consent and without his own contemporaneous occupancy.

According to the plaintiff, by permitting his former spouse, an "unrelated family member," to occupy the subject unit in his absence, the shareholder had allegedly breached paragraph 14 of his proprietary lease. This paragraph stated, in relevant part, that a unit could be occupied only by a maximum of three unrelated family members. When an unrelated family member resided in a unit, the shareholder of record was, according to the plaintiff, required to reside there as well.

Here, since the shareholder's former spouse was admittedly "unrelated" to the shareholder and since the shareholder had never resided in the subject unit, the occupancy was deemed unauthorized. The plaintiff sought the shareholder's eviction because of the uncured default.

IN COURT: The appellate court reversed the holding of the lower court and held that the corporation's interpretation of the subject proprietary lease to limit occupancy to the lessee and members of his immediate family was incorrect. According to the court, the language of the subject proprietary lease was unclear as to whether written consent was needed to allow a non-family member to occupy a unit in the absence of contemporaneous occupancy by a shareholder of record.

Further, the court noted that the plaintiff offered no "extrinsic evidence" to support its interpretation of the proprietary lease, and that this document, which was drafted by the corporation, was ambiguous. Citing the oft-stated rule of contract interpretation, namely, that any ambiguity is construed against the drafter, the court reversed the findings of the lower court, vacated the possessory judgment, and held that the shareholder was not in default.

TAKEAWAY:

Although it justified its reversal of the lower court ruling on the basis of an alleged ambiguity in the language of the proprietary lease, the court, in actuality, allowed principles of equity to intervene to prevent a forfeiture of an ownership interest. Here, because the shareholder's son had openly and notoriously resided in the subject unit for a significant time period, without any objection by the corporation, the court was reluctant to permit a narrow definition of a family member. The shareholder's good faith disclosure, when he purchased the subject unit decades ago, that it would be utilized by his children, including his son (who had lived there alone for nine years before vacating and resuming occupancy), also persuaded the court that the shareholder was not "playing games" and that an illegal sublet did not exist.

In addition to finding that there was a waiver, the court broadened the expanding definition of "family members" to include former spouses, relying on the already broad proprietary lease language that allowed occupancy by brothers, sisters, children, same sex partners, and even "parent in laws."

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