BUT

210-220-230 Owners Corp. v. Arancio, 2009 WL 2356893 (City Ct. New Rochelle 7/21/2009) – Neither purchaser from sponsor nor foreclosing lender of purchaser were holders – the offering plan controls who is a holder and pursuant to the plan the purchaser must be designated affirmatively by the sponsor.

BUT

Perlbinder v. Board of Managers of 411 East 53rd Street Condominium, 2009 WL 3079602 (1st Dept. 9/29/2009) – designated holder of unsold shares had the right pursuant to the by-laws to place a sign advertising the sale of its units on the exterior of the building next to the sign placed by the managing agent. Removal of sign by the board was a breach of fiduciary duty, and were responsible for any resulting damage

V. LIABILITIES TO THIRD PARTIES

A. HOW MANY SHAREHOLDERS DOES IT TAKE TO CHANGE A LIGHT BULB

Moore v. 158 St. Riverside Drive Housing Co., Inc., 873 NYS2d 569 (1st Dept. 2/17/2009) – Claim against the cooperative by an employee of a shareholder who was injured while she was trying to change a light bulb was dismissed. The shareholder was responsible for maintenance of the lighting fixtures.

B. WORKERS

1. Safe Place to Work

Valdovinos v. Shore Road Apartment Corp., 2009 WL 1741848 (Sup. Ct. Bx. Co. 6/18/2009) – Worker employed by contractor hired by shareholder to renovate an apartment was injured by an allegedly defective saw. Cooperative's motion for summary judgment was denied because it has a statutory duty as an owner to provide a safe place to work even though it did not hire the contractor or had any notice or control over the work. Cooperative was granted summary judgment on its contractual indemnification claim against the contractor. The managing agent was granted summary judgment dismissing the case against it because it was not an agent for the work and had no authority to supervise and control and to role in monitoring the project.

B. DEFAULT JUDGMENT

Cohen v. Michelle Tenants Corp., 882 NYS2d 282 (2d Dept. 6/30/2009) – Default judgment was vacated because the defendant never personally received notice of the action. Process was served on the secretary of state but was mailed to an old address and there was no evidence that defendant was on notice of the incorrect address, and defendant showed a meritorious defense.

VI OTHER ISSUES

A. Power of Attorney - General Obligations Law § 5-1501

B. Reasons Law – Suffolk County

Soto v. Akam Associates [300 E 74th Owners Corp.], 877 NYS2d 358 (2d Dept. 4/7/2009) –
Injured employee sued the managing agent. Employee was supervised by the superintendent who was an employee of the cooperative, which paid his wages and furnished his equipment and uniform. Agent failed to show how it directed the manner, details and ultimate result of the employee's work. Summary judgment for agent denied.

Voultepsis v. Gumley-Haft-Klierer, Inc., 875 NYS2d 74 (1st Dept. 3/19/2009) – Superintendent was injured by falling off a ladder while replacing a wooden floor, and sued the managing agent. Claim under the Ladder law (Labor Law § 240) requires that agent be a "statutory agent", which turns on the authority to supervise and control the employee. There are issues of fact as to the scope of the agent's "oversight and control" of the work. Defense under the Compensation Law required agent to control "the manner, details and ultimate result of plaintiff's work", and agent conceded that it lacked that level of control. Defense was dismissed.

III. LEGAL RIGHTS AGAINST THIRD PARTIES

1. Commercial Lease – Perpetuities

Bleecker Street Tenants Corp. v. Bleecker Jones LLC, 882 NYS2d 42 (1st Dept. 6/23/2009) – Commercial lease held by sponsor's successor provided for a term of 14 years with 9 options to renew for 10 years each. Right to renew that continued after the lease tem expired and was exercisable even thought the tenant was on a month to month basis was void under the rule against perpetuities.

BUT

Bolivar Apartment v. Metered Appliances, Inc., 2009 WL 2407834 (1st Dept 8/4/2009) – Triable issues of fact prevent summary disposition of parties intent with respect to the duration of the leasehold specifically whether the lease automatically renewed upon expiration of its extended term.

2. Insurance

Earth Movement

Pioneer Tower Owners Ass'n v. State Farm Fire & Casualty Co., 880 NYS2d 885 (Ct. Apps. NY 4/30/2009) – Action to recover for damage to a building caused by excavation and resulting in subsidence. Insurer could not avoid liability based on exclusion for earth movement. Exclusions are to be narrowly read.

Duty to Defend

Fieldston Property Owners Ass'n, Inc. v. Hermitage Ins. Co., Inc., 873 NYS2d 607 (1st Dept. 2/26/2009) – Both CGL policy and D&O policy covered claims of wrongful acts and false statements. Both insurers were required to defend and D&O carrier was liable for an equitable share of the overall costs of defense.

Illusory Insurance

720-730 Fort Washington Avenue Owners Corp. v. Utica First Ins. Co., 2009 WL 3645656 (Sup. Ct. Bx. Co. 11/4/2009) – Subcontractor hired to do roofing work was contractually required to provide commercial general liability coverage. Policy it obtained contained exclusions for injury to any employee of the contractor, any obligation to indemnify any other party, or any work arising out of roofing operations. Insurer was entitled to summary judgment dismissing a claim based on an injury to a worker employed in roofing operations.

IV. SPONSORS

A. HOLDER OF UNSOLD SHARES

Acquiring Status

Kralik v. 239 East 79th Street Owners Corp., 879 NYS2d 46 (NY Ct. Apps. 4/7/2009) –
Motion for leave to appeal dismissed – the order sought to be appealed from does not finally determine the action. [Motion of CNYC to file a brief amicus curiae was granted].

2006, certain unit owners met and purported to elect a board. The meeting was declared invalid because the notice that was sent did not comply with the by-laws.

Sponsor
Kensington Terrace Apartments, LLC v. 160 Ocean Parkway Owners Corp., 2009 WL 939934 (Sup. Ct. K. Co. 4/6/2009) – Despite by-law provision which stated that sponsor shall relinquish control, sponsor has the right to vote so that 3 members of the 7 member board were sponsor representatives and the 4th member was a holder of unsold shares otherwise unaffiliated with the sponsor. A by law passed by the prior board purporting to require that all board members to be shareholders was void since the by-laws could not be amended without consent of all shareholders. The board was enjoined from entering into a new mortgage for a substantially increased amount.

I. BOOKS AND RECORDS

320 West 111th Street HDFC v. Taylor, 2009 WL 1815079 (Sup. Ct. NY Co. 4/23/2009) –
Action against former officers to compel turn over of books and records was governed by Article 78 – mandamus. Defendants ordered to deposit books and records in court. Corporations are quasi-governmental bodies and mandamus is available to compel compliance with by-laws. Where action is commenced in the wrong form, the court should convert it into the proper form rather than dismiss.

J. ATTORNEY'S FEES

Branscombe Investments, Ltd v. Board of Managers of the Olympic Tower Condominium, Decision of 2/1/2008, Sup. Ct. NY Co. Index No. 603543/05 (Ling-Cohan, J.) – Dismissal of unit owners action against the board for alleged violation of rules entitles board to an award of attorneys fees

K. SECURITY DEPOSIT

Vidipax, LLC v. Brown Bear Realty Corp., 2009 WL 38066 (Sup. Ct. NY Co. 1/7/2009) – RPL § 7-103 which requires that security deposits be held in a separate escrow account applies to cooperatives. If the fund is commingled with the landlord's funds, the tenant is entitled to the immediate return of the fund despite any defenses or counter claims. The law also applies to the subtenant of a cooperative apartment. Sub-tenant was entitled to an immediate return of the commingled fund with interest despite counterclaims for damage to the apartment.

L. LITIGATION ISSUES

E-mail Stipulation
Ruffini v. 41 Fifth Owners Corp., 2008 WL 5137053 (Civ. Ct. NY Co. 12/2008) – A stipulation of settlement entered into by an exchange of e.mails between attorneys is not enforceable because it does not conform to CPLR 2104 which requires it is not binding unless it is in a writing subscribed by the client or the attorney, and the email exchange indicated that the settlement would not be binding until signed by the attorneys and the clients.

II. EMPLOYEES

1. Managing Agent

Special Employer
Akins v. D.K. Interiors, Ltd. [230 Tenants Corp.], 885 NYS2d 289 (1st Dept. 9/24/2009) – Injured doorman, despite receiving compensation benefits, sued the managing agent [Akam Associates]. Doorman was supervised by the superintendent, who took his instructions from Akam's property manager. Management contract gave Akam control of the employees. Akam controlled the daily operation of the building. Akam was plaintiff's "special employer". Summary judgment was granted dismissing the complaint

BUT

1725 York Venture v. Block, 884 NYS2d 6 (1st Dept. 7/28/2009) – Failure to commence the action to remove the dog within 3 months of the time that the tenant started to walk the dog required dismissal of the claim to enforce the no pet policy. Doormen were deemed agents of the holder of unsold shares. Claim based on vicious propensity of the dog for lunging at resident and other dogs raises triable issues.

4. Elevator Door

Miguel v. 41-42 Owners Corp., 869 NYS2d 166 (2d Dept. 12/2/2008) – Elevator door allegedly closed on tenant's leg. Evidence of prior complaints to the superintendent about the door created a Triable issue of fact. Coop stated claim against the elevator maintenance company as to whether it had used reasonable care to discover the condition.

5. Stairway

Blackout

Kopsachilis v. 130 East 18 Owners Corp., 873 NYS2d 241 (Ct. Apps. NY 12/2/2008) – Requirement that a stairway be lighted does not apply in a blackout. The Cooperative is not liable for injury if the light failed without its "knowledge or consent", and there is no evidence of negligence. Summary judgment was granted dismissing the claim.

6. Toilet Leak

Parelman-Farber v. Shao, 2009 WL 1606417 (App. T. 2d, 11th and 13th Judicial Districts 6/8/2009) – Pipe connected to a toilet leaked and flooded the downstairs apartment. Motion for summary judgment of liability was denied because there was no evidence of actual or constructive notice of a defective condition on the part of the shareholder, or on the part of the cooperative.

F. DISCRIMINATION

Parking Space

Lindsay Park Housing Corp. v. NYSDHR, 866 NYS2d 771 (2d Dept. 11/5/2008) – Determination that the cooperative discriminated against a shareholder who did not own a car and could not drive by terminating her parking space was annulled and the case was dismissed. Coop had no obligation to provide a parking space for caregivers.

Companion Dog

Kennedy Street Quad, Ltd v. Nathanson, 879 NYS2d 197 (2d Dept. 5/19/2009) – Determination of the NYSDHR that cooperative discriminated against shareholders by refusing to allow them to keep a dog in violation of the no dog policy to accommodate their disabilities was annulled because shareholder had to show that the it is necessary for them to keep the dog in order to use the apartment, and evidence that the dog helped with symptoms of depression did not demonstrate that dog was necessary.

Echeverria v. Krystie Manor, LP, 2009 WL 857269 (USDC EDNY 3/30/2009) – Applicant for senior citizen housing claimed she was discriminated against because the complex rejected her application to purchase because they refused to make a reasonable accommodation for her handicap which prevented her from walking her companion dog off the premises as required by the rules. Court found issues of fact requiring a trial of a claim under the federal Fair Housing Act

G. PERSONAL INJURY

Mold

Fraser v. 301-52 Townhouse Corp., 870 NYS2d 266 (1st Dept 2/30/2008) (3-2 decision) – There is insufficient scientific evidence to support a finding that a damp or moldy environment causes upper respiratory symptoms. Cause of action claiming personal injury was dismissed.

H. ELECTIONS

Board of Managers of Park Regent Condominium v. Park Regent Unit Owners Associates, 871 NYS2d 373 (2d Dept. 1/13/2009) – Although no official notice was sent out for a meeting scheduled for June

confronted by a reporter on the street. Calling the news station was not so outrageous as to support a claim for intentional infliction of emotional distress.

B. TRANSFERS AND LEASES

1. By Law Amendment

Strathmore Ridge Homeowners Association, Inc. v. Mendicino, 881 NYS2d 491 (2d Dept. 6/23/2009) – Board's action to declare void leases entered into by unit owners was denied and restrictions on leasing were declared invalid. Amendments to By-Laws were improperly passed without a prior amendment of the Declaration, and Board exceeded its authority. Unit owners had standing to challenge amendment to the By-Laws.

C. COMMON ELEMENTS

Terrace Rights

Palmer v. WSC Riverside Drive, LLC, 879 NYS2d 397 (1st Dept. 4/28/2009) – Tenant was declared to have no leasehold possessory right to a terrace where the lease made no reference to the terrace and there was no evidence that the shareholder had any right to the terrace.

BUT

Kiam v. Park & 66th Corporation, 2009 WL 3126862 (1st Dept. 10/1/2009) – Right of exclusive use of the roof appurtenant to the penthouse apartment included the right to enclose the space with a sunroom. Board's failure to challenge the legality of the construction for 35 years constituted a waiver of the lease requirement that required written approval of structural alterations.

D. ARREARS

Star Tax Exemption

Village in the Woods Owners Corp. v. Powles, 2009 WL 1924759 (App. T. Co. 6/29/2009) – Purchaser of a unit was entitled to the benefit of a star tax exemption to which the seller had qualified. Board was obligated to give credit for the exemption and a resolution to the contrary was beyond the Board's authority. Action for arrears was dismissed and shareholder was awarded attorney's fees

E. VIOLATIONS AND DEFECTS

1. Assault

Padula v. Kensington Gardens Apt. Corp., NYLJ 5/4/2009, p.20. c. 3 (Sup. Ct. Rich. Co.) – Suit by resident against the cooperative alleging assault and stabbing by a tenant was dismissed on summary judgment. Cooperative had neither the ability or the obligation to control the conduct of residents. Prior warning letters sent by coop for violation of the rules did not constitute notice of violent tendencies or threats made by tenant.

2. Bedbugs

Zayas v. Franklin Plaza, 2009 WL 909664 (Civ. Ct. NY Co. 4/6/2009) – Shareholder awarded damages for loss of personal property and medical treatment but not costs of remediation caused by bedbug infestation. Shareholder is responsible for maintaining the apartment and extermination within the apartment, but infestation was building wide and coop took no steps to remedy the condition or keep the building in good repair.

3. Dogs

Board of Managers of Suffolk Homes Condominium v. Cheng, 2008 WL 5206295 (Sup. Ct. NY Co. 12/2/2008) – Board was entitled to a declaratory judgment that unit owner who had 4 cats and 4 dogs was in violation of pet policy, and pet law did not apply to a condominium. Board was not entitled to a preliminary injunction removing excess pets because they could not show irreparable injury and there was no evidence of a nuisance. Action to proceed to trial.

2. Unauthorized Construction

Meadow Lane Equities Corp. v. Hill [Hill # 1], 881 NYS2d 443 (2d Dept. 6/2/2009) – Board gave consent to certain alterations however shareholder made additional alterations for which consent was never requested or was refused. Board was granted a permanent injunction to compel removal and restoration on motion for summary judgment. [See Below]

3. Access to Unit - Inspection

Hamlet on Olde Oyster Bay HOA, Inc. v. Ellner, 869 NYS2d 591 (2d Dept. 12/16/2008) – Board was granted a preliminary injunction directing the unit owner to give the Board access to inspect whether modifications or alterations of the porch and garage had been made in possible violation of the By-Laws. Defense of improper service of process was dismissed without a hearing.

4. Access to Terrace - Installation

Board of Managers of Bond Parc Condominium v. Broxmeyer, 881 NYS2d 106 (2d Dept. 5/26/2009) – Board granted an injunction compelling the unit owner to give access to the terrace to install replacement windows.

Residential Board of Managers of the Vanderbilt Condominium v. Goldberg, NYLJ 9/8/2009, p. 18, c. 1 (Sup. Ct. NY Co.) – Unit owner is liable to condominium for legal fees incurred in bringing an action to compel access to the adjacent terrace where by-laws provide reimbursement for all sums of money expended and all costs incurred in performing a permitted function, and matter was set for a hearing on the amounts due.

5. Self-Dealing

Master Lease

Allannic v. Levin [682 Sixth Ave. HDFC], 870 NYS2d 286 (1st Dept. 12/30/2008) – Business judgment rule only shields directors only if they have a disinterested independence and do not have dual relations. Board was not disinterested when it voted to extend a master lease pursuant to which all of the shareholders would not be treated fairly and evenly. There are issues of fact as to whether this constituted self-dealing.

6. Punitive Damages

Bishop v. 59 West 12th Street Condominium, 886 NYS2d 153 (1st Dept. 10/1/2009) – Board decided to halt work on alteration of commercial unit venting kitchen equipment onto the terrace of a board member. Alteration was permitted if it was not a nuisance or did not interfere with the use of another unit. Triable issue of fact was presented on unit owner's claim for punitive damages because they acted to benefit a member of the board, action took place at a "secret meeting", and DOB rejected Board's request to revoke the work permit.

7. Personal Liability of Board Members

Trespass

Meadow Lane Equities Corp. v. Hill [Hill # 2], 880 NYS2d 338 (2d Dept. 6/2/2009) – Third party suit by shareholder against individual directors dismissed because there was no allegation the directors committed independent torts, however claim that president committed trespass by entering unit to inspect and take photographs without their permission or invitation was not dismissed.

Emotional Distress

Constructive Eviction - Nuisance

Baum v. Ragozzino [Station Avenue HOA], 2009 WL 884663 (Sup. Ct. Rich. Co. 3/31/2009) – Plaintiff claimed that as a result of his refusal to pay an assessment the Board embarked on an intentional plan to harass him and his family. Plaintiff raised Triable issues of fact as to whether the conduct was so outrageous or extreme so as to surpass the limits of decency, and whether it constituted a nuisance that caused him to sell his home. Causes of action for harassment and assault were dismissed.

Pu v. Bruni [Trafalgar House Condominium], 2009 WL 2870055 (Sup. Ct. NY Co. 8/10/2009) – In connection with a prior litigation where defendants were charged with making excessive noise, defendants called Fox News' "Shame, Shame, Shame" to complain about plaintiff, and plaintiff was

ASSOCIATION OF RIVERDALE COOPERATIVES AND CONDOMINIUMS

www.Riverdale-Arc.org

SIGNIFICANT LEGAL DECISIONS OF 2009

Marc J. Luxemburg, Esq.
Snow Becker Krauss P.C.
mluxemburg@sbklaw.com

February 23, 2010
7:00 P.M.

Research assistance by Jillian Goorevitch

I. LEGAL ISSUES INVOLVING UNIT OWNERS AND RESIDENTS

A. BUSINESS JUDGMENT

1. Management Decisions

Pullman

Trump Plaza Owners, Inc. v. Weitzner, 877 NYS2d 271 (1st Dept. 4/14/2009) – Judgment of termination and ejectment was affirmed – the minutes of the meeting of the directors which determined shareholder's objectionable conduct established that the board followed the requisite procedures.

F.T. Apartments Corp. v. Barbara L., 2009 WL 1886891 (Civ. Ct. NY Co, 6/17/2009) – Cooperative's motion for summary judgment against an incapacitated person represented by a guardian was denied because letters sent to shareholders relatives did not constitute notice to the shareholder, the termination occurred over 3 years after the only default notice sent to shareholder, and shareholder was not timely informed of the allegations against her and was not timely provided with an opportunity to be heard. Matter set down for a hearing.

Parker v. Marglin, 869 NYS2d 21 (1st Dept. 11/25/2008) - Shareholders' challenge to costs, means, allocation and methods used to make repairs to the building was dismissed in the absence of any evidence of any self-dealing, fraud, or other breach of fiduciary duty to over come the business judgment rule.

Cell Tower

DiFabio v. Omnipoint Communications, Inc. [Enclave Condominium], 2009 WL 3210142 (2d Dept. 10/6/2009) – Unit owner's action to enjoin the Board from entering into a lease to allow cellular antenna to be placed on the roof was dismissed. Owner failed to show possible non-economic injury or possible irreparable harm, and was without standing to assert a claim for damages to the common interest of the condominium. [Unit owner may have a right to bring a derivative action on behalf of the condominium].

BUT

Kaung v. Board of Managers of the Biltmore Towers Condominium, 873 NYS2d 421 (Sup. Ct. West. Co. 12/10/2008) – Unit owners have standing to enforce the restrictions in the By-Laws, which limit the use of the common elements to uses that are incidental to the use of the units as residences. A cell tower serving the general public was not a permitted use and a contract for placement on the roof was declared void.

Parking Space

Oakwood on the Sound, Inc. v. David, 883 NYS2d 54 (2d Dept. 6/16/2009) – Defense of interference with use of a parking space as a basis for withholding maintenance was dismissed.
Board's placement of soil and shrubbery in portion of space to prevent it from being used for parking more than one car was governed by business judgment rule.

Roof Deck

Woods v. 126 Riverside Drive Corp., 882 NYS2d 106 (1st Dept. 7/2/2009) – Board's decision to withhold approval for expanded new roof deck based on opinion of engineer was governed by business judgment rule. Board owed no fiduciary duty to shareholder concerning the purchase of the unit. Alleged oral representations can not be used to change the terms of the proprietary lease.