SIGNIFICANT LEGAL DECISIONS OF 2013

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ISSUES INVOLVING UNIT OWNERS AND RESIDENTS

BUSINESS JUDGMENT

INDIVIDUAL LIABILITY OF DIRECTORS

Hixon v. 12–14 East 64th Owners Corp., 968 N.Y.S.2d 449 (1st Dept. 6/20/13) – shareholder brought a breach of fiduciary duty cause of action against individual board members based on actions taken by the board members to prevent plaintiff from repairing water damage to her apartment, refusing to make such repairs themselves, terminating her leasehold interest and wrongfully prosecuting summary proceedings. These claims are not actionable because they stem solely from the co-op's alleged breaches of the proprietary lease as opposed to torts committed by the co-op or its board members. A director is not personally liable for a corporation's breach of an agreement merely by virtue of his or her decisions or actions that resulted in the corporation's promise being broken. The complaint does not allege that the co-op or the individual defendants engaged in tortious conduct. The complaint was dismissed.

DISCRIMINATION

Fletcher v. The Dakota, Inc., 2011 WL 8585237 (Sup. Ct. NY Co. 7/21/13) – All claims against two individual board members who were members of the finance committee that recommended the rejection of the shareholder's application were dismissed. Plaintiff alleged no independent tortious conduct on their part which would justify individual liability. Claims against two other directors where specific facts concerning discrimination were pleaded were not dismissed. Portions of the pleadings relating to settlement negotiations were stricken.

ALTERATION AGREEMENTS

STOP WORK ORDER

Wood v. 139 East 33rd Street Corp., 961 N.Y.S.2d 466 (1st Dept. 3/28/13) – Action by shareholder for breach of an alteration agreement. The issue of whether defendant coop breached the proprietary lease and the alteration agreement by stopping work that was allegedly proceeding in accordance with plaintiff's approved renovation plans is correctly resolved without regard to the business judgment rule. Summary judgment for either side was denied because there was an issue of fact as to alleged drilling into the ceiling.

Kleinerman v. 245 East 87 Tenants Corp., 936 N.Y.S.2d 187 (1st Dept. 4/11/13) - Shareholders seeking to renovate their unit allege that the cooperative and its board members condoned the superintendent's solicitation of kickbacks by improperly stopping certain renovations in the face of plaintiffs' accusations against him. Issues of fact exist, including whether the board members had knowledge of the superintendent's alleged conduct, whether

the coop stopped plaintiffs' renovations in good faith based on the interests of the coop, and whether plaintiffs were accorded disparate treatment.

INDEMNIFICATION

Musk v. 13-21 E. 22nd St. Residence Corp., 2012 N.Y. Misc. LEXIS 5775 (Sup. Ct NY Co. 12/3/12) - plaintiff seeks a declaration that the defendants are responsible for remediation of a vibration and noise problem and for damages apparently caused by an alteration. The eleventh cause of action alleges that the altering shareholder breached the alteration agreement. Plaintiff is not an intended third-party beneficiary of the Alteration Agreement, but. Section 7 of the Alteration Agreement provides:" you undertake to indemnify and hold harmless the Corporation, the Managing Agent and the Tenants and Occupants of the Building, against any claims for damages to persons or property suffered as a result of the Alteration. A shareholder is not precluded from enforcing the indemnification provision.

Altering shareholder contends that the Coop's cross claim for indemnification should be dismissed because the Coop was not a party to the agreement The Alteration Agreement states: "You have asked Wallack Management Co for its written consent for the making of certain alterations". The Coop contends that it is undisputed that Wallack is the Coop's management agent, and that the Coop's account executive, signed the agreement on behalf of the Coop. The Coop raises an issue of fact as to whether a scrivener's error resulted in Wallack, instead of the Coop, being defined as "the Corporation" in the agreement. Altering shareholder is not entitled to dismissal of the Coop's cross claim for indemnification on the basis of its contention that the Coop is not referred to in the Alteration Agreement, or its indemnification provision.

INJUNCTION

PREVENTING REPAIRS

York Towers v. Braha, 2013 WL 2474355 (Sup. Ct. NY Co. 6/6/13) – Cooperative sued to enjoin shareholders from denying the coop access to their apartment. Coop moved for partial summary judgment seeking a permanent injunction directing shareholders to grant the coop access to the apartment to perform complete mold abatement and such repairs as Coop's professionals deem necessary. The court held that he decisions of coop boards are protected by the business judgment rule; and the Proprietary Lease empowers the coop to have access to apartments to make such repairs as it deems necessary .Shareholders failed to allow Plaintiff to make the necessary repairs, and presented no triable issues as to the coop's' right to access the Apartment and make the repairs. The coop is entitled to an injunction barring the shareholders from denying access to the Apartment or otherwise interfering with the mold remediation and restoration work.

165 East 72nd Apartment Corporation v. McEvoy, 2013 WL 1127719 (Sup. Ct. NY Co. 3/14/13) - Coop moved for a permanent injunction preventing defendant shareholders from interfering with a hallway renovation The coop alleged that the shareholders told the project foreman not to perform any work on their floor. Defendant allegedly sat in the middle of the hallway outside of her apartment and refused to move, impeding work on the project. Defendants contacted DOH and DOB, claiming false code violations in an effort to further interfere with the project. Defendants physically appeared in the hallway and prevented the contractor from working there. The Court granted the coops request for a preliminary injunction enjoining defendants from physically interfering with the project and from contacting any governmental agencies with respect to the project until after three business days following defendants' notification to the managing agent of any complaint. The coop advised the Court that the project was completed during the pendency of the motion. Accordingly, plaintiff's motion seeking a permanent injunction was denied as moot.
Also see attorney's fees, below.

Goldstone v. Gracie Terrace Apartment Corporation, 970 N.Y.S.2d 783 (App. Div. 1st Dept. 8/27/13) - shareholder brought an action against the cooperative challenging the plan for the renovation of her apartment and seeking an injunction to prevent the work from proceeding. Shareholder suffered extensive damage to her apartment when the water tank above her unit overflowed. The plan of repair proposed by the board of directors would necessitate a 50 square foot reduction of the apartment's more than 1,400 square feet. Shareholder established the probable success of her claim that the repairs will constitute a breach of the proprietary lease. The business judgment rule

does not shield cooperatives from liability for breaches of contract and the anticipated diminution of square footage constitutes an injury, however the injury is de minimis insofar as a claim of irreparable harm is made. Although plaintiff proposed an alternative method of performing the work on the exterior, she failed to respond to the coop's assertion that this method would entail substantial extra expenses that defendant was under a fiduciary duty to avoid imposing on the other cooperative shareholders. The claimed impact to plaintiff of the planned modifications to her apartment, most of which will be compensable based on plaintiffs' breach of contract theory, is far outweighed by the expense to the co-op of demolishing and rebuilding exterior walls. The injunction was denied

PRELIMINARY INJUNCTION

Board of Managers of the Britton Condominium v. C.H.P.Y. Realty Associates, 956 N.Y.S.2d 150 (2d Dept. 1219/12) - Board of managers brought action against owner of commercial unit seeking judgment declaring that board had the right to access water pipes for the purpose of altering and repairing them. Board moved for a preliminary injunction. The purpose of a preliminary injunction is to maintain the status quo pending determination of the action. Although the plaintiff may ultimately be successful, the order of the Supreme Court effectively altered the status quo and granted the plaintiff the exact relief which it sought in the complaint. Plaintiff failed to demonstrate that it would suffer irreparable harm in the absence of a preliminary injunction. Preliminary injunction denied.

SPOLIATION OF EVIDENCE

Kosovsky v. Park South Tenants Corp**.,** 2013 N.Y. Misc. LEXIS 3572 (Sup.Ct. NY Co. 8/7/13) – Shareholder brought action arising out of damage to his apartment as a result of repairs made to an adjacent balcony. The coop counterclaimed and cross claimed against its architect. The cooperative decided to make repairs to a window and the exterior wall. The Court ordered that all parties be present during the repair work so all parties could observe the condition of the wall. Shareholder also requested that his counsel and his engineer be able to discuss the scope of the work with the Board. Instead, the coop obtained access to plaintiff's apartment by procuring a locksmith to drill through the locks and, the repair work commenced without the shareholders or the architects being present. The court granted the motion of the architect and the cross-motion by plaintiff to strike the Board's answer and cross-claims based on the Board's spoliation of evidence.

Fraser v. 301–52 Townhouse Corp., 958 N.Y.S.2d 37 (1st Dept. 12/27/12) - Shareholder's liability claims are based on an alleged toxic mold condition in their former cooperative apartment. Damages for lost earnings are not recoverable in light of the court's previous dismissal of plaintiffs' personal injury claims. Plaintiffs should be precluded from offering evidence at trial as to loss of personal property because they disposed of the items they claim were damaged, thereby preventing defendants from challenging the validity and extent of those claims (Spoliation)

MAINTENANCE OF THE BUILDING

Board Of Managers of 41 North Moore Street Condominium v. Violet Purchasing Corp., 2013 WL 2245466 (Sup. Ct. NY Co. 5/17/13) – Business judgment rule does not bar an action for failure to maintain where there are objective criteria for maintenance. See below re Sponsors.

Pedalino v. Woodhill Green Condominium, Inc., 969 N.Y.S.2d 805 (Sup. Ct. Dutchess Co. 2/15/13) - Action by a unit owner to recover damages based on causes of action for negligence, and gross negligence, among others. Unit owner asserted that a pipe below her unit in the common area crawl space had been leaking and burst, causing water and mold damage to her unit. The condo moved for summary judgment on the cause of action for negligence. The court found that the condo has a duty to maintain and repair the common elements of the condominium. Although the condo contended it promptly repaired the leaky pipe, it submitted no evidence as to when the leak was first discovered or how often the area of the leaky pipe was inspected. Motion for summary judgment was denied.

TRESPASS

York Towers, Inc. v. Kotick, 2013 N.Y. Misc. LEXIS 3953 (Sup. Ct. NY CO. 9/3/13) - At a board meeting the board discussed the noise problem complained of by the shareholders, and then directed the superintendent to check if the shareholders were in the apartment. Once the superintendent determined that the Shareholders were not home, the board members directed him to get the pass key for the apartment so that they could hear the noise for themselves. The shareholders claim that the superintendent and board members' entry into the apartment, without prior permission and/or notice, constitutes trespass. The coop argues that pursuant to the "right of entry" clause in the proprietary lease it was entitled to enter the Shareholders' apartment without their prior consent or notice, and therefore, the trespass claim must be dismissed. The clause provides that the lessor "shall be permitted to visit and examine the apartment …to make or facilitate repairs in any part of the building." The coop presented no evidence that the superintendent and board members entered the shareholders' apartment to "make or facilitate repairs". The trespass counterclaim was not dismissed..

MAINTENANCE OF THE APARTMENT

Great Neck Terrace Owners Corp. v McCabe, 957 N.Y.S.2d 216 (2d Dept. 12/19/12) - coop commenced this action against the shareholder alleging that the shareholder breached the proprietary lease by allowing the existence of cat urine odor. The coop further alleged that, despite its repeated requests for access to the shareholder's unit to investigate and remedy the alleged offensive odor, the shareholder refused to provide such access, although required to do so by the terms of the lease. The coop moved for summary judgment on the issue of liability to recover damages for breach of contract and attorney's fees. The Court granted the coop's motion and directed a hearing on the issue of damages and attorney's fees. Shareholder did not address the coop's evidence which established that she had neither fully remedied the odor nor granted access to her apartment before the commencement of the instant action. Defendant failed to raise a triable issue of fact as to whether she had breached the lease.

BUT

433 Sutton Corp. v. Broder, 968 N.Y.S.2d 71 (1st Dept. 6/27/13) (3-2 decision) - Neighboring shareholders of defendant complained of a stench emanating from his apartment. Coop's staff did not first attempt to contact defendant, as per the proprietary lease, which provides for notice and an opportunity to cure any condition or effect repairs prior to entry by the owner, but instead used the spare key at the desk to enter the apartment. Once inside the apartment, coop's staff ascertained that the source of the odor was defendant's pet cat. Defendant was upstate as part of a search and rescue team dispatched in the aftermath of Hurricane Irene. When contacted by the president of the board he responded that he would return to clean the apartment. Defendant returned and removed the cat but did not clean the apartment. Coop commenced an action seeking injunctive relief and damages on account of defendant's alleged violation of the proprietary lease. Coop sought a preliminary injunction authorizing it to remove "junk and filth" from the apartment, as well as defendant's "neglected" house cat, which coop believed had been "abandoned". The Coop asserted that the conditions present in the apartment "require an imminent and emergency response". The court granted the ex parte application pending a hearing on the motion to the extent of allowing coop access to defendant's apartment to remove all odor producing garbage and food stuffs as well as waste and areas of infestation". Subsequently the court denied coop's motion for a preliminary injunction, finding that coop had violated the proprietary lease by failing to give defendant the requisite notice and opportunity to cure (¶ 19) before resorting to self-help. The court noted that although it had permitted only the removal of organic matter which might have caused the noxious smell, a video recording of the removal showed a "wholesale taking of things ... not the kind of odor producing organic matter that the court instructed be removed." The court sua sponte dismissed the action. Coop having failed to comply with its duties under paragraph 19, any alleged nuisance in the apartment had not ripened into a breach of the lease.- Defendant was unquestionably the "prevailing party" and was therefore entitled to attorney's fees.

The Dissent stated the lower court found that the nuisance had been resolved, and the injunction denied, because the coop had removed the offending material. This result, the dissent concluded, did not render defendant the prevailing party.

DERIVATIVE ACTIONS

Bridgers v. West 82nd Street Owners Corp. [316 W. 82 St], 2013 WL 1796709 (Sup. Ct. NY Co. 4/22/13) – shareholder brought a derivative action claiming that the board's enforcement of alteration requirements and fees against her despite the board's failure to enforce alteration requirements against 2 board members was unequal treatment of shareholders, and a breach of the proprietary lease. Demand on the board was not necessary because each board member stood to benefit by disparate application of the rules. Motion to dismiss denied.

Gentile v. Flyer [2400 Johnson Ave. Owners Inc.], NYLJ, 3/7/13, p. 25 (Sup. Ct. Bx. Co.) – Shareholder brought this action derivatively to recover funds allegedly lost due to director's alleged breach of fiduciary duty. While a member of the Co-op board, defendant designed and manufactured storage bins that were mounted above the vehicles parked in the Co-op's garage. The bins were acquired by the Co-op in a lease-purchase agreement. During the four year rental period, individual Co-op renters paid $25 per month to rent a bin. The bulk of the $25 fee was paid to the lessor and the balance to the Co-op. At the end of the four year lease period, each bin was purchased by the Co-op for $100, and the coop now receives the entire monthly rental fee for the bins Of the seven members of the Co-op's current Board only the defendant was a member of the Board which approved the lease agreement and he was excluded from all deliberations regarding how to respond to the demand that the Co-op sue him for self-dealing and corporate waste. The Board concluded that the Co-op suffered no damages as a result of the installation of the bin .and the Co-op now has a substantial source of revenue. The Board concluded that the Co-op benefited from the bins. and that any recovery would be far outweighed by attorney's fees and other costs of litigation. The action was dismissed.

PRIOR AGREEMENT

Kushner v. 79 Barrow Street Owners Corp., 2013 N.Y. Misc. LEXIS 4723 (Sup. Ct. NY Co. 10/16/13) – In 2006 the cooperative audited shareholder's renovation work to determine if his renovations conformed to Code. After the audit was completed, the parties entered into an agreement in settlement of all outstanding issues concerning the renovations. In 2011 the coop informed shareholder that it would not approve a sale until the Apartment was re-inspected. The engineer identified eight Code violations and the coop advised shareholder that it would not approve the sale until all of the violations were remedied and that shareholder would be assessed the costs to repair damage to the roof of the building plus engineering and legal fees. At the closing shareholder paid the costs and fees, and then brought this action. The complaint alleges that shareholder fully performed his obligations under the 2006 Agreement and that the coop breached the Agreement and the proprietary lease when it used its power to prevent the sale of the Apartment in order to extract additional performance by shareholder relating to the repair of the co-op's roof. Shareholder's allegations are sufficient to create an issue as to whether the coop violated its obligation of good faith which warrants denial of the coop's request that this cause of action be summarily dismissed.

DOGS

Board Of Managers Of The Cove Club Condominium v. Jacobson, 965 N.Y.S.2d 727 (1st Dept. 6/4/13) - The issue in this case, of whether the condo can lawfully evict defendants' dog from its premises, is no longer a live controversy since the dog died during the pendency of the appeal. Defendants' motion for summary judgment dismissing the complaint or, alternatively, for a stay of the proceedings pending an investigation by the New York State Division of Human Rights, unanimously dismissed as moot.

East River Housing Corp. v. Aaron, 2013 WL 3762654 (Civil Ct. NY Co. 7/17/13) - Coop brought a summary holdover proceeding based on the allegation that Respondent was violating her lease by harboring a dog. Respondent cross-moved for a stay pending the outcome of Respondent's discrimination complaint at the State Division of Human Rights (DHR). The court initially denied Respondent's motion for a stay based on a determination by DHR that there is no probable cause to believe landlord engaged in any discriminatory practice, and granted the coop's cross-motion for summary judgment, awarding the coop a final judgment of possession.

The DHR initially found that the evidence does not support that Complainant's dog is necessary as opposed to helpful. Subsequently DHR issued a "REOPENING" which stated that DHR, upon its own motion, had reviewed the determination and found that the proceeding should be reopened for reconsideration, and then requested that a stay of eviction proceedings be granted pending the completion of the investigation. Respondent's motion for renewal was granted and the court stayed enforcement of the final judgment of possession pending a determination on the pending discrimination complaint.

COLLECTION OF ARREARS

PAYMENT OF COMMON CHARGES

AMT CADC Venture, LLC v 455 CPW, LLC, 2013 N.Y. Misc. LEXIS 5094 (Sup Ct NY Co. 10/18 13) – Consolidated blanket mortgage on sponsor units took priority over Condo's lien for unpaid common charges
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Board of Managers of Brightwater Towers Condominium v. Cheskiy, 971 N.Y.S.2d 349 (2d Dept. 9/ 25/13) - Action to foreclose a lien upon a condominium unit for the nonpayment of common charges. Condo established its entitlement to judgment as a matter of law by submitting evidence of its authority to collect assessments of common charges and fees, invoices reflecting the defendants' account, and an affidavit of the president attesting to the defendants' failure to pay the balance on the account.
Defense of constructive eviction should have been dismissed since the answer failed to adequately plead the existence of a landlord-tenant relationship between the parties and that the defendants abandoned the premises.

Board of Managers of 85 8th Ave. Condominium v. Manhattan Realty LLC., 958 N.Y.S.2d 368 (1st Dept. 1/22/13) Board of managers of condominium which consists of a residential unit (a cooperative), a garage unit, and a commercial unit, brought action to foreclose liens filed against owners of garage and commercial units for failure to pay common charges. The bylaws require a five-member board of managers. The garage and commercial units each have the right to designate one member and the residential unit has the right to designate three members. The garage and commercial units claimed they had no representation on the condominium board as of January 2010, as all six of the members of the alleged condominium board were from the cooperative. Defendants raised issues of fact as to whether the condominium board was properly constituted and whether it had the authority to impose the charges at issue in this case. Accordingly, the board is not entitled to summary judgment.
Defendants are not entitled to summary judgment voiding cooperative's decision to spend more than $10,000 to repair the cooperative's courtyard, which is also the garage's roof. Although the bylaws provide that "[n]o ... vote shall be binding without the consent of ... ninety ... percent of the Cooperatives if such vote purports to ... decide to expend more than $10,000," the next sentence states that "notwithstanding the foregoing, the Board of Managers is authorized to operate the building as a first-class multiple dwelling ... Toward that end, the Board may expend any sums it deems necessary in connection with the operation and maintenance of the Common Elements. The courtyard is undisputedly a common element. If the courtyard renovation was unnecessarily lavish, to the sole benefit of the cooperative, this might be contrary to the bylaws. This creates an issue of fact for trial.

ASSESSMENTS

40–50 Brighton First Road Apartments Corp. v. Kosolapov, 964 NYS2d 396 (App T. 2d Dept. 3/20/13) – Action to collect an assessment. Shareholders asserted defenses that the Board's representations were false because no part of the assessment charges was spent on facade repairs, that the basis of the Board's rejection of the mortgage alternative was unreasonable and contrary to the cooperative's best interests, that the facade work was premature, and that the special assessment was a pretext to balance the corporation's operating budget. The broad financial management authority granted to the Board in the bylaws and proprietary leases clearly includes the determinations made by the Board, and there is no claim that any part of the funds collected from the special assessment were used for any purpose other than the furtherance of the cooperative's legitimate interests. The defenses were dismissed.

LATE FEES

Board of Managers of the Westbury Terrace Condominium v. Roberts, 2013 WL 4717929 (Sup. Ct. Nassau Co. 5/29/13) - , condo alleges causes of action for breach of contract, account stated, and attorneys' fees. The by-laws provide that in the event of default the condo may recover attorneys' fees and expenses, and interest. The authorization for “fines for late payment of common charges” is found in the Condominium's Rules. Defendants allege affirmative defense that the condo failed to interview tenants interested in leasing the Unit thereby causing defendants to lose tenants and substantial amounts of money. Defendants failed to submit evidence of their counterclaim, that cooperative failed to interview prospective tenants The condo made out a case of defendants' liability for the Board's attorneys' fees, disbursements, and interest at the legal rate. However, the late fees of $100.00 per month, in addition to 9% interest and attorneys' fees seemed excessive and the court held the condo has failed to make out a *prima facie* case of its entitlement to judgment for late fees.

HOLDOVER PROCEEDING

2638 Tenants Corporation v. Pabst, 2013 WL 1406227 (Civil Ct. NY Co. 4/4/13) - Summary holdover proceeding based on the allegation that the proprietary lessee had failed to pay rent and had sublet the premises without permission. Respondent never filed an answer or appeared in court because Respondent was incarcerated. A stipulation was executed by the undertenant who was residing in the apartment at the time the proceeding was commenced. Undertenant signed on behalf of himself and on behalf of the shareholder as the shareholder's “attorney in fact.” Shareholder, who had been released from prison, appeared in this proceeding for the first time and moved to vacate the stipulation. It is unlawful for a person who asserts he is an attorney in fact to represent another in a proceeding. This constitutes the unlawful practice of law without a license. The stipulation is void as to shareholder, and must be vacated. The money judgment and judgment of possession entered against shareholder pursuant to said stipulation are also vacated. Moreover, the court notes that the underlying pleadings assert a claim for termination of tenancy based on failure to pay maintenance as a conditional limitation, which is not permitted under New York law. All prior stipulations in this proceeding were vacated as against shareholder. The matter was set for trial on the coop's sublet claim.

WARRANTY OF HABITABILITY

170 West End Avenue Owners Corp. v. Turchin, 2012 WL 5974139 (Civil Ct. NY Co. 11/29/12) - This summary nonpayment proceeding was based on the failure to pay maintenance. Shareholder commenced Supreme Court litigation against the coop and a second shareholder claiming that the apartment suffered water damage as a result of a leak from a pipe that burst in the other apartment, and asserted a claim against the other unit owner based on its negligence with respect to the leak and resulting water damage. A motion to consolidate was denied because the proprietary lease contained a no-setoff provision. There is nothing in RPL 235-b that suggests that the warranty of habitability remedy must be available to shareholders as a defense in a summary proceeding, where the contract governing the tenancy limits the assertion of that claim to an action instituted by the shareholder. The award may take the form of a sum of money awarded the tenant in a plenary action or a percentage reduction of the contracted-for rent as a setoff in a summary proceeding. There is no reason to hold that the no-setoff provision in the proprietary lease herein should not be enforced.

Storage fee-The court did not find that the charges for the storage bin are rent. The charges are not pursuant to the proprietary lease between the parties but a separate license and the storage claim was severed from this proceeding without prejudice.

GUARDIAN AD LITEM

Columbus Park Owners, Inc. v. Battin, N.Y. Misc. LEXIS 1198 (Civil Ct. NY Co. 3/27/13) -Petitioner moved for a default judgment and a judgment of possession was entered against Respondent on default based on unpaid arrears. DSS then appeared and moved for the appointment of a Guardian Ad Litem (GAL) for Respondent. The motion was based on a combination of Respondent's physical illnesses, including lung cancer, some psychological difficulties, as well as Respondent's failure to take appropriate steps for herself and her family such as completing an SSI application. The default judgment and warrant were vacated, and Respondent was permitted to submit an answer and be restored to possession. CPLR 1203 provides that "No default judgment

may be entered against an adult incapable of adequately protecting his rights for whom a guardian ad litem has been appointed, unless twenty days have expired since the appointment." Respondent's eviction was based on a default judgment entered prior to the appointment of the GAL in this proceeding. Matter to be set for Trial.

STATUTE OF LIMITATIONS

170 West 85th Street HDFC v Marks, 2013 WL 4281119 (Civ. Ct. NY Co. 6/10/13) - the cooperative commenced this summary proceeding on the ground of nonpayment of rent. Respondents have not paid maintenance since approximately 1990. In addition, co-respondent testified that the shareholder has not been residing at the subject premises and that he has been residing there. The cooperative's claim for maintenance arrears is governed by a six-year statute of limitations that runs on each payment from the date it becomes due. The Court noted that the nature of the defenses of laches, estoppel, and wrongful refusal of properly-tendered rent are equitable in nature. Respondents have not conducted themselves in an equitable manner in the history of their occupancy of the subject premises. The proprietary lease requires the shareholder to use the subject premises as her primary residence. HDFC's are intended to provide housing to low income families. A failure to maintain such housing as a primary residence undermines that objective and denies affordable housing to another eligible household. The length of Respondent's non-residence at the subject premises bespeaks a particularly brazen disregard for this objective. The occupancy of the subject premises by shareholder's son does not mitigate this iniquity. The failure to reside in the subject premises also operates to deprive her of a remedy pursuant to a breach of the warranty of habitability.

Stidolph v. 771620 Equities Corp., 959 N.Y.S.2d 718 (2d Dept. 2/13/13) – In 2001 the Co-op issued a stock certificate, stating that shareholder owned 685 shares in the Co-op, allocated to Apartment 6–J. The same day, the unit owner entered into a proprietary lease with the Co-op relating to Apartment 6–J, which also indicated that the unit owner was the owner of 685 shares of the Co-op. In 2011 the shareholder commenced this action against the Co-op, the individual members of the Co-op's Board of Directors, and the Co-op's former managing agent, alleging that, based upon a 1994 amendment to the Co-op's offering plan, his unit was properly allocated only 585 shares. The shareholder sought declaratory and injunctive relief that the defendants could only charge him maintenance in accordance with an allocation of 585 shares The relief the shareholder seeks in the first three causes of action could have been brought as a cause of action for reformation of a contract on the ground of mistake, which is subject to a 6–year statute of limitations, accruing from the date the alleged mistake was made. The instant action was commenced more than 10 years after the unit owner executed the lease in which a mistake was allegedly made as to his allocation of shares, the first three causes of action are time-barred.

PROPER NOTICE

Turin Housing Development Fund v. Suarez**,** 2013 WL 3958252 **(**Civ. Ct. NY Co. 8/1/13) **-** summary nonpayment proceeding. Respondent never answered or appeared. The cooperative applied to the court for a default judgment. The managing agent submitted an Affidavit of Investigation in support of the application for a default judgment. The affidavit provides in pertinent part:

"On December 7, 2012 I called [Respondent] and spoke with him directly. I asked him if he was in the military service of the United States. He advised me that he is not in the military service of the United States nor is anyone in his family dependent of anyone in the military service of the United States.'

Respondent died on September 10, 2007. The coop had written knowledge of the persons actually occupying the apartment and the coop and its counsel evicted them without ever naming them or serving them with any papers and without a valid judgment or warrant being issued against them. The court set the matter down for a hearing to provide the coop, its agents and counsel with a reasonable opportunity to be heard prior to a final determination on whether the coop and its attorneys engaged in frivolous conduct, and whether costs and/or sanctions should be imposed on the coop and/or its attorneys.

Horatio Arms, Inc. v. Celbert, 972 N.Y.S.2d 813 (App. T. 1st Dept. 7/31/13) - holdover summary proceeding, based upon allegations that shareholder illegally sublet the cooperative apartment premises, was properly dismissed for lack of personal jurisdiction. Cooperative received "written information" from in the form of a power of attorney presented at the time of closing, that shareholder actually resided at a specified street address in Paris, France, an address specifically referenced by cooperative, through counsel, in email correspondence sent to shareholder's attorney-in-fact prior to commencement of this eviction proceeding. In this posture, "it was incumbent upon cooperative after affixing notice of the eviction proceeding to the door of the apartment, to mail a copy to shareholder's alternate address within one day. Cooperative's acknowledged failure to do so rendered the proceeding jurisdictionally defective.

Guzman **v.** Arena, NYLJ, 4/1/13, p. 32 (Civ. Ct. K. Co.) **-** Petitioner commenced this "nuisance" holdover proceeding The predicate notice to cure contains four paragraphs:

1. Starting in May of 2012 you have continuously harassed the landlord and other tenants in the bathroom.
2. Starting in April of 2012 you have been walking around the common areas of the subject premises naked and/or only wearing underwear creating a nuisance condition to the landlord and surrounding neighbors.
3. You and your invited guests have created a nuisance condition by making loud and obscene sounds at all hours of the night creating a nuisance condition for the Landlord and your neighbors.
4. You have kept garbage and suitcases and other clutter in your apartment which creates a fire hazard as well as a sanitary hazard to your neighbors and landlord.

The predicate notice is not sufficient to adequately advise the tenant regarding the allegations, and to permit the tenant to frame a defense. Two of the four allegations have no dates at all, and the other two allegations contain one month of occurrence. The predicate notice is devoid of any specific facts or allegations describing the nuisance behavior. The petition was dismissed.

TRANSFERS AND SUBLETS

CONSENT TO TRANSFER

Simon Elias v. Orsid Realty Corp. [75 East End Ave.], 2013 WL 861559 (Sup. Ct NY Co. 3/1/13) – holder of unsold shares required consent of managing agent to sale of apartment, not to be unreasonably withheld. Managing agent is entitled to adopt board policies concerning transfers. However rejection based solely on a rule prohibiting more than 2/3rd financing, without considering the overall financial ability of the buyer, is unreasonable. Unit owner granted an injunction prohibiting automatic disqualification of a buyer based solely on the financing rule.

TRANSFER FEE

Katz v. Third Colony Corporation [180 East 79 St.], 957 N.Y.S.2d 330 (1st Dept. 12/27/12) - shareholders sold their interest in two apartments and, under protest, paid a "flip tax" to defendant, and then commenced this action to recover the fees. Shareholder's claim is barred by the statute of limitations. The cooperative's allegedly ultra vires acts occurred in 1997 and in 2008 when the bylaws and proprietary leases were amended to, respectively, allow a majority of the directors to alter the bylaws, and to allow two thirds of shareholders to approve amendments to the proprietary leases, and to institute a 2% "flip tax" on the gross sale price of any apartment. Shareholders are now prohibited from challenging the propriety of those amendments because they are required to have done so via a proceeding pursuant to CPLR article 78 within four months thereof!

SUBLET FEE

Cohan v. Board Of Directors Of 700 Shore Road Waters Edge, Inc., 969 N.Y.S.2d 547 (2d Dept. 7/24/13) – shareholder commenced this proceeding pursuant to CPLR article 78 to annul the board's determination and to rescind the sublet fee and for a reasonable attorney's fee, alleging that the board had violated the by-laws, the proprietary lease, and applicable law in assessing the sublet fee. Various shareholders had complained to the

board of directors that the petitioner no longer resided in the subject apartment, which was occupied by another individual who was making "excessive noise." The board assessed a "sublet fee" of $3,000. The court found the shareholder had not sublet the subject apartment, but was residing there full-time with her sister. The board was without authority under its governing documents to assess a fee against a shareholder for alleged illegal subletting. The proprietary lease, by-laws, shareholder handbook, and "house rules" adopted by the board fail to substantiate the board's claim that the "sublet policy" recited in the shareholder handbook was an enforceable "house rule" incorporated into the proprietary lease. The board acted outside the scope of its authority in assessing the $3,000 sublet fee and, thus, its action was not protected by the business judgment rule. Shareholder is the prevailing party in this proceeding to rescind the sublet fee, and established entitlement to a reasonable attorney's fee

CONSENT TO SUBLET

Board of Managers of South Star v. Grishanova [80 John Street], 2013 WL 869953 (Sup. Ct. NY Co. 3/8/13) The Board of Managers moved to preliminarily enjoin unit owner from subletting, or renting out the unit for less than 30 days. Unit owner asked the Condominium staff to provide access and keys to 48 different visitors (an average of four per month), some with international and out-of-state driver's licenses provided upon their visits, who stayed in her Unit for several days at a time. The manager accessed "craigslist.org" and saw defendant's Unit advertised as a short term rental, along with photographs of her "living room, bedroom, and distinctive red kitchen". In support of preliminary injunctive relief, the Board argued that it is likely to succeed on the merits of their claims. Even if defendant's visitors were not paying customers, their occupancy would violate the By-laws and Multiple Dwelling Law because defendant has not been residing in her Unit, and the Condominium unit owners will suffer irreparable harm. The unit owners are gravely concerned about the risk to their safety and security posed by large numbers of strangers in the building. The legislature considers the practice of furnishing hotel room rentals in a residential building "fundamentally unsafe" and "dangerous" because of the increased risk of fire caused by the presence of transients in such buildings. The ongoing nuisance and interference with the unit owners' use and enjoyment of their property caused by defendant's illegal rooming house business is sufficient to establish irreparable harm. The apparent granting of the "ultimate relief" is not an obstacle to granting a preliminary injunction. Otherwise, preliminary injunctions could never issue in cases in which the sole relief sought is to enjoin a continuing violation of the law or a continuing harm.

COMMERCIAL USE

Campaniello **v.** Greene Street Holding Corp, NYLJ, 3/20/13, p. 30 (Sup. Ct. NY Co.) – Shareholder sought to enjoin the cooperative from collecting a sublet fee. Since 1980, the cooperative has collected a sublet fee from all shareholders that sublet any portion of their units, including shareholders who own the commercial spaces. In 2010, shareholder asked the cooperative to consent to his subleasing his commercial space. The cooperative consented on the condition that he paid a sublet fee of ten percent of the monthly rent. The proprietary lease provides that "[A]ny consent to subletting may be subject to such conditions as the Directors...may impose." This broad language in the proprietary lease clearly gives the cooperative the right to collect and impose sublet fees. The amendment to the By-Laws permitting the collection of a sublet fee was validly imposed. The cooperative has collected a sublet fee from all shareholders who have tried to sublet their units for the past 32 years. The Notice to Cure was properly served, and therefore there is no basis to grant the shareholder any relief.

PERSONAL INJURY AND PROPERTY DAMAGE

ELEVATOR

Haberstroh v Rudd Realty Mgmt. Corp**.,** 2013 N.Y. Misc. LEXIS 3957 (Sup. Ct. NY Co. 9/3/13) – Unit owner was exiting the elevator on the tenth floor when she tripped and fell. She claimed that the elevator had misleveled, having come to rest below the level of the tenth floor, creating a tripping hazard which was allegedly the cause of her fall. The super and the doorman testified they never observed any misleveling problems with the elevator, and never received any complaints relating to leveling issues with the elevator prior to the incident. An elevator mechanic was sent to the premises prior to her fall, to address an issue of the elevator "jumping." He determined that the elevator brakes required an adjustment. After adjusting the brakes, he rode the elevator several times

and confirmed that the elevator was functioning properly. He did not observe any misleveling. A defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it. Summary judgment granted for defendants.

EXERCISE FACILITY

Austion v. Parkchester South Condominium, Inc., 966 N.Y.S.2d 667 (1st Dept. 6/13/13) - Dismissal of the complaint was proper in this action where plaintiff alleges that he was injured while playing basketball, he slipped on sand that was present on the outdoor court. Plaintiff assumed the risks inherent in playing on the outdoor court, and the sand he allegedly slipped on was a result of a naturally occurring condition of the outdoor setting Plaintiff had played on the subject court on numerous occasions and was familiar with its problem of accumulating sand, which was dealt with by sweeping the court when necessary.

THEFT

Bornstein v. 255 West 84th Owners Corp., 2013 N.Y. Misc. LEXIS 2804 (Sup. Ct. NY Co. 7/1/13) - action against a residential cooperative and the managing agent to recover damages for the theft of multiple pieces of jewelry from an apartment. The theft was committed by an employee of the building who pleaded guilty to and is currently serving an eight-year prison term. Shareholder seeks damages for negligent hiring, retention, and supervision of the employee. Employer cannot be held liable for torts committed by an employee who is acting solely for personal motives unrelated to the furtherance of the employer's business. There is no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee. There was no proof that defendants were aware of any prior conduct on the part of the employee that would put them on notice of the foreseeability of such incidents and require them to investigate. Summary judgment for defendants

PROPRIETARY LEASE

ELECTIONS

Pomerance v. McGrath [310 West 52nd Street Condominium Association] , 961 N.Y.S.2d 83 (1st Dept. 3/7/13)- A shareholder of a cooperative is entitled to the names and addresses of the other shareholders in connection with an election, pursuant to BCL § 624(b). A condominium unit owner is not entitled under the BCL to examine the books and records of the condominium, which is an unincorporated association governed by Real Property Law article 9–B. However, the right of a stockholder to examine the books and records of a corporation existed at common law. The rationale for a shareholder to examine a corporation's books and records at common law applies equally to a unit owner of a condominium. The legislative history of article 9–B indicates that one of its purposes is to encourage home ownership in the condominium form. Giving condominium unit owners the same rights as cooperative shareholders will encourage condominium ownership. Since a unit owner should be given rights similar to those of a shareholder under BCL § 624, at least where elections for a condominium board are concerned, the condominium was required to provide a unit owner with contact information for the other unit owners.

Lebovits v. 104 Division Avenue HDFC, 966 N.Y.S.2d 347 (Sup. Ct. K Co. 12/28/12) - The bylaws specify that "[n]o shareholder shall be eligible to vote ... who is shown on the books … of the Corporation to be more than two months delinquent in payments due … under the Proprietary Lease." Both shareholders at the time of the shareholders' meetings in question were more than two months in arrears under their proprietary leases. The shareholders were not entitled to notice of the shareholders' meetings because they were not entitled to vote at such meetings.

ATTORNEYS FEES

Great Neck Terrace Owners Corp. v. McCabe, 957 N.Y.S.2d 216 (2d Dept. 12/19/12) - Pursuant to paragraph 28 of the lease, the coop was entitled to recover any expenses, including reasonable attorney's fees, from a shareholder in the event that it had to institute any action or proceedings against a shareholder due to the shareholder's breach of the terms of the lease. Given the defendant's refusal to abate the odor or to provide the

coop with access to her unit to allow it to handle the abatement in accordance with the terms of the lease, the coop was required to institute this action and incur expenses in connection with the litigation. Since the coop demonstrated that the defendant breached the unambiguous terms of the lease, the coop is entitled to reasonable attorney's fees.

BUT

165 East 72nd Apartment Corporation v. McEvoy, 2013 WL 1127719 (Sup. Ct. NY Co. 3/14/13) -cooperative may be awarded attorney's fees only in the event of the tenant's default of obligations contained within the lease. Defendants' alleged conduct in interfering with hallway construction did not rise to a level sufficient to constitute a breach of the Proprietary Lease. The rules in the Proprietary Lease relating to hallway use, viewed in their entirety, suggest that the main purpose of those rules is to keep hallways, stairways, etc. free from obstructions for fire safety purposes. Defendants' use of the hallways did not constitute a fire safety hazard or obstructed any resident (as opposed to the contractor) from passing through the hallway. While defendants' use of the hallway may have been an annoyance with respect to the project, the Court did not find that such conduct breached the Proprietary Lease. In order to recover legal fees for breach of the Proprietary Lease as a result of a nuisance, the lease should have included nuisance avoidance as an express contractual term.

MALPRACTICE

Seminara v Board of Mgrs. of the Fitzgerald Condominium, 2013 N.Y. Misc. LEXIS 4215 (Sup. Ct. NY Co. 9/16/13) – Action against the Board and its attorney for damages arising out of a leak, and against the attorney for aiding and abetting a breach of fiduciary duty. Second unit owner who cause the leak cross-claimed against the attorney based on the same claims. An attorney's conduct is "immunized from liability under the shield afforded attorneys in advising their clients, even when such advice is erroneous, in the absence of fraud, collusion, malice or bad faith." Thus, an attorney will not be held civilly liable when the actions complained of "fall completely within the scope of defendant's duties as an attorney" and the acts complained of do not "suggest that defendant acted in any capacity other than as an attorney". Claims and cross claims dismissed on motion.

I. LEGAL ISSUES INVOLVING THE SPONSOR

JENNIFER REALTY ISSUES

Board Of Managers Of 41 North Moore Street Condominium v. Violet Purchasing Corp., 2013 WL 582257 (Sup. Ct. NY Co. 2/8/13) – Sponsor had a continuing obligation to sell all the units offered in the plan – failure to sell is a continuing violation. Date when sponsor refused to sell was disputed and not subject to summary disposition.

BUT

Bauer v. Beekman Intern. Center LLC.[315 East 51st Street], 2013 WL 4779566 (Sup. Ct. NY Co. 8/16/13) –Unit Owner sought a declaratory judgment that Sponsor is in default of its obligations under the offering plan; and an injunction directing Sponsor to offer all unsold units for sale immediately and to sell all unsold units within a time provided by the court. In order to make a prima facie showing that the condominium is not viable unit owner must establish that Sponsor's retention of a minority of residential units for lease frustrated unit owner's ability to resell her units, interfered with unit owner's ability to obtain favorable financing terms and caused wear and tear to the building for which unit owner has had to pay increased common charges. Sponsor showed that less than half of the residential units in the building are currently being leased and that residential units have recently been sold or refinanced. These averments are sufficient to satisfy Sponsor's prima facie burden of establishing that the condominium is viable. Motion for summary judgment was granted and the complaint was dismissed.

MAINTENANCE OF THE BUILDING

Board Of Managers Of 41 North Moore Street Condominium v. Violet Purchasing Corp., 2013 WL 2245466 (Sup. Ct. NY Co. 5/17/13) – Action against the sponsor for failure to properly maintain the building after the formation of the condominium while the sponsor was in control of the board of managers. The offering plan contained objective criteria ("maintained, repaired, cared for and operated in substantially the same condition and manner as it was on the Presentation Date of the Plan".) for maintenance of the building, and therefore the business judgment rule was not a defense. Motion to dismiss was denied.

ELECTIONS

Continental 66 Associates, Llp, v. Continental Gardens Apartment Corp, 2013 N.Y. Misc. Lexis 2803 (Sup. Ct. Q Co. 7/2/13) - petitioners seek a judgment declaring that 2 sponsor representatives are members of the Board of Directors. Public policy requires that a sponsor not only relinquish control of the Board of Directors where the offering plan requires such a result but also militates against a sponsor appointing or designating members of the Board, absent a bylaw permitting such appointments. Petitioners' claim that the bylaws were amended in order to permit the sponsor to appoint members of the Board of Directors was rejected. No documentary evidence exists that establishes that the bylaws were in fact amended. To the extent that the sponsor has maintained a *de facto* presence on the Board for the past 19 years by appointing or designating Board members, this activity did not constitute an amendment to the bylaws

II. RIGHTS AGAINST AND LIABILITIES TO THIRD PARTIES

LABOR LAW

Guryev v.Tomchinsky [200 Riverside Boulevard], 957 N.Y.S.2d 677 (Ct. Apps. 12/11/12) (4-2 decision) – Action pursuant to Labor Law § 241(6) by worker injured while renovating an apartment in a condominium against the condominium Board and the managing agent. Action dismissed on summary judgment. There is no lessor-lessee relationship between the condominium and the unit owner, who owned unit in fee simple absolute. The apartment is real property separate and apart from the land beneath the condominium building. Worker's accident occurred while he was working in the apartment. The Board and the managing agent are not the owner's agents within the meaning of the Labor Law. The unit is a single family dwelling.
As a matter of public policy, condominiums and cooperative corporations should be treated similarly under the Labor Law because both are forms of "collective ownership." Cooperatives have been held to be owners potentially liable under the Labor Law when a contractor's employee is injured while performing construction work in an apartment. However, ownership of the premises where the accident occurred--standing alone--is not enough to impose liability under Labor Law § 241 (6) where the property owner did not contract for the work resulting in the plaintiff's injuries; additionally, the court has "insisted on some nexus between the [non-contracting] owner and the worker, whether by a lease agreement or grant of an easement, or other property interest". The condominium did not own the apartment. The Alteration Agreement between the unit owner and the Board does not reflect otherwise.
Dissent asserted that a condominium does in fact retain a propriety interest in its owners' units every bit as palpable in the unit alteration context as that of a residential cooperative corporation and that there exists no rationale for treating the two kinds of entities differently when it comes to allocating responsibility under the Labor Law. It is to blink at reality to treat condominiums simply as agglomerations of one-family dwellings, as this Court now does. The alteration agreement also gave the board control over the performance of the work. This decision is a studied elevation of form over substance.

BUT

Martinez v. The 305 West 52 Condominium, 2013 N.Y. Misc. LEXIS 2901 (Sup. Ct. Q. Co 6/24/13) – Worker was plastering the kitchen ceiling, while using an A-frame stepladder. Worker claimed the ladder was unsteady, lacked rubber feet, and had one leg made out of a two-by-four piece of wood, and because it was too short for him properly to reach portions of the ceiling to perform the work, he had to stand on the top of the ladder. Worker

further claimed that there was a two foot puddle on the kitchen floor. The unit owner and the contractor have failed to make a prima facie showing that the apartment was a one-family dwelling used as a residence by the unit owner prior to the renovation, and that he was renovating the apartment with the intent to continue to use it as his one-family dwelling. The Condominium failed to make a prima facie showing that it is not an owner of the apartment or agent of the owner and that there is no lessor-lessee relationship between the condominium and the unit owner. None of the defendants made a prima facie showing that they did not create, or have actual or constructive notice of, any leak causing water to appear on the kitchen floor in the apartment and contributing to the happening of the accident. Motions for summary judgment denied.

Campos v. 68 East 86th Street Owners Corp., 2013 WL 3782435 (Sup. Ct. NY Co. 7/12/13) – Ladder law action by worker preparing a closet ceiling for painting. The coop. contends that the apartment owner should not be dismissed from the action because he was supposed to obtain insurance naming Cooperative. as an additional insured. By failing to obtain such insurance, he has left Cooperative. exposed to liability, in violation of the proprietary lease. Paragraph 21 of the proprietary lease does not support cooperative's position. That paragraph requires permission before a lessee engages in any alterations that would affect major building systems, like electric or plumbing. That paragraph does not indicate that permission would be required for painting the interior of one's own apartment. Nor has Cooperative. referenced any written requirement that a lessee obtain any insurance in order to do such work. Cooperative argues that the ladder was not defective and that Campos was the sole cause of his accident. However, Cooperative. fails to introduce any evidence to raise a fact question that the ladder was not defective or that Campos' own acts or omissions solely caused the accident. The fact that the ladder appeared to be in working order prior to the accident is not sufficient evidence to show that the ladder was free from defects or that unit owner caused his own accident. Summary judgment granted for shareholder; summary judgment for coop denied.

GARAGE ROOF REPAIR

Anita Terrace Owners, Inc. v Goldstein Assoc. Consulting Engrs., PLLC., 2013 WL 3585141 (Sup.Ct. Q. Co. 7/12/13) – Action by coop against roofing system manufacturer, contractor, and engineer for defective repair of a garage roof and the improper installation of a waterproofing system on the garage roof during a major renovation of the garage. Both the specifications and the contract identified the waterproofing system to be used on the roof deck of the parking garage but neither provided any detailed specifications or protocols to be followed by the contractor. The Specifications included the manufacturer's specifications for the interior waterproofing system, but failed to include the specifications for the roof. With respect to the manufacturer, a claim for a breach of a 20 year warranty was dismissed because the contract did not include such a warranty. The only warranty that the roofing manufacturer did issue was a five-year warranty which does not cover any failure caused by or due to workmanship or improper installation. The claim against the manufacturer for negligent supervision of the project was not dismissed. With respect to the engineer, the contract was oral. The parties dispute the scope of the oral contract. The engineer's contention that its contract did not impose a duty to inspect is contrary to the express language of the contract with the contractor. That contract provided that the engineer was not obliged to supervise the construction work or to make exhaustive or continuous on-site inspections, but was required to visit the site periodically in order to be familiar with the progress and quality of the work, to determine generally if the work was proceeding in accordance with the contract documents, to keep coop informed about the progress and quality of the work, and to guard coop against defects in the work. The primary object of these provisions is to impose the duty on the architects to insure to the owner that before final acceptance of the work the building would be completed in accordance with the plans and specifications The motion by the manufacturer for summary judgment dismissing the cause of action for negligence was denied. The branch of the engineer's motion for summary judgment dismissing the breach of contract claim was denied.

PROMPT PAYMENT ACT

Southgate Owners Corp. v. KNS Building Restoration Inc., 2013 WL 3956925 (Sup. Ct NY Co. 7/24/13) - Cooperative that hired contractor to make repairs seeks to stay arbitration of claim for payment of balance due under contract. Contractor asserts that the claim is for an undisputed amount owed for services rendered pursuant to a construction contract and that pursuant to the provisions of the Prompt Payment Act the claim is subject to mandatory arbitration. The coop maintains that the parties agreed expressly not to arbitrate and that the

PPA does not entitle contractor to arbitration because the PPA concerns payment of undisputed amounts and the amount demanded in this case is a disputed amount due to multiple defaults by contractor.
The PPA states that its "purpose... is to expedite payment of all monies owed to those who perform contracting services pursuant to construction contracts" and sets forth a timetable for payment of undisputed invoice amounts and requires payment of interest at the rate of 1% per month for late payment *(see* GBL § 756-b[i]). The law provides that "[e]xcept as otherwise provided in this article, the terms and conditions of a construction contract shall supercede the provisions of this article and govern the conduct of the parties."

The law is not intended to trump the terms of agreements of parties to construction contracts. The PPA does not purport to require parties to construction contracts to forego the right to choose whether to litigate disputed claims or to submit disputed claims to arbitration. The PPA applies to undisputed invoices only. The terms and conditions of the modified AIA Contract continue to govern disputed invoices .The contract of the parties in this case expressly excludes arbitration as the vehicle for resolution of disputed matters.

INSURANCE

Soho Plaza Corp. v Birnbaum, 969 N.Y.S.2d 96 (2d Dept. 7/3/13) - Action by coop against insurer for contractor employed by shareholder, and against insurer for shareholder, for defense and coverage of claims by injured employee of contractor. Action against contractor's insurer dismissed, because even though the coop was named as an additional insured, the policy excluded coverage for claims for injuries to employees of the contractor. Action not dismissed against the shareholder's insurer because the policy covered third parties who might be vicariously liable for the negligence of the shareholder.

SUBROGATION

Payson v. 50 Sutton Place South Owners, Inc., 967 N.Y.S.2d 66 (1ST Dept. 6/13/13) - summary judgment for coop dismissing the assigned subrogated claim affirmed. The unambiguous waiver of subrogation clause in the insurance policy applied the clause to the claims of damage to unit owner's cooperative apartment, despite the clause's reference to condominiums.

BUT

American Ins. Co. v Hotel Carlyle Owners Corp., 2013 N.Y. Misc. LEXIS 4731 (Sup. Ct. NY Co. 10/17/13) – Clogged drain line caused a flood into an apartment. Subrogation action was brought by insurer of alleged sublessee of the apartment against the cooperative. The proprietary lease contained a waiver of subrogation. It was not established by the submitted documentary evidence that the sublessee is bound by the waiver of subrogation clause in the proprietary lease. The cooperative did not demonstrate that the requirements of the proprietary lease were incorporated into the sublease. The motion to dismiss and/or for summary judgment by the cooperative was denied.

ADJACENT UNIT OWNER - ACCESS LICENSE – RPAPL § 881

MK Realty Holding, Llc, v. Scneider, 2013 WL 1482745 (Sup. Ct. Q. Co. 4/11/13) - Petitioner commenced this Special Proceeding to obtain access to respondent's property in order to repair the westerly wall of its building, which leaks when it rains. The court initially denied the application without prejudice to renewal, and directed that any renewal contain an affidavit from a contractor setting forth the details of the work to be done, the necessity for such work and how long it will take for the work to be completed. The court stated it must balance the competing interests of the parties and issue a license when necessary, under reasonable conditions, and where the inconvenience to the adjacent property owners is outweighed by the hardship of their neighbors if the license is refused. The renewed affidavit of the contractor explained the necessity of the work and described the work to be done. In addition, petitioner stated that it will obtain adequate insurance and name respondent as an additional insured. Petitioner also stated that it will compensate respondent $1,000.00 for allowing the petitioner to conduct the repairs. The court granted the license provided petitioner paid the license fee in advance and obtained a

policy of insurance covering liability and property damage in an amount of not less than $1 million naming the respondent as an additional insured.

BUT

401 Broadway Building LLC, v. 405 Broadway Condominium, 2013 N.Y. Misc. LEXIS 3227 (Sup. Ct. NY Co. 7/23/13) – application for a license in order to perform work under Local Law 11. As in 10 E End Ave Owners, Inc., the court held that license fees are not warranted in connection work in compliance with Local Law 11. Petitioner was granted a license to enter upon the roof of respondent's building for the limited purpose of (i) placing protective covering on the roof to protect the respondent's roof and skylight and (ii) erecting scaffolding that will be attached to the side of petitioner's building in order to allow petitioner to carry out required emergency Local Law 11 repairs to the facade and copper roof of petitioner's building. Petitioner was required to maintain a policy of liability which names respondent as additional insured.

EMPLOYEES

Mancero v 242 East 38th Street Tenants Corp., 2013 WL 3723206 (Sup. Ct NY Co. 7/12/13) - superintendent alleges a violation of New York Labor Law § 650, in that the cooperative withheld from the superintendent overtime wages of one and one-half times his regular rate for hours worked in excess of 40 hours a week. However Section 141-1.4 of the Minimum Wage Order for the Building Services Industry provides that a superintendent in a residential building is not entitled to overtime pay. The coop also asserts that the superintendent lived in the building rent-free, that the cooperative paid for his utilities, and that there are no records establishing the claim to overtime. Consequently, there is no issue of fact requiring a trial of this cause of action.

AUCTION OF APARTMENT

Slukina v 409 Edgecombe Ave. Hous. Dev. Fund Corp., 2013 N.Y. Misc. LEXIS 3729 (Sup. Ct. NY Co. 8/16/13) – Coop twice auctioned an apartment. Purchasers assert that they placed conforming bids on the apartment at both auctions, and were both times rejected. The complaint asserts a claim for violation of the auction procedures. The plaintiff's attempt to set aside the foreclosure sale as commercially unreasonable under Article 9 of the UCC is misplaced, as she does not have standing to invoke the protections of the UCC. Paragraph 18 of the terms of sale afforded the coop the right to set a "reserve price" for the sale of the apartment and does not require that the coop disclose that price. The coop had the right to reject the bids. The complaint was dismissed.

Louzon v Citibank, N.A.,[520 West 50th Street] 2013 N.Y. Misc. LEXIS 2679 (Sup. Ct. NY Co. 6/17/13) - Purchaser commenced this action for declaratory and injunctive relief to consummate a purchase of the apartment at auction. He alleges that he successfully bid for the Apartment at an auction held by Citibank and entered into a contract to purchase it. He submitted an application to the board. The board denied his application. The letter did not specify the board's reason. The complaint seeks a declaratory judgment that the Coop's approval is subject to managing agent approval under Paragraph 17 of the proprietary lease; and the Coop's approval was unreasonably withheld. The Coop contends that his purchase is not subject to Paragraph 17 of the proprietary lease because he lacks standing to enforce the proprietary lease. Purchaser also contends that the business judgment rule does not apply because the Coop engaged in a self-dealing transaction by purchasing the apartment at the second sale. However, the Coop's purchase of the shares and proprietary lease does not amount to a self-dealing transaction. A self-dealing transaction is a transaction in which a corporate director violates the duty of loyalty to the corporation by acting for his or her own personal benefit, rather than the benefit of the corporation. The purchase was held to be subject to the Coop's approval under the terms of the contract, and the Coop acted within its authority to reject the application. Motion to dismiss granted.