SIGNIFICANT LEGAL DECISIONS of 2015

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LEGAL ISSUES INVOLVING UNIT OWNERS AND RESIDENTS

APPLICATION OF THE BUSINESS JUDGMENT RULE TO BOARDS OF DIRECTORS

Pomerance v. McGrath [310 West 52nd Street Condominium], 124 A.D.3d 481 (1st Dep't 1/20/15) - Plaintiff's first cause of action, which alleges that individual board members violated the subject condominium's bylaws, is insufficient. The violation of bylaws is akin to a breach of contract and participation in a breach of contract will typically not give rise to individual director liability.

To the extent the twelfth cause of action alleges that the board violated the bylaws by failing to "muster a quorum" of unit owners for the annual election of board members, that claim is insufficient, as plaintiff cites no authority actually imposing such a duty on the board.

The business judgment rule also bars the seventeenth cause of action, which alleges that the board acted in bad faith and for an improper purpose by wasting the condominium's funds on unnecessary litigation with the Sponsor. The bylaws give the board the power to negotiate and settle "all claims and actions relating to the Condominium." The issues of how aggressive the board should be toward the Sponsor, and whether it should discontinue a lawsuit against the Sponsor, are matters of business judgment.

INDIVIDUAL LIABILITY OF DIRECTORS

Cohen v. Kings Point Tenant Corp., 6 N.Y.S.3d 93 (2d Dep't 3/18/15) – Action to recover damages for breach of fiduciary duty against the president of the cooperative and a member of the Board. The plaintiffs alleged that the defendants breached their fiduciary duties in refusing to address chronic water leakage and mold infestation throughout the building, including in the plaintiffs' apartment, and that the defendants' conduct was motivated by discrimination on the basis of the plaintiffs' religion. The business judgment rule provides that a court should defer to a cooperative board's determination so long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith. Although "decision making tainted by discriminatory considerations is not protected by the business judgment rule" the amended complaint contained only conclusory allegations of discrimination, without any factual basis. The amended complaint was devoid of allegations that the defendants acted tortuously other than within the scope of their authority as Board members. BUT

Tucciarone v Hamlet on Olde Oyster Bay Homeowners Assn., Inc., 13 N.Y.S.3d 853 (Sup. Ct. Nass. Co. 3/10/15) - The motion by the plaintiffs to amend their complaint is granted to the extent that the plaintiffs may assert a cause of action for breach of fiduciary duty on the part of the individual members of the Board, but not as against the corporation. This case arises from the actions taken by the defendants against the plaintiffs for the alleged responsibility for the spread of invasive bamboo planted on their property. An injunction barred the defendants from taking away plaintiffs' rights in the amenities of the development where they lived, including parking, while this matter is pending. The deposition transcripts of Board members arguably show their lack of good faith in addressing the issue of the invasive bamboo, including imposing fines and restrictions on plaintiffs for their failure to abate the condition on private property belonging to a neighbor. The Board members knew that the neighboring owner was not cooperative, could not be forced to cooperate, and had denied the plaintiffs access. The Court is mindful of the business judgment rule, which protects Board members such as the individual defendants here, provided they act in good faith and in the best interests of the home owners association, but there is a sufficient basis for permitting plaintiffs to amend their pleading to assert a violation of that duty by the individual defendants.

BOOKS & RECORDS

Matter of Giaccio v Brancati, 2015 N.Y. Misc. LEXIS 1626 (Sup. Ct. West. Co. 5/11/15) - With respect to the Petitioner's entitlement to inspect corporate documents, BCL § 624 gives a shareholder the statutory right to inspect books and records of a corporation. Moreover, a shareholder has a common-law right to inspect a corporation's books and records if the inspection is sought in good faith and for a valid purpose. The lease states "the Lessor shall keep full and correct books of account at its principal office . . . and the same shall be open during all reasonable hours to inspection by the Lessee **".** Petitioner has demonstrated his entitlement to inspect the records of the Corporation from 2003 through the present. Respondents have failed to justify limiting the review to the past two years since they have failed to demonstrate any bad faith or an improper purpose on the part of the plaintiff.

FINES

Gabriel v. The Board Of Managers Of The Gallery House Condominium, 15 N.Y.S.3d 1 (1st Dep't 7/9/15) **-** Although the Board's authority to impose fines is within its power to implement rules and regulations as provided in the by-laws the imposition of fines in the amount of $500 per day for violations of the guest policy is confiscatory in nature (*see Sandra's Jewel Box Inc. v. 401 Hotel, L.P.,* 273 A.D.2d 1, 3, 708 N.Y.S.2d 113 [1st Dept.2000]). The Board cites no persuasive authority to support the imposition of such a hefty fine.

LATE FEES

Board of Mgrs. of the Park Ave. Ct. Condominium v. Sandler, 2015 N.Y. Misc. LEXIS 3284 (Sup. Ct. NY Co. 9/11/15) - Action to foreclose a lien due to unpaid common charges, assessments, electric charges, late fees, and attorney's fees. Plaintiff made a prima facie showing of entitlement to summary judgment on the merits of the foreclosure claim and for the appointment of a referee to compute the amount owed. Defendant contends that the late fees imposed were unreasonable and confiscatory, and thus unenforceable. A usury defense would not apply to these late fees, which are not connected to a loan, but which rather are based upon a default under the by-laws. The charge, while not technically interest, is unreasonable and confiscatory in nature and therefore unenforceable when examined in the light of the public policy expressed in Penal Law

§ 190.40, which makes an interest charge of more than 25% per annum a criminal offense. The late fees were limited to $0.04 per dollar owed as provided in the by-laws.

DISCRIMINATION

Fletcher v. The Dakota, 101298/11, NYLJ 1202737441836, at *1 (Sup. Ct. NY Co. 9/11/15) - Action for discrimination, retaliation, and defamation, based on the board of directors failure to approve an existing shareholder's application to purchase additional shares in the corporation. Assuming that Plaintiffs meet their burden of demonstrating a prima facie case of discrimination, the burden shifts to Defendants to set forth, through proof in evidentiary form, legitimate, non-discriminatory reasons to support the Board's denial of Fletcher's application. Defendants satisfy their burden of producing evidence of legitimate, independent, and nondiscriminatory reasons for the Board's denial of Fletcher's application to purchase Apartment 50. Therefore, the burden shifts to Plaintiffs. Even viewing Fletcher's testimony and the emails in the light most favorable to Plaintiffs, Plaintiffs fail to raise a genuine issue of fact as to whether Board's proffered nondiscriminatory reason for denying Fletcher's application was "mere pretext".

RETALIATION

The length of time between Fletcher's 2007 complaints and the Board's 2010 denial, along with the Board records and testimony demonstrating an opportunity for retaliation via the 2008 Board election, establish that Plaintiffs cannot make out a prima facie showing of causation based on "indirect" proof of temporal proximity. Plaintiffs fail to raise any triable issue of fact as to whether Fletcher's 2007 objection to the Board's treatment of the Jewish couple was "closely followed" by the Board's 2010 decision to deny Fletcher's application to purchase the Apartment.

DEFAMATION

Even if a statement is defamatory, a qualified privilege exists for communications made to persons who have some common interest in the subject matter. The common interest privilege has been extended to communications between members of a board of governors of a tenants' association. Defendants' submissions demonstrate that Statement 4 is a communication on a subject in which the Board had a duty to speak, and that Statement 4 was made to shareholders who had a corresponding interest in the subject matter.

Kasowitz, Benson, Torres & Friedman Llp, v. .JPMorgan Chase Bank N.A., 2015 WL 6175022 (Sup. Ct. NY Co 11/20/15) - This is an enforcement proceeding commenced by judgment creditor KBTF for turnover of the cooperative apartments in which Fletcher has an interest and that are currently held by garnishee; and sale of Fletcher's interest to satisfy KBTF's judgment against Fletcher in the principal amount of $2,748,244.03. Fletcher has not answered the petition. The motion seeking the appointment of a receiver was granted; and the receiver was ordered to market the stock and proprietary lease(s) subject to the customary marketing, purchase application and review process and requirements of the board of directors of The Dakota.

BUT

Trump Village Section 4 v. Bezvoleva, 509277/2014, NYLJ 1202736140848, at *1 (Sup Ct. K. Co. 8/10/15) – Defendants contend that the challenged statements are not actionable because they are protected by the common interest privilege which protects statements made on a subject in which both persons share a common interest. The rationale for applying the privilege is that the flow of information between persons sharing a common interest should not be impeded. However, the shield provided by the common interest privilege is dissolved where the defendants disseminate the statements in a manner which exceeds the scope of this privilege or constitutes "excessive publication" Thus, alleged defamatory statements are not protected by the common interest privilege where they are disseminated to those who do not have either a common interest in them, or a legal, moral, or social duty to speak upon the subject of the communications. Here, the communications contained on the website were not disseminated solely to Trump Village residents. There was no required password limiting access to the website to residents. Rather, defendants knowingly allegedly published these statements on the worldwide web to the general public to whom its publication was not privileged. While defendants may have directed their statements to residents, they were well aware that anyone having access to the internet could read these statements. The fact that the statements were also communicated to persons to whom they were privileged to publish it does not prevent their conduct from being an abuse of the common interest privilege and excessive publication.

DISCRIMINATION

Curley v Bon Aire Props., Inc., 2 NYS3d 571 (2d Dep't 1/28/15) - Bon Aire commenced a summary proceeding against the plaintiff seeking to recover possession of the apartment on the ground that the plaintiff had violated his proprietary lease by failing to cover at least 90% of certain areas of his apartment with carpeting or rugs. A final judgment was entered in that proceeding awarding possession of the apartment to Bon Air. The plaintiff was evicted from the apartment. A year later the plaintiff commenced the instant action to recover damages for housing discrimination based upon his disability. He alleged that, after the landlords learned that he suffered from a mental illness, they embarked on a "campaign of harassment, discrimination and hostile conduct" for the purpose of creating a hostile environment so as to induce him to leave his apartment. The landlords moved for summary judgment dismissing the complaint on the ground that it previously had been determined in the summary proceeding that Bon Aire evicted the plaintiff for a legitimate, nondiscriminatory reason, and that the instant action was merely an attempt by the plaintiff to relitigate the propriety of his eviction. The prior summary proceeding did not decide whether the plaintiff was subjected to harassment based on his mental illness, whether such harassment affected a term, condition, or privilege of his housing, or any other elements of his cause of action to recover damages for housing discrimination. Judgment of dismissal reversed.

RETALIATION

Khazanov v. 2800 Coyle St. Owners Corp., 2015 N.Y. Misc. LEXIS 2819 (Sup. Ct. K. Co. 7/16/15) – Shareholder brought 6 prior actions against the cooperative – 3 in small claims court, 1 before the Human Rights Division, 1 in Supreme Court to recover legal fees, and the instant case alleging harassment and retaliation. The facts alleged by plaintiff are sufficient to establish a retaliation claim under Real Property Law § 223-b. The court could not reject outright plaintiff's assertion that the non-payment/eviction proceeding was commenced in retaliation for plaintiff's filing of the NYSDHR complaint or in retaliation for plaintiff's institution of the small claim proceedings to enforce his rights under the lease. Plaintiff has sufficiently alleged grounds suggesting

that he was not properly declared in default in paying his maintenance. Such allegations may allow the fact finder to infer that retaliation was the motive behind the commencement of the non-payment/eviction proceeding.

ENFORCEMENT OF CONTRACTS

Newman v 911 Alwyn Owners Corp., 2015 N.Y. Misc. LEXIS 1275 (Sup. Ct. NY Co. 4/14/15) - The action concerns the prospective sale of three closets and two bathrooms located in the common hallways. The managing agent sent a notice to all shareholders advising that the co-op was soliciting bids to purchase these spaces. The spaces would be sold to the highest bidder. The plaintiff submitted the highest bid for two of the hallway spaces. Thereafter, the managing agent issued a memorandum to all shareholders informing them that the Board of Directors decided not to accept any of the bids submitted and did not enter into any contracts of sale. The memorandum stated that the Board of Directors cancelled the proposed sale on the grounds that continuing to rent the closets and bathrooms would be more economically advantageous for the co-op. The board's decision to cancel the sale of all hallway spaces does not constitute a breach of duty as to the plaintiffs or any shareholder, Absent factual allegations showing that the cancellation of the sale was not taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes, further judicial inquiry is barred by the business judgment rule. The undisputed facts establish only a solicitation of bids. The plaintiffs do not plead facts indicating that their bids were accepted so as to form a contract

Gotham Condominium v. Firstservice Residential, 2015 N.Y. Misc. LEXIS 287 (Sup. Ct. NY Co. 2/2/15) - The Board made a determination that it needed to replace the railings on the terraces adjacent to a unit. The Board requested that the property manager order replacement railings. The property manager represented to the Board that he had ordered the replacement railings for the unit, when in fact he never ordered them. In reliance on these representations, the plaintiff condominium informed the Unit Owners that the railings had been ordered. When the Board learned that the railings had never been ordered, they complained to defendant who then replaced the property manager with a new property manager. Condominium Unit Owners threatened litigation in the event that the list of repairs, including the new railings, was not addressed. Defendants never reported these threats to the insurance carriers, even though it was their responsibility to do so. The defendants also failed to disclose this information on the condominium's application for directors and officers insurance. As a result of these actions, the insurance carriers declined coverage for litigation that was subsequently commenced by the Condominium Unit Owners. The lawsuit commenced by the Condominium Unit owners was subsequently settled by the condominium. In the instant case, plaintiff's negligence claim must be dismissed as it is duplicative of plaintiff's contract claim for breach of the management agreement. Any obligation that defendants had to order replacement railings or to notify the insurance carriers of any threatened litigation or properly fill out applications for insurance only arose from their obligations to perform under the management agreement.

INDEMNIFICATION

Nolasco v. Soho Plaza Corp., 129 A.D.3d 924 (2d Dep't 7/17/15) - The Birnbaums hired the third-party defendant Diamond Era Construction, to perform certain alterations to their apartment. In connection with these alterations, the Birnbaums enteredinto an alteration agreement with the coop. The plaintiff, an employee of Diamond, allegedly was injured while working in the apartment and commenced a personal

injury action against the coop. which commenced a third-party action against the Birnbaums and Diamond, seeking contractual indemnification. The Birnbaums demonstrated their entitlement to judgment as a matter of by proffering the proprietary lease and the alteration agreement. Broad indemnification provisions such as those in the proprietary lease and in the alteration agreement, which are not limited to the lessee's acts or omissions, and which fail to make exceptions for the lessor's own negligence, are unenforceable pursuant to General Obligations Law § 5-321 where the proprietary lease and the alteration agreement were not negotiated at arm's length by two sophisticated business entities.

OBJECTIONABLE CONDUCT

151 First Ave. Hous. Dev. Fund Corp. v Gorman, 2015 N.Y. Misc. LEXIS 28 (Sup. Ct. NY Co. 1/7/15) -Plaintiff served defendant with a notice of default based on defendant's objectionable conduct including failing to remedy a leak, leaving personal items in the basement and in the hallway outside his door, leaving an air-conditioning unit on his fire escape, and owing $24,400 in maintenance charges and other fees. Plaintiff then served defendant with a notice of a special meeting at which a vote would be taken on whether to terminate defendant's proprietary lease. Defendant did not attend the meeting; plaintiff unanimously voted to terminate his lease. Plaintiff commenced this action and ultimately served a notice of eviction. Defendant sought an order: 1) temporarily restraining plaintiff from going forward with the eviction; (2) vacating the default judgment; and (3) permitting him to serve a proposed verified answer. The motion was denied - Notwithstanding the strong public policy in favor of disposing of cases on their merits, defendant's submissions reflect his disingenuousness, lack of candor, and disregard of notices and legal filings which form a pattern of dilatory conduct. He has thus failed to demonstrate a reasonable excuse for failing to answer the complaint.

BUT

Jovic v. Blue, L&T 75281/14, NYLJ 1202737927581, at *1 (Civ. Ct. Q. Co. 9/16/15) - This matter involves a rent controlled tenancy, where the owner is residing in the subject building. Rent controlled tenancies are few and far between. The tenant is living there with her 15 year-old daughter who is severely disabled and nonverbal and walks with the aid of a metal leg brace. This summary eviction nuisance holdover proceeding was commenced based upon allegations that the tenants of this six unit multiple dwelling have been disturbed by: a) the smell of cigarettes and marijuana coming from the respondent's apartment; b) shouting inside the respondent's unit and in the public areas of the building; c) a constant stream of visitors, many of whom have keys to the respondent's apartment and the front door to the building; d) police and medical personnel visiting the respondent's apartment and knocking for extended periods of time before the respondent opened the entry door on two occasions; e) the respondent's verbal abuse and threatening the safety of the landlord and other tenants of the building; f) respondent leaving her trash around or on top of the garbage cans provided for the tenants; and g) a bicycle locked to the railing on the third floor of the building. A jury after trial determined that the facts as proven justified a finding of nuisance The Court stated it was loathe to disturb a jury finding. Nonetheless, based upon the evidence submitted, assuming the facts alleged to be true, the jury erred in finding a nuisance tenancy. This evidence does not rise to the level of a nuisance. The objectionable conduct has not been such that it has interfered with the comfort or safety of the petitioner or other tenants. Nor has it presented an imminent danger to them. It is certainly unfortunate that harmony is absent in this small multiple dwelling, but the behavior complained of, even when viewed in the totality of the circumstances, does not amount to nuisance.

HEALTH CLUB

Oriogun v Board of Mgrs. of Hampton house Condominium, 2015 N.Y. Misc. LEXIS 2779 (Sup. Ct. NY Co. 6/25/15) The condominium amended the health club membership agreement to include a waiver of liability. The By-Laws allow the Board to adopt administrative rules and regulations pertaining to the Common Elements. The Board has the power to amend these rules at any time. Such rules and amendments are binding upon all unit owners. Plaintiff cannot argue that he somehow acquired a personal, vested right in the use of the Health Club facility that creates a basis for contractual negotiation. Plaintiff knowingly moved into a condominium which, pursuant to its by-laws, allows its Board to make amendments. Plaintiff is bound by said amendments.
Normally, the fact that the board acted within the scope of its authority would bar judicial intervention of any kind, but an exception must be made in this case. The business judgment doctrine bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. The liability release imposed by the amended rules is not a lawful furtherance of corporate purposes. Hold harmless releases are in violation of GOL § 5-326 whether utilized by public or private facilities. The hold harmless portion of the amended membership agreement is thus void.

PRELIMINARY INJUNCTION

LOBBY RENOVATION

Golden Ox Realty, Llc, v. The Board of Managers of Colden Garden Condominium, Inc., 2015 WL 6675603 (Sup. Ct. NY Co. 10/29/15) - Plaintiff's motion seeks a preliminary injunction enjoining the defendants from conducting affairs on behalf of the Condominium without unit owner approval, and temporarily suspending the renovation of the lobby and the installation of security cameras. Plaintiff argues that there is a likelihood of success because pursuant to the Declaration and By-laws, the Board of Managers cannot dispense monies for these two projects in excess of $10,000.00, without consent from the unit owners. Plaintiff's relief of preventing the Board of Managers from conducting any further business, including the repairs to the lobby, applies to the final relief sought in the complaint with no showing of extraordinary circumstances. The balancing of the equities will not apply favorably to the actions of a shareholder of a cooperative building where the relief sought will have a detrimental effect on the remainder of the shareholders.

DOGS

The Cove Homeowners Assoc., Inc. v. Jordan, 7254/14, NYLJ 1202728905760, at *1 (Sup. Ct. K. Co. 3/12/15) – Plaintiff moved for a preliminary injunction enjoining the defendant from keeping her Pit Bull in her home during the pendency of the litigation. Plaintiff is a homeowner's association formed for a "private community" consisting of thirty-five separate two-family homes, with community spaces. Each two-family home, and the lot upon which it sits, are owned by the individual owners in fee-simple. There is no prohibition to owning a pit bull within the by-law, only the requirement that such owning be subject to written permission of the Board of Directors. Therefore any allusions to a clear and unambiguous "prohibition" are disingenuous and will not serve to support the plaintiff's position. Plaintiff offers no evidence as to what factors would permit granting or refusing such permission, therefore, while the plaintiff alludes to the notion that possession of the dog is

"prohibited", under the "clear and convincing evidence" standard it cannot be said that defendant has clearly violated a prohibition for the purposes of granting the injunction. Assuming that owning the dog was directly prohibited, the plaintiff would nonetheless fail to meet its burden as it has failed to show that the Pet Law is inapplicable herein. The papers evidence a sharp factual dispute as to the Pet Law's applicability.

STRAY CATS

Lee v Parkview Estates Condominium, 2015 N.Y. Misc. LEXIS 3989 (Civ. Ct. R. Co. 10/29/15)(Straniere, J.) – Claimant commenced this action against the Condominium seeking to have penalties and late fees assessed against her reversed. Defendant assessed fines against claimant because her sister, who was living with her at the time, was feeding stray cats on the porch of the premises. Defendant notified the claimant that feeding stray animals was in violation of the Bylaws and House Rules of the condominium and unless the activity stopped, she would be fined. When claimant did not stop feeding the cats, defendant assessed the fines which totaled $350.00. Claimant asserts that the Bylaws/House Rules violate Agriculture and Markets Law §353 in that it subjects anyone who fails to assist a hungry animal to potential criminal charges. As well intentioned as the actions of claimant's sister were in feeding stray cats, to adopt the interpretation claimant is asserting, that is an affirmative duty to provide food, drink and sustenance to all animals with which a person comes in contact, would subject any homeowner to arrest for not putting food out on the chance that Garfield, Sylvester or Felix might wander onto their property looking for a meal like some impoverished Dickens character. Claimant would be responsible for any violation of the House Rules during the period when claimant's sister resided with her. At the time some of these were assessed, claimant's sister was living in another unit and not with the claimant. Claimant has no obligation for her sister's actions on those dates absent a showing the feeding was on claimant's property. Refund awarded for the fines assessed after the sister moved out.

TRESPASS

Schwartz v. Hotel Carlyle Owners Corp., 2015 N.Y. App. Div. LEXIS 7655 (1st Dep't 3/20/15) – Plaintiff alleges that following a water leak the hotel's agents trespassed in his apartment and that the hotel breached the covenant of quiet enjoyment in the proprietary lease. Defendants demonstrated entitlement to dismissal of the trespass claim because the proprietary lease for the apartment permits the hotel to enter the apartment for purposes of assessing leak damage and making repairs. Defendants further demonstrated that their agents left the apartment as soon as plaintiff objected. Since the essence of a trespass is intentional entry onto the property of another without justification or permission plaintiff's allegations that the hotel's agents mishandled his drapery and otherwise exacerbated the conditions caused by the leak do not support a trespass claim.
As for plaintiff's claim for breach of the covenant of quiet enjoyment, a tenant must show an ouster, or if the eviction is constructive, an abandonment of the premises. Constructive or actual eviction requires that there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises.

Richstone v. Board of Mgrs. of Leighton House Condominium, 2015 N.Y. Misc. LEXIS 2224 (Sup. Ct N.Y. Co. 6/22/15) – Plaintiffs had not obtained DoB permits for their wooden terrace and they failed to obtain written approval from the Board to make alterations or improvements. Plaintiffs violated the By-Laws. The Board is entitled to costs and attorneys' fees associated with curing plaintiffs' breach of the By-Laws. The Board is also

entitled to remove the wooden terrace at Plaintiffs' expense. The trespass claim is dismissed. The elements of a cause of action sounding in trespass are an intentional entry onto the land of another without justification or permission. The By-Laws require Plaintiffs to provide the Board access to the roof/terrace in order to perform necessary repairs to the building. The Board's decision to perform necessary repairs was made in good faith and entitled to deference under the business judgment rule. The Building's manager states that the Board received various complaints about water leaks from unit owners. The Board retained experts to inspect the roof, and provided Plaintiffs with adequate notice of their intent to install a sidewalk bridge in order to conduct the work.

COLLECTION OF ARREARS

ABATEMENTS

12-14 E. 64th Owners Corp. v. Hixon, 130 A.D.3d 425 (1st Dep't 7/2/15) - This appeal arises from a nonpayment proceeding to recover maintenance withheld by respondent following a flood in her apartment. The proceeding was tried jointly with a holdover proceeding. The Appellate Term properly denied rent abatement to respondent in light of her admitted misconduct, and subsequent delays, after the flood. Once respondent advised the cooperative that she intended to make the repairs herself the cooperative could not have overridden her instructions by making its own repairs. The warranty of habitability only applies to areas that are "within the landlord's control". This was a sufficient reason to deny rent abatement, at least until respondent changed her mind and demanded that the cooperative make the repairs. With respect to the remainder of the time period in question, respondent is again foreclosed from seeking a rent abatement in light of her own misconduct. Respondent admits that she commenced flood repairs without the proper application for doing so, and that she did not tender the $10,000 repair escrow amount, thus delaying her compliance with a separate stipulation between the parties by some nine months.

PAYMENT OF COMMON CHARGES

Waterways at Bay Pointe Homeowners Assn., Inc. v Waterways Dev. Corp., 2015 N.Y. App. Div. LEXIS 7895 (2d Dep't 10/28/15) - The plaintiff made a prima facie showing that the sponsor failed to pay its 2000, 2001, and 2004 deficiency contributions. However the defendants proffered evidence that major repairs and renovations to units built by the original sponsor were undertaken in those years, that the cost of those improvements was included in the plaintiff's general budget, and that there was not an associated increase in the per-unit assessment to compensate for those expenses. The defendants contend that, in undertaking these expenses without raising assessments, the plaintiff violated the covenant of good faith and fair dealing by preparing a budget which would ensure a substantial deficit payable by the sponsor. The business judgment rule does not protect the board from attack upon its budget decisions. Pursuant to the business judgment rule, courts exercise restraint and defer to *good faith* decisions made by boards of directors in business settings. Here, the defense is that the plaintiff's budget was not prepared in good faith and that its decision was tainted by discriminatory considerations. The plaintiff's reliance on the business judgment rule does not, therefore, change the fact that the defendants have successfully raised a triable issue of fact regarding whether the sponsor in fact breached the contract by failing to pay its deficiency contribution

STORAGE CHARGES

ATTORNEYS FEES

Hawthorne Gardens Owners Corp v Jacobs, 2015 NY Misc. Lexis 1755) (App. Term 2d Dept. 5/6/15)- Cooperative commenced this nonpayment proceeding following tenant's failure to pay costs incurred by the corporation to remove his property from a basement storage area to permit the completion of an asbestos remediation project. A default final judgment was entered. Tenant has not shown that he has a meritorious defense to the proceeding. Tenant breached covenants requiring his cooperation with the cooperative's purposes, to abide by the rule-making authority of the Board, to allow lessor to "enter . . . any storage space assigned to Lessee. . ." and to reimburse landlord for the expenses incurred in curing tenant's default. Landlord established at the trial that its board of directors had acted properly, as a matter of business judgment, in requiring tenants to empty their basement storage areas to permit asbestos removal. The amount of fees must be established at a hearing.

FORECLOSURE – CONDOMINIUM

Plotch v Citibank, N.A., 120 A.D.3d 1210 (2d Dep't 9/10/14) – motion for leave to appeal granted - 10 N.Y.S.3d 524 (5/5/15) - In 2000, the former condominium unit owner gave a mortgage in the sum of $54,000 and in 2001 gave a second mortgage in the sum of $38,000 and executed a consolidation agreement consolidating the two mortgages "into a single mortgage lien". The mortgages and the agreement were recorded approximately seven years prior to the filing of a common charges lien. Citibank's cross motion for summary judgment declaring that Citibank's consolidation agreement is the first mortgage of record against the premises was granted. Since Real Property Law § 339-z is in derogation of the common-law principle of "first in time, first in right," the statutory right of the condominium to priority must be narrowly construed . Moreover, Citibank's second mortgage comes within the ambit of the statutory priority accorded to all sums unpaid on a first mortgage of record over a lien for unpaid common charges. Thus, the common charges lien does not have priority over the consolidation agreement.

TRANSFERS AND SUBLETS

CONSENT TO TRANSFER
RIGHT TO REJECT PURCHASERS

Griffin v. Sherwood Vil., Co-op "C", Inc., 13 N.Y.S.3d 522 (2d Dep't 7/15/15) - The cooperative demonstrated its prima facie entitlement to judgment as a matter of law dismissing the complaint claiming breach of fiduciary duty by establishing that its denial of the resale application was protected by the business judgment rule. In particular, the cooperative demonstrated that its denial of the resale application was authorized, and done in good faith and in furtherance of the legitimate interests of the cooperative, in light of significant debt the prospective buyer held relating to a separate property.

TRANSFERS BY ESTATES –LEGATEES

Rubenstein v. Berkeley Coop. Towers Sec. II Corp., 2015 N.Y. Misc. LEXIS 2071 (Sup. Ct. Q. Co. 6/5/15) - Plaintiffs applied for the transfer of a decedent’s apartment to plaintiff Herbert. Defendant denied the application. By the terms of the bylaws, upon the death of a member, a legatee or distributee who has

obtained the stock by will or intestate distribution may assume the occupancy agreement and become a member. Plaintiffs have failed to prove that Herbert is the decedent's distributee. To the extent plaintiff administrator of the Estate claims defendant has wrongfully failed to approve her application to transfer the decedent's apartment to Herbert pursuant to the bylaws, it is the business judgment rule, not the court's independent assessment of the reasonableness of the decision to withhold such consent that provides the proper standard of review. Plaintiff administrator has failed to demonstrate that defendant's withholding of consent is in bad faith or in furtherance of purposes other than those legitimately held by the corporation

STATUTE OF LIMITATIONS

Gabriel v. The Board Of Managers Of The Gallery House Condominium, 15 N.Y.S.3d 1 (1st Dept. 7/9/15) - Plaintiffs' challenges to defendant Board's 2005 house rules, including its prohibition on subletting, and its 2007 rental and guest policy are barred by the six-year statute of limitations for commencing a declaratory judgment action. Plaintiffs' argument that the limitations period began to run anew each time the guest policy was amended, based on the continuing wrong doctrine, is unavailing under the circumstances of this case The February 2014 amendment to the House Rules requiring that leases be limited to no more than one year does not constitute mere clarification of the by-laws. Rather, it amends the permitted use of plaintiffs' units. The only restriction in the by-laws regarding an owner's use of the apartment is that it cannot be used for transient tenancy. The Board failed to offer any explanation as to how requiring leases not to exceed one year is in keeping with the prohibition on transient tenancies.

860 Fifth Avenue Corp. v. Ender, L&T 53374/2014, NYLJ 1202727375453, at *1 (Civ. Ct. NY Co. 5/15/15) - Petitioner commenced this holdover proceeding alleging that the Proprietary Lessees have violated the proprietary lease by permitting the undertenants to occupy the apartment while not concurrently residing with them. Respondents allege that Petitioner's claim against them first accrued in 1997, when the proprietary lease was amended to require cohabitation of occupants with the shareholder. Respondents further assert that a breach of lease claim is subject to the 6 year statute of limitations, and Petitioner should be barred since it did not commence this proceeding until 17 years after the claim accrued. Petitioner's argument that the "no waiver" provision in the lease permits it to maintain this proceeding is unavailing, as Respondents are not asserting the affirmative defense of waiver. Petitioner has chosen not to enforce the co-occupancy provision until 17 years later. This claim is barred by the 6 year statute of limitations. Petitioner's argument that the harm is continuous, and thus it is not barred by the statute of limitations is also unavailing. Petitioner fails to establish that Respondents' violation of the proprietary lease co-occupancy provision was illegal or an interference with the rights of other lessees.

Katz v. 215 West 91st Street Corp., 626 NYS2d 796 (1st Dept. 5/23/95) Coop has absolute right to restrict the placement of planters on the roof and to decide whether to permit planters at all; alleged 10 year delay in enforcing regulations did not constitute waiver.

SUBLEASE POLICY

Matter of Giaccio v. Brancati, 2015 N.Y. Misc. LEXIS 1626 (Sup. Ct. West. Co. 5/11/15) – Respondents submit that Petitioner's tenant moved into Unit 203 in violation of the one-year sublet policy without the approval of the Board. Respondents have failed to demonstrate a valid exercise of their authority by imposing the unduly harsh, unauthorized and unprecedented penalty of terminating Petitioner's lease. Conspicuously absent is a

resolution or a vote or minutes from a meeting or some other corporate document showing the reasons why such a strict penalty was imposed, which is not authorized by its own House Rules. Respondents have failed to explain what aggravating factors caused the Board not to apply the prescribed penalty for violating the sublet policy as set forth in the House Rules (a $250.00 fine and a $50.00 daily continuing violation). Even more egregious is that Respondents admit that only fines have been imposed in the past for such a violation and that the one-year sublet policy was waived for another shareholder. Additionally, the e-mails demonstrate a personal animosity between Petitioner and Respondent Simone that beg the question as to whether the departure from the uniform treatment of shareholders was taken in good faith or in furtherance of a justifiable and bona fide business purpose. Respondents have failed to justify inconsistent imposition of this apparently novel penalty; the business judgment rule does not apply. The penalty of termination of the lease is punitive on its face, is disproportionate to the offense and is shocking to the conscience.

PERSONAL INJURY AND PROPERTY DAMAGE

WATER LEAKS

71st Street Lexington Corp. v. Waitman, 2015 N.Y. Misc. LEXIS 3129 (Sup. Ct. N.Y. Co. 8/25/15) -. Plaintiff alleges that defendants installed a plant irrigation system that malfunctioned and they failed to clear the terrace drains of dirt and debris, which caused the drains to clog, thereby causing water to accumulate on their terrace, thereby causing damage to the apartment below and to plaintiff's property. Defendants have failed to raise an issue of fact. That the super was called to perform his customary inspection does not raise any issue of fact because ultimately it was defendants' responsibility and not the responsibility of the building to make sure the drains were not clogged and if they were, to unclogged them. It was defendants' responsibility to have other people check on the apartment and the terrace while they were away. A motion for partial Summary Judgment on the issue of liability was granted

Gottesman v. Graham Apts., Inc., 2015 NY Misc. Lexis 1274 (Civ. Ct. N.Y. Co. 4/5/15) - Defendant had actual notice that the main storm line from the last catch basin through to the city sewer connection collapsed, and that the line needed to be replaced. The court found that the Defendant breached its contractual duty to the Plaintiff by failing to protect the subject premises from water accumulation by the immediate correction of the deficient 27 feet of catch basin piping, which caused a substantial flood in the unit.
It is the duty of the tenant to exercise ordinary care in the use of the premises and not to cause any material or permanent injury thereto except ordinary wear and tear. The Plaintiff had the affirmative obligation under his lease (Repairs by Lessee, ¶18-a-d) not to permit waste and not to allow the apartment to deteriorate into complete disrepair and/or uninhabitability. The Plaintiff never lived in the apartment after the flood or made any efforts to remediate the conditions in the apartment, thereby causing the apartment to deteriorate. The time span from the flood to the date of trial was in excess of 9 years, which the Court deemed to be an unreasonable period of time for the apartment to languish in total disrepair. An ordinary and prudent person would have made some concerted efforts to remediate the conditions to this apartment. The Court found that the Defendant, breached the warranty of habitability by the failure to correct the sewer pipes after due notice and is 100% liable from the date of the flood until the condition was repaired. After the correction of the condition the Plaintiff's culpable conduct is 100% for the mold and other toxic deterioration of the subject premises and the Plaintiff is not entitled to the recovery of any claims for the breach of warranty of habitability or breach of contract.

NEGLIGENT SUPERVISION
DEFAMATION

Abraham v. 257 Central Park West, Inc., 2015 N.Y. Misc. LEXIS 283 (Sup. Ct. N.Y. Co. 1/16/15) - Action by shareholder against the cooperative and its board of directors and managing agent. Defendants maintain that the video recordings of plaintiff's altercation with the building superintendent provides a complete defense against plaintiff's claim that defendants' letter to the cooperative's shareholders defamed him. Defendant did not submit evidence that each original recording from which the copies were made was itself an unaltered, continuous, complete, and accurate depiction of the entire incident.
The qualified common interest privilege applies as a defense to a defamatory communication when made only to persons sharing a common interest in the subject. Defendant board of directors distributed the letter containing the alleged defamatory statements to the cooperative building's shareholders in response to plaintiff's letter to the board, also distributed to the shareholders, to rebut his claim of assault and harassment by the superintendent.
Defendants are liable for negligent supervision and retention of their employee only if they were on notice of the superintendent's propensity to engage in the type of conduct that caused injury to plaintiff. None of the complaints about his lack of interpersonal skills in interacting with building residents and visitors indicated a propensity for physical violence. The superintendent addressed his lack of interpersonal skills by participating in an anger management class through his union, but the record shows defendants neither required nor recommended such a program so as to suggest they were on notice of a propensity for physically violent anger. Plaintiff claims no injury other than annoyance. Rudeness causing annoyance simply does not amount to violation of a right.

NUISANCE – NOISE

Board of Mgrs. of the 257 W. 17th St. Condominiums v. 257 Assoc. Borrower LLC, 2015 N.Y. Misc. LEXIS 142 (Sup. Ct. N.Y. Co. 1/16/15) - Defendant continued to hold cross-fit classes despite being made aware of the numerous complaints regarding the noise and vibrations emanating from the gym when such classes are occurring which not only which caused residents interference, but also violated the New York City Noise Control Code. Plaintiffs have no obligation to tolerate any violation of the Noise Code. In a noise case, however, while sound level is a significant factor, the unreasonableness of an alleged interference with a property owner's rights also requires the evaluation and weighing of multiple factors, including the duration of the allegedly offending sound, the times at which it is made, whether the condition is recurring, and if so, with what frequency. The affidavits, submitted by the owners of the building, detail the daily assault on the quiet enjoyment of their apartments, including sleep deprivation, inability to concentrate/work, stress, inability to use the apartment, and fear of injury when entering/exiting the building. This evidence, coupled with the expert testimony provided by acoustical engineers that the noise levels violate applicable code provisions, demonstrates a likelihood of success on the merits of plaintiff's nuisance claim. Preliminary injunction was granted preventing dropping or throwing of weights.

Galkin v. Plaza 400 Owners Corp., 2014 N.Y. Misc. LEXIS 5024 (Sup. Ct. N.Y. Co.11/14/14) - Plaintiff moved for a preliminary injunction to have defendant hire professionals to determine the source of, and take any means necessary to eliminate, alleged noise and vibrations in her apartment. The Cooperative hired an acoustic

consultant who was present on several occasions when plaintiff's professionals sought the source of the offending noises and vibrations. There is no evidence of the Cooperative's unwillingness to cooperate in solving the problem. The Cooperative has been hindered in attempting to solve the problem by the lack of specificity in defining it, based on plaintiff's own experts' reports which cycle through a variety of possible causes for the noises and vibrations without resolution. The vagueness surrounding the origin of the noises and vibrations makes it especially difficult to insure their elimination, the second prong of plaintiff's motion. Further, the probability of success on the merits is far from certain under such clouded conditions. Plaintiff's application for injunctive relief was denied.

CONVERSION

Jacobs v. Grant [Hawthorne Gardens Owners Inc.], 6 N.Y.S.3d 623 (2d Dep't 4/15/15) - Action, inter alia, to recover damages for conversion. The plaintiff and other tenants were notified that, due to a building-wide asbestos abatement project, tenants were required to remove all personal items from the storage areas. The plaintiff refused to do so, and after sending out several notices and upon the advice of counsel, the Co-op hired a moving company to remove and store the plaintiff's property until the completion of the asbestos abatement project. The defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the decision to remove the plaintiff's personal property located in a storage area of the subject co-operative apartment building in order to facilitate an asbestos abatement project was protected by the business judgment rule

MAINTENANCE OF THE BUILDING
LEAKING PIPES

Red Apple Child Dev. Ctr. v. Board of Mgrs. of Honto 88 Condominiums, 2015 N.Y. Misc. LEXIS 2584 (Sup. Ct. N.Y. Co. 7/17/15) - The building's cooling system failed to provide sufficient cooled water to the air conditioners in plaintiff's units and water and steam leaked from steam pipes from the building's heating system and released steam, water and acrid particles into plaintiff's units. Absent any allegation by plaintiff that the Board acted in bad faith or engaged in self-dealing, the Board's actions are shielded from review by the business judgment rule. Accordingly, the Board's decisions regarding the extent and manner of repairs and maintenance, if unwise, are protected by the business judgment rule, and plaintiff fails to state a cause of action for negligence as to the Board. Nuisance claim was dismissed, breach of contract claim survived.

Karydas v. Ferrara-Ruurds, [Mercer Square Owners Corp] 101386/12, NYLJ 1202741935412 at *1 (Sup.Ct. NY Co.10/16/15) – Plaintiff shareholder alleges that defendants including the managing agent are liable for the loss of use of his property due to their failure to make repairs on the premises during a continual leak lasting 18 months which emanated from the unit above. The managing agent moved for summary judgment to dismiss all claims and cross claims as against it on the basis that, as a disclosed agent of the owner of the cooperative, it cannot be held liable for any negligent conduct, because it had no control, management or authority over plaintiff's unit. The agent did not demonstrate that it did not breach any duty of care it owed to plaintiff by having "launched an instrument of harm" through some carelessness on the part of its plumber causing damage to plaintiff's unit. Negligence claim was not dismissed. The motion was granted as to the causes of action for "loss of use of property", "breach of warranty" and "nuisance.

CORPORATE ISSUES

ELECTIONS

Mishaan v. 1035 Fifth Ave. Corp., 47 Misc. 3d 930 (Sup. Ct. N.Y. Co. 1/15/15) At the annual meeting, the board's assistant secretary and appointed inspector of election, an employee of the building's managing agent, collected and counted the ballots and proxies, and announced the election results. The next day it was discovered that a proxy timely sent to him had not been counted. He consulted with the co-op's attorney, who advised him to count the proxy before signing the certificate. The by-laws provide that “All proxies shall be in writing and shall be filed with the secretary at or previous to the time of the meeting... *All ballots and proxies shall be voted and counted at one and the same time*". The by-laws also provide for the appointment of an inspector of elections and require him or her to "*immediately*" file an oath and a certificate of the results of any vote. In regard to balloting, it has been held that votes "cannot... be added after the polls have closed and the results formally announced." The fundamental rule is that all who are entitled to take part [in an election] shall be treated with fairness and good faith" and "[t]hat rule ... permits the correction of a mere mistake." However a mere mistake can be corrected only "when it can be made without prejudice to the rights of others, *and before the final vote is announced*." Thus, it is the announcement of the election results at the annual meeting that is the point of finality after which no further votes can be added or counted.

Pending the decision, the court granted a temporary restraining order which enjoined the cooperative, and anyone acting pursuant to their direction from holding any meeting as or on behalf of the board of directors, until further order of the court. The parties subsequently executed a stipulation in which they agreed that, pending a decision on the motion, board meetings were permitted to resume, but could be attended only by the eight uncontested board members.

Sahid v.1065 Park Avenue Corporation, 2015 WL 1309963 (Sup. Ct. NY Co. 3/20/15) - In considering whether to confirm or set aside an election, the court must determine whether improprieties produced a different result from what it otherwise ‘would have been’ or whether an inequitable result has been thereby produced. The petitioner failed to make that showing in regard to the subject election or any other board action taken, including the vote to increase the building “flip tax.” As observed by the respondents, the gravamen of his petition is that he doubts the respondent's representation that 96% of the outstanding shares voted in person or by proxy. This unsupported allegation is insufficient to warrant the relief requested. The petitioner has fallen far short of showing that the vote was “so clouded with doubt or tainted with questionable circumstances that the standards of fair dealing require” setting the election aside or even that there was any impropriety or action outside the scope of authority.

Hughes v. Newport Apts., Inc., 2015 N.Y. Misc. LEXIS 2699 (Sup. Ct. N.Y. Co. 5/7/15) – Challenge to the 2012 election of directors. Discovery and motion practice took 3 years. The cooperative conducted two more annual elections for the Board, the first in 2013 and the second in 2014. Petitioner chose not to run in these two annual elections. This petition has been mooted by the annual elections conducted in 2013 and 2014. Business Corporation Law § 619 provides in relevant part: "Upon the petition of any shareholder aggrieved by an election, the supreme court ... shall **forthwith** hear the proofs and allegations of the parties, and confirm the election, order a new election, or take such other action as justice may require." Since the commencement

of this special proceeding in or about September, 2012, there have been two annual elections to the Board and a third one is imminent. The respondents correctly contend that there is no longer any need to order a new election, if there ever was a need in the first place.

Board of Mgrs. of the 25th Charles St. Condominium v. Seligson, 126 A.D.3d 547 (1st Dep't 3/17/15) - The court properly awarded attorneys' fees to the Condo Board. Although the Condo Board did not have a written retainer agreement with the law firm, such an agreement is not necessary for the Condo Board to recover legal fees for the services provided by the firm. The attorneys' fees judgment should exclude fees for services rendered before the formation of the Condo Board. The condominium's bylaws provide that a unit owner shall pay for legal fees incurred by the Condo Board, and the record shows that a proper Condo Board did not exist before December 1, 2009. The award of attorneys' fees to the Residential Unit Owner should be vacated because attorneys' fees were not authorized by agreement, statute or court rule. The subject condominium's bylaws authorize the payment of attorneys' fees only to the Condo Board.

257 Cent. Park W., Inc. v. Abraham, 2015 N.Y. Misc. LEXIS 1883 (App. Term 1st Dept. 5/29/15) – Petitioner was the prevailing party in this summary proceeding to recover possession of a parking space, but is not entitled to an award of attorneys' fees. The proprietary lease provision on which petitioner relies is inapplicable, since that provision specifically limits its application to actions or proceedings commenced as a result of respondent's default under the terms of the lease. Inasmuch as the underlying predicate notice of termination and holdover petition were not grounded in a default by respondent of a provision of the lease, but rather were based on the assertion that respondent's "license" to utilize the parking space at issue was "freely revocable," and that once petitioner revoked that license, respondent had no right to continued possession, paragraph 28 does not require respondent to pay petitioner's legal fees. Respondent has never been found to be in default of the lease

LEGAL ISSUES INVOLVING THE SPONSOR

FRAUD –STATUTE OF LIMITATIONS

Board of Mgrs. of 111 Hudson St. Condominium v. 111 Hudson St., LLC, 2015 N.Y. Misc. LEXIS 2845 (Sup. Ct. N.Y. Co. 7/28/15) - Action for fraud in relation to the Sponsor's alleged failure to disclose the damaged condition of the cellar and sub-cellar in the Offering Plan. The motion to dismiss the fraud claim is granted as the statute of limitations bars the fraud claim. The statute of limitations for fraud is the later of six years from the date the cause of action accrued, or two years from the time the plaintiff discovered or should have discovered the fraud. The latest date the action could be commenced was 6 years after June 27, 2008. The action was commenced on June 27, 2014, but without proper authorization by the Board of Managers. On July 1, 2014, the Board of Managers ratified the action at a special meeting, but board ratification does not relate back for the purposes of the statute of limitations. The second cause of action for fraud is dismissed because it is time barred.

Defendants further assert that plaintiff lacks capacity to bring any of the other causes of action, as it was never properly authorized by the Board of Managers. Although the Board of Managers did not authorize the action before it was filed on June 27, 2014, the Board of Managers met on July 1, 2014 and ratified the filing. Ratification successfully cured the initial defect of the commencement of this action. The board's decision to commence the action, arguably voidable, was ratified by the subsequent acts.

RELEASE

Garriot v. O'Neill Condominium Assoc., 2015 N.Y. Misc. LEXIS 3433 (Sup. Ct. N.Y. Co. 9/23/15) - A construction defect lawsuit, commenced by O'Neill Condominium against the construction company that renovated the property from a department store into a residential condominium was settled for the sum of $15,000.00. As part of the settlement, Ladies Mile and O'Neill Condominium executed a release. Subsequently individual apartment owners sued to recover damages in tort to their apartments, as the result of a post-release “collapse" at the ground floor retail space of the property. The court found that there was an issue, sufficient to survive a motion to dismiss, as to whether O'Neill Condominium, by signing the release, effectively released the unit owners’ claims. Generally, questions of agency and of its nature and scope are questions of fact. Whether O'Neill Condominium possessed authority to execute the release as plaintiffs' authorized representative is, at the pleading stage, unknown, and must be further litigated.

RIGHTS AGAINST AND LIABILITIES TO THIRD PARTIES

Argo Corp. v Admiral Indem. Co., 128 A.D.3d 544 (1st Dep't 5/19/15) - Defendants' motion for summary judgment declaring that they have no duty to defend or indemnify plaintiff in the underlying action was granted. The test for whether notice should be provided to the insurer is not whether the insured will ultimately prevail as to liability, or believes it will prevail. The test is whether from the information available relative to the accident, an insured could glean a reasonable possibility of the policy's involvement. Despite Argo's contention that its relations with the underlying plaintiff's attorney were cordial, Argo's receipt of a letter wherein the attorney explicitly mentioned bringing suit put Argo on notice that the damage to the underlying plaintiff's apartment could result in a claim, and Argo's failure to notify Admiral for 5 months constituted untimely notice pursuant to the policy.

SLIP AND FALL

Maniscalco, v. Sovereign Bank, N.A.,[250-254 West 82nd Street Owners, Inc.] 2015 WL 5937674 (Sup. Ct. NY Co. 10/13/15) Plaintiff slipped and fell on the sidewalk in front of defendant Bank. Defendant Co-op moves for summary judgment. Plaintiff said that her second fall was caused by a patch of clear and slick ice in front of the Bank's entrance. Liability for a dangerous condition is generally predicated on “occupancy, ownership, control, or a special use of the premises.” The Administrative Code § 7-210 (the sidewalk law) provides that the owner of real property abutting a sidewalk must maintain it in a reasonably safe condition and that the owner is liable for an injury brought about by its negligent failure to remove snow and ice from the sidewalk. The owner may not delegate this duty and the duty is not obviated by a provision in a lease that a tenant will remove snow and ice from the sidewalk. As the owner of the premises, the Co-op has a duty to keep the sidewalk safe. The Bank's obligation under the lease to maintain the sidewalk does not destroy the Co-op's obligation. The evidence in this case raises factual questions about whether there was a dangerous condition in front of the Bank and what caused it and whether the Co-op knew about it. The Co-op's motion for summary judgment dismissing the complaint is denied.

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