SIGNIFICANT LEGAL DECISIONS of 2014

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ISSUES INVOLVING UNIT OWNERS AND RESIDENTS

BUSINESS JUDGMENT

DERIVATIVE ACTION

DSW Lenox, LLC v. Rosetree on Lenox Ave. LLC [Lenox Grand Condominium], 2014 N.Y. Misc. LEXIS 2302 (N.Y. Sup. Ct. May 16, 2014) - DSW demanded that the Condominium Board vote in favor of filing a complaint against the Sponsor to preserve the [Condominium's] legal rights on the construction defects and fraud claims, where the statute of limitations would otherwise expire. In order to trigger scrutiny of the Board's acts, an aggrieved unit owner must make a showing that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith. Plaintiff specifically alleges that at a meeting the purported Board members decided to poll the unit owners to ask whether a complaint should be filed, and all unit owners except DSW voted against the suit. Thereafter, the Board voted against filing a complaint. To the extent that DSW's breach of fiduciary duty claim is based upon the fiduciary duties of Board members to act solely in the best interest of all shareholders in commencing suit, that claim is disproved by DSW's admission that the unit owners themselves voted against the lawsuit. DSW cannot now circumvent the Board's decision by stepping into its shoes and asserting its claims derivatively on behalf of the Condominium and the Board; to do so would undermine the very purpose of the business judgment rule.

LAW SUIT

Schwartz v Forest Park Owners Corp., 2014 WL 5351145, (App. Div. 2d Dep't Oct. 22, 2014) - Plaintiff tenant-shareholder in the defendant residential cooperative, a former president of the cooperative, commenced this action to recover damages for, inter alia, breach of fiduciary duty. The plaintiff alleged that the defendants, including former and current members of the Board, breached their fiduciary duties in allowing the cooperative to commence a prior action against him to recover damages for breach of fiduciary duty. The defendants established their prima facie entitlement to summary judgment dismissing the complaint insofar as asserted against each of them by establishing that the Board acted in good faith, within its authority, and for the benefit of the cooperative when it determined that the cooperative should sue the plaintiff.

PARKING SPACE

Linda Tenants Corp. v. Spanakos, 992 N.Y.S.2d 159 (App. T. 2d Dept. April 16, 2014) – Action to recover possession of a parking space. Tenant defended on the ground that landlord had brought the proceeding in retaliation for various of his actions, including his organizing shareholder opposition to landlord's managing agent, and his complaints to the New York State Attorney General. Following a nonjury trial, the Civil Court awarded possession to landlord. Here, since landlord neither alleged nor proved a reason for its decision to terminate tenant's parking-space lease, it cannot be determined whether landlord's actions were "taken in good faith and in ... legitimate furtherance of corporate purposes" or whether they were arbitrary. In view of landlord's failure to articulate any basis for the termination, the petition must be dismissed

LIQUIDATED DAMAGES

Manor Towers Owners Corp. v. McGann, New York Law Journal, p. 33, Civ. Ct. Bx. Co. June 12, 2014 - Action for breach of an alteration agreement against defendant shareholders. The coop moved for summary judgment on the liquidated damages provisions of the agreement. Defendants oppose the motion arguing that plaintiff's actions "absolutely precluded" defendants from completing their apartment alterations in a timely manner. It is undisputed that plaintiff imposed a lengthy stop work order and the reasons for doing so are not well articulated in the papers. Thus a question of fact arises concerning whether plaintiff willfully interfered with defendants' ability to have the work completed in time to avoid incurring liquidated damages.

AUTHORITY OF BOARD TO ACT

The Board of Managers of the Clermont Greene Condominium v. Vanderbilt Mansions, LLC, 2014 WL 3002516 (Supreme Court, Kings Co. July 2, 2014) - Action by the Board against the sponsor to recover for construction defects. Although the statute contains no requirement that there be a resolution passed or a vote taken to commence litigation at a noticed meeting, the legal effectiveness of the actions of the Board depends upon the Board acting as a body within the constraints of the by-laws. It is clear that plaintiff has standing to maintain this action against defendant, but in the absence of any indication that it acted as a board by voting to authorize commencement of suit, defendant's motion to dismiss must be granted as plaintiff lacked capacity to sue at the time the action was filed.

AMENDED CAUSES OF ACTION

Pomerance v McGrath [310 West 52nd Street Condominium Association], 2014 N.Y. Misc. LEXIS 2914 (Sup. Ct. N.Y. Co. June 27, 2014) Derivative action where the third amended complaint asserted 17 causes of action, virtually all of which survived a motion to dismiss. Defendants based much of their motion to dismiss on the basis that the various claims had been previously dismissed. Plaintiff's claims concerning residency requirements for board membership; concealing the termination of the insurance policy; approval of improvements to the elevators without a vote of unit owners; allocation of reserve funds to construction and a legal fund without a unit owner vote; failure to provide access to the books and records of the condominium; and wasteful litigation to attempt to deprive the sponsor of board seats; all stated causes of action that were not barred by prior decisions in the case. In the 12th cause of action plaintiff alleges that the board breached a duty, allegedly imposed by the bylaws, to muster a quorum at the annual meeting. The defendants allegedly did not deny that this claim had merit.

Cutone v. Riverside Towers Corp., 2014 Misc. Lexis 4656 (Sup. Ct. NY Co. Oct. 22, 2014) – Action by shareholder against the coop and two directors claiming unreasonable interference with renovations to the apartment, misrepresentation of the value of the apartment, and deterring buyers for the apartment. Plaintiff moved to add causes of action for fraud, breach of the warranty of habitability, and intentional infliction of emotional distress, and to add the managing agent as a defendant. Claim for misrepresentation of the financial health of the coop at the time of plaintiff's purchase was dismissed based on the statute of limitations; claim based on the warranty of

habitability was dismissed because plaintiff never resided in the apartment; claim for emotional distress was dismissed because the defendants' conduct was not extreme or outrageous; there was no basis for adding the managing agent. Defendants' motion to dismiss causes of action for breach of fiduciary duty and nuisance, and all claims against the individuals were granted – cause of action for breach of contract survived

INDIVIDUAL LIABILITY OF DIRECTORS

Simmons v. Stolin [Kingsview Homes], 2014 WL 4251004 (App. Term, 2d Dept. August 20, 2014) - Plaintiff seeks to recover for water damage to his car. The damage occurred while the car was parked in the garage of a residential cooperative with which plaintiff had entered into a parking agreement. The president of the co-op's board, and, the managing agent of the co-op, were acting on behalf of a disclosed principal, and thus, are not personally liable for any alleged breach of contract committed by their principal. The record does not establish that defendants had committed any tortious acts. Action dismissed.

2 CLASSES OF SHARES

Razzano v. Woodstock Owners Corp.,. 975 N.Y.S.2d 38 (1st Dept. 11/19/2013) [Council of New York Cooperatives & Condominiums, Amicus Curiae.] - The sublet policy at issue, which allows those who purchased their shares before October 2002 to sublet, while prohibiting those who purchased their shares after that date from subletting, violates Business Corporation Law § 501 (c). Because the sublet policy violates the Business Corporation Law, it is not protected by the business judgment rule.

AIR CONDITIONERS

Kaplan v. Park S. Tenants Corp., 2014 N.Y. Misc. LEXIS 1260 (Sup. Ct New York County March 18, 2014) - Plaintiffs seek to compel defendants to allow plaintiffs to install an "exterior" air conditioning system, including placing three condenser units on the (arguably) private terrace adjoining plaintiffs' apartment and creating a two inch hole in an exterior wall to connect it to the interior components. Alterations may not be made without the Board's "prior written consent, said consent not to be "unreasonably withheld." Board's claim that the house rules prohibit placing A/C units on the terrace was not a reason not to allow the installation. The Court enjoined the coop from taking any action to prevent plaintiffs from completing the installation of the "exterior" air conditioning.

CONFIDENTIAL INFORMATION

Board of Directors of Windsor Owners Corp. v Platt, 2014 N.Y. Misc. LEXIS 3890 (Sup. Co. N Y Co, August 22, 2014) - Plaintiff cooperative sued a board member of the cooperative who breached the corporation's attorney-client privilege by revealing legal advice given by counsel to board members at a meeting. Plaintiff moved for a preliminary injunction barring Platt from "disclosing communications by its attorneys to anyone not a member of the cooperative's board of directors". Plaintiff has demonstrated irreparable harm. Once a privileged communication is revealed, it cannot be withdrawn in any meaningful way. Breach of the privilege can provide a windfall to an opponent in litigation. Plaintiff's motion was granted. Pending the determination of this lawsuit, defendant shall not in any manner disclose or disseminate confidential privileged communications provided by

INDEMNIFICATION

Guryev v. Tomchinsky, [200 Riverside Boulevard at Trump Place], 981 N.Y.S.2d 429 (2d Dept. Feb. 13, 2014)- Construction worker brought action against condominium unit owners, as well as condominium association, seeking recovery for eye injury allegedly sustained while worker was performing renovations on condominium unit. Summary judgment was granted to the condominium association. Subsequently, the Supreme Court entered summary judgment against one of the unit owners on the condominiums' cross-claim for contractual

indemnification. The Condominium defendants met their initial burden of demonstrating their entitlement to contractual indemnification by submitting the Alteration Agreement, which included an express indemnification provision obligating the unit owner to indemnify them against "any claims of any person for death, personal injury or property damage" arising out of the renovation work to be performed in the condominium. The terms of the indemnification did not require the unit owner to indemnify the Condominium defendants for their own negligence. Since the Condominium defendants have established their freedom from negligence, the contractual indemnification agreement, as applied, does not run afoul of the proscriptions of General Obligations Law § 5-322.1

Morales v. 310 West End Ave. Owners Corp., 2014 N.Y. Misc. LEXIS 1394 (Sup. Ct. Bronx Co. February 21, 2014) - Plaintiff seeks damages for injuries sustained when he fell off a ladder while performing alterations in a residential cooperative apartment. By prior decision plaintiff's Labor Law claims against the individual defendant were dismissed upon a finding that the defendant shareholder established the homeowner's exemption from Labor Law liability, upon a showing that defendant neither supervised nor controlled the means and methods of plaintiff's work. Shareholder moves for an order dismissing the cooperative's indemnification cross-claims on the grounds that the indemnification agreement contained in the Alteration Agreement between the individual defendant and the coop is unenforceable The coop has sufficiently stated cross-claims for indemnification including contractual indemnification as predicated upon the Alteration Agreement between the parties. Included within the terms of the agreement as pre-conditions to the commencement of the agreed-upon alterations, is a requirement that the contractor procure Workers' Compensation and comprehensive general liability insurance naming the coop, the shareholder, and the managing agent as additional named insureds. It would appear unambiguous here that the parties were using insurance as a way of allocating the risk of liability to third parties

BUT

Campos, v. 68 East 86th Street Owners Corp., 988 N.Y.S.2d 1 (App. Div. 1st Dept. 5/22/2014) - An employee of a contractor was injured when he fell off an A-frame ladder while sanding the ceiling of a closet in a cooperative apartment. The coop did not raise an issue of fact as to whether the indemnity provisions of paragraph 11 of the proprietary lease, which apply to "liability . . . arising from injury to person . . . due wholly or in part to any act, default or omission of the Lessee or of any person dwelling or visiting in the apartment", were triggered. When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty that the parties did not intend to be assumed. The term "visitor" is not defined in the proprietary lease, and a reasonable interpretation of "any person . . . visiting in the apartment," as used in paragraph 11, would distinguish plaintiff, a worker or "servant," employed by "contractor", from a visitor.

OBJECTIONABLE CONDUCT

Gordon & Gordon v. the Coop Realty Corp., 2014 N.Y. Misc. LEXIS 2281,(Sup. Ct N.Y. Co. May 19, 2014) - In response to plaintiffs' complaints of leaks in their apartment, the Condo performed a waterproofing project on the exterior of the building at the 10th and 11th floors. The Coop claims to have paid for 60% of the cost of this project. Plaintiffs refused to pay maintenance and assessments relating to the costs of waterproofing, and refused the Coop access to their apartment for the purpose of performing water spray testing on the exteriors in order to troubleshoot the leaking problem, and to preserve the warranty for the waterproofing work performed. Defendants contend that, without the testing, the waterproofing project could not be completed. They also contend that as the Coop was denied access, the complained of leaks could not be corroborated. The Coop thereafter held a meeting at which the shareholders elected by 94.25% of the votes cast in favor of terminating plaintiffs' tenancy. Such meeting was held in accordance with a notice that the Coop sent to plaintiffs alleging objectionable conduct on plaintiffs' part for denying access. Plaintiffs seek declaratory and injunctive relief from the determination of the shareholders' proceeding, i.e. a declaration that termination of plaintiffs' proprietary lease was illegal and an injunction barring the Coop from enforcing the termination. The notice of objectionable conduct issued to plaintiffs which was the subject of the shareholders' meeting, comprised plaintiff's interference in the cooperative's work process, including harassment of workers, along with plaintiffs' alleged failure to provide

access to the subject apartment. The Coop has shown that plaintiffs were given notice of this meeting, and that they were present, with their counsel, at the meeting. The ground for the meeting, plaintiffs' unreasonable and prolonged refusal to provide access to the cooperative, was subject to discussion and plaintiffs had their opportunity to present their position. The vote to terminate the lease was in accordance with section 31 (f) of the lease. There was competent evidence of plaintiffs' objectionable conduct to sustain such a vote. This court must defer to the Coop's decision under the business judgment rule. Even if it was responsible for some delays, the Coop's conduct was not as extreme or disreputable as to represent bad faith, or to raise a material issue of fact with respect to bad faith. In the absence of sufficient proof of a retaliatory motive behind the Coop's determination, this court must defer to the Coop's decision under the business judgment rule. The court granted summary judgment to the Coop.

1855 7 Ave. Housing Dev. Fund v. Wigfall, New York Law Journal, Pg. 29, Civ. Ct. N.Y. Co., March 21, 2014 - Holdover proceeding pursuant to a Board decision which terminated respondents' proprietary lease based upon objectionable conduct. At the conclusion of the meeting the Board unanimously voted to terminate respondents' proprietary lease. Respondent's motion to vacate the summary judgment decision and order was granted. The court found there was at least one disputed fact in this proceeding namely the tenancy may have been reinstated by the issuance of a duplicate lease to replace a lost lease. Phase one of the bifurcated trial was limited to the Board's decision to terminate respondents' tenancy for objectionable conduct and whether such decision should be granted deference under the business judgment rule. It is the respondents' burden to show why this court should not give the Board deference and apply the business judgment rule. Respondents' have failed to establish their burden of proof. The Board's actions were within the scope of authority, legitimately furthered the corporate purpose and were made in good faith. The Board's actions furthered the best interest of all shareholders and their families and friends by promoting a healthy, clean and safe environment in the subject building. The Board's failure to act in the face of these allegations would amount to an abdication of its responsibilities and duties to all the shareholders. Respondents have not raised any allegation that the Board's actions were biased, fraudulent, discriminatory or engaged in favoritism. Rather, it appears from a review of the record that the Board's actions were deliberate, thoughtful and accommodating.

Respondent's counsel contends that respondents were denied due process because the Notice of the Board Meeting did not inform respondents that they could have counsel present at the Board Meeting. There is no case law that requires a cooperative board to place such language in a Notice for a Board Meeting. Furthermore, there is no right to counsel in a non-criminal matter.

PREVENTING REPAIRS

151 First Ave. Housing Dev. Corp. v Gorman, 2014 N.Y. Misc. LEXIS 3956 (Sup. Ct. N.Y. Co. Aug. 29, 2014) - Plaintiff observed a leak emanating from defendant's apartment. Defendant refused plaintiff's repeated requests to enter his apartment in order to inspect and fix the leak, which continued for over two years, damaging other apartments and areas in the building, and gave rise to the issuance of violations from DHPD. Defendant also refused to remove items from his fire escape and other common areas, creating fire and safety hazards, and became delinquent in his maintenance payments. The board unanimously found objectionable defendant's failure to attempt to address the defaults described in the default notice, some of which endangered other residents. On that basis, the board voted to terminate his lease. Plaintiff acted within the scope of its authority, having duly convened the special meeting, which defendant declined to attend. There is also no evidence that the board acted in bad faith or in furtherance of an illegitimate purpose. Consequently, plaintiff has provided competent evidence necessary to sustain its determination.

DAY CARE CENTER

Walden Gardens, Inc. v. Burns, New York Law Journal, July 2, 2014, pg. 40 (Civ. Ct. Bx. Co.) - Petitioner alleges that respondent has used the premises as a "daycare business" in violation of the Proprietary Lease. Petitioner further alleges that respondent failed to amend her annual family income affidavit to reflect her actual income and the

actual members of her household. Respondents' motion for partial summary judgment is granted. This court finds that the proprietary lease for the cooperative herein, which requires the premises to be used solely for residential use, is unenforceable and is void as against the strong public policy of this state as it relates to relating to the use of the premises as a family day care business. The portion of the petition relating to the use of the premises as a day care business in violation of the proprietary agreement is dismissed with prejudice.

SPOLIATION OF EVIDENCE

Admiral Indem. Co. v. Bovis Lend Lease LMB, Inc., 2014 N.Y. Misc. LEXIS 158 (Sup. Ct. N.Y. Co. Jan. 8, 2014) – Plaintiff as subrogee commenced this action to recover damages to property. Plaintiff alleges that the water leak was allegedly caused when a contractor negligently punctured a cold water supply line behind a refrigerator appliance, with a sheetrock screw. The contractor asserts that plaintiff unintentionally, or negligently, discarded such screw. The contractor argues that such discard constitutes spoliation of evidence, and that the complaint should be dismissed. Although the failure to preserve the screw places the contractor at a significant disadvantage, its ability to defend the action is not fatally compromised. Presumably, a sheetrock screw is a generic piece of hardware, easily identifiable, one looking exactly like another. The absence of the subject screw does not leave the contractor prejudicially bereft of appropriate means to confront a claim with incisive evidence. Instead, as an alternative remedy, plaintiff shall produce responsive material created in anticipation of this litigation, such as expert reports, but any privileged opinions and conclusions may be redacted

MAINTENANCE OF THE BUILDING

Goldhirsch v. St. George Tower and Grill Owners Corp., Sup. Ct. Kings Co, Index No 12983/10, 3/26/14 - Action for damages against the coop because the terrace was unusable (i) due to a stopped drain, and (ii) because the coop needed to use it to effect repairs in the building. Closure due to stopped drain constituted a breach of the lease, closure due to repairs was shielded by the business judgment rule. Loss of use of terrace did not constitute a breach of the warranty of habitability.

DISCLOSURE

Hefter v. Citi Habitats, Inc., 2014 WL 4919751 (1st Dept. Oct. 2, 2014) - Purchaser of cooperative apartment brought suit against brokers and property manager, asserting misrepresentation regarding prospective increases in maintenance fees. Plaintiff contends that defendant managing agent assumed an affirmative duty to him "to speak accurately and honestly" when it responded to his counsel's question whether maintenance fees for the cooperative apartment he was contemplating purchasing were expected to increase, and that it breached this duty when it responded "Unknown". However, the answer to counsel's question was not inaccurate. Order dismissing the complaint as against defendants unanimously affirmed

BOOKS AND RECORDS

Goldstein v. Acropolis Gardens Realty Corp., 982 N.Y.S.2d 922 (2d Dept. April 9, 2014) - Petitioner sought access to various corporate documents and a list of all shareholders, including their mailing addresses. After not receiving the requested information, he filed the instant petition. The Court granted the petition and directed the coop to provide the petitioner with a list of all shareholders and their mailing addresses and to permit the petitioner and his representative to inspect and examine all of the coop's books, records, papers and contracts, including minutes of the Board's meetings, from January 2001 until the present. The petitioner satisfied the requirements of BCL § 624(b), and is entitled to a list of shareholders and their mailing addresses as well as all Board meeting minutes from 2001 to the present. Moreover, in light of the terms of the relevant proprietary lease the petitioner established his contractual right to inspect all of the coop's books of account from 2001 to the present. With respect to the petitioner's entitlement to inspect additional corporate documents, 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.

Belfer v. Travelers Ins. Co. [Victoria Owners Corp.], 2014 N.Y. Misc. LEXIS 3373 (Sup.Ct. N Y Co. July 25, 2014) – Action by a shareholder to recover damages from a flood. Plaintiff contends that her request for records maintained by defendants related to maintenance of the building's heating system, including all pipes and conduits transmitting fluids within the building, for the last 10 years is relevant to whether defendants properly maintained the system building-wide and whether they were on notice of any problems with the system based on prior incidents or accidents. Defendants argue that the demand is overly broad and burdensome. As the records for the entire building may show both whether there were problems in the overall heating system that may have contributed to the flood and also whether defendants had notice of any problems with the system before the flood, they are relevant, but will be restricted to the five years before the incident, from 2004 to 2009.

PARKING GARAGE

Board of Mgrs. of the 411 E. 53rd St. Condominium v. Perlbinder, 2014 N.Y. Misc. LEXIS 3256 (Supreme Court New York County July 18, 2014) - Action involves a dispute over whether the garage or the Condominium should pay for needed repairs in the Garage. The duty to repair turns on whether the damaged areas are common elements and what caused the damage. The motion and cross-motion for summary judgment in Action 2 are denied because there are questions of fact as to whether the columns in the Garage are General Common Elements and as to the underlying cause of the damage in the Garage.

COMMERCIAL STOREFRONT

136 E. 64th St., L.P. v 136 E. 64th St. Corp., 2013 N.Y. Misc. LEXIS 5851 (Supreme Court New York County December 11, 2013) - Plaintiff commenced the action seeking an injunction directing defendant to consent to plaintiff's request for the installation of new awnings/signs for two of plaintiff's commercial tenants. Pursuant to Paragraph 34 of the Lease, plaintiff is not restricted from installing "a new storefront, signs or awnings in keeping with the character of the Building as a first class apartment house." Accordingly, the issue to be determined in this action is whether the proposed signs/awnings herein at issue are "in keeping with the character of the Building. " This is a factual determination. Plaintiff argues that the proposed signs/awnings are "in keeping with the character of the Building" as a matter of law as they are merely "replacement" signs/awnings and they must be acceptable as the prior signs were already approved. Such contention is without merit. Contrary to plaintiff's assertion, nowhere in the Lease is a determination made that when plaintiff entered into the Lease with the Cooperation the awnings that were in place at the time were deemed to meet this standard. Moreover, the idea of what is deemed "first class" is not necessarily a stagnant standard and can evolve with time.

DOGS

Gold Queens, Llc v. Cohen, 977 N.Y.S.2d 867 (App. T. 2d Dept. January 9, 2014) - Landlord commenced the holdover summary proceeding against tenants claiming that tenants had violated their lease by harboring a dog without landlord's written permission. Tenants moved to dismiss the petition, asserting that they had harbored the dog openly and notoriously for more than three months before landlord had commenced the instant proceeding, and were thus protected under New York City's Pet Law. Landlord served the notice of termination (with a termination date of April 29, 2010) on April 26, 2010, and this shortening of the notice period from the requisite seven days to only three days after service rendered that notice defective. As the notice of termination served on April 26, 2010 could not have validly terminated the tenancy within the three-month period, the landlord here had not acted diligently and landlord's commencement of the prior holdover proceeding on April 30, 2010 can be given no legal effect. Consequently, the branch of tenant's motion seeking to dismiss the petition should have been granted.

However, since the record demonstrates that tenants admitted to having breached the no-pet provision of the lease, they are not entitled to an award of attorney's fee

COLLECTION OF ARREARS

MAINTENANCE

Hotel Carlyle Owners Corp. v. Schwartz, 2014 N.Y. Misc. LEXIS 813 (Sup. Ct. N.Y. Co. Feb. 25, 2014) - The coop moves for an order compelling Schwartz to pay outstanding maintenance of $124,504.40 and currently accruing maintenance in the amount of $7,591.51 pending the resolution of this action and a companion action. The Apartment suffered damage due to a water leak. After some repair work was done in the Apartment, Schwartz instructed the coop to stop any further action to repair damage. The coop gave Schwartz a complete abatement from August 2011 through April 2012. It then sought payment of rent as it accrued, but Schwartz has not paid any rent since that time. The coop asserts that problems with the apartment are due to Schwartz's instructions to cease repairs. Currently, the Apartment is under Schwartz's control, since Hotel Carlyle cannot enter it to make repairs without Schwartz's permission. Schwartz is occupying the Apartment rent-free. The actual condition of the Apartment, the responsibility for delays in repairs, and the amount of repair work needed are factual controversies that will be resolved at trial. In the interim, Schwartz's pending claim cannot provide him with a license to withhold maintenance from the cooperative for an indefinite time. The coop's motion for an order compelling Schwartz to pay the Outstanding and Monthly Rent is granted.

Baker v. 40 E. 80 Apt. Corp., 2014 N.Y. Misc. LEXIS 1428 (Sup. Ct. N.Y. Co. Mar. 24, 2014) - Plaintiffs move for an order: (1) declaring that plaintiffs are entitled to a 100% abatement of maintenance until their apartment is rendered fully habitable; and (2) requiring the coop to pay plaintiffs the monthly sum of $18,532.09, representing the difference between the rent for a comparable apartment and plaintiffs' monthly maintenance, to enable plaintiffs to rent alternative accommodations. The Bakers' request for a 100% abatement of maintenance and alternative living expenses goes "far beyond the ordinary purpose of preliminary injunctive relief, which is to maintain the status quo and to prevent any conduct which might impair the ability of the court to render final judgment". It cannot be said on this motion that the Bakers' apartment is clearly uninhabitable. Mrs. Baker has been living in the apartment at all relevant times to the motion. The motion for a preliminary injunction declaring that they are entitled to a 100% abatement of maintenance and requiring defendant the coop to pay alternative living expenses is denied.

BUT

300 East 85th Housing Corp. v. Dropkin, New York Law Journal, September 2, 2014, Pg. 24 (Civ. Ct. NY Co.) – Action by the coop based on nonpayment. Petitioner introduced into evidence a rent ledger for the subject premises. The rent ledger shows that the monthly maintenance accrued at a rate of $4,324.79 from January of 2014 through May of 2014. According to the rent ledger Respondent is left with a balance of $12,910.05 due. The only evidence Petitioner introduced that is probative of the amount of Respondent's monthly rent obligation is the rent ledger, the minutes of a meeting of the Board that memorialized a maintenance increase of 0.84 percent, and a letter sent to all Petitioner's shareholders reporting this maintenance increase. Petitioner did not introduce any evidence probative of the aggregate cash requirements of Petitioner, any evidence of Respondent's proportionate share of the total shares held in Petitioner, or any evidence of the maintenance on a per-share basis. Petitioner was not required to introduce all of this evidence in order to prove its prima facie case, but without any evidence of this type Petitioner has failed to prove so much of the terms of its contractual landlord/tenant relationship with Respondent as to entitle it to relief.

Clarke v. Parkway Village Equities Corp., 2014 WL 128548 (Supreme Court, Queens County January 7, 2014) – Plaintiffs allege that CitiMortgage caused $33,527 to be charged against their account and paid the coop. Plaintiffs further allege that CitiMortgage was not entitled to remove said funds from the plaintiffs accounts without plaintiffs' consent. Plaintiffs claim that CitiMortgage undertook to pay the coop an amount for maintenance

which they did not owe. CitiMortgage contends that pursuant to the cooperative loan security agreement it has the right to advance payment, without the borrower's consent, in order to defend the lender's security interest and to subsequently seek reimbursement from the borrower. The court granted the plaintiff's motion for a preliminary injunction to the extent that the coop was enjoined from taking any action to terminate the subject proprietary lease and from commencing summary proceedings to evict the plaintiffs during the pendency of this action. There is a question of fact as whether CitiMortgage established the existence of an account stated as CitiMortgage has not submitted sufficient evidence documenting the accounting of the maintenance arrears upon which it based its payment to the coop.

PAYMENT OF COMMON CHARGES

Board of Mgrs. of the Lenox Grand Condominium v. DSW Lenox LLC, 974 N.Y.S.2d 452 (1st Dep't 11/14/13) - Action to recover common charges. The main reason that plaintiff increased common charges was legal fees in this action and in a derivative action brought by DSW. DSW's argument that defense costs are not proper common charges pursuant to the by-laws is unpreserved, but DSW may raise it for the first time on appeal because the by-laws are in the record. The by-laws state "The common expenses may . . . include such amounts as the Board of Managers may deem necessary for customary or extraordinary legal expenses incurred with respect to the Condominium Property." Order directing defendant to pay the common charges affirmed.

ASSESSMENTS

Yusin v. Saddle Lakes Home Owners Association, Inc., 986 N.Y.S.2d 869 (Supreme Court Suffolk County March 3, 2014.) – Action involving the right of a daughter under 55 to occupy a unit at a senior citizen community. The parties entered into a stipulation pursuant to which the defendants agreed that during the pendency of this action they would “not disturb in any manner the possession rights of the Plaintiff in the subject premise.” The parties also agreed that the defendants “may continue to assert fines for any alleged violation of the Defendant’s Governing Documents but may not send or communicate notices or demands with respect to said alleged violations nor attempt to collect said assessments or fines.” Plaintiff moved to punish the defendants for contempt for their violation of the stipulation. Plaintiff received a statement which includes a charge of $50.00 for “violation”. Two other statements set forth charges for violations, with each statement listing two violations The defendants sent to each of the unit owners notice that each homeowner would be assessed $250 .00 for the litigation expenses connected with a lawsuit instituted by one homeowner under the age of 55 years who resides alone in the condominium complex. Plaintiff has sustained her burden. The account statements sent by defendants constituted notices of alleged violations as well as attempts to collect fines in violation of the terms of the stipulation, and the notice of a special assessment for litigation expenses that was sent to all homeowners by defendants can only be viewed as adversarial, and its circulation prejudiced the plaintiff by instigating harassment by neighbors and disturbing plaintiff's right to peaceful occupancy and possession of her condominium unit.

FORECLOSURE – CONDOMINIUM

Columbia Condominium v. Ullah, 2014 N.Y. Misc. LEXIS 4400 (Sup. Ct. N.Y. Co. Oct. 2, 2014) - Plaintiff commenced this action to foreclose on a lien for unpaid common charges. Plaintiff has made out its prima facie entitlement to summary judgment by presenting evidence establishing that it was authorized under the Condominium's by-laws to collect common charges and that Ullah has failed to pay such authorized charges. In opposition to plaintiff's motion, Ullah has failed to raise an issue of fact sufficient to require a trial of this action. Ullah's argument that she has a defense to the claim for common charges based on plaintiff withholding building privileges and amenities from her is without merit. Pursuant to a house rule passed by the Board, the Board had the authority to deny Ullah these services based on her failure to pay these common charges. Ullah has failed to establish that the Board did not have the authority to pass this house rule or that the Board acted in bad faith or in a way that did not further the legitimate interests of the Condominium.

BUT

The Board of Managers of the 4260 Broadway Condominium v. Caballero, 988 N.Y.S.2d 476 (1st Dept. June 26, 2014) - Plaintiff moved for summary judgment to foreclose on its lien for unpaid common charges on defendants' units. The court properly determined that issues of fact remained as to whether the board acted within the scope of its authority when it imposed various assessments without unit owner approval. On its summary judgment motion, the board failed to meet its burden to demonstrate that the assessments were related to building repairs, for which unit owner approval is not required, as opposed to items such as building alterations, additions, or improvements, which do require unit owner approval under certain circumstances pursuant to bylaws

TRANSFERS AND SUBLETS

CONSENT TO TRANSFER

FIRST REFUSAL

Bittens v. Board of Mgrs. of the Octavia Condominium, 2013 N.Y. Misc. LEXIS 6010 (Supreme Court, New York County December 17, 2013) - Plaintiff alleges that the Board of Managers acted improperly in exercising its right of first refusal. When the Board found out about the prospective purchase, it was concerned how the below-market price sale would affect the other units in the building. The Board wanted to buy the Unit and then proceed with a "quick flip of that unit," for the best interests of the condominium. The Board voted to exercise its right of first refusal, and designated an LLC to be its designee. The Board entered into a joint venture agreement with the LLC, which would be the designee who financed and purchased the Unit. After re-sale, the LLC and the Condominium split the profits. The LLC then re-sold the Unit to other purchasers for $540,000. The Condominium received a check for $112,086.00. Plaintiff's first cause of action is for tortious interference with contract. Plaintiff argues that he entered into a valid contract with the Seller and that defendant tortuously interfered with the contract by purporting to exercise a right of first refusal and then failing to consummate the sale. Plaintiff's claim for tortious interference with a contract fails as a matter of law. In the present situation, plaintiff specifically denied that the Seller breached the contract at issue, which is the one between himself and the Seller. The action was dismissed against all defendants including the individual board members.

ESTATE

Estate of Del Terzo v. 33 Fifth Ave. Owners Corp., 2014 NY Misc. Lexis 4305 (Sup. Ct. NY Co. Sept. 30, 2014) - The complaint seeks a judgment that the Coop has breached paragraph 16 (b) of the proprietary lease by its unreasonable denial of the application to transfer the shares and proprietary lease from the Estate to Michael and Robert. The lease provides "If the Lessee shall die, consent [of the board of directors] shall not be unreasonably withheld to an assignment of the lease and shares to a financially responsible member of the Lessee's family (other than the Lessee's spouse, as to whom no consent is required)."

Paragraph 16(b) does not condition an assignment of the lease and shares to a member of the lessee's family who intends to occupy the apartment. The only express condition is financial responsibility. As Paragraph 16(b) specifically addresses the circumstance of death of a shareholder, it takes precedence over general policies and preferences of a co-op. The Board disregarded Michael's finances and found Robert's financial capabilities insufficient to make the monthly maintenance payments. However, the brothers were co-applicants, and thus their finances should have been considered together. The Board acted unreasonably under Paragraph 16(b) of the Proprietary Lease in rejecting Robert and Michael's joint application. Approval of their joint application would merely formalize the living arrangements as they existed at the time of their mother's death.

Skyline Terrace Coop. v. Ortiz-Robies, 2014 NY Misc. Lexis 4598 (App. T. 2d Dept. 10/3/2014) – Summary proceeding to recover possession on the ground that the estate allowed the daughter of the decedent to occupy the apartment without consent. The occupancy did not constitute a sublet. Since the daughter moved in while the mother was alive, the occupancy was authorized, and the subsequent death of the mother did not render the

occupancy unauthorized. The proprietary lease does not provide a mechanism for the coop to obtain possession of the apartment. Summary judgment granted for the estate.

BUT

352-54 West 48 Street Housing Development Fund Corporation, v. Rodriguez, 2013 WL 6122316 (App. T. 1st Dept. November 20, 2013) - Holdover proceeding. Judgment of possession awarded to the coop. The court found that the estate of the deceased tenant shareholder breached the material obligations of the HDFC proprietary lease by failing to timely transfer the shares to a qualified individual and by subletting the premises to respondent without first obtaining the required prior approval. The record also supports the court's determination that petitioner's rejection of the estate's post-trial application to transfer the shares to respondent was for legitimate reasons, including respondent's poor credit history and his unauthorized entrance into the apartment without permission

BOARD APPROVAL

Jonas v City of New York [340 East 93rd Street Corporation], 2014 N.Y. Misc. LEXIS 3586 (N.Y. Sup. Ct. July 23, 2014) - Action for alleged personal and pecuniary injury sustained by plaintiff. The complaint alleges that the action is about discrimination, assault upon plaintiff's person to cause plaintiff injury and financial burden. Plaintiff moves for an order allowing him to sell the shares allocated to apartments without the approval of the coop. Courts should refrain from interpreting agreements in a manner which implies something not specifically included by the parties, and courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing. This approach serves to preserve stability to commercial transactions because when parties set down their agreement in a clear, complete document, it should be enforced according to its terms. The relief sought by plaintiff would violate the clear and unambiguous language of the respective proprietary leases. Paragraph 16 of the proprietary lease requires consent before the sale of plaintiff's apartments. Plaintiff is not entitled to sell his shares absent approval

TORTIOUS INTERFERENCE

Bridgers v West 82nd Street Owners Corp. , 981 N.Y.S.2d 78 (1st Dept. February 27, 2014) – Plaintiff claims that defendants tortuously interfered with their business relations with prospective buyers of their apartment. The Court held in a prior action that Plaintiffs' allegation that the cooperative board's minutes referring to the allegedly illegal work performed in their apartment discouraged a potential purchaser is insufficient to support their claim of tortious interference. The interference claims in the instant case were properly dismissed. The board minutes about which plaintiffs complain are not defamatory. Even if they were defamatory, they are protected by the common-interest privilege.

PERSONAL INJURY AND PROPERTY DAMAGE

MOLD

Cornell v.. 360 West 51st Street Realty, Llc,. 986 N.Y.S.2d 389 (Ct. Apps. March 27, 2014) – Plaintiff did not raise a triable issue of fact to rebut the prima facie showing made by defendant that her claimed personal injuries were not caused by indoor exposure to dampness and mold. The trial Court properly granted the corporation's cross motion for summary judgment to dismiss Cornell's complaint in its entirety. In *Frye v United States* (293 F 1013, 1014 [DC Cir 1923]), the court rejected the testimony of an expert regarding the results of an early type of polygraph test because it had not yet "gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made." While the *Frye* test turns on acceptance by the relevant scientific community, we have never insisted that the particular procedure be unanimously indorsed by scientists rather than generally acceptable as reliable. The submissions by plaintiff's experts did not show sufficient acceptance of a

causal relationship between mold and plaintiff's symptoms. However the court stated that this case does not (and indeed cannot) stand for the proposition that a cause-and-effect relationship does not exist between exposure to indoor dampness and mold and the kinds of injuries that Cornell alleged. Rather, Cornell simply did not demonstrate such a relationship on this record.

BUT

Granirer v. The Bakery, Inc., 992 N.Y.S.2d 158 (Sup. Ct. NY Co. April 28, 2014) - Plaintiffs commenced this action individually, and on behalf of their infant daughter as a result of personal injuries allegedly sustained from toxic mold exposure at the defendant cooperative (transverse myelitis). The Bakery now moves for summary judgment dismissing the amended complaint based upon lack of medical causation. Alternatively, The Bakery moves for an order precluding plaintiffs' expert witnesses from providing opinion evidence that: (1) exposure to mold causes the types of illnesses suffered because any such opinion is not generally accepted as reliable by the scientific community; and (2) exposure to mold in the apartment caused the specific injuries, as any such opinion cannot be proven with a reasonable degree of medical certainty. The Bakery's evidence fails to eliminate material factual issues from the case. Plaintiffs have substantiated their causation theory by showing general and specific causation. The Bakery's motion to preclude plaintiffs' expert witnesses from providing opinion evidence is denied. Moreover, a *Frye* hearing is unwarranted, as plaintiffs' causation theory is substantiated and supported by relevant examples and data accompanying the experts' opinions.

NUISANCE

Brown v. The Blennerhasset Corporation,. 979 N.Y.S.2d 27 (1st Dept. January 14, 2014) – Action for private nuisance caused by noise. The court granted the motion of the upstairs neighbor to dismiss because their' conduct, which allegedly caused plaintiff's interference, was, as a matter of law, not substantial or unreasonable because it was premised upon noises that are incidental to normal occupancy, including heavy footsteps, snoring, and using a dishwasher. The court allowed the plaintiff to serve an amended complaint alleging a breach of the warranty of habitability because it adequately alleges that the coop deprived plaintiff of her right to quietly enjoy her apartment by failing to take effective steps to abate allegedly excessive noise emanating from the neighboring defendants' apartment.

MAINTENANCE OF THE BUILDING

REPAIRS

Eida v 135 Condominium, 2014 N.Y. Misc. LEXIS 3796 (App. T. 1st Dept. 8/22/2014) - The record establishes that the trial court applied the appropriate rules and principles of substantive law and accomplished substantial justice in dismissing the small claims action after a full and fair hearing. The evidence supports the court's fact-laden determinations that plaintiff failed to timely remedy the defective shower condition in his condominium apartment, that such defect was the source of the water penetration in the downstairs apartment, and that the condominium defendant was authorized pursuant to the governing by laws to effectuate the repair work at plaintiff's expense.

BUT

Diaz v D&F Development Group, LLC [91 East 208 Street Tenants Corp.], 2014 N.Y. Misc. LEXIS 3570 (Sup. Ct. N.Y. Co. July 22, 2014)- Action to recover monetary damages for personal injuries allegedly sustained as a result of slipping and falling on debris which fell from a hole in the bathroom ceiling allegedly caused by a broken pipe in the ceiling. The coop moved for summary judgment. Plaintiff testified that she was in the shower in the bathroom when a large piece of debris came down from the ceiling striking her across her left shoulder. Plaintiff then stepped out of the shower and fell as a result of the debris coming down. Pursuant to the terms of the proprietary lease, the responsibility for repair of the broken water pipe located in the ceiling, and for repair of the means of

access thereto (the ceiling) is placed on the coop. The motion for summary judgment was denied. The branch of the motion by the coop for indemnification was denied. Under paragraph 19 of the proprietary lease indemnification is applicable only when Lessor is not obligated to perform. Lessor was obligated to make the repairs to both the broken pipe and the means of access thereto.

TERRACE REPAIR

Kosovsky v. Park South Tenants Corp., 992 N.Y.S.2d 158 (Sup. Ct. NY Co. April 17, 2014.) - This action arises from construction work performed on the balconies and facade of the building. Plaintiff allegedly failed to cooperate by allowing workers into his apartment to clean the debris which allegedly entered his home. Thus, to the extent he claims a breach of paragraph 18(b) of the lease arising from debris entering his apartment, issues of fact exist regarding whether remediation could have cured the debris issue had he cooperated with the coop, whether his failure to allow the coop to enter the apartment violated the cooperation clause set forth in paragraph 24 of the lease, and whether his actions could have lessened the amount of damages he now seeks

BICYCLE

DeJesus v. Parkchester South Condominium Inc., 988 N.Y.S.2d 481 (1st Dept. July 3, 2014) - Defendant established its entitlement to judgment as a matter of law in this action where plaintiff was injured when a child, riding a bicycle, struck her from behind as she walked on an interior walkway of defendant's complex. Defendant submitted the testimony of a member of its private security force, who stated that defendant employed five to seven security guards during normal business hours. He asserted that people traversed the property, and some "occasionally" rode bicycles, but this happened "rarely." Nevertheless, defendant had a rule against riding bicycles in this area, and there were a number of signs posting this rule. Defendant also had surveillance cameras on the interior and exterior of the property, and the security officer further stated that when someone was found riding a bicycle, he or she would either be given a summons, the bicycle would be confiscated, or a warning would be issued. Defendant demonstrated that it provided the requisite "minimal precautions" to protect people from the foreseeable harm of bicycle riders. The court stated it is difficult to understand what further measures could have been undertaken to prevent plaintiff's injury.

MANAGING AGENT

Green, v. Brown Harris Stevens, 984 N.Y.S.2d 632 (App. T. 1st Dept. December 19, 2013) - Defendant, as managing agent of the (nonparty) residential cooperative corporation, may not be held liable for breach of its contractual duties since it was at all times acting as agent for a disclosed principal. Nor can defendant be cast in damages for negligence, in the absence of any showing that it was in exclusive control of the building. Small claims action dismissed.

Vasquez v Fieldstone Plaza Condominium, 2014 N.Y. Misc. LEXIS 4479 (Sup. Ct. Bx. Sept. 3, 2014) - Plaintiff claims that he was injured while delivering mail to the condominium The area of the ramp and stairs where plaintiff's accident occurred is a common element of the building. The managing agent moved for summary judgment. Veritas did not have a management agreement that put it in exclusive and complete control over the condominium and did not have any independent authority to act to hire a contractor to perform work on the premises. Veritas generally had to obtain Board approval to do any work at Fieldstone. Veritas could not cause repairs or alterations to be performed involving expenditures in excess of $3,000 without Board approval. Under these circumstances, it cannot be said that Veritas had exclusive control over the management and operations of the building. There was no evidence that the agent had any notice of a defective condition that it was obligated to call to the board's attention, and the board's cross-claim against was dismissed also.

CORPORATE ISSUES

BOOKS AND RECORDS - ELECTIONS

Pastrana v. Cutler [Greencroft Condominium II], 983 N.Y.S.2d 33 (2d Dept. March 12, 2014) - action for a judgment declaring that the plaintiffs are entitled to inspect the books and records of the condominium. Unit owners submitted a petition to the Board that 25% of the unit owners signed demanding a special meeting for the purpose of removal of all of the current Board members and, if they were removed, for the election of new Board members. This was refused. The court granted the plaintiffs' first motion to compel the defendants to permit the plaintiffs to review the condominium's books and records and to compel the convening of a special meeting. Defendants continued to prevent the plaintiffs from inspecting the books and records, and declined to call a special meeting. The Supreme Court granted the plaintiffs' third motion. The order directed that the plaintiffs were to schedule the date of the special meeting, set the time and location of the special meeting, send out the notice of the special meeting with a proxy, and conduct the special meeting and to retain Honest Ballot Association or Election Services Solution to collect the proxies, conduct the election, and certify the results. Although the third order may have deviated somewhat from the strict letter of The condominium's by-laws in permitting the plaintiffs to call for and conduct the special meeting, the Supreme Court acted appropriately pursuant to its inherent plenary power to enforce compliance with its prior orders and to fashion a remedy for the proper administration of justice

Board of Managers of Central Park Place Condominium, v. Potoschnig, 975 N.Y.S.2d 665 (1st Dept. 11/26/2013) - Plaintiff's entitlement to unpaid common charges brings with it a right to late fees, interest, and attorneys' fees, all of which are provided for in the condominium by-laws. Defendant has not raised an inference that the late fees and interest, which, in accordance with the bylaws, were imposed only upon default, were usurious Defendant's challenges to the amounts due may be addressed by a referee. The referee should also determine the amount of plaintiff's reasonable attorneys' fees.

Lenox Gardens Apartment Corp., v. Sandville, New York Law Journal, June 4, 2014, Pg. 25 (Civ. Ct. NY Co.) - After trial in this holdover predicated on a breach of a proprietary lease, the Court rendered a judgment in favor of Petitioner albeit finding that Respondent had eventually cured the breach. Petitioner moved for attorneys' fees and for unpaid use and occupancy. The proprietary lease establishes Petitioner's entitlement to a judgment for attorneys' fees upon prevailing in litigation. Even though the Court found that Respondent cured the breach, Petitioner's establishment of an entitlement to a judgment and the necessity for bringing this proceeding in the first place demonstrates Petitioner's status as the prevailing party for the purpose of determining Petitioner's entitlement to a judgment for attorneys' fees. Use and occupancy was also awarded.

WEST'S JURY VERDICTS -

Vanchiro v. Powells Cove Owners Corp., 2014 WL 4639121 (Verdict and Settlement Summary)(Sup. Ct. Queens County May 21, 2014) - The case proceeded to a bench trial. Judge Kitzes, noting that the plaintiff was apparently ready to drop the lawsuit immediately prior to trial but the defendant wanted attorney fees, issued judgment in favor of the plaintiff, awarding the plaintiff $2,000 in attorney fees for time at trial that day and later awarding the plaintiff $1,070 for costs and disbursements.

LEGAL ISSUES INVOLVING THE SPONSOR

UNSOLD SHARES – PROFESSIONAL UNIT

Katz v 61 West 9 Tenants Corp., 2014 N.Y. Misc. LEXIS 3328 (Sup. Ct. N.Y. Co. July 23, 2014) - The issue on the parties' dueling summary judgment motions is whether the plaintiff violated the Professional Lease with the

defendant cooperative by subletting the premises. Paragraph 11 of the Lease, "Use of Premises" states: “The Lessee may occupy or use the apartment or permit the same or any part thereof to be occupied or used as a doctor's office only. However, Lessee has the option … to perform the necessary alternations … so as to permit residential occupancy.” Paragraph 34 (a) states that all leases which are Unsold Leases retain their character as such until such leases are held by a purchaser for bona fide occupancy of the apartment. Defendant argues that plaintiff cannot avail herself of the status of the holder of an Unsold Lease because plaintiff is holding the Lease for her occupancy. The court agreed with plaintiff's assertion that the "bona fide occupancy" referred to in Paragraph 34 (a) refers to "residential occupancy" as set forth in Paragraph 11 of the Lease. The construction proposed by the defendant, that plaintiff's occupancy and use of the premises as a business comes within the termination of Unsold Lease provision of Paragraph 34 (a) is contrary to the nature of the Lease as set forth in Paragraph 11 which clearly states that the premises may only be used for a doctor's office unless the premises is converted to residential occupancy. Such shares as described in Paragraph 34 (a) do not exist in this case because no conversion has taken place. To the extent that defendant relies upon Paragraph 34 (a) (2) that plaintiff's occupancy without conversion terminates the leasehold's status as an Unsold Lease, defendant misreads that provision by failing to acknowledge that Paragraph 11 of the Lease specifically authorizes plaintiff to occupy the apartment as a doctor's office. Therefore the only plausible interpretation of "occupancy" in Paragraph 34 (a) of the Lease is residential occupancy.

ELECTIONS

420 West 206th St. Owners Corp. v. Lorick, 2014 N.Y. Misc. LEXIS 585 (Sup. Ct. N.Y. Co. Feb. 5, 2014) - Plaintiffs commenced this action in February 2012 "to once and for all resolve" the issue of whether Lorick is entitled to cast his votes for all five seats on the Coop's Board. The by-laws provide that upon he earlier of three years subsequent to the Closing or after fifty-one percent (51%) of the shares have been sold, the Holder(s) of Unsold Shares will relinquish control of the Board of Directors if they have such control and will not elect a majority of the Directors of the Apartment Corporation even though the number of shares owned by them may enable them to otherwise do so. The First Department, relying on Second Department cases, held that a by-law provision, restricting the sponsor to the election of no more than two directors "by reason of" its vote of unsold shares, clearly limited the sponsor to voting its shares for one less than a majority of the board of directors. Thus appellate precedent in both the First and Second Departments weighs in favor of finding that Lorick similarly should be restricted to voting his unsold shares only for the two directors he is permitted to designate.

RIGHTS AGAINST AND LIABILITIES TO THIRD PARTIES

DISCRIMINATION

In the Matter of the Application of East River Housing Corporation v. New York State Division of Human Rights, 2013 Misc. Lexis 4878 (Sup. Ct. NY Co. December 4, 2013) - Complainant filed a complaint with DHR alleging East River discriminated against her "relating to housing accommodations because of disability" DHR issued an order finding that "there is no probable cause to believe that the respondent has engaged in the unlawful discriminatory practice complained of". The Dismissal Order was based on the fact that the evidence does not support that Complainant's dog is necessary, as opposed to helpful, to the use and enjoyment of her home. The Housing court then awarded East River "a final judgment of possession in light of the recently issued decision by Human Rights". DHR then notified East River that the proceeding had been "reopened" and "remanded" to the DHR Regional Director for reconsideration. HUD notified East River that it was "reactivating" the HUD Complaint after a purported determination by DHR that HUD should investigate the HUD Complaint. Petitioner then commenced the instant Article 78 proceeding seeking to annul the order to reopen. In an Article 78 proceeding brought against the DHR where no hearing has taken place, "the appropriate standard of review is whether the determination was arbitrary and capricious or lacking a rational basis." The court found that the Order had a rational basis. The commissioner may, on his or her own motion, whenever justice so requires, reopen a proceeding. Pursuant to this grant of discretion, DHR reopened the DHR Complaint and remanded it "to the Regional Director for

reconsideration and for such other or further action as deemed appropriate by the Regional Director." The Article 78 proceeding was dismissed.

OIL SPILL

Board of Mgrs. on Behalf of the Unit Owners of the 322 W. 57th St. Condominium v. Leardon Boiler Works, Inc., 2014 N.Y. Misc. LEXIS 2684 (Sup. Ct. N.Y. Co. June 16, 2014) - This action arises from an oil spill of more than 8,000 gallons of petroleum under a condominium building. Plaintiff seeks to recover for damages and costs in the investigation, remediation and removal of the discharged oil. PSI pumped oil to fuel Tank 1. However, because the Fill Line for Tank 1 was left disconnected, approximately 8,000 gallons of fuel did not reach Tank 1. Therefore, the oil spilled into the underground vault. Since Number 4 fuel had a lower viscosity, and upgrades to the underground vault were not recommended by Lawless, the oil soaked through the concrete walls and floor of the underground tank vault, and escaped to the gravel layer under the concrete floor slab. Hess now moves to dismiss the complaint. The action is governed by Section 181 of the Navigation Law, which imposes strict liability on "dischargers" - a term which included the condominium. However although even faultless owners of contaminated lands have been deemed "dischargers" for purposes of their own Section 181(1) liability, where they have not caused or contributed to (and thus are not "responsible for") the discharge, they should not be precluded from suing those who have actually caused or contributed to such damage. To preclude reimbursement in that situation would significantly diminish the reach of Section 181(5)." The Court of Appeals has stated that "Navigation Law § 181[5] allows a faultless landowner to seek contribution from the actual discharger, even though the landowner itself is liable as a discharger". The motion to dismiss was denied.

LABOR LAW - CONDO

Palacios v. Mehta [Dag Hammarskjold Tower Condominium], 2014 N.Y. Misc. LEXIS 4266 (Sup. Ct. N.Y. Co. Sept. 29, 2014) - Plaintiff seeks to recover damages for personal injuries he allegedly sustained as the result of his fall from a ladder while performing plastering work in the interior of a condominium unit. The court found that pursuant to the Court of Appeals ruling in *Guryev v Tomchinsky* the plaintiff's complaint against the Condominium must be dismissed. The facts in *Guryev* are similar to the instant case in that the plaintiff, a construction worker, was injured while working on a renovation project in a condominium unit. The Court held that because the owner of the Condominium Unit owns the unit in fee simple absolute, the Condominium was not an owner or an owner's agent for purposes of the Labor Law. Therefore, as the Condominium has no property interest in the premises upon which the plaintiff was injured, and as it neither contracted for nor controlled the construction work on the premises, the plaintiff's cause of action pursuant to Labor Law §§ 240 and 241(6) are dismissed. In addition, the defendant Condominium demonstrated its prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging common-law negligence and violation of Labor Law § 200 by establishing that it did not own, occupy, or control the premises and that it did not have the authority to supervise or control the manner in which the work was performed

LABOR LAW - COOP

Guzman v 170 West End Ave. Assoc. [170 West End Ave. Owners Corp.], 981 N.Y.S.2d 678 (1st Dep't2014) – Plaintiff's injuries were caused when he was struck by a 100-pound electrical cable that fell from a height of approximately 27 stories because it was improperly secured to a scaffold. Plaintiff was awarded summary judgment on his Labor Law Sec. 240 claim. Defendants' contract with Kay provided that Kay would indemnify "the Owner Parties" for any "liability or claims for damages [or] injuries . . . arising . . . as the result of any event or occurrence which arises in connection with the Work." Thus, indemnification is not premised upon Kay's negligence. Since there is no dispute that plaintiff's injuries arose out of the contract "Work," defendants are unconditionally entitled to indemnification by Kay. Although the indemnification clause appears to indemnify defendants for their own negligence, it is nevertheless enforceable by virtue of the "savings" language of the clause ("to the fullest extent permitted by law"). There is no view of the evidence that would support a conclusion that defendants were actually negligent. Their liability is purely vicarious. The court rejected Kay's argument that

defendants 170 West End Avenue Owners Corp. and 170 West End Avenue Associates are not entitled to indemnification because only 170 West End Avenue Condominium is specifically identified as the "Owner" in the contract. Kay's obligation is not limited to the "Owner," but includes "the Owner Parties and their respective officers, board members, agents and employees." 170 West End Avenue Associates is the managing agent of the premises, and 170 West End Avenue Owners Corp. is the actual owner of the premises.

Bonaerge v. Leighton House Condominium, 2014 N.Y. Misc. LEXIS 3587 (Sup. Ct. Bx. Co. July 10, 2014) - Labor Law action to recover damages for injuries sustained when plaintiff was struck by a header beam while dismantling a sidewalk bridge. Defendants contend that plaintiff was not subjected to an elevation-related risk because the beam was being lowered from a height of eight feet. The fact that the beam was being lowered when it struck plaintiff does not remove the case from the statute's protection. Plaintiff's cross-motion for judgment on liability on his Labor Law § 240(1) cause of action was granted. Leighton/Cooper also move for summary judgment on their cross-claim seeking contractual and common-law indemnification from the general contractor. The contract provides that the contractor "shall indemnify and hold harmless the Owner . . . from and against all reasonable claims, damages, losses and expenses . . . attributable to bodily injury . . . but only to the extent caused in whole or in part by negligent act(s) or omission(s) of the Contractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder." Leighton's liability under Labor Law § 240(1) is purely vicarious, and the "saving" language "to the fullest extent permitted by law" renders the provision enforceable.

Bogdanowicz v New York Univ. Med. Ctr. Condominium, 2014 N.Y. Misc. LEXIS 2962 (Sup. Ct. N.Y. Co. June 30, 2014) - This is an action to recover damages for personal injuries sustained by an asbestos handler when he fell from a ladder while working at a construction site. The contractor argues that the indemnification provision in the contract with the condominium is unenforceable, because it purports to indemnify NYU for its own negligence and does not contain a "savings clause". An indemnification clause that purports to indemnify a party for its own negligence is not void under General Obligations Law § 5-322.1 if it authorizes indemnification "to the fullest extent permitted by law". However, as in the instant case, where there is no negligence on the part of the proposed indemnitee, that statute does not apply - it only prohibits enforcement of a contractual indemnification clause if the party seeking indemnification was negligent, or had the authority to supervise, direct, or control the work that caused the injury.

NEGLIGENCE

Peat v Fordham Hill Owners Corp., 974 N.Y.S.2d 61, (1st Dep't 10/31/2013) - Plaintiff was injured while refinishing the floor in an apartment. While lacquering the floor in the apartment, the pilot light on the kitchen stove ignited the highly flammable lacquer, engulfing plaintiff in flames and causing second and third-degree burns over 50% of his body. The jury returned a verdict finding that the negligence of the coop proximately caused the accident, and that while the owner of the apartment was negligent, its negligence was not a proximate cause of the accident. The jury awarded $18,000,000 to the plaintiff. The jury's verdict finding Owners 100% liable was based upon a fair interpretation of the evidence. The record shows that it was the coop's responsibility to assure that the gas in the apartment was shut off prior to plaintiff undertaking his work of floor refinishing. Moreover, the jury's findings that the unit owner was negligent but that its negligence was not a proximate cause of plaintiff's injuries, and that plaintiff was not comparatively negligent were consistent and amply supported by the evidence.

AIA CONTRACT - PENALTY

Phoenix Constr., Inc. v. 70th Street Apts. Corp., 2014 N.Y. Misc. LEXIS 4408 (Sup. Ct. N Y Co. October 7, 2014) - Plaintiff contracted to perform roofing and facade construction for the co-operative. Plaintiff alleges that it completed its work and has not been fully compensated. Plaintiff filed a mechanic's lien against the premises. The coop served and filed a counterclaim alleging that it is entitled to a judgment against plaintiff in the amount of $45,500.00 pursuant to a penalty provision in its contract with plaintiff that provided for a "penalty" of $ 250 per day after 4 calendar months. The coop seeks summary judgment on the counterclaim on the grounds that

plaintiff's 302-calendar day delay is without justification. The coop expressly asserts that the provision in the rider is one of penalty, and the provision provides the term "penalty." The provision is not one for liquidated damages. The provision is not enforceable as is, and therefore, the recovery sought by the coop is limited to actual damages proven.

INSURANCE – TIMELY NOTICE

69 West 9 Owners Corp., v. Admiral Indemnity Company, 979 N.Y.S.2d 591 (1st Dept. Feb. 11, 2014) - In this declaratory judgment action, plaintiffs seek coverage from defendant in an underlying lawsuit against the plaintiff cooperative and some of its board members brought by a resident shareholder. The motion court properly denied partial summary judgment to plaintiffs, as there are questions of fact regarding whether plaintiffs provided notice of claim as soon as practicable and whether they maintained a good-faith, reasonable belief that the January 2007 correspondence was redundant of the December 2006 notice of incident. The motion court also properly denied partial summary judgment to defendant insurer, as there is a question of fact regarding the timeliness of its disclaimer. There is a material factual dispute over the date on which the basis for defendant's disclaimer was readily apparent, as well as whether defendant's explanation for any delay is satisfactory.

Argo Corp. v Admiral Indemnity Co., 2014 N.Y. Misc. LEXIS 1552 (Sup. Ct. N.Y. Co. Apr. 1, 2014) - Action seeking a declaration that defendant insurance carrier had a duty to defend or indemnify plaintiff in connection with an underlying action. The insurer established that plaintiff first became aware of the damage to an apartment stemming from water leaks in February 2008 and that it was directly contacted by the shareholder's attorney to discuss these damages in May of 2008, yet did not notify Admiral about the damages until March 19, 2009, when the shareholder commenced suit. Plaintiff's property manager testified that he was forwarded a copy of and read the October Letter wherein the shareholder's attorney explicitly mentioned bringing suit and directed that the letter be forwarded to the Building's insurer. Thus, starting in October 2008, plaintiff was on notice that the damage to the shareholder's apartment could result in a claim and was under a duty to give notice to the carrier. Plaintiff did not have a reasonable basis to believe that no claim would be asserted against it. Its assertion that managing agents generally are not liable to third parties for injuries occurring in an owner's building is immaterial as the inquiry is whether it had a rational basis to believe no claim would be made against it, not whether it could ultimately be held liable. The carrier had no duty to defend the plaintiff.

ADJACENT OWNER - ACCESS LICENSE – RPAPL § 881

Board of Managers of Artisan Lofts Condominium v. Moskowitz, 979 N.Y.S.2d 811 (1st Dept. February 13, 2014) - In determining whether to grant a license pursuant to RPAPL § 881, courts generally apply a standard of reasonableness. Courts are required to balance the interests of the parties and should issue a license "when necessary, under reasonable conditions, and where the inconvenience to the adjacent property owner is relatively slight compared to the hardship of his neighbor if the license is refused." Petitioner has failed to make a showing as to the reasonableness and necessity of the scaffolding device referenced in the order, a "swing scaffold," which would need to be attached to respondents' building. While the parties agree that a limited license for petitioner to protect respondents' property is reasonable, they sharply disagree over the extent of access for any other purpose. Until that dispute is resolved, the order was premature. The order which granted petitioner a license to enter respondents' adjoining property in order to take steps to protect respondents' property during renovations to the facade and roof of petitioner's building was unanimously reversed, the order was vacated, the petition denied, and the proceeding dismissed.

TRESPASS

Madison 96th Assoc., LLC v. 17 E. 96th Owners Corp., 2014 N.Y. App. Div. LEXIS 7408 (1st Dept. 10/30/2014) – The coop counterclaimed for trespass. Summary judgment for the plaintiff on the trespass issue was reversed. The transfer of risk for an excavation to the owner/excavator by the NYC Admin. Code does not carry with it a corresponding unfettered right to excavate more than 10 feet below curb level, or that the adjoining property

owner must allow underpinning of its property simply because the property owner undertaking such excavation bears absolute liability for any damage it may cause to the adjoining property. Although the record shows that the coop granted plaintiff's request for permission to enter and inspect its property, that license was for the purpose of a post-demolition, pre-excavation inspection of the coop's property. It does not provide the basis for finding that the coop consented to the erection of any permanent structure on its property, including the underpinning.

TRIP AND FALL

Topchieva v Lovett Co. [Lex 54 Condominium] 990 N.Y.S.2d 815 (App. Div. 1st Dep't2014) - As depicted on the surveillance video included in the record, plaintiff was injured when she slipped and fell immediately upon entering the lobby of defendants' building. One of the lobby's double glass doors was closed and locked, while the door through which plaintiff entered was unlocked and periodically held open by the doorman for pedestrians who were entering and exiting the building, including plaintiff. The evidence shows that while a mat was placed at the threshold, it was primarily placed in front of the locked door. After examining the video, we conclude that Supreme Court correctly held that there was an issue of fact as to whether defendants were negligent in their placement of the mat.