ASSOCIATION OF RIVERDALE COOPERATIVES & CONDOMINIUMS

SIGNIFICANT LEGAL DECISIONS OF 2016

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Marc J. Luxemburg, Esq.
Gallet Dreyer & Berkey, LLP mjl@gdblaw.com

LEGAL ISSUES INVOLVING UNIT OWNERS AND RESIDENTS

APPLICATION OF THE BUSINESS JUDGMENT RULE TO BOARDS OF DIRECTORS

Seligson v. Board of Managers of 25 Charles Street Condominium, 138 A.D.3d 432 (1st Dept. April 5, 2016) - Petitioner brought article 78 to challenge budgetary determinations made by the Board of managers. Petitioner failed to point to any evidence to show that the board's actions were "outside the scope of its authority," "did not legitimately further the corporate purpose," or were made "in bad faith" as required to overcome the protection of the business judgment rule. Nor does it avail petitioner to assert that the board's actions were "arbitrary and capricious," since board action that comes within the business judgment rule cannot be characterized as arbitrary and capricious, or an abuse of discretion.

Osberger v. 18 Mercer Equity Inc., 31 N.Y.S.3d 922 (Sup.Ct. NY Co. 12/23/15) - Action by shareholder to recover attorney's fees expended as a result of retaining counsel to intervene on their behalf in administrative proceedings brought by the City of New York against the Coop. The administrative proceedings were in response to complaints made against Plaintiffs by a former member of the Board of Directors that Plaintiffs were illegally renting their apartment for short periods of time. The Business judgment rule protects the actions of the board and a former board member in reporting apparent short term rentals of the apartment The former Board member's calls to 311—because he was concerned for the well-being of the other tenants in the building- - constituted legitimate actions in furtherance of the cooperative corporation's purposes.

Beach Point Partners v. Beachcomber, Ltd., --- N.Y.S.3d ----, 2016 WL 6605184 (2d Dept. November 9, 2016) – plaintiffs alleged that the that the board of directors, who were individually sued, acted in bad faith and discriminated against them by prohibiting parking on the grass behind the building where their apartment was located. The plaintiffs claimed that when they purchased the unit, they had been granted a right to park in that location since the only entry to the unit is in the rear of the building. They also claimed that since they are the only shareholders with a rear-facing unit, the defendants' action was specifically targeted at them. Defendants demonstrated their prima facie entitlement to judgment as a matter of law dismissing the complaint by establishing that the decision to enforce parking rules and prohibit parking in the grass area behind one of the cooperative buildings was protected by the business judgment rule. In particular, the defendants demonstrated that they were acting in the best interests of the cooperative after making a number of capital improvements that added to the aesthetics and value of the property. The defendants' motion was properly granted.

Chateau Owners Corp. v. Monahan, 2016 WL 1438020 (App. T. 2d Dept. 3/30/16) - Cooperative commenced this proceeding to recover possession of an apartment. The basis for the proceeding is that tenant had breached the lease by

making plumbing modifications and installing a dishwasher without permission. While paragraph 21(a) requires a tenant to obtain permission before making plumbing modifications, which would include plumbing modifications made in connection with the installation of a dishwasher, it does not require a tenant to obtain permission for the installation of a dishwasher per se. Thus, as landlord did not demonstrate that tenant had breached paragraph 21(a) of the lease by making unapproved plumbing modifications, and the installation of a dishwasher without obtaining permission is not a breach of the lease, landlord should not have been awarded summary judgment. Summary judgment for cooperative was reversed.

In re Schulte, [1125 Park Avenue Corp.] 2016 WL 1546922 (Surr. Ct. N.Y. Co. 4/14/16) – Trustee of testamentary trust sued the coop and the executor to compel transfer of an apartment to the trust. The court found that the most that decedent could bequeath to the Trust was the right to receive that property in kind if the Board consented or, failing that, the right to receive the proceeds of sale to a purchaser acceptable to the Board. Absent the Board's consent, decedent could no more freely give an enforceable interest in the apartment to a gratuitous transferee at death such as the Trust than he could freely give such an interest to a transferee for value under a contract of sale.

•The trustee also claimed that the coop could not unreasonably withhold consent because she was a member of the decedent's "immediate family". As a basic principle of law, a trust is a separate legal person, distinguishable from the persons who have a beneficial stake in it. The construction offered by the trustee does not have logic to commend it: since the term "trust" is not normally subsumed within the phrase "immediate family," The trustee cannot argue that the phrase "immediate family" must be read to include the term "trust" because that term was not expressly excluded from the phrase.

•The executor also moved to compel the transfer alleging that the Board withheld its consent in order to favor a specified member of the Board who expressed an intention to acquire the apartment for herself. Where the business judgment rule applies, it allows decision-making to proceed without judicial second-guessing so long as the decision in question is not a product of bad faith, such as self-dealing or unlawful discrimination. There is an issue of fact as to whether the discretion accorded to the Board by the governing instruments (albeit very broad) was exercised duly or was used in a way that violated the duty of the Board to act in good faith vis-a-vis its shareholders. The motion to dismiss is granted with respect to the trustee's petition, but it is denied with respect to the Executor's cross-claim.

Graham v. 420 East 72nd Tenants Corp., 2016 WL 3077373 (Sup. Ct. NY Co. 6/1/16) - Plaintiff sued for declaratory relief ordering that the sale of plaintiff's apartment be approved, and breach of contract alleging that the defendants acted in bad faith and/or self-dealing in not approving the sale. The Board may have engaged in self-dealing by denying the application and basing this denial on the sales price being too low, when the Board had previously offered to the Plaintiff to purchase the Unit from her at the price of $400,000. The Board's offer was much less than the Purchasers initial offer of $495,000.00. Further, Plaintiff has shown that after the Board initially stated that the $495,000.00 sales price was too low, and to come back with an offer of at least $535,000, Plaintiff complied with this request, but the Board still denied the sale. There are issues of fact as to whether the Board engaged in self-dealing because they had an interest in purchasing the Unit. The summary judgment motion was denied.

Estate of Del Terzo v. 33 Fifth Ave. Owners Corp., 136 AD3d 486 (1st Dept. 2/11/16) (3-2 decision) – Action by an estate to compel the transfer of an apartment to two brothers. Paragraph 16 (b) provides that "consent shall not be unreasonably withheld to an assignment of the lease and shares to a financially responsible member of the Lessee's family". Paragraph 16 (b) does not limit the application to "only one" family member and there is no prohibition in the lease against a "Lessee" being more than one person. By failing to consider the joint application as a whole, refusing to consider Michael's offer to provide further guarantee of payment, and requiring that each coapplicant be individually financially qualified to meet the carrying expenses of the apartment, defendant unreasonably withheld its consent to the transfer.

Dissent: The consent sought here was not for "*a* financially responsible" family member. It was for *two* adult family members, only one of whom the corporation considered to be financially responsible. The Coop was being asked to do several things it had valid reasons to reject: one, to give present possession of the apartment to a family that lacked the requisite financial responsibility; two, to approve part ownership of the apartment by an individual who would not be residing there; and three, to authorize possible future shared possession by two families of what is now a single apartment. It was certainly reasonable for the Coop to decline to give part ownership and possession of the apartment to a family lacking the financial ability to maintain it.

Decision Affirmed: 28 NY 3d 1114 (12/30/16)

Pilipovic v. Laight Cooperative Corp., 137 A.D.3d 710 (1st Dept. 3/31/16) – An application to alter a portion of the common elements adjacent to an apartment was governed by the not unreasonably withheld standard of Paragraph 21 (a) of the proprietary lease. Plaintiffs sought consent from defendant Board of Directors to make alterations to the loading dock adjacent to their ground-floor apartment for reasons of safety and aesthetics. Defendants' contention that the alterations provision of the lease applies only when a lessee seeks to make alterations to areas under his or her exclusive ownership, and not to common areas, is without merit, since the provision unambiguously states that it applies to proposed alterations to the "apartment or building." The complaint raises issues as to whether defendants' action in denying plaintiffs' application was unreasonable.

- The cause of action alleging a violation of BCL § 501(c), which requires parity of rights granted to shareholders by the lease or bylaws, is adequately pleaded to the extent plaintiffs allege that, as a result of defendants' conduct, they were the only shareholders whose apartment has only one safe mode of egress
- The causes of action alleging discrimination under the State and City Human Rights Laws have alleged sufficient facts to raise issues as to whether defendants made the determination to deny the alterations on account of plaintiffs' race or national origin. Plaintiffs point to email exchanges between the board president and the former building manager, including one that could be construed as referring to plaintiff's race in a derogatory manner and another apparently ridiculing plaintiff's Eastern–European nickname.

BUT

Size v. Bd. of Managers of 65 North Moore Condominium, 2016 WL 341548 (Sup. Ct. NY Co. January 22, 2016) - Plaintiff was attempting to construct a second means of egress from Unit B to a foyer/limited common element area. Plaintiff is required to get permission from the Board of Managers. But because the second egress is a material structure within the meaning of RPL § 339-k and because the construction of the egress would affect the common elements of the Condominium, it would also affect another unit owner. Such unit owner's consent is required before any work can proceed on the egress, and without such consent, the plaintiff cannot proceed despite having obtained the necessary approval from the Landmarks Commission and Department of Buildings. The adjacent unit owner is entitled to judgment dismissing the claim against it and plaintiff has failed to provide any evidence that it has unreasonably withheld its consent with regard to building a stairwell leading to the common element area.

De Brignac v. Friedman [Ventana Condominium], 2016 WL 6563611 (Sup. Ct. NY Co. October 28, 2016) - In 2011 plaintiffs sustained water damage to their unit when it was twice flooded by significant leaks from both the unit above theirs and common elements of the building. The members of the board of managers of a condominium owe a fiduciary duty to the individual unit owners in their management of the common property. The by-laws provide that the individual members of the board of directors may not be held personally liable to a unit owner unless "a judgment or other final adjudication … establishes (a) that his or her acts or omissions were in bad faith or involved intentional misconduct or a knowing violation of law, or (b) that he or she personally gained in fact a financial profit or other advantage to which he or she was not legally entitled," which generally tracks the common-law definition of breach of

fiduciary duty. In opposition to the Ventana defendants' prima facie showing that they did not act in bad faith, were not engaged in intentional misconduct or a knowing violation of law, or personally gained a financial profit or advantage, plaintiffs failed to raise a triable issue of fact. Summary judgment granted.

Pomerance v. McGrath [310 West 52nd Street Condominium Association], 38 N.Y.S.3d 164 (1st Dept. October 4, 2016) - While directors of a condominium board who cause the performance of an affirmative tortious act of malfeasance may be subject to personal liability, directors who are responsible for mere nonfeasance by the entity, without causing the commission of any affirmatively tortious acts, are not subject to personal liability for such nonfeasance. Plaintiff alleges that the board did not honor her inspection rights and failed to respond adequately to her complaints of noise emanating from an adjacent apartment. These allegations amount only to mere nonfeasance for which the board members cannot be held individually liable. Plaintiff's conclusory allegation that the board ignored her noise complaints to retaliate against her for other disputes does not suffice to transform the claim into one for affirmative tortious misconduct. The claims will proceed against the board members in their official capacities. Honoring plaintiff's inspection rights and enforcing bylaws against excessive noise are obligations of the condominium and of the board as a body. Mere failure of the board members to cause the association to discharge such obligations, while properly grounds for a claim against the board members in their official capacities, does not give rise to a cause of action against each of them in his or her individual capacity.

Cohen v. Cassm Realty Corp., 2016 WL 5897520 (Sup. Ct. NY Co. March 14, 2016) - Plaintiff may hold board members jointly and severally liable with the cooperative for a breach of their fiduciary duties under the By–Laws, particularly when it also violates a statutory mandate, here MDL § 78, if she demonstrates two sets of facts: first that they directed, controlled, approved, or otherwise participated in intentional neglect of the building's common elements, such as its roof beams and roof. Second, if the intent of the Board members in purposefully neglecting the common elements was to inflict particular injury on plaintiff, who as the owner of the top floor unit was likely to be most adversely affected by neglect of the roof and common elements. As evidence of such an intent, plaintiff attests that defendant has written nasty emails calling her a liar and crazy and that they have been rude and nasty to her. The court granted the individual defendants summary judgment dismissing plaintiff's claim against the individual defendants except the claim based on a violation of the statute.

Irene David Realty, Inc. v. Moyal [121 Varick Street Corp], 135 A.D.3d 599 (1st Dept. January 21, 2016) - Minority shareholders in a commercial cooperative allege that defendant president of the board of directors, engaged in self-dealing and breached his fiduciary duties through a series of transactions where he surreptitiously and without board approval obtained majority control of the cooperative, pressured the board of directors into approving loans for an unnecessary electricity upgrade in the building, and entered into subleases providing him and the entities he controlled with a substantial profit. Defendants sought summary judgment dismissing the complaint. Issues of fact exist concerning whether they exceeded the protection of the business judgment rule.

Pomerance v. McGrath [310 West 52nd Street Condominium Association], 38 N.Y.S.3d 164 (1st Dept. October 4, 2016) - Shareholders have both statutory and common-law rights to inspect a corporation's books and records, so long as the shareholders seek the inspection in good faith and for a valid purpose. While inspection rights permit shareholders to examine records that are relevant and necessary for a valid purpose, they do not grant shareholders a right to be involved in day to day management. Whether a shareholder asserts statutory or common-law inspection rights, the shareholder may be required to demonstrate good faith and a valid purpose, and inspection may be limited to the scope of records relevant and necessary for such purpose. Shareholders' statutory inspection rights are governed by BCL § 624, which grants shareholders the right to examine and make paper copies of a list of shareholders and shareholder meeting minutes, and requires a corporation to deliver an annual balance sheet to a shareholder. Shareholders seeking to inspect

more extensive records may proceed under their common-law inspection rights, and courts may grant an in-person examination of the relevant records, or require the corporation to deliver records to the shareholder.
•Condominium unit owners' inspection rights are governed by RPL 339-w which grants unit owners the right to examine "records ... of the receipts and expenditures arising from the operation of the property," as well as "the vouchers authorizing [such] payments," during "convenient hours of weekdays."
•Plaintiff has a right, whether statutory or under the common law, to examine monthly financial reports, building invoices, minutes of board meetings, and appropriately redacted legal invoices, so long as she seeks to do so in good faith and for a valid purpose. Any issue defendants raise concerning the good faith and validity of the purpose of plaintiff's request shall be determined by the court after a hearing.
•RPL § 339–w differentiates between a unit owner's right to examine records and a board's obligation to deliver records. RPL § 339–w requires the board to deliver an annual report summarizing receipts and expenditures, while merely conferring on a unit owner the right to examine records and vouchers of receipts and expenditures during convenient hours of the weekday. Defendants have no obligation to create and deliver to plaintiff copies of the records in question and they may require plaintiff to examine records in person at the management agent's office. Plaintiff has a right to make paper copies while examining. We see no reason to differentiate between allowing plaintiff to make paper copies and allowing her to create electronic copies, as is now common. Defendants' confidentiality concerns are sufficiently accommodated by requiring plaintiff to sign a confidentiality agreement.

GDLC, LLC v. The Toren Condominium, 2016 WL 6189017 (Sup. Ct. NY Co. October 21, 2016) - Petitioners' request to inspect and copy the books and records of respondents. An Article 78 proceeding may be brought against a *body*, which includes every *board*, corporation, or officer. Petitioners are permitted to bring this proceeding against the board. To perform his directing duties, a corporate director must keep himself informed as to the policies, and business affairs of the corporation, and he may be subjected to liability for improper management. Because of these positive duties and potential liabilities, corporate directors have an absolute, unqualified right to inspect their corporate books and records." Petitioner is entitled to inspect and copy the books and records, including the settlement agreement and the RAND report. In order to fulfill a board member's fiduciary obligations, board members need unfettered access to the books and records of the condominium. Plaintiff's cross-motion for summary judgment was granted.

AUTHORITY OF THE MANAGING AGENT

Roger Morris Apartment Corp. v. Varela, 2016 WL 2727378 (Civil Court NY Co. May 10, 2016) - Petitioner commenced this holdover proceeding seeking possession of Apt. 22, on the basis that Respondent breached his lease by installation of a central air-conditioning system without permission. Petitioner must overcome the apparent factual dispute between the managing agent and the designer about whether the agent gave his consent to install the system. Petitioner shows that Respondent's proposal not only did not indicate that Respondent would install the HVAC system, but it affirmatively stated that Respondent would not do any HVAC work and that Respondent would not do any work affecting that envelope of the building. Respondent claimed the agent advised the designer that he consented to the installation of the HVAC system so long as the system was quiet and had a cooling capacity of less than three tons, and that as no DOB permit would be required, the designer need not provide engineering or mechanical plans pertaining to the HVAC system.
Respondent avers that he relied on the agent's representations in submitting Respondent's proposal without a reference to the HVAC system. The Court denied Petitioner's motion for summary judgment.

OBJECTIONABLE CONDUCT

Ezrapour v. Schaffer, 2016 WL 5338211 (Sup. Ct. NY Co. September 20, 2016) - Plaintiff alleges that defendants breached the condominium by-laws and the Admin. Code § 24-202 because defendants' children play the piano for at least two hours a day and seeks a permanent injunction on the basis of nuisance. Plaintiff has not shown that he will be irreparably injured. Under the by-laws playing of musical instrument is forbidden between 10:00 p.m. and the following 9:00 a.m. Defendant explains that the children, ages 9 and 14, are enrolled in a music school and the children are required to practice the piano at least two hours a day. Practicing less than two hours a day will severely damage both children's chances of pursuing a career as professional musicians. Plaintiff submits a report from Acoustilog which concluded that "[t]he sound levels and the character of the sounds from the upstairs occupants create an unreasonable disturbance in [plaintiff's] apartment in violation of the Noise Code." Plaintiff does not explain whether Acoustilog qualifies as an expert. Also unclear is how Fierstein can formulate a legal conclusion, namely, that defendants violated the Noise Code. The report, therefore, has no probative value. Defendants submit their own acoustic report from Cerami which explains that Acoustilog's report does not provide any evidence of a technical violation of the Noise Code. Defendants have acted to dampen the alleged noise emanating from their apartment. After receiving plaintiff's acoustical report, defendants hired a contractor to install wall-to-wall carpeting and sound dampening padding. It is unclear whether installation of the wall-to-wall carpeting has improved the quality of plaintiff's right to use and enjoy his apartment. Nonetheless, defendants have done exactly what plaintiff's alleged expert has recommended they do. The condominium board has not joined in the complaint or otherwise complained about the piano playing. Plaintiff's motion for a permanent injunction is denied.

Lincoln Guild Housing Corp. v. Ovadiah, 2015 WL 7471741 (App.T.1st Dept. November 24, 2015) - Landlord, a cooperative corporation, established its entitlement to summary judgment of possession under the business judgment rule. The evidentiary proof submitted established that the cooperative followed the requisite procedures in terminating the underlying tenancy based upon some 56 separate acts of objectionable conduct by tenants, including threats of violence and verbal abuse of staff members and shareholders, sexually explicit and derogatory remarks directed at shareholders, and false allegations of criminal conduct against shareholders and staff. The record shows that landlord acted within the scope of its authority and in good faith to further its legitimate interests. Tenants' conclusory and speculative allegations were insufficient to raise any triable issue as to whether the cooperative acted in bad faith, outside of its authority, or for an illegitimate corporate purpose in terminating the tenancy.

DISCRIMINATION

Mazzocchi v. Windsor Owners Corp., 2016 WL 4542035 (USDC SDNY August 31, 2016) - Tenant, proceeding pro se on behalf of himself and his long-term girlfriend, Jane Doe, who resides in his cooperative apartment, filed suit against landlord, managing agent, and members of landlord's board of directors, claiming violation of Fair Housing Act (FHA) by disability discrimination based on girlfriend's alleged bipolar disorder. Defendants moved for summary judgment. FACTS: Doe began having frequent fits of anger, during which she would curse and scream. Doe had "violent nightmares" in which she had bouts with the devil. She began painting "religious symbols" on the walls of the Apartment and covered the windows with black paint to block out sunlight. Doe was occasionally observed yelling or screaming at passersby—sometimes using profane language, making nonsensical statements, or issuing threats. Doe said, "I'm a prophet; I'm Jesus; F you," and yelled, cursed and said her name was God. Her interactions with others were typically abusive. Whenever she walked through the lobby she would yell at the doormen. She would call them names. She would insult them. She would threaten them. She would say 'F you' and intimidating things like I'm going to get you. Mazzocchi moved out of the Apartment, in part due to "friction in their relationship". Mazzocchi visits Windsor Tower almost every weekend to see Doe, though sometimes Doe will not come out of the Apartment to see Mazzocchi. [Not to mention not letting him in].

LAW: Mazzocchi was subjected to the imminent threat of the loss of his residence, which resulted from Defendants' actions and are redressable by this Court. Section 3604(f)(2) of the FHA makes it unlawful to "discriminate against any person in the terms, conditions, or privileges of … a dwelling… because of a handicap." Mazzocchi has raised a genuine dispute of fact as to whether Defendants regarded Doe as having a mental impairment that substantially limited her ability to obtain shelter. A reasonable jury could find that (1) the Board members concluded that Doe had a mental impairment that caused her to engage in conduct that threatened the Building's image and market value and (2) acted on that belief when the Board voted to terminate the lease on the ground of undesirable and illegal tenancy. A reasonable jury could find that although the evidence shows that Doe often behaved inappropriately or even aggressively, her behavior did not rise to the level of "dangerous and harmful," and that Defendants' perception of Doe's conduct was clouded by stereotypes about those suffering from mental illness. A reasonable jury could also find that Defendants' conclusion reflected not only a belief that Doe was unfit to live in the Building, but also that her mental illness caused her to engage in conduct that would make her unfit to live in a broad class of housing . Accordingly, the motion for summary judgment on Mazzocchi's claims under Section 3604(f) of the FHA as to board members is denied.

Berkowitz v. 29 Woodmere Boulevard Owners, Inc., 23 N.Y.S.3d 830 (Sup. Ct Nassau Co. 12/2/15) - Action by shareholder alleged the Board discriminated against a single male purchaser because of his marital status. Plaintiff asserts that the Board then rejected a female purchaser to cover for their unlawful rejection of the first purchaser.
•A corporation does not owe a fiduciary duty to its individual unit owners and shareholders. The managing agent of a cooperative corporation owes a fiduciary duty to the cooperative corporation but not to the individual shareholders. The directors owe a fiduciary duty to the corporation's shareholders to act solely in the best interest of all shareholders. Although a majority of the Board attempted to justify its refusal to approve plaintiff's application on the ground that the selling price was too low, they ultimately approved a purchaser for a selling price that was 20% lower.
•There are still Second Department cases that repeat without analysis the notion that independent tortious conduct by board members must be shown. An examination of these cases reveals that the legal support cited for the proposition is dependent (directly or indirectly) upon the now-overruled 1st Dept. decision in *Pelton.*[3] Upon examination the Second Department is likely to follow the 1st Dept.'s lead in *Fletcher* and reject reliance upon *Pelton* and its progeny.
•The Proprietary Lease expressly forbids the co-op from rejecting a prospective purchaser unreasonably. For the reasons discussed above, the court finds that plaintiff has raised triable issues of fact as to whether the corporation breached the Proprietary Lease by rejecting the purchaser.

UNAUTHORIZED ALTERATIONS

Board of Managers of Sunrise Manor Condominium Assn. v. Aksakalova Family Ltd. Partnership, 2016 WL 400980 (Sup. Ct. Q. Co. January 20, 2016) - The prior sponsor-controlled Board of Managers consented to the installation of the HVAC unit and fence on the second story rooftop in a designated recreational area. Such approval is not subject to the business judgment rule. The prior Board did not act within the scope of its authority when it approved the plans to install the subject HVAC system and fence, as said installation effectively diminished a common element, and thereby diminished each units owner's appurtenant right to recreational use of said rooftop area, in violation of Real Property Law § 339(i). In order to alter each unit owner's common interest in a common element the approval of each unit owner is required, and such approval must be in the form of a recorded declaration amendment. The prior Board neither sought nor obtained such approval prior to consenting to the installation. Therefore, the prior Board of Manager's approval of the installation of the HVAC system and fence is null and void.

Board of Managers of Sailmaker at City Island Condominium v. Laddomada, 2016 WL 5817076 (Sup. Ct. Bx. Co. October 3, 2016) - Defendants acknowledge that they converted their four parking units into a floor-to-ceiling storage structure within the first level parking garage. The 1st Dept. has upheld the authority of the Board of Managers to grant a one-year license, terminable by either party, to enclose a portion of the hallway space in exchange for a fee proportional to

the percentage allocated to the utilized common element. That is not the case here, where the defendants wrongfully converted their parking units to a private enclosure. The ECB issued a violation for work without a permit that resulted in a fine. Defendants' use of their parking units is contrary to both the Condominium Declaration and the Building Code. Plaintiff's motion for a permanent injunction is accordingly granted and Defendants are ordered to remove the storage enclosure; arrange for a re-inspection by the City; and pay all related costs and fines.

REPAIRS

Board of Managers of the Columbus Common Condominium v. Fife, 2016 WL 2919325 (Sup. Ct. NY Co. May 19, 2016) - Action for foreclosure of a common charge lien. The action stems from a window replacement project. The by-laws require unit owner approval for "alterations, additions or improvements" exceeding $100,000 per year, but not for "repairs and replacements." By-law 6.1.1 gives the Board sole discretion to determine whether a Common Charge is for a "repair and replacement" or should be considered an "improvement". Defendant challenges the decision of the Board determining that the Window Project was a "repair and replacement." Courts apply the business judgment rule when determining challenges to the decisions of a board of directors of cooperative and condominium corporations. The Board's determination that the proposed work constituted "repairs and replacements" under the by-laws was within its authority and was made in good faith to further a legitimate interest of the condominium. The Board hired engineering firms to conduct inspections and issue findings. The reports recommended a full-scale replacement for a variety of reasons, including cost, invasiveness, and uniformity, as opposed to a more patch-work repair system. Thus, in relying on these reports, the Board had a basis in evidence to make a determination that the Window Project would be a "repair and replacement," and such a determination was made in good faith. Accordingly, the Board acted within its authority in entering into the Window Project contract without unit owner approval.
Board of Managers of the Residences at Worldwide Plaza LLC v. Fuchs, 2016 WL 1732143 (Sup. Ct. NY Co. April 28, 2016) - Plaintiff, an unincorporated association that manages the affairs of the Condominium, commenced the instant action against a unit owner, requesting relief due to the extensive water damage allegedly caused by Defendant leaving his bathtub faucet open in his unit. Plaintiff asserts that based upon the by-laws defendant bore the responsibility in maintaining plumbing fixtures within his unit. The flooding was caused by a faucet in defendant's unit, which is under the exclusive control of defendant, and which per the by-laws, plaintiff's had no responsibility to repair. Since the faucet, was within the exclusive control of defendant, plaintiff has shown that the flood and the resulting damage were not contributed to in any way by plaintiff. Therefore, summary judgement on the issue of liability against defendant is proper.

Dempsey v. 73 Tenants Corp., 2016 WL 75602 (Sup. Ct. NY Co. January 6, 2016) - Plaintiff claims that there was a fireplace in the unit when she purchased the unit but it had been purposely closed off, was covered by a wall and was not in working order. She then submitted an alteration request to defendant to reopen the existing fireplace. Pursuant to the alteration agreement, the shareholder is responsible for all costs in connection with the Work. Plaintiff's contractor reopened the fireplace and repaired the firebox. The contractor discovered a blockage in the flue. The blockage could only be removed from the unit above plaintiff's unit. Plaintiff requested that defendant remove the blockage. Plaintiff moves for summary judgment on the ground that paragraph 2 of the Lease requires defendant to remove the blockage from the flue. Defendant cross-moves for summary judgment dismissing plaintiff's complaint on the ground that the alteration agreement places any obligation to remove the blockage from the flue solely on plaintiff. The Lease does not unambiguously require that defendant remove the blockage from the flue and reopen the existing fireplace as it is unclear from the face of the Lease whether the removal of the blockage is a repair or maintenance, based on the fact that the flue and fireplace were purposefully closed off when plaintiff purchased the unit. Defendant is not entitled to summary judgment dismissing plaintiff's complaint based on its argument that the alteration agreement supersedes the Lease and places any obligation to remove the blockage from the flue solely on plaintiff. Initially, none of the provisions of the alteration agreement upon which defendant rely unambiguously provide

that it is the obligation of the plaintiff pursuant to the alteration agreement to remove a blockage from the flue which is not located in her unit. Plaintiff's motion and defendant's cross-motion for summary judgment were denied.

Barbizon (2007) Group Ltd. v. Barbizon/63 Condominium, 2016 WL 6083868 (Sup. Ct. NY Co. October 18, 2016) - The Complaint alleges that Barbizon 2014 purchased Unit 17C in October 2014, in reliance on Defendants' indication that they would be able to combine two units. Plaintiffs' claim that in May 2016 the Defendants had entered into a moratorium agreement preventing any alterations requiring building permits until the building obtained its permanent certificate of occupancy. The Plaintiffs have not established a clear right to a preliminary injunction. Plaintiffs have not provided any proof that the Defendants are discriminating against them by not approving their application, nor have they offered any proof of self-dealing or misconduct. Therefore, the Plaintiffs have not established a likelihood of success on the merits. The Defendants have not denied plaintiffs' application for work permits to combine their two Units, the process has only been delayed in order for the open permits and violations to be closed in order for the building to obtain its certificate of occupancy. The Plaintiff is not being denied the full use and enjoyment of his Units, only the combination of the two for now. That Plaintiffs are not at present able to combine the two units does not warrant the drastic remedy of a preliminary injunction.

BUT

ENFORCEMENT OF CONTRACTS

Square-Arch Realty Corp., v. Polsinelli, 2015 WL 7429586 (Sup. Ct. NY Co. 11/23/15) –Shareholders show a written offer in 2000 to acquire hallway space in exchange for a one-time payment, as well as additional maintenance. Shareholders accepted this offer, and a meeting of the minds was formed. Shareholders performed renovation work to incorporate the Hallway Space into their apartments, and Shareholders have had exclusive use of the Hallway Space since then. However, no one-time payment was debited from Owners' checking account, no Hallway Shares were issued to Owners, and no closing respecting such shares took place. The amount of Owners' maintenance was not increased. The Co-op communicated a demand for payment in the amount of $101,505.27 for use of the Hallway Space and for their acquisition of shares and a proprietary lease. Shareholders raise triable issues of fact as to whether the Individual Directors acted in bad faith toward Shareholders, exceeded the scope of their respective authority, or singled out Shareholders for disparate treatment in violation of Individual Directors' fiduciary duty to treat shareholders fairly and evenly. Accordingly, summary judgment on Shareholders' counterclaims is not warranted. Shareholders motion for summary judgment, is granted only to the extent that the agreement to purchase Hallway Space shall be specifically performed and the Co-op is directed to issue Shares for the Hallway Space and Shareholders are directed the pay the agreed upon acquisition price plus the agreed upon additional maintenance amount from 2000 to date.

STATUTE OF LIMITATIONS

Donato v. Citylights at Queens Landing, Inc., 2016 WL 661889 (Sup. Ct. NY Co. February 11, 2016) - Plaintiff seeks a writ of mandamus directing the cooperative to restore his gym membership. CPLR Article 78 permits the courts to review actions or failure to acts of certain non-governmental organizations under certain circumstances. In Levandusky the court noted that a cooperative is a quasi-governmental organization. Thus the remedy is found in a proceeding under Article 78. Therefore, a four-month statute of limitations is appropriate. This action was commenced more than four months after the corporate action. It is commenced too late for the court to exercise jurisdiction. The motion to dismiss the complaint is granted.

Musey v. 425 East 86 Apartments Corp., 2015 WL 4365395 (Sup. Ct. NY Co. July 16 2015) - Challenge to decision requiring the shareholder to put waterproofing on a terrace governed by 4 months statute.

The Kibel Companies, LLC v. Highpoint-on-the-Hudson Owner's Inc., 2015 WL 1814331 (Sup.Ct. NY Co. April 17 2015) - Claim that imposition of a sublet fee on plaintiff was a breach of contract was governed by a four month statute.

BUT

Estate of Del Terzo v. 33 Fifth Ave. Owners Corp., 136 AD3d 486 (1st Dept. 2/11/16) - Claim based on board unreasonably withholding consent to a transfer of a decedent's apartment was a breach of contract action governed by a 6 year statute.

Konigsberg v. 333 East 46th Street Apartment Corp., 2016 WL 3455940 (Sup. Ct. NY Co. June 21, 2016) - Plaintiffs move for summary judgment on their complaint for a declaratory judgment that defendant Coop's revocation of its consent to allow plaintiffs to have a washer/dryer in their apartment is improper. The board voted to amend the House Rules, which previously had permitted installation of washer/dryers.to provide that the installation of clothes washers and dryers is prohibited. Plaintiffs do not allege that the Coop was acting in violation of its own governing documents, which would subject them to the four-month statute of limitations associated with Article 78 proceedings. Plaintiffs allege that the Coop breached the 1994 Agreement by not allowing them to replace their washer/dryer. These allegations are governed by the six-year breach of contract statute of limitations.

●The fact that plaintiffs were allowed to keep a previously approved washer/dryer for 20 years before the new house rule was adopted, does not prevent the board from enforcing the new house rule when plaintiffs sought to install new appliances. Pursuant to the proprietary leases, the board at any time could 'alter, amend and repeal' the house rules, and it cannot be reasonably argued that respondents had somehow acquired vested rights in the continued maintenance of these machines. Accordingly, the branch of plaintiffs' motion seeking a declaration that the board's revocation of its consent to plaintiffs' washer/dryer was improper, and for an injunction restraining the board from preventing plaintiffs from replacing their washer/dryer is denied, and the branch of the Coop's motion for summary judgment dismissing the first and second causes of action in the complaint and for a declaration that plaintiffs are not entitled to install a washer/dryer in their apartment is granted.

DOGS

Clearview Gardens First Corporation v. Wicelinski, NYLJ 1202745899709, at 1 (Sup Ct. Queens Co. 12/3/15) - Notice to cure based on unauthorized harboring of a dog. The notice was defective because it set forth an incorrect date as to when the coop learned of the dog and because the notice was equivocal because it offered the shareholder the option to remove the dog instead of being evicted. Action dismissed.

TRESPASS

Wong v. 200 East Tenants Corp., 2016 WL 2897873 (Sup. Ct. NY Co. May 16, 2016) - Plaintiffs commenced this action alleging that the coop and its agents entered plaintiffs' apartment without their consent, commenced a series of demolitions in the guest bathroom, and damaged plaintiffs' personal property. The coop contends the entrance to the apartment was necessary in order to repair a water leak that was causing damage to the building and to the apartment immediately below. Plaintiffs seek damages for trespass and an equitable ruling that the coop cannot bill Plaintiffs for the costs incurred in investigating the leak and repairs. The Cooperative's decision to perform necessary repairs was made in good faith and entitled to deference under the business judgment rule. Generally, a landlord entering a tenant's premises to make repairs does not constitute a trespass, especially when the right is reserved in the lease. Entry into a

tenant's apartment pursuant to a right reserved in a Proprietary Lease in order to make repairs is consented to by the tenant by signing the lease. The coop provided plaintiffs with adequate notice of their intent to go into the apartment to investigate and make repairs due to plaintiff's failure to cure the leak. This evidence refutes any allegation of trespass. The coop's motion for summary judgment dismissing the complaint was granted,

WRONGFUL EVICTION

Turin Housing Development Fund Co., Inc. v. Suarez, 2016 WL 688800 (Civ. Ct. NY Co. February 18, 2016) - A purpose of sanctions is to advance the public interest, in part to prevent malicious litigation tactics. Neither Petitioner nor Petitioner's counsel dispute that the managing agent committed an act of fraud on the Court by executing a false non-military affidavit, nor that Petitioner should not have commenced a summary eviction proceeding only against a party who had been dead for four years. Petitioner and Petitioner's counsel argue that Respondent has not been residing in the subject premises as her primary residence, thus perpetuating a fraud upon Petitioner and the Court. Petitioner shows another summary proceeding against Respondent in a different part of the Housing Court. An order of that Court part found that Respondent lives at this other address. Even assuming *arguendo* that the person evicted as a result of such actions was a fraudfeasor of the first order, the Court has an independent interest in discouraging violations of law and Court procedures as Petitioner has engaged in. Petitioner's conduct in this proceeding warranted a hearing to determine if sanctions should be imposed and, if so, how much.

COLLECTION OF MAINTENANCE

COLLECTION OF ARREARS

Avila v. Riexinger & Assoc., 817 F.3d 72 (US Ct. Apps. 2d Cir 3/22/16) - Collection notices that failed to notify debtor that the balance could increase due to accrual of interest and fees were misleading and a violation of the FDCPA.

ABATEMENTS

WARRANTY OF HABITABILITY

Goldhirsch v. St. George Tower & Grill Owners Corp., 142 A.D.3d 1044 (2d Dept. Sept. 21, 2016) - Plaintiff's terrace was damaged by a storm. Based upon an engineer's inspection that revealed the terrace was unsafe, the defendant placed the terrace off limits. The terrace was reopened but the terrace was again closed so that the defendant could conduct major renovations on upper floors of the building. Plaintiff commenced this action to recover damages for breach of the proprietary lease and breach of the implied warranty of habitability. The implied warranty of habitability provides that the landlord shall be deemed to warrant that the premises and all areas used in connection there are fit for human habitation and for the uses reasonably intended by the parties.

•Plaintiff established that the water damage and subsequent closures of the terrace rendered it unfit for the uses reasonably intended by the parties. The defendant contends that the plaintiff's terrace does not fall within the proprietary lease's definition of apartment. However, paragraph 7 of the lease inconsistently provides that if an apartment includes a terrace, the lessee "shall have and enjoy the exclusive use of [it]." We construe this ambiguity in the lease against the defendant, the party that drafted the lease, and find that the subject terrace is a part of the plaintiff's apartment. In cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it and favorably to a party who had no voice in the selection of its language.

•The plaintiff failed to establish a right to summary judgment on the issue of liability to recover damages for breach of the proprietary lease with respect to the terrace closures due to renovations. Paragraph 29(a) of the proprietary lease

provides: “No abatement of rent... shall be made or allowed because of the making or failure to make or delay in making any repairs, alterations or decorations to the building n ... unless due to Lessor's negligence.” While the provision for the proportional abatement of rent under paragraph 4(b) for damage due to “fire or other cause” is triggered irrespective of the defendant's negligence, in order to recover for the making of repairs, renovations, and disruptions necessary to comply with local law, paragraph 29(a) requires the plaintiff to demonstrate that the defendant was negligent.

Israel Realty LLC v. Shkolnikov, 2016 WL 1135843 (Civ. Ct. NY Co. February 23, 2016) - Summary nonpayment proceeding. The petitioner is the proprietary lessee of the subject premises. Respondent met her burden of proof on her defenses of partial eviction, constructive eviction, and breach of the warranty of habitability. Work pursuant to Local Law 11 is not damage in the nature of a fire or other unintended or sudden event. Petitioner’s attempt to avoid liability for its breach of the warranty of habitability by virtue of paragraph 2(b) of the proprietary lease (even if it applied herein which this Court finds it does not) is unavailing since any agreement waiving rights pursuant to RPL § 235–b is void. Nor is the fact that the work is mandated by the city a basis for a finding of no liability. The petitioner had actual knowledge that the Local Law 11 work would impact the respondent's use of the premises and failed to take any action. As a result, based upon the partial actual eviction as well as the doctrine of constructive eviction the respondent is entitled to a complete abatement of rent.

Cohen v. Cassm Realty Corp., 2016 WL 5897520 (Sup. Ct. NY Co. County March 14, 2016) - Action for failing to maintain roof beams, roof and other common areas. Plaintiff's obligation to pay for maintenance is dependent on the coop’s maintenance of the premises within its control in a habitable condition. If the nonperformance of building maintenance constructively evicted her and she vacated all or part of her unit, the vacatur suspended her obligation to pay for maintenance proportionate to the abandoned space. As long as plaintiff vacated her unit due to a condition of the roof beams, the roof, or another common area or element of the building that rendered her unit uninhabitable or unusable for its intended function as living-work quarters, she is entitled to damages, she is entitled to reasonable expenses for comparable alternative living-work quarters to the extent those reasonable expenses exceeded her maintenance payments had she not been constructively evicted.

PAYMENT OF COMMON CHARGES

Board of Managers of the Towers on the Park Condominium v. Cruz, 26 N.Y.S.3d 723 (App. T. 1st Dept. 11/18/15) - Defendant owner of a condominium unit is obligated to pay the common charges and special assessments. Defendant was not entitled to withhold payment in derogation of the condominium's bylaws based on any defective conditions in her unit or in the common areas. Defendant was also required to pay plaintiff's legal fees pursuant to the bylaws.

The Bank Bldg. v. Mehling, 2016 WL 5944457 (Sup. Ct. NY Co. October 6, 2016) - Condominium seeks to foreclose a lien for common charges allegedly owed by defendant unit owner. The bylaws authorize plaintiff to collect common charges from unit owners, and in the event of a default, he or she shall pay interest at 4% per month (but in no event more than the legal rate), together with a ‘late charge’ of $.04 for each dollar and all expenses, including attorneys' fees. Unit owner failed to pay the outstanding balance. As the interest rate was triggered only upon a default, it is not usurious. The actual interest rate charged by plaintiff is below the proscribed limit. Unit owner articulates no prejudice occasioned by executing a judgment for plaintiff even if he should prevail on his counterclaim nor does his counterclaim relate to plaintiff's claim of foreclosure, as his obligation to pay common charges is independent of plaintiff's obligation to make repairs to his unit.

LATE FEES

Board Of Managers Of One Strivers Row Condominium v. Giwa, 134 A.D.3d 514 (1st Dept. 15/15/2015) - Although defendant paid his outstanding common charges prior to the court's determination of plaintiff's motion for summary judgment, pursuant to the bylaws of the condominium plaintiff was still entitled to seek late charges and its reasonable attorneys' fees in connection with initiating and prosecuting this case. Defendant had an opportunity to be heard on the issues, and his due process rights were not violated. Judgment against defendant unanimously affirmed.

BUT

Board of Managers of Green Mansions Country Club Estates Section III Building 11 v. Grimaldi, 2016 WL 1417704 (Sup. Ct. Warren Co. January 12, 2016) - Plaintiff established its entitlement to judgment as a matter of law for common charges. Plaintiff failed to satisfy its initial burden relative to the late fees. Plaintiff has provided the Court with no proof whatsoever of its authority to impose late fees, let alone its authority to impose them in such a harsh manner. Plaintiff has failed to satisfy its initial burden of establishing its entitlement to judgment as a matter of law for counsel fees. While plaintiff is entitled to counsel fees as a matter of law for the collection of common charges, here all of the fees requested pertain not only to the collection of common charges, but also to the collection of late fees. Plaintiff's motion for summary judgment is granted to the extent that defendants are liable for the payment of common charges

ATTORNEYS FEES

Carlyle Towers Cooperative B, Inc. v. Hsu, 29 N.Y.S.3d 846 (App. T. 2d Dept. 12/2/15) - Cooperative commenced this action to recover legal fees which it had incurred in defending two small claims actions brought against it by defendants. Plaintiff is not entitled to the attorney's fees it incurred in the first small claims action, since plaintiff's counterclaim in that action was dismissed. Coop was awarded the attorneys' fees incurred by plaintiff in the [successful] second small claims action.

FORECLOSURE – COOPERATIVE

Lapidus v 1050 Tenants Corp., 138 A.D.3d 783 (2d Dept. April 13, 2016) - The plaintiffs were the owners of an apartment. As a result of litigation dating back to 1992, the defendant's shareholders voted to terminate the plaintiffs' proprietary lease. . Following litigation to eject the plaintiffs from the apartment the sheriff ejected the plaintiffs. The defendant sold the apartment for $4.2 million. The defendant sent an accounting of the sale to the plaintiff with a check representing the plaintiffs 'net amount, after deducting amounts due from them to the cooperative and other parties as shown on the accounting. The plaintiffs thereafter commenced this action, alleging that the defendants converted money from the plaintiffs by improperly withholding certain funds from the proceeds of the sale. Summary judgment was awarded to defendant. Defendant was entitled to deduct attorney's fees, unpaid maintenance, and a transfer fee from the proceeds.

FORECLOSURE – CONDOMINIUM

Plotch v Citibank, N.A., 27 N.Y.3d 477 (Ct. Apps. 5/10/16) –Bank's consolidated second mortgage took priority over condominium's lien, where the lien was not recorded until after the second mortgage was recorded. [RPL Section 399-z was thereby rendered meaningless]. Given the practical realities of this case, we agree with the Appellate Division that the agreement between Citibank and the previous unit owner to consolidate the mortgages "into a single mortgage lien," recorded years before the common charges lien, qualifies as the "first mortgage of record." To hold otherwise

places form over substance. Indeed, the ease with which a formulaic application of the term "first mortgage of record" can be manipulated demonstrates that such holding would not promote the statutory purpose.

BUT

CitiMortgage, Inc. v. Gueye [725 Riverside Condominium], 52 Misc. 3d 1203(A) (Sup.Ct. NY Co. 6/21/16) - Foreclosure action. It took the plaintiff 7 years to move for a judgment of foreclosure and sale in an uncontested action. The court reduced the amount of interest due to the bank and disallowed interest for 5 ½ of the seven years due to the unexplained delay in prosecuting the action.

TRANSFERS AND SUBLETS

RESCISSION

Board of Managers of Soundings Condominium v. Foerster, 138 A.D.3d 160 (1st Dept. February 23, 2016) - This is an action to rescind the conveyance of a condominium apartment on the ground that defendant purchaser misrepresented to plaintiff that she would use the unit as a private residence and, instead, established a professional day care business at the premises. The lower court denied defendant's motion for summary judgment dismissing the complaint, finding, that a triable issue is raised with respect to whether defendant made any misrepresentation that might impact the validity of the purchase agreement. In seeking reversal, defendant argues that "fraud cannot be established because an essential element, injury, does not exist." However pecuniary damages are unnecessary in an action for equitable rescission. Thus, defendant's arguments are unavailing.

TRANSFERS BY ESTATES –LEGATEES

601 West 135 Street HDFC v. Tsiropoulos, 2015 WL 6499461 (Civ. Ct. NY Co. 10/27/15) - Summary holdover proceeding. The Notice asserted that over 60 days had elapsed since the death of the proprietary lessees, without a transfer to an assignee as required by the proprietary lease, which also includes that Petitioner may not unreasonably withhold consent to assignment of the lease to a financially responsible member of the Shareholder's family. Respondent submitted an application for a transfer, and the Board was still actively considering that application after the commencement of this proceeding. The Board had not yet made a decision because they viewed the application as incomplete based on Respondent's failure to submit tax documents. Petitioners on going consideration of the application including the request that Respondent meet with the Board must be deemed to be an extension of the 60 day period referenced in the proprietary lease.

- Petitioner's argument that the Board's decision not to approve the application for the transfer of the proprietary lease and shares is protected by the business judgment rule is premature. The Board must first make such a decision before it can be protected by the business judgment rule, but the Board has yet to make a decision on the pending application.
- The Board's position that the application be held indefinitely in abeyance because of Respondent's failure to submit tax returns is not reasonable. There is no specific requirement in the proprietary lease that requires the submission of tax returns. While such a request as part of the application process is not unreasonable, it is possible that other documentation could be submitted to insure that Respondent's income qualifies her to become a shareholder, and the failure to submit a document which does not exist cannot be used as a basis by Petitioner to indefinitely postpone making a decision on the pending application.
- The provision of the proprietary lease providing that if the Board fails to act on an application within 30 days of submission, then the decision can be made by a majority of the shareholders rather than the Board, suggests that the Board has a duty to act on an application within a reasonable period after it is submitted.

230-79 Equity, Inc. v. Frank, 2016 WL 802392 (App. T. 1st Dept. March 1, 2016) - The proprietary lessee breached Paragraph 14 of the proprietary lease by permitting her daughter to reside in the apartment, while respondent lived elsewhere. Paragraph 14 provides that the apartment may not be used for any purpose "other than as a private dwelling for the Lessee and Lessee's spouse, their children, grandchildren, parents, grandparents, brothers and sisters and domestic employees." This language is correctly construed as permitting occupancy by the listed persons other than the lessee only if the lessee maintains a concurrent occupancy. The granting of landlord's motion for summary judgment on the holdover petition was affirmed.

BUT

50 Sutton Place South Owners, Inc. v. Fried, 2016 WL 3756020 (Sup. Ct. NY Co. July 14, 2016) - Plaintiff seeks a declaration that defendants have breached the proprietary lease by allowing their daughters to reside in the apartment and by failing to list them as residents on the Purchase Application. In *Haydon* [App. Div. 1st Dept.] the Court construed Paragraph 14 as permitting occupancy by the listed persons other than the lessee only if the lessee maintains a **concurrent** occupancy. Plaintiff asserts that the defendants misrepresented that "they had no intent to actually contemporaneously reside in the apartment" that defendants in contravention of their proprietary lease "maintain their residence in New Jersey" while permitting their adult daughters to "occupy the Apartment" in their absence. Plaintiff does not allege that the defendant proprietary leaseholders do not reside in the apartment. It only alleges that defendants do not "primarily reside in the Apartment." It further alleges that the daughters occupy the apartment "in the absence" of the defendant proprietary leaseholders. These carefully worded allegations fail to state a violation of Paragraph 14 of the proprietary lease because there is no requirement in that paragraph that occupancy by the proprietary leaseholders must be "**contemporaneous**" with any other permitted occupants as asserted by the plaintiff. As stated by the Court in *Haydon* there was a violation in that case because there was no *concurrent* occupancy. Plaintiff attempts to confuse and conflate concurrent occupancy, which in *Haydon* was not present because the leaseholder concededly did not occupy the premises at any time, with what it terms as "contemporaneous" occupancy which would apparently require that the defendant proprietary leaseholders be on the premises anytime their children were home. There is no such restriction in the proprietary lease and unlike *Haydon* there is no allegation here that the proprietary lessees are not in occupancy. Furthermore, there is no requirement of "primary residence" in the proprietary lease and thus the importation of that statutory rubric into this wholly private cooperative residential arrangement is inapposite. There is no authority for this court to impose such a restriction.

(b) SUBLEASE FEE

200 East 90th Street Owners Corp. v. Weber, 2016 WL 1563516 (Civ. Ct. NY Co. March 17, 2016) - Plaintiff, instituted a monthly sublet fee equal to 10% of maintenance. The by-laws offer plaintiff several options for charging a sublet fee including "a reasonable fee to cover actual expenses and attorneys' fees of the Corporation, a service fee of the Corporation and such other conditions as it may determine". The proprietary lease permits a charge determined by the Board of Directors to be collected to cover reasonable legal fees and other expenses of the Apartment corporation, including charges of the then Managing Agent. While defendants ask the Court to read these grants of authority narrowly as permitting only reimbursement of a certain type of charges, a plain reading clearly includes multiple options. The by-laws permit the imposition of "any other conditions" as determined by the Board of Directors and the proprietary lease permits the fee to broadly cover "other expenses of the Corporation." Neither document limits the sublet fee charge to only the expenses directly related to the sublet. Plaintiff's motion for summary judgment is granted.

PERSONAL INJURY AND PROPERTY DAMAGE

WINDOW GUARDS

Milano v. 340 East 74th St. Owners Corp., 2016 WL 3745565(Sup. Ct. NY Co. July 11, 2016) - Wrongful death action. Adult decedent was sitting on the ledge of the open window in the bedroom of his 5th floor apartment when he fell out the window to his death. Decedent was smoking a cigarette at the time of his accident. Decedent's blood alcohol content at the time of his death was .20%. Three children under the age of ten resided in the apartment at the time of the accident and window guards and L-shaped window stops were not installed on the subject window, and defendants were in violation of the window guard regulation. The 1st Dept. has repeatedly held that liability for injuries to an adult may not be predicated upon failure to install window guards. Neither plaintiff nor decedent made a written request to have defendants install window guards. Defendants also did not have a common law duty to install window guards. The common law rule is that, with some exceptions, a landlord is not liable to a tenant for dangerous conditions on the leased premises unless a duty to repair the premises is imposed by statute, by regulation or by contract. Defendants' motion for summary judgment is granted.

SLIDING DOOR

Jones v. Rochdale Village, Inc., 2016 WL 2606522 (Sup. Ct. NY Co. April 26, 2016) - Plaintiff claims personal injuries alleged to have been sustained in 2007 when she was caused to trip and fall while stepping through the sliding door onto her balcony. Plaintiff contends that the sliding door was designed, constructed and/or installed in violation of multiple sections of the Building Code, and negligently created a tripping hazard. The architect's report could not establish the applicability of one or the other dated versions of the Building Code. Given the conflicting evidence as to the appropriateness of the height of the draft bar, Rochdale has not established that the condition was, as a matter of law, open and obvious and not inherently dangerous such that there was no duty to protect against it. Rochdale has not sufficiently demonstrated that it did not create the condition (by deciding on renovation itself) nor that it lacked actual or constructive notice of any such defect. The Board had a hand in approving and revising the plans, and approving the manufacturer and installer of the doors, and that its employees had inspected each installed door on the premises prior to plaintiff's accident, raising a triable issue of fact as to notice.

WATER LEAKS

Michel v. 14 Beekman Place Corp., 2016 WL 3077372 (Sup. Ct. NY Co. May 31, 2016) Action for personal injuries allegedly sustained when plaintiff tripped and fell on a water-damaged, uneven wooden parquet tile floor in her apartment. The Beekman Defendants have made a *prima facie* showing that they are not liable to plaintiff for negligence as they did not owe a duty to repair the floor tiles. The proprietary lease requires the tenant to maintain and repair the interior of the apartment, including the floor. Defendants have established that they did not create the allegedly dangerous condition of the water-damaged, buckled floor tiles. The Defendants did not perform the work that allegedly caused the leak and consequent water damage or the allegedly negligent floor repairs.

●While an employer is generally not liable for the torts or negligent acts of an independent contractor under the doctrine of respondeat superior, the common law has developed certain recognized exceptions that fall roughly into three categories: (1) negligence of an employer in selecting, instructing or supervising the contractor, (2) employment for work that is especially or inherently' dangerous, and (3) instances in which the employer is under a nondelegable duty. Plaintiff has not submitted any evidence that Defendants were negligent in selecting, instructing or supervising these contractors, that the work was inherently dangerous or that the Defendants were under a nondelegable duty with regard to the renovation or the repair of plaintiff's floor.

DEFAMATION

Galanova v. Safir, 138 A.D.3d 686 (2d Dept. 4/6/16) - Posting a list of shareholders in arrears in the lobby was protected by the common-interest privilege. Action for defamation was dismissed on summary judgment.

Golden Skyline LLC v. Jin, 2016 WL 3974717 (Sup. Ct. NY Co. July 22, 2016) - Plaintiff sues for defamation. Plaintiff alleges that defendant made numerous false and defamatory statements that plaintiff is: improperly using PH2 as a residence; improperly using a parking space in the Condominium's loading dock; improperly using a terrace; not paying her fair share of electricity costs or carrying and water charges, and that plaintiff does not have proper insurance. The common-interest privilege "extends to a communication made by one person to another upon a subject in which both have an interest". In the instant matter, the allegedly defamatory statements were made by defendant as a member of the Board to other unit owners regarding issues that affected the entire Condominium. Accordingly, defendant's statements are protected by the qualified privilege. The defense of qualified privilege will be defeated by demonstrating a defendant spoke with malice. Plaintiff claims only that defendant "is engaged in a mean spirited personal vendetta," and alleges that the subject statements are "false and [were] or should have been known to defendant to be false". These conclusory allegations are insufficient to plead malice. Accordingly, the defamation claims must be dismissed.

NUISANCE – SECOND HAND SMOKE

Feinstein v. Rickman [Alhambra Condominium] , 136 A.D.3d 863 (App. Div. 2d Dept. 2/17/16) - Condominium residents brought action against neighbors, real estate agent, management company, and board of managers, seeking to recover damages for negligence, fraudulent misrepresentation, private nuisance, trespass, and intentional infliction of emotional distress. Action dismissed as to the condominium and the managing agent. The complaint failed to state a viable cause of action against the neighbors, since their "conduct in smoking in the privacy of their own apartment was not so unreasonable in the circumstances presented as to justify the imposition of tort liability against them".

BUT

Reinhardt v. Connaught Tower Corp., 2016 WL 4256704 (Sup. Ct. NY Co. February 1, 2016.) – The case presents two stark issues, one factual, one legal. The factual issue is whether plaintiffs' co-operative apartment was significantly polluted by second-hand cigarette smoke seeping in from other apartments in the building, and assuming it was, the legal issue is what the appropriate remedy is. The Court took judicial notice of the overwhelming, irrefutable, ubiquitous evidence that second-hand smoke causes or contributes to lung and other cancers and cardio-vascular disease, citing to the American Cancer Society website. In addition, there is no absolute rule that holds that while a tenant is not occupying the apartment he/she is not entitled to abatement. In this Court's view, the owners of pieds-a-terre, no less than the inhabitants of primary residences, are entitled to smoke-free environments. A tenant should not have to develop lung cancer to obtain an abatement. Owners are capable, and tenants are incapable, of providing smoke-free apartments by imposing strict no-smoking policies or by constructing or rehabilitating buildings so that smoke cannot travel between apartments. The Court did not say, and "presumably would not have the power to say", that you cannot smoke in your apartment. However if you want to avail yourself of the right to rent out residences, you assume the obligation to insure that your tenants are not forced to smell and breathe carcinogenic toxins. The court awarded a complete abatement of maintenance and attorney's fee, but declined to issue an injunction.

MAINTENANCE OF THE BUILDING

Dylan House, Ltd. v. Borges, 2016 WL 3974726 (Sup. Ct. NY. Co. July 19, 2016) - Plaintiff seeks a judgment declaring that it may enter the unit for the purpose of performing the work that it, in its business judgment, deems necessary to bring defendant's terrace into a state of good repair and to prevent further damage to the building. Plaintiff also seeks to permanently enjoin defendant from preventing it from entering the unit to perform the work. The court granted an order to show cause temporarily enjoining defendant from preventing access to the apartment to the extent of ordering defendant to grant plaintiff's contractor immediate access to the apartment and terrace for the purpose of "patching the drain through which plaintiff alleges the leak flows into the apartment directly below". The court denied plaintiff's motion for a preliminary injunction, and scheduled a hearing for a permanent injunction. Defendant's motion to dismiss the action was denied.

CORPORATE ISSUES

AMENDMENT OF THE PROPRIETARY LEASE

Wahrsager v. Paterline [20 East 11 Owners Corp], 2016 WL 3485378 (Sup. Ct. NY Co. June 27, 2016) - Plaintiff shareholder seeks a declaratory judgment that the changes to the proprietary leases were not properly adopted. Plaintiff received a notice that the majority shareholders had made changes to all of the proprietary leases "without a meeting, by written consent of the shareholder-lessees owning at least two-thirds of the corporation's issues shares, as authorized by Article 6.1 of the proprietary lease". Plaintiff had not been notified that any changes would be made, nor was she asked for her consent to make the changes. Defendants argue that an amendment to the lease does not require the unanimous consent of all shareholders, a vote at a meeting, or notice of such meeting, because Article 6 of the proprietary lease sets forth that an amendment can occur with written consent of lessees owning 2/3 or more of the shares. Section 2.5(b) of the By-Laws is effectively fashioned after BCL § 615(a). It provides that whenever any action may or must be taken by vote at a shareholder meeting, this formality may be disposed of upon written consent of all shareholders, unless expressly permitted by any other provision of the By-Laws or of the Certificate of Incorporation. It is not limited to amendments to the By-Laws, but applies broadly as an alternative to action by vote at a shareholder meeting, conditioned on complete consent. The final sentence in Article 6.1 ("approval by Lessees as provided herein shall be evidenced by written consent or by affirmative vote taken at a meeting for such purpose") does not expressly provide for such written consent to be evidenced by approval of less than all outstanding shares. It merely implies that as an alternative to a two-thirds vote, the shareholders could forego the vote entirely on complete written consent, a reading that would not only satisfy the minimum two-thirds majority requirement of Article 6.1 and Section 5.1 but also be consistent with Section 2.5(b). Where there is a conflict in the procedure for adopting amendments to proprietary leases between that contained in the by-laws and that provided for in the lease itself, with the by-laws containing the stricter of the two, there must be compliance with both the procedure contained in the by-laws and those contained in the lease. The court declared that the written consent is null and void.

LEGAL ISSUES INVOLVING THE SPONSOR

ELECTIONS - UNSOLD SHARES

Tiemann Place Realty, LLC v. 55 Tiemann Owners Corp., 141 A.D.3d 56 (1st Dept. 5/24/16) - Four days before the annual meeting, the sponsor assigned an apartment, to purchaser. Pursuant to the proprietary lease and a stipulation signed by the sponsor in federal court, the shares retained the status of "unsold shares". The stipulation also restricted the number of directors elected by holders of unsold shares to one less than the majority (that is, to no more than two of the five directors). In the 2014 election, three out of the five directors were voted in by holders of unsold shares (2

sponsors plus the purchaser). The court held that the assignee of the sponsor was a holder of unsold shares and was therefore bound by the stipulation even though he was not a signatory. Accordingly, the results of the election were set aside.

RIGHTS AGAINST AND LIABILITIES TO THIRD PARTIES

BOOKS AND RECORDS – MANAGING AGENT

Cloister Apt. Corp. v. Edel Family Management Corp., 2016 WL 4546281 (Sup. Ct. NY Co. August 29, 2016) – Plaintiff moves for a preliminary injunction compelling defendant to turn over all books and records in its possession relating to the management of plaintiff's cooperative. Defendant had been plaintiff's managing agent, but terminated the relationship. Plaintiff demanded that defendant turn over all of the books and records, but defendant refused to do so, apparently because it wished to link its relinquishment of the books and records to the negotiation of ground leases for commercial units of the building. Plaintiff has established a likelihood of success on the merits of its cause of action for replevin. A cause of action for replevin requires a plaintiff to show that a defendant is wrongfully withholding its property, that a demand was made for its surrender or return, and that the demand was improperly denied. Plaintiff has shown that the books and records rightfully belong to it, and that defendant refused to comply, notwithstanding the absence of any colorable claim that it is entitled to retain them. Plaintiff has also shown that it would suffer irreparable harm to its ability to operate the building and provide necessary services to its tenant-shareholders and employees in the absence of the injunction, and the balance of equities weighs in its favor, since defendant has shown no reason for retaining the books and records, or how it would be adversely affected were it to be compelled to relinquish them.

AUTHORITY TO SIGN CONTRACT - AIR RIGHTS

255 West 95th Street Apartment Corp. v. 732 WEA Holdings, LLC., 2016 WL 4529041 (Sup. Ct. NY Co. August 30, 2016) - Defendant moves for a declaration that the Fourth Amendment to the Agreement of Purchase and Sale (the "PSA") is a valid and effective agreement This case stems from a dispute over the enforceability of the Fourth Amendment pursuant to which plaintiff agreed to sell its undeveloped air rights to defendant. The parties signed the Agreement in 2008; defendant did not consummate the sale, and instead negotiated a series of one year extensions in exchange for payments to plaintiff. The managing agent, as assistant secretary, signed the Fourth Amendment to the agreement extending the deadline to close on the air rights deal for an additional two and one-half years. Prior to executing the Fourth Amendment, the agent sent an email to defendant's counsel where he states that the Board had approved the Fourth Amendment and he would be executing it. He then by email advised defendant's counsel that he did not have authority to sign the agreement and to "disregard the 4th Amendment with my signature as it is not valid". The existence of 'apparent authority' depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal--not the agent. A third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable. There remain issues of fact as to whether the managing agent had apparent authority to sign the Fourth Amendment.

ILLUMINATED SIGNS

Vosse v. The City Of New York, 2016 WL 6037372 (USCA 2d Cir. October 14, 2016) - Condominium resident brought suit against the City of New York alleging that her right to free speech was violated when she was fined, pursuant to the City's Zoning Resolution, for affixing an illuminated peace symbol to the exterior frame of a seventeenth-floor window in her condominium unit on the Upper West Side of Manhattan. She contends that the City's interests in "maintaining an aesthetically pleasing cityscape and preserving neighborhood character" are insufficient and unsupported by the record. It is well settled that these interests are legitimate government objectives. The restriction in the Zoning Resolution does

not prohibit non-illuminated, non-commercial signs with a total surface area of less than 12 square feet, even above 40 feet. Plaintiff is free to display the same sign in her window, as long as it is not illuminated. Although plaintiff argues that an unilluminated sign would be harder for passers-by to see at night, the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. [Congress shall make no law … abridging the freedom of speech]

SECTION 881 LICENSES

DDG Warren LLC v. Assouline Ritz 1, LLC, [Tribeca Townhomes at 16 Warren St. Condominium], 138 A.D.3d 539 (1st Dept. 4/19/16) – Application for a grant of a Section 881 license. Although the determination of whether to award a license fee is discretionary, in that RPAPL 881 provides that a "license shall be granted by the court in an appropriate case *upon such terms as justice requires*", the grant of licenses pursuant to RPAPL 881 often warrants the award of contemporaneous license fees. The respondent to an 881 petition has not sought out the intrusion and does not derive any benefit from it. Equity requires that the owner compelled to grant access should not have to bear any costs resulting from the access. Where the granted license will entail substantial interference with the use and enjoyment of the neighboring property during the planned 30-month period, thus decreasing the value of the property during that time, it was an improvident exercise of discretion to postpone until the end of the three-year license period the matter of the fees to which respondents must be entitled. •Petitioner's payment to respondents for development or air rights does not eliminate respondents' rights to a fee for the impact on them as a result of the RPAPL 881 license.

Van Dorn Holdings, LLC v. 152 West 58th Owners Corp., 2016 WL 4430493 (Sup.Ct. NY Co. 8/19/16) – Petitioner was granted a license to install temporary protection in an alley and on a terrace for a specified period of time on the conditions that petitioner pay the coop's attorney's and engineer's fees, provide insurance; and pay the terrace shareholder a licensee fee; and also to pay the shareholder and the coop a daily fee if the work is not completed on time.

TRESPASS

Diego Beekman Mutual Housing Assoc. HDFC v. Dish Network, LLC, 2016 WL 1060328 (USDC SDNY 3/15/16) - Action for trespass and negligence against a cable provider that installed a dish on the building. Trespass was dismissed because the coop did not claim to be in exclusive possession of the trespassed buildings, and the negligence claim was dismissed because the coop did not show how the cable company was responsible for the installation of its dish.

MALPRACTICE - ACCOUNTANT

Jefferson Apartments, Inc. v. Mauceri, 52 Misc.3d 1012 (Sup. Ct. Q. Co. July 25, 2016) - Landlord filed suit against the managing agent of landlord's residential cooperative and agent's employee for alleged conversion, and against its auditor for alleged professional malpractice. Plaintiff alleges that it retained Mauceri to audit plaintiff's financial statements and provide consultation on financial matters. Plaintiff alleges that Mauceri failed to identify unauthorized transactions. The continuous representation doctrine tolls the running of the statute of limitations on a claim arising from the rendition of professional services only so long as the defendant continues to advise the client "in connection with the particular transaction which is the subject of the action and not merely during the continuation of a general professional relationship". The motion seeking dismissal of the professional malpractice claims is denied. Plaintiff raised a question of fact as to whether the statute of limitations with regards to these transactions was tolled by the doctrine of continuous representation.

INSURANCE

St. George Tower v. Insurance Company of Greater New York, 139 A.D.3d 200 (1st Dept. 4/21/16) – Plaintiff cooperative seeks to recover from its insurer the cost of certain structural repairs that are necessary to bring the building into compliance with the Building Code, because the need for those repairs was uncovered in the course of performing water damage remediation covered by the policy. Where it is fortuitously discovered in the course of performing remediation of covered property damage, that structural repairs or modifications are needed in order to bring the building into compliance with applicable codes, the "Ordinance or Law" endorsement is not brought into play. Pressure testing of a pump related to the building's fire suppression system resulted in a flood that damaged the ceilings and floors in certain apartments on the upper floors. GNY reimbursed plaintiff for water damage and lost maintenance incurred as a result of that covered loss.

During the architect's inspection and repair, it was discovered that the concrete slabs under the flooring were in a distressed and deteriorated condition, which constituted a violation of the Building Code, and required repair before the water damage remediation could be completed. The latent problem that was uncovered by inspection necessitated by the covered damage was not a problem related to the covered damage; rather, the inspection discovered a latent, unrelated problem with the building's infrastructure. The condition of the concrete slabs in plaintiff's building, which had to be repaired to bring the building into compliance with the Building Code, bore no relationship to the covered loss—the water damage. Insurer was not obligated to provide coverage for loss due to the latent structural problem.

EMPLOYEES

Lopez v. Hollisco Owners' Corp., 147 F.Supp.3d 71 (USDC EDNY 11/30/15) -This is a compensation and disability employment discrimination case with no merit. It proceeds under the mistaken notions that: (i) an employer cannot condition an employee's return to work, after he reports he has a dangerous disease, on production of a doctor's note that he is fit for work; and (ii) that an employer cannot define the work week as running from Saturday to Friday for purposes of compensating overtime.

COMMON AREAS

Andrade v. 350 Bleecker Street Apartment Corp., 2015 WL 7454014 (Sup. Ct. NY Co. November 24, 2015) - Plaintiff masonry worker alleges that he was injured when he rested his right foot and placed his left foot on a wooden plank between the fourth rung of two A-frame ladders in order to use a scraper to clean underneath the exterior fire escape stairs, the plank broke and he fell approximately four feet to the ground. Plaintiff moves for partial summary judgment as to liability. The duty to provide safety devices is nondelegable and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury. A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential". Defendants 350 Bleecker Corp. and Tudor Realty violated the statute as the A-frame ladder and plank set up for plaintiff to carry out his assignment were insufficient to protect plaintiff from his fall while he was engaged in covered activity.

INDIVIDUAL APARTMENTS

Perez v. Faros Properties, LLC, [Downing Court Condominium], 2016 WL 3389872 (Sup. Ct. NY Co. May 19, 2016) Both Labor Law 240 and 241 are applicable to "all contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work." It is clear that the condominium defendants are not contractors with respect to the work performed in the subject apartment. With respect to whether

the condominium defendants are owners, liability under the Labor Law as an owner, however, turns in every case on sometimes fine distinctions relating to ownership of the premises and control of the injury-producing work. And whereas condominium apartments are owned by individual unit owners a cooperative corporation owns an entire building, including the apartments where individual tenant-shareholders reside. The condominium defendants are not the owner's agents within the meaning of the Labor Law. With respect to Labor Law 200: [M]ere oversight of the timing and quality of the work performed is not equivalent to direct supervision and control and is thus insufficient to support the imposition of liability under Labor Law 200.

BUT

Domaszowec v. Residential Management Group LLC. [40 Fifth Avenue Corp.], 135 A.D.3d 572 (1st Dept. January 19, 2016) - plaintiff, whose decedent fell to his death while cleaning a window on the 13th floor of an apartment building, is entitled to summary judgment on her Labor Law § 240(1) claim as against 40 Fifth defendants, the owner and manager of the building. The decedent was hired by two shareholders of the residential cooperative, and had a long-standing arrangement with the building to clean its windows. Thus, contrary to the motion court's finding, he was engaged in "commercial window washing," involving "heightened elevation-related risks," as opposed to "routine, household window washing". The court correctly dismissed the Labor Law § 202 claim as against the proprietary tenants, since it is undisputed that they did not have exclusive control of the subject window.
●The court correctly denied plaintiffs' motion for partial summary judgment on her common-law negligence claims as against Panorama and Panorama's motion for summary judgment dismissing those claims, in light of conflicting evidence as to whether Panorama cut the bolts of the anchor attached to the building, to which the decedent apparently attempted to attach his safety belt. Plaintiff's expert professional engineer concluded, based on multiple site inspections, that saw marks in the window frame must have been created by a certain type of reciprocating saw used by Panorama and not by the other two contractors working on the project, and this opinion was corroborated by experts of 40 Fifth defendants who found the marks consistent with that type of saw. However, Panorama's crew leader denied that any of the Panorama workers cut the bolts. Although the evidence establishes that cutting the bolts on the subject window would have been unnecessary, it cannot be assumed as a matter of law that the Panorama workers did not do so, since they were instructed to cut bolts on nine other windows in this project as well as any bolts that were in their way.

SLIP AND FALL

Gurley v. Rochdale Village, Inc. 137 A.D.3d 749 (2d Dept. March 2, 2016) - The plaintiff allegedly sustained injuries when she slipped and fell in the lobby of a cooperative apartment building owned by the defendant. She alleged that she slipped on water that had leaked from the ceiling of the lobby. The defendant established its prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that it neither created nor had actual or constructive notice of the water in the lobby. In opposition, the plaintiff failed to raise a triable issue of fact. A general awareness of a recurring problem is insufficient, without more, to establish constructive notice of the particular condition that caused the accident.

BUT

DeMonte v. Chestnut Oaks at Chappaqua**,** 134 A.D.3d 662 **(**2d Dept. December 2, 2015) - plaintiff allegedly sustained personal injuries when she slipped and fell on ice in the parking lot of the condominium. Under the so-called 'storm in progress' rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm. However, if a storm is ongoing, and a property

owner elects to remove snow, it must do so with reasonable care or it could be held liable for creating or exacerbating a natural hazard created by the storm. In such an instance, a property owner moving for summary judgment in a slip and fall case must demonstrate in support of its motion that the snow removal efforts it undertook neither created nor exacerbated the allegedly hazardous condition which caused the injured plaintiff to fall. In this case, defendants failed to make a prima facie showing that the snow removal efforts undertaken during the storm did not create the allegedly hazardous icy condition which resulted in the plaintiff's injuries.

TRIP AND FALL

Doman v. P.S. Marcato Elevator Co., Inc. [Ellivkroy Realty Corp.], 2016 WL 1643028 (Sup. Ct. NY Co. April 19, 2016) - Plaintiff alleged that she sustained injuries when she tripped and fell while exiting a misleveled elevator. A property owner can be held liable where it fails to notify the elevator company with which it has a maintenance and repair contract about a known defect. There are triable issues of fact as to whether the coop had actual notice of the defective condition of the elevator prior to the accident, and whether they notified Marcato of a specific, known defect. The building defendants also failed to establish the inapplicability of the doctrine of res ipsa loquitur. The misleveling of an elevator is the type of occurrence that is unlikely to transpire in the absence of negligence. Since their submissions reveal the existence of a triable issue of fact as to whether their active negligence in failing to notify Marcato of specific, known defects in the condition of the elevator contributed to the subject accident, and their motion for summary judgment on their cross claim for common-law indemnification must be denied.

SPOLIATION

Dzidowska v. The Related Companies, LP [Strathmore Condominium], 2016 WL 108264 (Sup. Ct. NY Co. January 8, 2016) – Action seeking damages for injuries from a trip and fall in an elevator. Plaintiff sought sanctions based on defendants' failure to produce any video footage recorded from the cameras located inside an elevator and in the lobby depicting the hours prior to plaintiff's accident. Defendants, who had control over said video footage, had an obligation to preserve said footage and that the failure to produce the video footage or the destruction of same was done with a "culpable state of mind". The video footage is relevant in that it could show actual or constructive notice of the condition on the part of defendants. The court found that plaintiff is entitled to sanctions against defendants. However, based on the fact that defendants provided some video footage which shows plaintiff falling in the elevator, the court declined to impose the extreme sanctions of striking defendants' answers or resolving the issues of notice in favor of plaintiff and instead determined that the more appropriate sanction is a negative inference charge against defendants

QUESTIONS AND DISCUSSION