ASSOCIATION OF RIVERDALE COOPERATIVES & CONDOMINIUMS

SIGNIFICANT LEGAL DECISIONS of 2017

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LEGAL ISSUES INVOLVING UNIT OWNERS AND RESIDENTS

APPLICATION OF THE BUSINESS JUDGMENT RULE TO BOARDS OF DIRECTORS

Siller v. Third Brevoort Corp., 145 A.D.3d 595, Appellate Division, First Department, December 22, 2016. The complaint alleges that defendant corporation and the president of the coop board breached plaintiff's proprietary lease and a 1990 agreement under which plaintiff built a laundry room in her apartment by refusing to allow her to replace her broken washer and dryer with machines of her choice rather than any of the three brands that the coop's house rules allow for replacement machines. The governing agreements flatly contradict plaintiff's allegations of breach of contract Plaintiff has not identified a single term or provision that gives her a contractual right in perpetuity to install any replacement laundry machine she chooses. She relies generally upon the board's approval of her plans to construct the laundry room in 1990 and the lease provision making her solely responsible for repairing her appliances, but nothing in those agreements gives her a right to repair the appliances in a manner that conflicts with the house rules. Plaintiff's reliance upon the provision of the lease requiring that any house rules be “reasonable” is unavailing. Even under a standard of reasonableness, rather than the less stringent business judgment rule, plaintiff has not established a breach, since the house rule at issue is reasonable on its face and was not unfairly targeted at plaintiff. **The claims asserted against the president for prima facie tort and tortious interference with contract, based on the speculative and far-fetched theory that she blocked plaintiff's attempts to replace her washing machines in order to receive a kickback, fail to state causes of action.

Tucciarone v. Hamlet on Olde Oyster Bay Homeowners Assn., Inc., 2017 WL 4655087, Appellate Division, Second Department, October 18, 2017. Plaintiffs alleged that they had planted bamboo on their property and that the bamboo had spread to the property of adjacent homeowners and onto common areas, their “efforts to contain the bamboo infestation [proved] to be ineffectual,” and that the HOA imposed unauthorized and excessive fines upon them and failed to remediate the problem itself. Plaintiffs alleged that the HOA was liable for damages for breach of contract and that the individual defendants were liable for breach of fiduciary duty. Defendants established that the HOA was authorized to impose fines in connection with the bamboo infestation rather than exercise its discretionary authority to remediate the problem itself, and that this decision was made in good

faith and in furtherance of the legitimate interests of the HOA. The plaintiffs failed to show that the HOA acted in bad faith or that its actions were taken for any purpose other than to address the bamboo infestation that was admittedly caused by the plaintiffs. **Supreme Court erred in denying defendants' motion for summary judgment dismissing the cause of action alleging breach of fiduciary duty insofar as asserted against the individual defendants. The individual defendants did not commit any tortious acts outside the scope of their authority as Board members

St. Denis v. Queensbury Baybridge Homeowners Assn., Inc., 150 A.D.3d 1379, Appellate Division, Third Department, May 4, 2017. Plaintiff alleges that, in the absence of member approval, defendant lacked the authority to spend $56,637 from a capital savings account to repair a building roof. In view of defendant's bylaws and declaration and the Board's minutes the court found that the record is devoid of any proof demonstrating that the Board's decision to spend money from the capital account for the roof repair was contrary to defendant's governing documents or taken in bad faith. With respect to the second cause of action the evidence demonstrates that certain line-item expenditures exceeded what was originally budgeted for such line items. This mere fact of overspending, however, does not mean that the Board acted in bad faith or against the legitimate interests of defendant. Nor does plaintiff cite to any provision in the declaration or bylaws requiring that the Board seek membership approval if it will exceed the budget for any specific line item. Since the record evidence does not reflect the Board's process or reasons leading to the alleged overspending for a particular line item, summary resolution as to plaintiff's second cause of action is not appropriate at this time.

Skalyo v. Laurel Park Condominium Board of Managers, 147 A.D.3d 1358, Appellate Division, Fourth Department, February 3, 2017. Plaintiff commenced this action seeking a declaration that the installation of a dog restraint system known as an “invisible fence” did not violate the provisions of the Declaration and Bylaws of the Condominium prohibiting the alteration, addition or modification of the lot on which plaintiff's unit is located without the prior written consent of defendant Board of Managers. Supreme Court properly granted defendants' motion seeking summary judgment.

BUT

In re Dicker v. Glen Oaks Village Owners, Inc., 153 A.D.3d 1399, Appellate Division, Second Department, September 27, 2017. Shareholder commenced Article 78 proceeding seeking review of decisions granting an application to erect a terrace; and assessing a fee for a window replacement program on a per apartment basis. The board's determination to allow the subject terrace without the petitioner's consent was not protected by the business judgment rule. In 2004, the board promulgated rules governing the construction of decks and terraces, including a requirement that the second-floor shareholder-tenant obtain the consent of the first-floor shareholder-tenant to erect a terrace above a first-floor window. These rules also provided that they may be waived or altered on a case-by-case basis, By dispensing with the petitioner's consent, and, more generally, the consent of first-floor shareholders who do not reside in the building, the board deliberately singled out the petitioner, as well as tenant-shareholders who do not reside on the premises, for harmful treatment and engaged in favoritism toward tenants-shareholders who resided on the premises. Petitioner established that the board's determination to dispense with his consent did not legitimately further the corporate purpose and was made in bad faith.

**Petitioner also challenges the board's assessment to fund a window replacement program for all units in the complex on a per apartment basis rather than a per share basis. In addition to using reserve funds, the board charged each unit the same amount, regardless of the number of shares owned. The petitioner contends that the proprietary lease requires that any such fee be collected on a per share basis. The board violated the proprietary lease when it assessed the window replacement fees on a per apartment basis, and, therefore,

acted outside the scope of its authority. Therefore, its determination was not protected by the business judgment rule.

DERIVATIVE ACTIONS

Lawrence v. Longfellow Estates Homeowners Association, Inc., 2017 WL 1930268, Supreme Court, Bronx County (4/4/17). Plaintiff alleges causes of action for beach of covenant; breach of fiduciary duty, and fraud. The Court of Appeals has "historically been reluctant to permit shareholder derivative suits, noting that the power of courts to direct the management of a corporation's affairs should be exercised with restraint." The complaint must allege with particularity that "(1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction". Plaintiff's complaint fails to make these allegations with particularity. Moreover, the business judgment rule "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. The Complaint was dismissed.

Sims v. Firstservice Corp. [200 East 90th Street Owners Corp.], 2017 WL 356415, Supreme Court, New York County, January 17, 2017. Derivative action. Plaintiff alleges that defendants breached their fiduciary duties as managing agent and that the FSR defendants conspired with a favored vendor to rig the bidding process for the garage. Plaintiff contends that the board of directors was duped by the defendants, resulting in a failure to award the garage lease contract to the highest bidder. The complaint does not state that plaintiff ever made a pre-suit demand on the board of directors. Before shareholders may commence a derivative action, they must make a demand upon the corporation to commence the action, unless such demand would be futile. The demand requirement rests on "the basic principle of corporate governance that the decisions of a corporation – including the decision to initiate litigation – should be made by the board of directors or the majority of shareholders, the demand requirement is a prophylactic device designed to weed out unnecessary or illegitimate shareholder derivative suits commenced by shareholders for personal gain rather than the benefit of the corporation. The complaint alleges that the board delegated the search for a new garage operator and the negotiation of the lease agreement to the managing agent, and the complaint asserts no specific facts that the board acted improperly in deciding to delegate that task to the managing agent, especially in light of the managing agent's representation that it had expertise in such matters. Because it can be inferred from these allegations that the board acted in a reasonable manner under the circumstances, it follows that the complaint does not allege with particularity that the challenged transaction was so egregious on its face that it could not have been a product of the sound business judgment of the directors. The motion to dismiss the complaint was granted.

LIABILITY OF DIRECTORS

Lepie v. Gilliat [136 West 78th Street], 2017 WL 2734058, Supreme Court, New York County, June 26, 2017. Plaintiff commenced the instant action against the board members, individually. Plaintiff recounts a number of incidents in which the president attempted to deny her right of access to the building's roof, including: 1) physically threatening her; 2) threatening to call the police if she attempted to access the roof; 3) serving a written demand from the board for $50,000.00 in return for granting her the right to access the roof; 4) claiming that her use of the roof was illegal, in the absence of a Department of Buildings (DOB) permit authorizing that a flooring structure be placed on the roof; 5) refusing to sign the DOB application that Plaintiff had retained an engineer to prepare 6) falsely claiming that it was an illegal act for Plaintiff to sign said application in her capacity as a unit owner; 7) retaining workmen who improperly entered Plaintiff's apartment and erected a new

structure that covered the skylight, preventing her from accessing the roof; 8) committing acts of harassment against her, such as shutting off heat and/or electricity, interfering with her mail and intercom service, instructing workmen to leave the building's doors open (with the result that her unit was burglarized), and instructing workmen on the roof to damage her ceiling while installing the new roof structure. The court found that all of the allegations in each cause of action set forth in Plaintiff's complaint, when read in the light most favorable to her, are merely conclusory allegations that the president committed tortious acts as an individual, rather than in his capacity as president of the building's board. Such claims are barred by the business judgment rule. Accordingly, the court finds that the president's motion to dismiss should be granted.

Omansky v. 160 Chambers Street Owners Inc., 2017 WL 3670243, **Su**preme Court, New York County, August 25, 2017. Plaintiff sues based on defendants' alleged failures to repair the roof, replace windows and skylights that are leaking into plaintiff's unit, and to permit him to reinstall the deck/terrace on the appurtenant portion of his unit. Plaintiff asserts claims against the individual defendants for damages based on their refusing to allow plaintiff to reinstall the terrace and to repair/replace the defective windows and skylights and repair interior water damage. Plaintiff contends that defendants breached the lease as revenge for plaintiff's prior lawsuit against them and for their own financial gain in avoiding payment for the repairs. Plaintiff's disagreement with defendants' contention that they were unable to make repairs due to a lack of funds does not establish that the defendants' actions are not protected by the business judgment rule. Plaintiff's allegations that defendants were motivated to act against him based on their personal animosity toward him and/or their hope for financial gain in avoiding payment for the repairs are conclusory and insufficient. Defendants' motion to dismiss is granted to the extent of dismissing plaintiffs' claims relating to repairs or replacement of windows, skylights, and the roof, and against the individual defendants.

Milford Management Corp. v. Dellaportas [Liberty House Condominium], 2017 WL 1739697, Supreme Court, New York County, May 3, 2017. This action arises out of a rancorous dispute among the Board of Directors and the Condominium's sponsor and managing agent, purportedly brought derivatively on behalf of the unit owners, against defendant as president of the Board, for alleged breaches of fiduciary duty.
Plaintiff Milford Management Corp. also joins the action with direct claims against defendant for alleged tortious interference. Defendant, as a Board member, owed a fiduciary duty to the shareholders, including the Sponsor. However, plaintiffs, while offering a slew of allegations of misconduct, fail to show how these various acts harmed anyone except the managing agent to whom no duty was owed. They certainly do not show how the Condominium was harmed merely because Milford was replaced by another management company. The Board heard every argument which plaintiffs insist on calling the "Smear Campaign," and plaintiffs' rebuttal, and made their own determination in the face of these facts. That the Board sided with defendant rather than with plaintiffs does not establish a breach of fiduciary duty. Milford's termination is traceable to the Board, not defendant. Plaintiffs' claim that defendant has had a number of "secret meetings" in breach of his duties as President of the Board is conclusory and there is no rule that like-minded Board members cannot meet to discuss issues amongst themselves which might come up later in an official meeting. The motion to dismiss the complaint is granted,

BOOKS & RECORDS

IKI Associates LLC v. The Abbey Condominium, 2017 WL 4708065, Supreme Court, New York County, October 19, 2017. Petitioner sent a letter to the condominium seeking to review certain books and records. Respondent rejected that demand as "unreasonable". Respondent speculates that petitioner is bringing this proceeding because petitioner is upset after receiving a fine when a dog owned by petitioner's principals went to the bathroom in the lobby on multiple occasions. Petitioner unit owner has a right to inspect the books and records of respondent. The Court finds that petitioner is not entitled to certain records because petitioner has not

articulated a valid purpose for them and these requests are burdensome. Request number 1 (the ledgers) is granted, but request number 2 (the checks) is denied. Petitioner is not entitled to see a copy of every check the condominium has written in the last five years without stating the reason for that request. A unit owner has a right to review the meeting minutes of the condominium's board. And, presumably, all unit owners pay (through common charges) the management company to oversee the building- therefore, a unit owner should be able to see the agreement. Request for a unit owner list is denied because the petition does not state a valid purpose for needing that information. The 2013 *Pomerance* case held that a shareholder in a co-op was entitled to the names and addresses of other shareholder-tenants in connection with an election. Here, petitioner refers to an upcoming election only in reply papers.

OBJECTIONABLE CONDUCT

The East Drive Housing Development Fund Corp. v. Allen, 2017 WL 3047540, Supreme Court, New York County, July 18, 2017. Plaintiff informed defendant that based on her protracted refusal to pay maintenance for seven years, repeated refusal to allow access to her apartment to fix a leak, and for various acts of vandalism and harassment, including destroying holiday decorations, the board would hold a meeting, to discuss its grievances against her and allow her an opportunity to resolve them. By subsequent letter, the board informed defendant that it had voted to confirm its decision to terminate the lease, commence an action to recover possession of her apartment. Decisions of a coop board to terminate its relationship with one of its shareholders is generally protected by the business judgment rule and will be upheld unless it is outside the scope of its authority, does not further the coop's corporate purpose, or was made in bad faith. Plaintiff notified defendant of the behaviors that it found objectionable and gave her many opportunities to correct that conduct. Defendant's refusal to participate in mediation or appear at the special meetings that the board held to deliberate on her relationship with plaintiff does not give rise to a right to do so here. The sheriff may proceed with the eviction of defendant.

PARKING

Cruz v. Seward Park Housing Corp., 2017 WL 3084982, Supreme Court, New York County, July 19, 2017.
The Board voted that the Garage was to be converted from a self-park system to a valet system, because it would increase access to parking for shareholders and generate more income for the Coop. The Board awarded a management contract to Icon for a 10-year term. The instant petition challenges the Contract's validity, alleging that the BOD exceeded its authority by not providing prior notice of a purported change to the co-op's "house rules"; and destroying petitioners' property rights in their previously assigned parking spaces. The Court found that the Board did not exceed its authority in converting the Garage to a valet parking system. The Board acted within its authority even if its decision to do so was unpopular. The Board was under no contractual, legal, or equitable duty to involve more than 1,700 cooperators in its decision-making process. Rather, the Board was elected specifically to conduct the day-to-day affairs of the co-op and to take entire charge of the property, interests, business, and transactions of the co-op. It would be nearly impossible for co-op boards to function if every time they had to act, they had to entertain potentially endless debate involving numerous varying positions.
**The Statute of Limitations for bringing an Article 78 special proceeding is 120 days and begins to run when the body's challenged decision becomes "final and binding," which is typically when an individual receives a notice of the final determination. The Court finds that the Board's decision to convert the Garage became "final and binding" upon petitioners on January 28, 2016, when petitioners received the Notice. The motion to dismiss was granted.

DISCRIMINATION

COMPANION ANIMAL (DOG)

Delkap Management, Inc. v. New York State Div. of Human Rights [Lindenwood Village Section C Cooperative], 144 A.D.3d 1148, Appellate Division, Second Department, November 30, 2016. Cooperative brought Article 78 proceeding for review of determination of DHR that corporation discriminated against its shareholder, who was diagnosed with rheumatoid arthritis and heart rhythm irregularities, because of her disability; and wrongfully retaliated against her. The complainant demonstrated that she was disabled and was a shareholder in the Coop. She also submitted evidence that the dog helped her with her symptoms by easing her stress and causing her to be more active. The complainant failed to present medical or psychological evidence sufficient to demonstrate that the dog was actually necessary in order for her to enjoy the apartment. The complainant had resided in the apartment for more than 20 years without the dog; was diagnosed with her disability several years prior to the dog being brought to the apartment by the complainant's daughter; and the dog was present in the apartment for only two weeks before the complainant asked the Board for a reasonable accommodation. Accordingly, the SDHR's determination of discrimination based on her disability was not supported by substantial evidence. **The SDHR's determination that the petitioners retaliated against the complainant for engaging in protected behavior was supported by substantial evidence. Complainant established that she participated in the protected activity of filing an SDHR discrimination complaint against the petitioners, the petitioners were aware of this action, and there was a causal connection between the protected activity and the petitioners' retaliatory conduct, which included taking away the complainant's designated parking space for a nine-day period, refusing to accept her maintenance checks, filing eviction proceedings against her, and directing her to immediately remove her dog from her apartment

AGE

Kolja v. R.A. Cohen & Associates, Inc. [The 230 Riverside Condominium], 2017 WL 1550192, Supreme Court, New York County. April 27, 2017. Plaintiff brought this action alleging age discrimination. Courts have described the NYCHRL as “the most progressive anti-discrimination law in the nation” that is to be “construed broadly in favor of discrimination plaintiffs to the extent that such a construction is reasonably possible.
The changes to plaintiff's work schedule and job duties made a significant impact on him. Several days a week, the east side porter was responsible for collecting the garbage on for both the east and west sides of the 250-unit apartment building while the west side porter was not responsible for any of the trash, but rather for the vacuuming. Plaintiff has proffered adequate evidence of discriminatory conduct to survive summary judgment. The timing of the change in plaintiff's work schedule and job duties raises an inference that it might have been done in retaliation for plaintiff's complaints to his union. There is an issue of fact as to why, after 28 years of having weekends off, plaintiff's work schedule suddenly changed to have Sunday and Monday off. Plaintiff's claims of retaliation and aiding and abetting discrimination and retaliation survive summary judgment.

ALTERATIONS

Steinberg-Fisher v. North Shore Towers Apartments, Inc. 149 A.D.3d 848, Appellate Division, Second Department, April 12, 2017. Petitioner filed a complaint with the New York State Division of Human Rights alleging that the cooperative discriminated against her by not granting her an accommodation from its rule requiring that before any alterations to an apartment could be made, a shareholder must execute an alteration agreement, providing that all alterations had to be completed within 90 days. Before filing her complaint with the Division, the petitioner presented North Shore with a detailed letter from her doctor stating that she suffers from attention

deficit hyperactivity disorder and a sleep disorder, which prevent her from being able to complete tasks within strict time constraints. The Division dismissed the complaint, finding no probable cause to believe that North Shore engaged in an unlawful discriminatory practice based on the petitioner's disability. The Division's factual findings are not supported by the record. The petitioner submitted evidence that North Shore required that the alteration agreement "be executed as presented." In her complaint to the Division, the petitioner sought a "more relaxed time frame" within which to complete the alterations. Thus, the Division's finding that the requested accommodation was unreasonable was without regard to the facts in the record. it is undisputed that North Shore, despite being presented with evidence of the petitioner's disability and its impact on her ability to adhere to rigid time frames, refused to offer her any accommodation whatsoever from the 90–day rule in the alteration agreement. We reject North Shore's remaining contention, that judicial review of its decision is foreclosed by the business judgment rule, as "decision making tainted by discriminatory considerations is not protected by the business judgment rule.

STAY OF PROCEEDING

CONTEMPT

Board of Directors of Windsor Owners Corp. v. Platt, 148 A.D.3d 645, Appellate Division, First Department, March 30, 2017. This appeal is based on admitted disclosures of attorney/client communications by defendant —a former board member of plaintiff - to a shareholder and her violation of a permanent injunction order that specifically enjoined her from making such disclosures. Defendant's contentions that she should not be held in contempt for violating the permanent injunction order fail. There is no legitimate defense to defendant's violation of the literal terms of the permanent injunction order, which she fully admits. Judiciary Law § 753 does not require a showing of willfulness or monetary harm as a precondition to a finding of civil contempt. The Court of Appeals has not imposed a willfulness requirement for a civil contempt finding. Civil contempt is established, regardless of the contemnor's motive, when "disobedience of the court's order 'defeats, impairs, impedes, or prejudices the rights or remedies of a party' ." The motion court determined that plaintiff showed that it suffered potential harm from Platt's disclosures and that Platt's disclosures to Mazzocchi had strengthened his lawsuits against the Board and caused the Board to incur additional legal fees in defending against them

ALTERATIONS

Roger Morris Apartment Corp. v. Varela, 2016 WL 7007817, Appellate Term, First Department, November 30, 2016. Respondents breached paragraph 21 of the proprietary lease agreement, which required them to obtain the Board's "written consent" before installing any "air conditioning system." Respondents submitted a written application for approval of certain alteration work within their apartment; which affirmatively stated that "NO WORK REGARDING BUILDING ENVELOPE, HVAC" would be performed. Respondents subsequently installed a central air conditioning system on the facade of the building without first obtaining petitioner's written consent. Respondents cannot rely upon any purported oral consent to the work by the managing agent. The proprietary lease unambiguously states that "written consent" of the lessor is required. Summary judgment of possession is granted. Since the holdover petition was premised upon a breach of lease, tenant must be afforded the remedy of a post-judgment cure.

Stanton v. The Board of Managers of the Textile Building Condominium, 2017 WL 4843821, Supreme Court, New York County, October 20, 2017. Stanton entered into an Alteration Agreement which provided for work to be completed within six months. The Stantons failed to timely complete the renovations. As a result of the delay,

the Board of Managers began leveling fines against the Stantons as the project stretched into an extended period of time exceeding two years. The Stantons directly violated the **Condominium** Documents by engaging in extensive renovations for two years without permission to perform such work beyond the first six months. Stanton's assertion that the Board lacked the authority to impose the fines is without merit as such action was within the scope of authority explicitly granted to the Board by the various governing documents. Accordingly, Stanton's motion for summary judgment is denied as against the Board of Managers.
** There is no basis for imposing liability against Douglas Elliman since it is uncontested that it is merely a management company that serves as an agent for a disclosed principal.

Cutone v. Riverside Towers Corp., 2017 WL 1836424, Supreme Court, New York County, May 5, 2017. Plaintiff's claim that he was treated differently from other shareholders because defendant gave him "an unreasonably short time period of 45 days" to complete his renovations is without merit. Because renovations often disturb neighbors, it is not uncommon for cooperative boards to use their business judgment and to require renovations to conclude within a specified time frame. Besides, plaintiff himself caused delays; he filed a request for renovation with defendant's managing agent on July 1, 2007, and changed his plans again in September 2007 to sub-divide the living room. Plaintiff has not raised any issue of fact demonstrating that he was treated differently from any other shareholder, or that he was unfairly targeted. To the contrary, the defendant cut plaintiff some slack despite his breaches; as defendant indicates, even though plaintiff missed the forty-five day deadline, defendant never issued any fines for violating the alteration agreement. Defendant's motion for summary judgment dismissing the causes of action in the complaint is granted;

INDEMNIFICATION

Bruno v. Redi-Const. Inc.[32 Gramercy Park], 2017 WL 543351, Supreme Court, New York County, February 10, 2017. The coop and the managing agent move for an order granting them summary judgment on their cross claim of contractual indemnification and attorney fees as against plaintiff's neighbor, defendant Moosbrugger. Moosbrugger and Gramercy entered into an alteration agreement, whereby Moosbrugger agreed to indemnify the coop and other shareholders against any damages suffered to persons or property as a result of the Work. An indemnification contract purporting to indemnify the indemnitee for its own negligence may be enforced upon a finding that the indemnitee was free from negligence. The indemnification clause in issue obligates Moosbrugger to indemnify Gramercy for any injuries resulting from the work, without regard to Gramercy's negligence or her or her contractor's own negligence. Absent any limiting language, the clause runs afoul of GOL § 5-322.1. There is no basis at this juncture of the action for finding that movants are free from negligence, their claim for contractual indemnification is premature.

REPAIRS

Goldenberg v. 425 Park-South Tower Corp., 151 A.D.3d 522, Appellate Division, First Department, June 13, 2017. Plaintiff's proprietary lease provides that the lessor "shall not be required to repair or replace, or cause to be repaired or replaced, equipment, fixtures, furniture, furnishings or decorations installed by [plaintiff] or any previous proprietary lessee of the leased space." In addition, it provides that plaintiff "shall be solely responsible for the maintenance, repair, and replacement of plumbing, gas and heating fixtures and equipment." The lease is unambiguous on its face and must be enforced according to the plain meaning of its terms. Contrary to plaintiff's contention, there is no ambiguity as to whether the standard building equipment, for which the lease places the responsibility for maintenance on the lessor, includes the fixtures or equipment installed by the previous proprietary lessee. Summary judgment dismissing the second cause of action was unanimously affirmed

Dogwood Residential, LLC v. Stable 49, Ltd., 2016 WL 7489223, Supreme Court, New York County, December 19, 2016. Plaintiffs move to reargue the prior order which granted the motion by defendant for summary judgment dismissing the complaint. Prior to purchasing the apartment, plaintiff advised defendant by email that he was willing to accept responsibility for the structure of the elevator and the roof if and when he became a member of the coop. Plaintiffs allege that defendant breached the lease due to its failure to repair the roof and elevator. The Court, in its discretion, granted reargument of defendant's motion for summary judgment. Plaintiffs correctly assert that this Court misapprehended the relevant law in finding that this email estopped them from asserting that defendant was responsible for structural repairs pursuant to the lease. The lease which provided that it would be the "obligation" of defendant to perform structural repairs controls the obligations of the parties. The parol [sic] evidence rule operates to exclude evidence of all prior or contemporaneous negotiations between the parties offered to contradict or modify the terms of their writing. Since the lease specifically imposed upon defendant the obligation to perform structural repairs, this Court could not consider extrinsic evidence of a prior or subsequent agreement or the subsequent course of performance by the parties.
**In addition, plaintiffs urge that parol evidence could not be used to alter the terms of the proprietary lease since Paragraph 6 prohibited any variation from the form of the lease unless the same was authorized by "[l]essees owning at least 75% of the [l]essor's shares then issued and outstanding." The complaint was reinstated.
**The Court also granted reargument with respect to the dismissal of plaintiffs' claim for breach of fiduciary duty, since such a claim may be asserted against the Board.

BED BUGS

7 West 92nd Street Housing Development Fund Corp. v. Vidal, 2017 2017 WL 106649, Supreme Court, New York County, January 10, 2017. Defendant has failed to establish a meritorious defense to the present action. Pursuant to the proprietary lease, the obligation to repair the conditions in the apartment required to eradicate the bed bug infestation is imposed on the defendant. If the apartment owner declines to perform this work when requested to do so, the HDFC has the right to perform the work and recover the expenses of the work from the tenant. The determination by the HDFC that there is in fact a bed bug infestation in the defendant's apartment and that the work recommended to eradicate the condition must be performed by defendant is protected by the business judgment rule. The determination by the Board to require defendant to implement the recommendations to eradicate the bed bug infestation in her apartment is protected by the business judgment rule, as a result of which the court need not determine whether there is in fact a bed bug infestation or whether these repairs are required to eradicate the infestation. The actions were taken by the directors in good faith and in the exercise of honest judgment that this work was required to eradicate the bed bug infestation in the building. The motion by defendant to vacate her default is denied and the stay issued by this court of the enforcement of the judgment and order is hereby vacated.

PRELIMINARY INJUNCTION

- **GRANTED**

SMOKING

Bd. of Managers of 400 Cent. Park West Condominium v. Henriquez-Berman, 2017 WL 244808, Supreme Court, New York County. January 17, 2017. Plaintiff condominium, seeking to recover unpaid common charges and enjoin violations of its by-laws upon theories of breach of contract and nuisance, now moves to preliminarily enjoin the defendants from smoking marijuana in Unit 1S of the condominium and permitting marijuana smoke and excessively loud noises from infiltrating into the common areas and other units of the condominium. Defendant has received cease and desist letters and been fined at least 10 times for these smoke and noise violations, By this proof, the plaintiff has demonstrated a likelihood of success on the merits. The holding of *Ewen v Maccherone*, (App Term, 1st Dept. 2011), does not require a different result. There, the court found that cigarette smoke emanating from an apartment does not alone support a private nuisance claim by one tenant against another where smoking is not expressly prohibited in the by-laws. However the court noted that such a claim may lie where the condominium's by-laws impose some duty on the tenants and the board is made a party to the action. Here, the by-laws impose such a duty by prohibiting any nuisances or practices which annoy another resident or interfere with peaceful possession or use of the property, and authorize the condominium board to enforce the by-laws, as per this action. The injunctive remedy sought here is proper. It has been held that exposure to second-hand smoke from a neighboring apartment does not give rise to cause of action to recover money damages. However, a court may issue a preliminary injunction prohibiting a unit owner from violating the by-laws Since any injury caused by the smoke conditions arising from the defendants' conduct here is not compensable by money damages, the plaintiff has demonstrated that irreparable injury, requiring injunctive relief, would result should the smoke condition be permitted to persist.

REPAIRS

Rabice v. Board of Managers of Green Mansions Country Club Estates, Section III-Bldg. 11, 57 Misc.3d 1205(A), Supreme Court, Warren County, September 5, 2017. Petitioners seek to compel respondent to complete repairs in accordance with the provisions of the By–Laws. To the extent that the parties agree on what needs to be done—namely, repairs to the damage in the Unit—it is unfortunate that settlement could not be reached and Court intervention remains necessary. Inasmuch as respondent is indisputably obligated to complete the repairs and—as noted above—appears willing and able to do so, the petition is hereby granted to the extent that respondent is compelled to complete the repairs within sixty (60) days of the date of service of a copy of this Decision and Order with notice of entry thereon. Petitioners shall cooperate fully with respondent and provide unhindered access to the Unit so as to ensure prompt completion of the repairs.

- **DENIED**

Moltisanti v. East River Housing Corp., 149 A.D.3d 530, Appellate Division, First Department, April 18, 2017. This dispute concerns plaintiffs' attempt to build an enclosure on the balcony/terrace attached to their apartment. Plaintiffs sought a preliminary injunction enjoining defendant from compelling them to remove the already constructed enclosure framework, declaring that they are entitled to complete the enclosure, and enjoining defendant from interfering with or otherwise preventing them from completing it. The preliminary injunction should have been denied. Plaintiffs' request for a preliminary injunction against removal of the enclosure

framework also must fail because plaintiffs have not demonstrated the requisite irreparable harm. Any costs incurred in removing the enclosure framework would be compensable in money damages and do not warrant injunctive relief. Defendant's cross motion to dismiss should have been granted as to the Business Corporation Law § 501(c) claim. Plaintiffs do not claim that the terms of their lease or shares are any different from those of the other shareholders. Rather, they claim that they were treated differently from other shareholders because they alone were not permitted to construct an enclosure without first obtaining defendant's written permission. Assuming arguendo plaintiffs were in fact treated differently, this is not the type of differential treatment that BCL § 501(c) was designed to address.

ENFORCEMENT OF CONTRACTS

Ran v. Weiner [451 West Broadway Coop], 2017 WL 456967, Supreme Court, New York County, October 13, 2017. The Complaint alleges that a leak in defendant's apartment caused Plaintiff's ceiling to collapse into her apartment, causing substantial damage. The Complaint alleges breach of contract against Defendant, seeking monetary damages and breach of contract against the Co-op. As a remedy for the latter claim, Plaintiff seeks specific performance: namely, that the Co-op enforce the House Rules by requiring Defendant to reimburse Plaintiff for the balance of damages. Plaintiff has failed to show that Defendant and the Co-op intended the Proprietary Lease and House Rules to confer a direct benefit to Plaintiff to reimburse her for the property damage caused by the leak. Neither the Proprietary Lease, nor House Rules clearly confer rights to Plaintiff or any third-party. Specifically, there is nothing in the plain language of the Proprietary Lease or House Rules indicating that Defendant would be liable to Plaintiff for damages caused by the leak. While Section 11 of the House Rules indicates that damages caused by a water leak is the responsibility of the lessee whose apartment the leak originated, it does not clearly indicate that a third-party may enforce that provision. Instead, Plaintiff is an incidental beneficiary of the Proprietary Lease and House Rules, since she may derive a benefit from the performance of the contract, but is neither the promisee nor the one to whom performance is to be rendered. As to Plaintiff's breach of contract claim against the Co-op, the Proprietary Lease clearly indicates that the Co-op may not be responsible for the violation of the Proprietary Lease and House Rules by other lessees. The Complaint and the proceeding are dismissed

STATUTE OF LIMITATIONS

Musey v. 425 East 86 Apartments Corp., 2017 WL 4365017, Appellate Division, First Department, October 3, 2017. The co-op board adopted new house rules, providing that the roof membrane shall be protected at all times from foot traffic, planters, deck covering, furniture and/or other objects. Plaintiff contended that the new house rules deprived him of his right to the exclusive use and quiet enjoyment of the terrace. Nearly one year after receiving the house rules, plaintiff commenced this action. As relevant to this appeal, plaintiff sought a declaration that rules 4 and 5 of the house rules violated the terms of the proprietary lease and were, therefore, null and void. Supreme Court properly dismissed, as time-barred, so much of the cause of action that sought a declaratory judgment that the house rules enacted by the co-op, concerning use of the roof/terrace adjoining plaintiff's penthouse unit, were contrary to the terms of the proprietary lease. Where a cooperative shareholder seeks to challenge a co-op board's action, such challenge is to be made in the form of an article 78 proceeding which must be commenced within four months after the determination to be reviewed becomes "final and binding upon the petitioner." Plaintiff did not commence this plenary action until well beyond the four-month statute of limitations. Plaintiff's attempt to repackage his dislike of the new house rules as a breach of the lease by the co-op was properly denied.

[Madonna] **Ciccone v. One West 64th Street, Inc.,** 2017 WL 4180170, Supreme Court, New York County, September 21, 2017. The cooperative board amended the proprietary lease, paragraph 14, for all shareholders after an affirmative vote of the holders of over two-thirds of the outstanding shares. The amendment required the shareholder to be in residence in order for certain family members to be in residence. Plaintiff seeks a declaration that Paragraph 14 is void and unenforceable as against public policy and that paragraph 14 may not be enforced against plaintiff. A proceeding challenging an action a cooperative corporation takes must be commenced within four months after the corporation's determination becomes final and binding. Supreme Court properly granted defendant's motion because plaintiffs' claim, despite their current characterization, is barred by the statute of limitations. Defendant's allegedly ultra vires acts occurred in 1997 and in 2008 when the by-laws and proprietary leases were amended to, respectively, allow a majority of the directors to alter the by-laws, and to allow two-thirds of shareholders to approve amendments to the proprietary leases, and to institute a 2% flip tax on the gross sale price of any apartment. Plaintiffs are now prohibited from challenging the propriety of those amendments because they are required to have done so via a proceeding pursuant to CPLR article 78 within four months thereof.

DOGS

Brookside Senior Citizens Co-op. Community, Inc. v. Lia, 2017 WL 4316233, Supreme Court, Putnam County, April 18, 2017. After trial in this proceeding, commenced to determine the rights of the parties under a Proprietary Lease and By-Laws, specifically enforcement of a provision prohibiting oversized pets, Plaintiff is awarded an injunction prohibiting the defendant from having his dog “Crystal” and any substitute reside within the confines of Brookside Senior Citizens Cooperative Community Inc., based upon his breach of a valid lease/by-law prohibition against dogs who weigh over twenty pounds.

EVICTION

221 Middle Neck Owners Corp. v. Paris, 56 Misc.3d 855, District Court, Nassau County, .June 1, 2017. Petitioner claims that defendant is unlawfully subletting the apartment to her daughter, and that defendant does not reside in the apartment, and that the lease requires her to occupy the premises contemporaneously with her daughter. She claims that she has never illegally sublet her apartment to her daughter. Rather, her daughter resides with her and on occasion, her daughter's boyfriend “stays at the apartment”. The respondents also rely upon the Proprietary Lease (¶ 15) and maintain that the plain language allows her to reside in the apartment with her immediate family members. In view of controlling Second Department authority, the relevant provision of the proprietary lease is ambiguous and does not expressly require that consent be obtained for the type of arrangement at issue in this case. The respondents' motion for a dismissal upon documentary evidence, i.e. the Proprietary Lease, must be denied.

FORECLOSURE – COOPERATIVE

Hixon v. 12-14 East 64th Owners Corp., 2017 WL 5006608, Supreme Court, New York County, November 2, 2017. This case arises from plaintiff's eviction from the co-op and the resultant sale at a public auction. There is a lengthy history between the co-op and plaintiff: there were seven lawsuits resulting from plaintiff's defaults and/or actions in connection with the subject unit prior to the instant action. Plaintiff now seeks a declaration that the co-op's conduct was “commercially unreasonable”. The co-op has established that the sale of the subject unit by public auction was routine and proper and in turn plaintiff has failed to raise a triable issue of fact. The co-op's decisions with respect to prospective purchasers, to the extent that said purchasers existed, is protected by the business judgment rule To the extent that plaintiff argues that the co-op defendants took

more than it was entitled to from the sale proceeds, these claims are wholly unsubstantiated. The co-op defendants have demonstrated that the amounts deducted were proper and comprised of additional unpaid maintenance, repairs and removal of HPD violations, capital assessments and attorney's fees incurred in prosecuting and defending actions while plaintiff was in default under the proprietary lease. Contrary to plaintiff's position, the co-op was entitled to recoup its reasonable legal fees pursuant to Section 28 of the proprietary lease. The co-op's motion for summary judgment must be granted.

Chatham Square Owners Corp. v. Roth, 52 N.Y.S.3d 245, District Court, Nassau County, February 22, 2017. After defendant defaulted on his maintenance payments, the petitioner commenced a Non–Judicial Foreclosure. Pursuant to such foreclosure, the apartment was sold to the petitioner in accordance with the procedures set forth in UCC Article 9. Thereafter, petitioner' commenced this summary holdover proceeding by the service of a Ten Day Notice to Quit on the respondent. The petition alleges that the respondent is a licensee, the basis of which has since been revoked as a result of the foreclosure. Tenant is not a licensee. Rather, he entered into possession as a tenant under a proprietary lease. If that lease has been terminated - and there is no allegation that it has - tenant is in possession as a holdover tenant. The petition, which was based upon respondent's status as a "licensee," is defective and must be dismissed. And service of a Ten Day Notice to Quit was likewise improper.

FORECLOSURE – CONDOMINIUM

APPOINTMENT OF A RECEIVER

Heywood Condominium v. Wozencraft, 148 A.D.3d 38, Appellate Division, First Department, January 12, 2017. As a result of defendant's failure to pay common charges, plaintiff exercised its right to curtail certain nonessential services to defendant pursuant to Rule 32 of the condo's House Rules, which permits the cessation of such services to unit owners who are more than 60 days in arrears in the payment of common charges.
**Pursuant to section 5.5(c) of the bylaws, plaintiff began assessing late charges, interest and attorneys' fees incurred in its efforts to collect the unpaid charges from defendant. Section 5.5(c) of the condominium bylaws authorizes plaintiff to add attorneys' fees, late fees, and interest to the amount of the delinquent common charges and section 5.7 of the bylaws states that all such fees will constitute a lien on the unit.
**The court granted plaintiff's motion for the appointment of a temporary receiver. Both Real Property Law § 339–aa and section 5.9 of the bylaws provide for the appointment of a receiver in a lien foreclosure action to collect the reasonable rent. Defendant's reliance on cases where this Court has held that there was no showing that a receiver was necessary is misplaced. Those cases are factually distinguishable, as they did not involve condominium bylaws authorizing the appointment of a receiver.
**Real Property Law § 339–aa provides that in a foreclosure action, "the unit owner shall be required to pay *a reasonable rental for the unit* for any period prior to sale. The court granted the receiver's motion ejecting defendant from the unit as a result of his failure to pay for his use and occupancy of the unit

TRANSFERS AND SUBLETS

CONSENT TO TRANSFER

Oshlani v. Tomfol Owners Corp., 2017 WL 1836425, Supreme Court, New York County, May 5, 2017. Plaintiff' alleges tortious interference with a contract to purchase an apartment, specifically, Defendant Hardy used her position on the Board to influence the Board to vote against Plaintiff's application so that Defendant Hardy could purchase the Apartment. Plaintiff, as a non-shareholder, sufficiently alleged that the Board of Directors acted in bad faith when they denied his application. The Complaint alleges that Defendant Hardy should not have participated in the vote. Further, the Board of Directors allegedly conspired to deny Plaintiff's application in order to "force" the sale to Defendant Hardy. Defendants' motion to dismiss Plaintiff's first cause of action is denied.

TRANSFERS BY ESTATES –LEGATEES

Koeppel v. 130 East End Ave Tenants Corp., 2017 WL 4737269, Supreme Court, New York County, October 20, 2017. The complaint seeks a declaratory judgment that Plaintiff is financially qualified to assume his father's Co-op shares and Lease and that his Application was unreasonably denied. Plaintiff argues that he is likely to succeed on the merits because he has a net worth far exceeding the value of the Apartment. Plaintiff relies heavily upon *Estate of Del Terzo v 33 Fifth Ave. Owners Corp.* The complaint seeks an order requiring the Defendant to approve the transfer of the Apartment. This case and *Del Terzo* are different in several respects. Robert Del Terzo had lived in the apartment for most of his life, and at the time of his application was living there with his family. These were special circumstances that are clearly not present here. There was also no dispute in *Del Terzo* that at least one of the applicants was financially qualified. The court's ruling rested heavily on this undisputed fact. Here, there are questions about Plaintiff's assets and financial responsibility that require discovery, Plaintiff has never lived in the Apartment, and given that the proposed renovations are estimated to cost approximately $185,000 it is unlikely that he could live in the Apartment at this time. Plaintiff's motion is denied.

BUT

Estate of Del Terzo v. 33 Fifth Ave. Owners Corp., 28 N.Y.3d 1114, Court of Appeals. December 20, 2016. The Appellate Division did not err in holding defendant Owners Corp. breached paragraph 16(b) of its proprietary lease by unreasonably withholding consent to transfer an apartment from plaintiff Estate of Helen Del Terzo
to her two sons.

SUBLETS

Olszewski v. Cannon Point Ass'n, Inc., 148 A.D.3d 1306, Appellate Division, Third Department, March 9, 2017. Condominium owners brought article 78 proceeding and action for declaratory judgment against condominium associations and homeowners association to challenge rules imposing restrictions upon owners wishing to lease their properties. The HOA board approved the "Cannon Point House Rules and Regulations" including a requirement that no unit may be rented for a period of less than two weeks and a prohibition barring renters from access to the Manor House. Respondents may adopt reasonable rules and regulations relative to the business and/or property of the condominium associations and/or the HOA provided such rules do not conflict with a right expressly granted to the homeowners by the bylaws. Here, the rules impose various

restrictions upon homeowners who wish to lease their properties—restrictions that do not appear anywhere in the governing bylaws and are in direct conflict with the provisions granting homeowners the right to convey or lease their properties "free of any restrictions". Under these circumstances, the provisions of the bylaws relative to the rental of individual homeowner units precludes the HOA board of directors from unilaterally adopting the 2014 rules. Petitioners' motion for summary judgment is affirmed.

SUBLET FEE

Cutone v. Riverside Towers Corp., 2017 WL 1836424, Supreme Court, New York County, May 5, 2017. Plaintiff alleges that he asked the Board's permission to sublet and was advised he could only sublet for 2 years if his maintenance payments were increased 20% for the first year and 30% for the second year. Plaintiff insists this requirement was unreasonable. Defendant routinely imposed a sublet fee equal to 20% of the monthly common charges. In opposition, plaintiff did not dispute that defendant has the authority to charge such a sublet fee. Moreover, plaintiff does not dispute that he never submitted an application to sublet his apartment despite reporting over $100,000.00 in income on his tax returns from rent during 2007-2009. Plaintiff has not raised an issue of fact demonstrating that he was treated differently from any other shareholder, or that he was unfairly targeted. Defendant's motion for summary judgment dismissing the last remaining cause of action of the complaint, breach of contract, was granted.

PERSONAL INJURY AND PROPERTY DAMAGE

SEXUAL ASSAULT

Dejesus v. Moshiashvili [Corinthian Condominiums], 2017 WL 1362695, Supreme Court, New York County, April 14, 2017. This action arises out of an alleged sexual assault committed by plaintiff against defendant in her apartment. Plaintiff works as a handyman. Plaintiff was arrested and charged with forcible touching and sexual abuse based on Mrs. Moshiashvili's statements to the police. Nine months later the charges against plaintiff were dropped. Employers are held vicariously liable for their employees' torts only to the extent that the underlying acts were within the scope of the employment. The Court finds that the alleged sexual assault, if it took place, was not in the scope of plaintiff's employment and, therefore, third-party defendants cannot be held liable on this cause of action With respect to the negligent hiring, there is no indication that third-party defendants had notice of plaintiff's alleged propensity to commit assault when they hired him. The motion by third-party defendants for summary judgment dismissing the third-party complaint is granted.

WATER LEAKS

Gordon v. 476 Broadway Realty Corp., 2017 WL 2494800, Supreme Court, New York County, June 9, 2017. Plaintiff alleges that he slipped and fell on water that had leaked into his cooperative apartment. Plaintiff asserts that he had complained to Defendants about ongoing leaks since he moved into the building and that these leaks resulted from the inadequate waterproofing of the exterior wall on the north side of the building. Defendants contend that the ongoing leaks resulted from Plaintiff's contractors removing waterproofing as part of renovations to Plaintiff's apartment. Defendants argue the building superintendent observed that the waterproofing layer was being removed and that he warned plaintiff at the time of the renovation that it was improvident to remove the waterproofing protection and that water leaks would occur. Even if Defendants submitted proof that Plaintiff's contractors contributed to the chronic leak conditions, Defendants submit no

proof, nor cite to any authority, to support their contention that such actions would absolve them of liability as a matter of law. There are material issues of fact for trial, including, but not limited to, the cause of the leaks in Plaintiff's apartment and which party (or parties) were responsible for remedying the leaks.

DEFAMATION

Holliswood Owners Corp. v. Rivera, 145 A.D.3d 968, Appellate Division, Second Department, December 28, 2016. Action for defamation. Plaintiffs, cooperative and the managing agent, seek injunctive relief and to recover damages as a result of various statements allegedly made by the defendant shareholders who challenged the manner in which the board and managing agent were handling the affairs of the Co-op. The Supreme Court granted the defendants' motion to dismiss. Since falsity is a necessary element of a defamation cause of action and only 'facts' are capable of being proven false, it follows that only statements alleging facts can properly be defamation. In this case, the challenged statements are nonactionable opinion. Many of the statements do not have a precise meaning; others are hyperbolic and incapable of being proven true or false. In the context of a dispute regarding control of the Co-op board, no reasonable person could have concluded that the defendants' statements were conveying facts about the plaintiffs. The Supreme Court properly granted the motion to dismiss

NUISANCE – SECOND HAND SMOKE

Reinhard v. Connaught Tower Corp., 150 A.D.3d 431, Appellate Division, First Department, May 4, 2017. The finding of liability against the cooperative was not based on a fair interpretation of the evidence. The evidence failed to show that the odor of cigarettes rendered plaintiff's apartment uninhabitable, breached the proprietary lease, or caused plaintiff to be constructively evicted. In particular, plaintiff's evidence failed to show that the odor was present on a consistent basis and that it was sufficiently pervasive as to materially affect the health and safety of occupants. Plaintiff's witnesses testified that they smelled smoke in the apartment on a handful of occasions over the years, and the source of the smoke was never identified. Moreover, plaintiff lived in Connecticut and only intended to stay in the apartment occasionally. The complaint was dismissed, and the matter remanded for a hearing as to attorneys' fees

NOISE

Shamilzadeh v. Ralco Realty LLC [64-11 Owners Corp.] 2017 WL 3221259, Supreme Court, Queens County, June 19, 2017. This is an action for injunctive relief and damages for private nuisance, breach of contract, negligence, intentional harassment, negligent infliction of emotional distress, and breach of warranty of habitability based on alleged noise nuisance Plaintiffs allege that since the Neighbors have moved into the building in 2011, plaintiffs have been subjected to unreasonably loud noises in the form of excessive and extremely loud creaking floors, stomping, running, jumping, stampeding, unusually loud footstep, banging, clanking, loud noises that shock the conscious, and other sounds that sound like the dropping of heavy items onto the floor, loud television, running and roughhousing, other unreasonably loud sound reverberations, and noises which disrupt plaintiffs' quiet enjoyment of their apartment. Plaintiffs contend that the conduct occurs several times daily, lasts up to 30 minutes per occurrence and as late as 2:00 a.m. The alleged disturbances do not, as a matter of law, rise to the level of substantial and unreasonable interference with plaintiffs' use of the property which would constitute a nuisance. Accordingly, plaintiffs are unable to establish that defendants breached a duty owed to plaintiffs. The complaint is dismissed as against all defendants.

ACORNS

Kohavy v. Veritas Management, LLC, 55 NYS.3d 592, Civil Court, Bronx County. February 27, 2017. While parked in the Cooperative's parking lot, plaintiff's automobile sustained damages from acorns falling from a tree overhanging plaintiff's parking space. The defendants move to dismiss because the Cooperative cannot be held liable in negligence as the damage to plaintiffs automobile was caused by a healthy tree. Cooperative has failed to raise a clear issue of law on its motion to dismiss to warrant deviation from the well-established principle that pre-trial motions are generally unavailable in Small Claims Court. There exist questions of fact regarding the condition of the overhanging tree that damaged plaintiff's automobile, which would be determinative of the validity and enforceability of the exculpatory clause found in the Parking Lot License Agreement entered into between plaintiff and defendant Cooperative. Defendants cannot rely upon an exculpatory clause in a licensing agreement absolving it from liability for its own negligence. In the case at bar, there exists an issue of fact regarding the condition of the tree, therefore, a trial is necessary in order for this Court to determine whether or not the defendants were negligent.

CORPORATE ISSUES

ELECTIONS

Krodel v. Amalgamated Dwellings, Inc., 2017 WL 4539253, Supreme Court, New York County, October 11, 2017. Petitioner commenced this special proceeding in 2014 to challenge the election of Respondents to the board of Respondent Coop. Petitioner's only remaining claim seeks an order nullifying the, 2013 election. The Board of Directors held an election in 2017. This election marked the end of the three-year terms of the Individual Respondents who were previously elected at the December 2013 Election. Based on a copy of the minutes of the 2017 Election, the Individual Respondents, who were the only candidates at that election, ran and were re-elected without opposition as Board Members. When a shareholder commences litigation to set aside a previously held corporate election for board of directors, the action will be moot if the subject corporation subsequently holds an election for directors. Petitioner's Election Cause of Action is moot because the results of the new election superseded the results of the December 2013 election during the pendency of this litigation.

Kaiser v. Horizon Condominium Board of Managers, 2017 WL 3578582, Supreme Court, New York County, August 18, 2017. This proceeding challenges whether a quorum appeared for a meeting of the residential condominium and its board of managers, and whether all votes for two positions on the board were counted accurately. The disclosure to which the parties stipulated now shows that a quorum did appear, and enough votes were counted accurately so that any votes not counted or not accurately recorded would not affect the outcome of the election. The two winning candidates received 77 and 72 votes. The two petitioners received 49 and 45 votes. Therefore a minimum of 23 votes must have been erroneously voided or erroneously not counted to affect the outcome of the election. Petitioners do not claim that respondents inaccurately recorded votes for petitioners as votes for the winners. The evidence establishes that enough votes were counted accurately so that any votes erroneously voided not counted would not affect the outcome of the election. The court therefore denied the petition and dismissed this proceeding.

Ripley LLC v. The Bd. of Managers of the Avery Condominium, 2017 WL 476785, Supreme Court, New York County, February 6, 2017. Plaintiffs seek an injunction mandating election of a "non-residential" representative to the Condominium Board. After the first annual meeting of the unit owners, the Residential Board is to consist of five persons elected by residential unit owners (subject to the Sponsor's specified rights) and the Non-Residential Board is to consist of two persons elected by commercial unit owners. It is undisputed that there has never been any elected non-residential owner representative to the Non-Residential Board or the Condominium Board. Defendants now take the position that Plaintiffs' demand for an order directing the election of a non-residential representative to the Board cannot be sustained without the nonparty Sponsor. The Sponsor is no longer in the majority, and its failure to designate a new Non-Residential representative is irrelevant. Plaintiffs are entitled to summary judgment on this cause of action,

RIGHTS AGAINST AND LIABILITIES TO THIRD PARTIES

EMPLOYEES

Lyons v. Maxwell-Kates, Inc. [55 East 86th Street Condo Ass'n], 2017 WL 1759214, Supreme Court, New York County, May 5, 2017. Plaintiff was employed by the Condo Association as his general employer. He was injured when he hit his head on a steel bar attached to the top of a misleveled elevator cab. Plaintiff elected to receive Workers' Compensation benefits from his general employer. At the time of the accident, Defendant was the managing agent for the Condo Association, pursuant to the terms of a Management Agreement which stated that Defendant was responsible for supervising the building's service employees, hiring such employees, purchasing supplies, entering into contracts and handling the maintenance and daily operations of the building on behalf of the Condo Association. However, the Board of Managers of the Condo Association maintained the right to approve all decisions and made all final decisions in the hiring, firing, disciplining and in the terms and conditions of employment of the building's workers. It is clear that Defendant controlled and directed the manner, details and ultimate result of Plaintiff's work on a daily basis either directly or through the superintendent of the building. Based on the facts presented, it appears that the building's superintendent took his instructions from the Defendant and did not appear to have sufficient autonomy over his work or Plaintiff's work to defeat the determination that Plaintiff was Defendant's special employee. While the contract may have indicated that the Condo Association did not surrender complete control and supervision of the daily operations of the building, such contract is not determinative of the issue of whether Plaintiff was a special employee of Defendant and such terms in the contract appear to be contrary to the actual daily practices of the building's property manager, superintendent and Plaintiff. As such, Defendant's motion for summary judgment is granted.

BUT

Burgos v. Premiere Properties, Inc. [Promenade Condominium], 145 A.D.3d 506. Appellate Division, First Department, New York. December 13, 2016. A building porter commenced this action against the management company, and a construction company, for personal injuries sustained when he tripped over a tool bag left on a building stairway. Plaintiff testified that he worked for the owner as a porter responsible for, among other things, cleaning garbage rooms and stairwells of a residential condominium. Premiere's role was to serve as the "day-to-day management of the building," which included hiring and scheduling repair people, and overseeing the quality of their work. Premiere moved for summary judgment dismissing the complaint, arguing that it was not liable under the common law because it did not own the building and was not in complete and exclusive control of the management or operation of the building, and did not cause or create the open and

obvious condition. Given its responsibilities regarding the construction work—responsibilities that resemble those of a construction manager—there are issues of fact as to whether Premiere was a statutory agent of the owner and general contractor, i.e., whether it exercised general control over the work site rather than the exclusive control that it claims. Inasmuch as Premiere did not supervise plaintiff, it cannot raise a Workers' Compensation Law Defense even if it is found to be a statutory agent of the owner pursuant to the Labor Law.

THEFT

413 West 48th Street Housing Development Fund Corp. v. Saparn Realty, Inc., 2017 WL 3614540, Supreme Court, New York County, August 17, 2017. HDFC alleges that defendant Saparn as managing agent stole funds from a reserve account. HDFC learned that its reserve funds had vanished. One of Saparn's principals, Alan B. Gorelick, is now incarcerated after confessing that Saparn had stolen almost two million dollars from its clients, including more than $219,000 from HDFC. HDFC had originally commenced this action only against Saparn and its principals. Thereafter it discovered that stolen money that had been withdrawn from HDFC's reserve bank was deposited into two bank accounts held by Oaks. HDFC now moves for summary judgment on its cause of action for money had and received asserted against Oaks. HDFC argues that, even though Oaks did not participate in the wrongdoing, it may not retain the windfall. While HDFC has demonstrated that Oaks received money from HDFC's account, HDFC has not made a showing that Oaks either retained or benefitted from the receipt of that money, because Saparn also stole from Oaks There is simply no evidence to establish that Oaks benefitted from the receipt of HDFC's money. Both parties were victims of Saparn's fraud. Accordingly, HDFC's claim for money had and received asserted against Oaks must be dismissed.

FORECLOSURE

227-229 East 14th Street Housing Development Fund Corp. v. Vaknine, 2017 WL 2828698, Supreme Court, New York County. June 30, 2017. Plaintiff moves for a preliminary injunction enjoining defendant from exercising possessory rights over the unit including performing construction work therein. Defendant cross-moves for an order compelling plaintiff to issue defendant a proprietary lease to the apartment. It is well settled that a coop board cannot block shares and a proprietary lease from passing to a transferee by operation of law, where an individual is the winning bidder at a foreclosure sale. Notwithstanding that title to the shares and proprietary lease pass freely under these circumstances, the right to occupy the apartment does not. Where the coop board retains the right to do so, regardless of the transfer, it may still separately determine whether it will extend the right to occupy the apartment to the transferee. In the event that the coop board votes not to extend this right to the transferee, the transferee still retains title to the shares and proprietary lease. The transferee in such a situation will only have the right to enter the apartment at reasonable times to conduct reasonable repairs and alterations, with the consent of the board, as are necessary to make the apartment marketable for resale. The coop's determination whether to extend the right to occupy the apartment is generally protected by the business judgment rule. The Court clarified the rights of the parties: (1) defendant may not use or occupy the subject apartment as a tenant, (2) defendant must relinquish the keys to the unit to plaintiff, (3) plaintiff must not interfere with defendant's right to access the apartment for the purpose of sale and must allow defendant, along with realtors or prospective buyers, to visit the apartment in connection with marketing it, at reasonable times and upon reasonable notice to plaintiff, (4) to the extent further maintenance or repairs to the unit are necessary in order to market it, defendant may not undertake those repairs or maintenance without the consent of the board, and the board may not unreasonably withhold its consent.

SECTION 881 LICENSES

Van Dorn Holdings, LLC v. 152 W. 58th Owners Corp., 149 A.D.3d 518, Appellate Division, First Department, April 13, 2017. Although the determination of whether to award a license fee is discretionary, in that RPAPL 881 provides that a 'license shall be granted in an appropriate case upon such terms as justice requires, the grant of licenses often warrants the award of contemporaneous license fees because 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. Supreme Court did not abuse its discretion in requiring petitioner to pay respondent a license fee where the necessary repairs to petitioner's building will deprive him of the use of a portion of his property. Notwithstanding that petitioner's intrusion was for the purpose of repairs, as opposed to new or elective construction, he should not have to bear the loss uncompensated. Supreme Court also did not abuse its discretion in granting respondents attorneys' and engineers' fees. "A property owner compelled to grant a license should not be put in a position of either having to incur the costs of a design professional to ensure petitioner's work will not endanger his property, or having to grant access without being able to conduct a meaningful review of petitioner's plans.

FIREFIGHTERS LAW

Serino v. Eleven Twelve Corp. 2017 WL 87169, Supreme Court, New York County, January 4, 2017. Plaintiff alleges he was injured during the course of his employment as a firefighter when he was tripped from behind by a fire hose line being used to fight the fire in a 14th floor apartment. Recovery under General Municipal Law § 205-a does not require the same proof of actual or constructive notice as would be required for a common-law negligence claim based upon an unsafe condition on the property. Instead, the statute requires only that the circumstances surrounding the failure to comply with the local law or regulation indicate that it was a result of neglect, omission, willful or culpable negligence on the defendant's part. Plaintiff's testimony that there were boxes and/or recycling bins in the area where he fell which required him to go to the center of the stairway where he was tripped by the hose, raises triable issues of fact as to whether his injuries were proximately caused by violations of various provisions of the Maintenance, Building, and Fire Codes. , summary judgment is denied insofar as the court finds there are triable issues of fact as with respect to the violations related to objects on the stairs, and whether such violations have a reasonable or practical connection to plaintiff's injuries.

SLIP AND FALL

SIDEWALK

STORM IN PROGRESS

Liu v. Westchester Property Management Group, Inc., 145 A.D.3d 942, Appellate Division, Second Department, December 28, 2016. Under the 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. On a motion for summary judgment, the question of whether a reasonable time has elapsed may be decided as a matter of law by the court, based upon the circumstances of the case Here, the defendants established their prima facie entitlement to judgment as a matter of law by submitting evidence,

including climatological data, demonstrating that they did not have a reasonable opportunity to remedy the dangerous ice condition that was created by the snowstorm.

BUT

Baumann v. Dawn Liquors, Inc., 148 A.D.3d 535, Appellate Division, First Department, March 21, 2017. Under the storm in progress doctrine, a landowner's duty to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is ongoing until a reasonable time after the storm has ended. Here there was a storm in progress at the time of the accident. Thus, the burden shifted to plaintiffs to demonstrate the existence of a triable issue of fact as to whether Sterling created or exacerbated a hazardous condition through its snow removal activities. Plaintiffs have met that burden, Sterling employees were using a snowblower prior to plaintiff's accident, but they could not say whether they used de-icing material when removing the snow. Accordingly, an issue of fact was raised as to whether St
erling's actions created or exacerbated a hazardous condition by employing a snowblower to remove snow without taking further steps to de-ice the sidewalk.

TRIP AND FALL

Commender v. Strathmore Court Home Owners Assoc., 151 A.D.3d 1014, Appellate Division, Second Department, June 28, 2017. Plaintiff allegedly tripped and fell over an exposed tree root in a common area located in the side yard next to a condominium unit. A landowner has no duty to protect or warn against an open and obvious condition that is inherent or incidental to the nature of the property, and that could be reasonably anticipated by those using it. Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint by demonstrating that the tree root was an open and obvious condition and inherent or incidental to the nature of the property, and was known to the injured plaintiff prior to the accident.

BUT

Ross v. Bretton Woods Home Owners Ass'n, Inc., 151 A.D.3d 774, Appellate Division, Second Department, .June 7, 2017. Plaintiff contended that she fell when she stepped down a single-step riser on a walkway located in a condominium complex maintained by the defendant. Plaintiff identified the cause of her fall as her inability to see the single step on the walkway. The defendant's submissions failed to eliminate triable issues of fact as to whether the step constituted a dangerous condition or whether the subject step was open and obvious, and not inherently dangerous as a matter of law. Defendant's expert failed to establish that a handrail that the defendant contends was adjacent to the walkway on the date of the accident provided a sufficient visual cue to alert pedestrians to the presence of the step. Furthermore, defendant failed to demonstrate that it did not have constructive notice of the dangerous condition prior to the subject accident.

QUESTIONS AND DISCUSSION