ASSOCIATION OF RIVERDALE COOPERATIVES & CONDOMINIUMS

SIGNIFICANT LEGAL DECISIONS OF 2018

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LEGAL ISSUES INVOLVING UNIT OWNERS AND RESIDENTS

APPLICATION OF THE BUSINESS JUDGMENT RULE TO BOARDS OF DIRECTORS

Fernholz v. Hart [The Washington Irving Condominium], 155 A.D.3d 520, Appellate Division, First Department, November 21, 2017. Plaintiffs and defendant owners of the apartment directly above plaintiffs' apartment challenge the Board's decision not to require the former owner of the upstairs apartments to rebuild an interior wall she had demolished without authorization. They contend that the absence of the wall created a condition that amplified noises from the upstairs apartment. The Board established its entitlement to summary dismissal of the complaint and cross claims on the ground that its decision was protected by the business judgment rule. The Board engaged an independent expert who opined that the removal of the wall did not affect the structural integrity of the building and did not cause the noise. Plaintiffs failed to raise a triable issue of fact whether the Board's decision not to require rebuilding of the wall and its handling of plaintiffs' noise complaint were in breach of its fiduciary duty to the condominium. They submitted no evidence that the Board's actions were not taken in furtherance of a corporate purpose or that the Board acted in bad faith, arbitrarily, or out of favoritism, discrimination or malice.

Bd. of Managers of the 120 East 86th Street Condominium v. Park Ave. Physicians Realty, LLC, 2018 WL 4917797, Supreme Court of New York, October 9, 2018. The Condo Board placed a lien on the Professional Unit and commenced the instant action. The third affirmative defense alleges that the Board violated section 5.3 of the By-Laws--which requires prior unit owner approval for any “alterations, additions, or improvements” that would “exceed $100,000 in the aggregate in any calendar year”. The fourth affirmative defense alleges that the assessment in connection with the Elevator Contract was similarly invalid. Physicians alleges that the Elevator Contract was for the modernization and improvement of the elevator system and not an expensive repair. Both claims are barred by the business judgment rule. The board acted within the scope of its authority under the bylaws. Pursuant to section 5.1 of the By-Laws, the Condo Board is empowered to perform “repairs and replacements, whether structural or non-structural, ordinary or extraordinary” as a common expense. Unlike section 5.3, which deals with “alterations, additions, or improvements”, section 5.1 authorizes the Condo Board to perform maintenance, replacement and repairs without the consent of the unit owners. With respect to the elevator, a professional inspection concluded that “all components [were] in poor conditions and ... in need of a modernization.” The Façade and Roof Contract includes masonry restoration, roofing, and flashing. As both projects “merely involved the replacement of existing building components that had fallen into a state of disrepair,” they did not constitute improvements and, therefore, consent of unit owners was not required.
**The seventh proposed affirmative defense alleges that the Condo Board engaged in self-dealing in obtaining financing for the Residential Unit only and that this was in violation of section 2.1 of the By-Laws. The Condo Board has not satisfied its prima facie burden of showing that its decision to arrange for financing of the assessment for the residential cooperative, but not Physicians and the retail unit, advanced a legitimate interest of the Condominium.
** The second amended answer “does not allege that any of the individual board members committed an independent wrong that was distinct from the actions taken as a board collectively.” To the extent Physicians seeks to hold individual members of the Condo Board liable, leave to amend is denied.

BUT

Ashby v. Lindner [Towers on the Park Condominium], 2018 WL 3364568, Supreme Court of New York. July 5, 2018. Plaintiff sues for nuisance and trespass arising from the excessive noise and vibrations emanating from an apartment, and sues the Board of Managers and First Service for breaching their duty to her to enforce the condominium bylaws and house rules prohibiting such noise and vibrations. Plaintiff adds to her claim against the condominium that they have disparately treated her complaints concerning the noise by failing and refusing to enforce the pertinent condominium bylaw provision, while enforcing other provisions against her and doing nothing about the conduct of her neighbor, then a Board member, who often allowed her cat to roam their hallway, and other unit owners who left objects in the hallway. Condominium defendants' argument that a board of managers may not be held liable for a breach of fiduciary duty toward a condominium owner is meritless. While the application of the Board's business judgment to the situation may preclude plaintiff from recovering condominium defendants submit no evidence that they exercised any judgment or took any action related to the issues raised by plaintiff. Plaintiff sufficiently sets forth a claim for breach of fiduciary duty based on the Board's alleged disparate treatment of her. Motion to dismiss by defendants Board of Managers and First Service Residential is denied.

FINES

Vidov v. Morton Square Condominium, 2018 WL 1558428, Supreme Court of New York. March 30, 2018. This action concerns the imposition of fines by a condominium board against a unit owner for renting the unit on a transient basis on airbnb.com. Where a condominium's bylaws authorize the board to impose fines for violations of the bylaws, the board's determination to do so generally will be protected from judicial scrutiny by the business judgment rule, so long as the determination is made in good faith and the amount of the fine is not unreasonable and confiscatory. The First Department had previously declared invalid a condominium board's imposition of $500 per day for violations of its guest policy, finding the fine to be confiscatory. Here, defendant has imposed a fine of $119,000, representing $1,000 for each alleged night that plaintiff's unit was used illegally as a transient hotel, which was intended as a deterrent, and was based on the $700 per night that plaintiff was charging to stay in the unit plus an additional $300. Defendant has alerted this Court of no authority standing for the proposition that it is entitled to impose such a large fine on the basis that a smaller fine would not adequately deter the improper conduct. Indeed, basing a fine on the amount that the unit owner earned is the very definition of a confiscation.
**With respect to plaintiff's demand for attorney's fees, even assuming that she is entitled to request them under a reciprocity theory, her conduct was likely both a violation of the bylaws and of the laws of this State. Her Airbnb listing leaves little doubt that she engaged in at least some degree of improper use of the apartment. The third cause of action for attorney's fees was dismissed.

Bd. of Managers of Downtown Club Condominium v. Sun, 2018 WL 1172599, Supreme Court of New York. March 6, 2018. Plaintiff sought a permanent injunction prohibiting Sun from leasing out her apartment for less than 30 consecutive days, and an award of fines and attorneys' fees. The plaintiff twice imposed fines of $1,000.00 for violating the provision of the by-laws prohibiting the leasing or subleasing of a unit for a period of less than 30 days, for a total of $2,000.00 in fines, Where a condominium's by-laws authorize its governing board to impose fines upon a unit owner, the board's determination to impose those fines is within its inherent power and protected by the business judgment rule, as long as the determination was made in good faith and the amount of the fine is not confiscatory. The two $1,000.00 fines for illegal use as a transient hotel over a period of more than one year is reasonable and not confiscatory.
**Where the by-laws of a condominium provide that the prevailing party in an action to abate a violation of the by-laws is entitled to an award of reasonable attorneys' fees, that provision is enforceable. To be a prevailing party, the party need only “be able to point to a resolution of the dispute which changes the legal relationship” with the defendants. The plaintiff is clearly the prevailing party here.

Zyuz v. The Bd. of Directors of 313-23 Owners, Corp., 2018 WL 5281820, Supreme Court, Kings Co., October 22, 2018. Petitioner maintains the respondents have improperly terminated her proprietary lease and are in the process of evicting her for failing to pay sublet fees, failing to pay maintenance charges and failing to pay a host of fines, including fines that were apparently imposed due to petitioner's failure to correct a violation due to an improperly installed air conditioner. She maintains that she was never given timely notice or the reasons why the fees, charges and fines were imposed and was never given an opportunity to cure any of the violations. The parties did not address the important issues: Does the proprietary lease or house rules provide the cooperative with authority to fine proprietary lease holders for improperly installed air conditions? If so, where does this authority come from? If the cooperative intends to fine a proprietary lease holder, for any reason, does the proprietary lease holder have the right to advance notice, and if so, how must notice be given? Is the proprietary lease given an opportunity to cure? If the cooperative intends to impose a special maintenance charge, what is the procedure? Is notice to the proprietary lease holder of such required? Can fines be imposed for violations of the occupancy restrictions set forth in the house rules? Since the petition raises a multitude of questions that the Court could not resolve on the record, the petition was denied without prejudice.

LIABILITY OF DIRECTORS

Hersh v. One Fifth Avenue Apartment Corp., 163 A.D.3d 500, First Department, July 26, 2018. Plaintiff alleges that her apartment sustained extensive water infiltration due to the greenhouse on the roof terrace on the floor above her. According to plaintiff, the individual owners of the offending greenhouse, the cooperative, and the individual board members failed to remedy the situation.
** A breach of fiduciary duty claim does not lie against individual cooperative board members where there is no allegation of individual wrongdoing by the members separate and apart from their collective actions taken on behalf of the cooperative. The complaint does not allege that any of the individual board members committed an independent wrong that was distinct from the actions taken as a board collectively. Thus, the breach of fiduciary duty claim is not viable.
**There is no viable corporate tort alleging breach of fiduciary duty, because a corporation owes no fiduciary duty to its shareholders. In the absence of a corporate tort in which the individual board members could have participated, the breach of fiduciary duty claim as against them was properly dismissed. *Fletcher* made this very point by dismissing the breach of fiduciary duty cause of action against an individual board director, while at the same time sustaining Human Rights Law claims against him.

345 East 50th Street LLC v. The Bd. of Managers of M at Beekman Condominium, 2017 WL 6509593, Supreme Court of New York. December 15, 2017. The Complaint as against the Individual Defendants alleges claims for breach of fiduciary duty and fraud in that the Individual Defendants failed to disclose the Board's plans to replace the roof at the time Ms. Brown applied for consent to carry out the deck improvements; and affirmatively continued to encourage Brown to carry out the deck improvements while failing to disclose the Board's plans to replace the roof. The Board's decision to replace the roof was reasonable and in furtherance of corporate purposes. The Board determined that the roof replacement was cost efficient and done to protect the integrity of the Condo. The record does not suggest that the Individual Defendants' failure to notify Plaintiff of their prospective plan to replace the roof once they began contemplating the roof replacement and at the time they realized the replacement was necessary was not taken “in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.” The Individual Defendants' failure to inform Brown of the roof replacement until after Brown's deck renovations were complete, while seemingly irresponsible, was not a breach of their fiduciary duty.

BUT

Stinner v. Epstein [Ansonia Storage Warehouse Corporation], 162 A.D.3d 819, Second Department, June 13, 2018. Plaintiffs commenced this action after suffering a bed bug infestation, which allegedly originated in the apartment across the hall, and continued for approximately 10 months until the plaintiffs hired an exterminator to provide competent abatement services. The plaintiffs alleged numerous causes of action against the Co-op

and its Board, including the defendant Sharfstein individually. Plaintiffs alleged that the Board deliberately conspired to conceal the unsafe condition posed by the building-wide infestation, and improperly prioritized some maintenance and repair obligations at the Co-op's expense. Unequal treatment of shareholders is sufficient to overcome the directors' insulation from liability under the business judgment rule and a director who participates in the commission of a tort committed by the board may be held individually liable. Plaintiffs contend that Sharfstein received an allegedly improper $25,000 payment from the Board to repair water damage to his apartment, while the Board allegedly unfairly declined to take responsibility for the plaintiffs' expenses caused by the building-wide bed bug infestation. The undenied allegation that Sharfstein actively participated in the unequal treatment of the plaintiffs is sufficient to sustain a cause of action alleging breach of fiduciary duty against him individually.

BOOKS & RECORDS

[Madonna] Ciccone v. One West 64th Street, Inc., 2018 WL 3201912, Supreme Court of New York. June 25, 2018. Plaintiff moves for summary judgment on her cause of action to access defendant's corporate books and documents. Shareholders have an established statutory and common-law right to inspect a corporation's books and records if done in good faith and for a valid purpose. Plaintiff argues that her desire "to understand how and why her Lease was amended so she can protect her children so that they can live in Unit 7A as a family" is a valid purpose to obtain the requested records and that she made it in good faith. This court disagrees. The court had previously dismissed plaintiff's first and second causes of action as time-barred. Plaintiff does not need those materials anymore to prove a case that, by law, she is no longer allowed to prove. To seek the records at this phase is merely harassing. Plaintiff is unable to demonstrate that she is entitled to the additional records. Plaintiff's motion for summary judgment is denied.
**Defendant's motion for a grant of attorney fees is denied. Determining the prevailing party for purposes of attorney fees is premature while litigation is ongoing. Plaintiffs' third cause of action for defendant's corporate books and records remains. This court dismissing the other causes of action does not warrant granting attorney fees.

DISCRIMINATION

Farkas v. River House Realty Co., Inc., 2018 WL 3540125, Supreme Court of New York. July 16, 2018. Plaintiff entered into a contract for the sale of her apartment to the French Government. A shareholder wrote to the Board objecting to the sale on the grounds that the apartment's use as the residence of a United Nations Ambassador would lead to excessive noise, disruption, and security concerns. The Board approved the sale, but with certain conditions, including that receptions, parties, meetings, and convocations in the apartment be limited to no more than 50 people, and that large events such as these be limited to three such events per year. The French Government terminated the contract. The plaintiff sold her apartment for $78,788.00 less. The plaintiff alleges that the defendants refused to permit the sale of her apartment to the French Government because of their discriminatory animus towards French people. The plaintiff has not pleaded a single fact to suggest that the French Government was denied housing under circumstances giving rise to an inference of discrimination.
** Plaintiff does not plead any facts about the individual defendants regarding their alleged participation or approval of any alleged discriminatory conduct. The plaintiff does not plead any facts supporting an inference that the defendants would have treated any other government purchaser differently under the circumstances presented. Accordingly, the amended complaint must be dismissed.

Maun v. Edgemont at Tarrytown Condominium, 156 A.D.3d 873, Second Department, December 27, 2017. Action to recover damages against the condominium association, its board of managers, alleging that they had discriminated against her in furnishing services to her unit because of her sexual orientation, and that a board member had defamed her in an email to the Tarrytown Village Administrator in which he stated that the plaintiff had taken video images of a neighbor's children and that the neighbor was concerned about how the plaintiff would use the video. Defendants are not entitled to the protection of the business judgment rule with respect to the causes of action alleging violations of the NYS Human Rights Law and the Administrative Code

of Westchester County. Nonetheless, the Supreme Court properly granted the defendants' motion for summary judgment where the defendants established that the alleged failure to furnish services to the plaintiff was not related to her sexual orientation. In opposition, the plaintiff failed to raise a triable issue of fact.
**The Supreme Court also properly granted defendants' motion for summary judgment dismissing the cause of action alleging libel. The plaintiff admitted both that she took the subject video and that the neighbor expressed concern to the board about her having done so. Truth is an absolute defense to a cause of action based on defamation.

COMPANION ANIMAL (DOG)

Clearview Gardens First Corp. v. Bechtold, 2018 WL 1044049, Supreme Court, Queens Co. February 1, 2018. Plaintiff sought to terminate defendant's lease on the ground that defendant is harboring 2 dogs in violation of the lease and house rules. The plaintiff met its initial burden by establishing that the defendant is harboring 2 dogs. However, the defendant established an issue of fact as to whether the dogs are necessary to treat a disability. Accordingly, the plaintiff's motion for summary judgment motion is denied.

ALTERATIONS

280-290 Collins Owners Corp. v. McCaskill, 59 Misc.3d 1229(A), 2018 WL 2670556 (Table), City Court, Mount Vernon. June 4, 2018. In this holdover summary proceeding, petitioner seeks to terminate the tenancy on the ground that respondent has violated her lease by installing a new washing machine. Respondent was permitted by the petitioner, for more than three years, to keep the pre-existing washing machine despite the enactment of House Rule 21. Once petitioner became aware of the new washing machine petitioner timely demanded that respondent remove the washing machine. House Rule 21 states that said rule was enacted after the Board made a determination that the plumbing system is not sufficiently robust to allow the use of washing machines in the individual apartments. House Rule 21 was enacted for the well-being of the cooperative as a whole, within the scope of its authority and in good faith. The business judgment rule should be applied when a cooperative board is seeking enforcement of its lease terms and house rules. Respondent was ordered to cure her default and remove the new Washing Machine from her apartment.

REASONABLE

Perrault v. Village Dunes Apt. Corp., 164 A.D.3d 847, Second Department, August 22, 2018. Plaintiff requested that the board approve his proposal to raise the height of the ceiling in a portion of his unit by enclosing unfinished common-area space above his unit for his exclusive use, and to replace an existing window in his unit with one of a different type and size. The proprietary lease provided that the defendant could not unreasonably withhold its consent to a proposed alteration “in the unit or building.” The board of directors denied the plaintiff's requests. The plaintiff commenced this action to recover damages for breach of contract and for an injunction authorizing the proposed alterations. The Supreme Court decision granting the defendant's motion for summary judgment dismissing the complaint was affirmed. Where a proprietary lease provides that a board's actions in giving consent to alterations are to be reviewed under a reasonableness standard, the board's actions are not protected by the business judgment rule. A board's actions are reasonable where they are “legitimately related to the welfare of the cooperative”. Defendant established its entitlement to judgment as a matter of law by demonstrating that its withholding of consent for the plaintiff's proposed alterations was reasonable.

BUT

Forestal Condominium v. Davydov, 157 A.D.3d 866, Appellate Division, Second Department, January 24, 2018. Plaintiff condominium commenced this action against an owner of one of the units for a judgment declaring that the defendant violated the by-laws by performing alterations to the subject apartment without the plaintiff's permission. Plaintiff failed to establish its prima facie entitlement to judgment as a matter of law. While the by-laws specified that a unit owner could not make any structural addition, alteration, or improvement to his or her

unit without the prior written consent of the board of managers, it also provided that the board had 30 days to answer any written request, and that the failure to respond within that time frame would constitute consent to the proposed alteration. The plaintiff's submissions failed to eliminate all triable issues of fact as to what requests the defendant made of the plaintiff, and what responses, if any, were provided by the plaintiff.

Berger v. 1120 Fifth Ave. Corp., 2018 WL 3439762, Supreme Court of New York. July 12, 2018. Plaintiffs claim: they were promised that they could install a condenser on the building's roof; they engaged architects, planners, and contractors; the cooperative changed its mind and claimed that they had never approved a plan to put a condenser on the roof; and they were forced to change all their plans so that the unit could be installed through the window of their apartment. The complaint claims damages based upon the defendants alleged breach of a promise to allow the plaintiffs to install an air conditioner on the roof. This breach of contract claim is not waived by the terms of the alteration agreement. The cooperative's claim that the modification was authorized and necessary in order to protect the safety and integrity of the building merely creates issues of fact that cannot be resolved on a pre-answer motion to dismiss. Accordingly, the first cause of action for breach of contract is permitted to go forward.
**The sixth cause of action alleges breach of fiduciary duty against the cooperative board as a whole, and specifically against its president. Members of a cooperative board may not be held personally liable for acts taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. Breach of fiduciary claims against a cooperative board and its members are subject to heightened pleading requirements; they should be dismissed absent specific allegations of bad faith, fraud, self-dealing or independent tortious acts. While plaintiffs allege that the board president had a personal animus towards them, these allegations are conclusory and do not rise to the level of specificity required to demonstrate bad faith. This claim was dismissed.

TERRACE RIGHTS

Fairmont Tenants Corp. v. Braff, 162 A.D.3d 442, Appellate Division, First Department, June 7, 2018. Order which granted plaintiff coop's motion for summary judgment, declared that plaintiff has right to the roof adjacent to apartments 2F and 2G, and enjoined defendants from occupying or using that space, unanimously affirmed. The proprietary lease defines the apartment as “the rooms in the building as partitioned on the date of the execution of this lease designated by the above-stated apartment number, together with their appurtenances and fixtures and any closets, terraces, balconies, roof, or portion thereof outside of said partitioned rooms, *which are allocated exclusively to the occupant of the apartment*” (emphasis added). This clause is ambiguous because it is unclear from the lease whether the disputed roof area has been exclusively assigned to defendants. The court properly looked to extrinsic evidence, including the offering plan which makes clear that there is no outdoor space allocated exclusively to defendants' apartment.
** The coop's knowledge of defendants' use of the roof space does not raise issues of fact regarding the coop's waiver of a right under the lease in light of an unambiguous no waiver clause. Defendants' continued trespassing on the roof space entitles the coop to injunctive relief as the irreparable injury is the interference with the coop's property rights.

INDEMNIFICATION

Morales v. 310 West End Ave. Owners Corp., 2018 WL 2222449, Supreme Court New York. April 30, 2018. Plaintiff seeks damages against the coop and a unit owner for personal injury in a work-related accident that occurred, at a cooperative apartment. The coop moves for summary judgment on its cross-claim for contractual indemnity under the alteration agreement. The unit owner argues that she signed the alteration agreement without conferring with an attorney, and that she is a housewife, and not a sophisticated business entity. The First Department has enforced alteration agreements even though the agreement was broadly worded when the building owner was not negligent, and the building owner's liability was purely vicarious. The law in the Second Department appears to conflict with that of this department. The Second Department held broad indemnification provisions such as those in the proprietary lease and in the alteration agreement here, which

are not limited to the lessee's acts or omissions, and which fail to make exceptions for the lessor's own negligence, are unenforceable pursuant to General Obligations Law § 5-321 where the proprietary lease and the alteration agreement were not negotiated at arm's length by two sophisticated business entities. This Court, is bound by the First Department. The indemnity clause is thus enforceable. The fact that 310 West's superintendent inspected the apartment for compliance with building rules and city laws was not tantamount to supervising, controlling or directing the work. The coop's motion is granted.

Toro v. 9 East 97th Street Owners Corp., 2018 WL 3230951, Supreme Court New York .May 14, 2018. Action for personal injuries allegedly sustained by Plaintiff when he fell 8 to 15 feet to the ground after a metal platform on which he was standing collapsed. Plaintiff was installing windows as part of a renovation project at a cooperative apartment. The shareholder sought approval for the installation of an AC condenser outside the kitchen window on an existing metal platform mounted to the exterior wall of the building. The co-op board denied this request because they were unsure whether the metal platform could support the weight of the AC condenser. The coop now moves for summary judgment in its favor on its cross-claims for indemnification against the contractor and the shareholder.
** Issues of fact exist as to whether the coop had actual or constructive notice of a dangerous condition, i.e., the metal platform, and the contractor's negligence has not been determined, so the coop is not entitled to summary judgment on its common law indemnification claim against either the contractor or the shareholder.
** The Alteration Agreement provides that the shareholder "agree[s] to indemnify [the coop]] ... from any claims … which may arise … as a result of any matter arising out of the proposed alteration." The shareholder contends that the work performed from outside of the apartment was work outside of his obligation to indemnify based upon the Agreement stating that "[a]ll work shall be conducted within the individually demised premises", He cannot now claim that he only agreed to indemnify the coop for work performed from inside the apartment. Accordingly, the coop is entitled to be indemnified by the shareholder to the extent that it is not found negligent.

INJUNCTION

Fullilove v. The Bd. of Directors of the 351 West 114th Street HDFC., 2018 WL 2971164, Supreme Court of New York. June 13, 2018. Plaintiff moves to enjoin defendant Board from (1) enforcing the alleged deadline for plaintiff to complete the combination of Apartments 3A and 3B; (2) forcing plaintiff to sell her shares in Apartment 3B; and (3) preventing plaintiff and her agents from combining both apartments. To show a likelihood of success on the merits, the movants must show that they will ultimately be successful in the underlying action. Here, conflicting evidence exists about who caused plaintiff's delay in combining the two apartments by the contractual deadline. The evidence also shows that plaintiff contributed at least to some of the delays in obtaining the plan approval from the HDFC. Plaintiff has not shown that the HDFC breached the implied covenant of good faith and fair dealing. Plaintiff has also not persuaded this court that the HDFC is not entitled to the business-judgment defense. Plaintiff has, therefore, not tendered sufficient evidence demonstrating ultimate success on the merits of her claim. The Appellate Division has held that losing an apartment that is not a residence does not lead to irreparable harm. The court finds that plaintiff has not demonstrated irreparable injury absent the grant of the preliminary injunction. Under CPLR 6301's three-pronged test, plaintiff has not shown a likelihood of success on the merits or irreparable injury to her absent the preliminary injunction, even though she has shown a balance of equities in her favor. Plaintiff's motion for a preliminary injunction is denied.

BUT

McMahon v. Cobblestone Lofts Condominium, 161 A.D.3d 536, Appellate Division, First Department, May 15, 2018. Unit owners brought action against condominium, and its managing agent, seeking preliminary injunction requiring defendants to make requested repairs to common elements of condominium that purportedly caused damage to their unit, and asserting contract and tort claims.
**The court properly dismissed the tort and contract claims against the managing agent, who was at all times acting as agent for a disclosed principal, the condominium.

**The court properly declined to dismiss the causes of action relating to Cobblestone's contractual and statutory duties to repair and maintain the roof over the plaintiffs' penthouse and properly dismissed the negligence cause of action against it. The allegations concerning Cobblestone's defective work sound in breach of contract, not negligence.
**The court properly granted plaintiffs' motion for a preliminary injunction requiring Cobblestone to make all necessary repairs to prevent further infiltration of water in plaintiffs' unit. Plaintiff demonstrated a likelihood of success on the merits, the prospect of irreparable harm absent an injunction and a balance of equities in their favor.

SMOKING POT

Bd. of Managers of 400 Cent. Park West Condominium v. Henriquez-Berman, 2018 WL 3224091, Supreme Court of New York. July 2, 2018. Condominium, seeking to enjoin violations of its by-laws upon theories of breach of contract and nuisance, moves for summary judgment against the defendants and to hold the defendants in contempt for their violation of the court's prior order, which enjoined the defendants from smoking marijuana in Unit 1S and permitting marijuana smoke and excessively loud noises from infiltrating into the common areas and other units of the condominium pending the disposition of this action. Plaintiff demonstrates that the defendants breached their obligation to comply with the by-laws by their persistent smoking of marijuana and/or permitting others to do so in their unit, as well as the excessively loud music emanating from their unit which constitutes an intentional, unreasonable, and substantial interference with a neighbors' right to use and enjoy their units and the common areas of the condominium. Since 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, any injury caused by the smoke conditions arising from the defendants' conduct here is not compensable by money damages. Thus, the plaintiff has demonstrated that irreparable injury, requiring injunctive relief, would result should the smoke condition be permitted to persist. While money damages may be available to compensate a person for a nuisance created by loud noises, injunctive relief is not precluded where, as here, such damages are inadequate to abate the nuisance.

YELLOWSTONE INJUNCTION

Estate of Arthur Klein v. 400 East 85th Street Realty Corp., 2018 WL 3412822, Supreme Court of New York, July 13, 2018. This action arises from a dispute over whether Pollack can reside in the unit. In 2014, the Estate became the proprietary lessee of the unit. Pollack continued to live in the unit with the written consent of defendant, granted annually. At the expiration of Pollack's most recent annual sublet, defendant advised Pollack that it no longer wished to renew its consent to his residence in the unit. Defendant served Pollack with a notice to cure claiming plaintiffs were in breach of the proprietary lease because the sublet of the unit expired and they failed to obtain written consent to remain in the unit after that date. Since Pollack cannot maintain a concurrent occupancy with the lessee, who is deceased, plaintiffs have failed to establish a substantial likelihood of success on the merits. Nor have plaintiffs established that the equities weigh in their favor. Pollack has obtained written approval for his occupancy on an annual basis. He thus cannot now assert that such written consent is not required. Given the foregoing factors, plaintiffs are not entitled to a preliminary injunction.
**Plaintiff also seeks a Yellowstone injunction. The purpose of *a* Yellowstone injunction is to stop the running of the cure period of a tenant's alleged default, thereby protecting the tenant's investment in the leasehold and preserving the status quo until the parties' rights can be adjudicated. Although RPAPL § 753(4) displaces injunctions pursuant to Yellowstone for residential tenants within the City of New York, RPAPL § 753(4) does not limit *Yellowstone* where an action seeking a judgment declaring the parties' rights and obligations under a proprietary lease remains pending. Plaintiffs' motion for a *Yellowstone* injunction is granted and, pending adjudication of this matter, the defendant is hereby enjoined and restrained from terminating or cancelling the plaintiffs' proprietary lease and the plaintiffs' time to cure any alleged defaults under the lease is hereby tolled.

REPRESENTATIONS

Johnson v. Levin [1150 Fifth Avenue Owners Corp.], 2017 WL 6391316, Supreme Court of New York. December 11, 2017. Paragraph 18(a) of the Proprietary Lease states "The Lessee shall take possession of the Apartment and appurtenances and fixtures "as is" as of the commencement date hereof." Plaintiffs' claim that in entering into such lease they detrimentally relied on defendant cooperative corporation's misrepresentations as to the condition of the Apartment is belied by such provision. Moreover, defendant cooperative was not the contract vendor, and plaintiffs make no claim that in the sale of the securities, the sponsor defendants were acting on behalf of the cooperative corporation and subject to its control.

REPAIRS

Richstone v. Board of Managers of Leighton House Condominium, 158 A.D.3d 551, Appellate Division, First Department, February 20, 2018. Plaintiffs own a penthouse unit that has the exclusive use of the condominium's roof terrace, defined as a limited common element. To enable inspection and repair of a water leak affecting many units in the building, defendant installed construction rigging on the terrace. Plaintiffs assert a breach of contract claim based on the building manager's alleged oral promise to them that the rigging would be removed by March 31, 2014, so that they could use the terrace from then through the end of October, and a trespass claim based on the rigging's interference with their use of the terrace after March 31, 2014.
**The contract claim fails for lack of consideration. Plaintiffs were obligated under the bylaws and declaration to permit defendant access to the terrace to enable defendant to inspect and make necessary repairs to the building, and gave no additional consideration so as to bind defendant to the alleged oral promise.
**Plaintiffs' argument that the building's water leak was not an emergency and that therefore, under the bylaws, defendant's access to the terrace had to be at their convenience, is unavailing. Since there is no evidence that defendant left the rigging in place beyond March 31, 2014 in bad faith, its decision is entitled to judicial deference. The record reflects that multiple inspections revealed that the leaks were more extensive than had been anticipated and that two months of severe winter weather impeded defendant's progress on the repairs.
**The trespass claim fails because, having given proper notice of its need for access, defendant did not require plaintiffs' permission to keep the rigging in place. Moreover, as indicated, there is no evidence of bad faith in defendant's decision to do so. To the extent the trespass claim is based on plaintiffs' contention that the installed rigging damaged a wooden deck that they had erected on the terrace, it is unavailing, in view of the unrefuted evidence that plaintiffs installed the deck without defendant's approval, in violation of the condominium's governing documents, and without the requisite permit from the Department of Buildings. Plaintiffs do not challenge the court's order that the deck be removed.
The **condominium's bylaws provide that defendant is entitled to attorneys' fees incurred in connection with the abatement, enjoinment, removal or cure of any violation, breach or default committed by a unit owner. As plaintiffs' claims are related to defendant's successful counterclaims that plaintiffs wrongfully interfered with its right of access to the terrace to make necessary building repairs and to remove their improperly installed deck, defendant is entitled to its full attorneys' fees and costs expended in this action.

BUT

Dogwood Residential, LLC v. Stable 49, Limited, 159 A.D.3d 490, Appellate Division, First Department, .March 13, 2018. Plaintiffs allege that defendant breached their proprietary lease by failing to make necessary repairs to the private elevator and roof that are part of the "exclusive area" appurtenant to their penthouse apartment. The proprietary lease obligates shareholders to maintain their apartments, except for repair and maintenance of the "Building's structure" for which defendant is solely responsible. Defendant submitted plaintiff's pre-closing written representation that he would accept responsibility for repairs of the elevator and roof, on which defendant contends it relied in approving plaintiffs' purchase application, and evidence that plaintiffs thereafter filed an application for a work permit with the DoB. The court initially ruled that plaintiffs' claims were barred by the doctrine of estoppel. Plaintiffs then moved for leave to reargue on the ground that the pre-closing representation was parol [sic] evidence offered to contradict or modify the terms of the proprietary lease, and

could not be considered. The court providently exercised its discretion in granting plaintiffs leave to reargue. As Blumenfeld made the representation that he would be responsible for structural repairs before the parties entered into the lease, and the lease unambiguously provides that structural repairs are defendant's sole responsibility, the representation cannot be considered for the purpose of contradicting the terms of the lease. The parol evidence rule cannot be evaded or set aside by the device of claiming an estoppel.
**The motion court providently exercised its discretion in granting plaintiffs leave to assert the breach of fiduciary duty claim against defendant's board of directors.

WARRANTY OF HABITABILITY

Marrero v. Property Services, LLC, 2018 WL 2975029, Civil Court Bronx Co. May 18, 2018. It is well settled that a tenant may not rely on the breach of warranty of habitability or RPL § 235-b to provide a basis for liability against the owner absent proof of negligence on their part. "There is no hint either in the decisions that section 235-b was designed to codify, or the legislative history of that section, of any purpose to extend the doctrine of strict liability to landlords with regard to wrongs that had traditionally been an area of tort liability. In a case directly on point, where a tenant sued for property damage resulting from a fire, the court held "Real Property Law § 235-b does not permit a tenant to recover damage to his personal property resulting from a breach of the warranty.

BUT

Grinberg v. Eissenberg [1802 Ocean Parkway Owners, Inc.], 58 Misc.3d 84, Appellate Term, Second Dept., December 29, 2017. Plaintiff brought this action for breach of contract and to recover for property damage caused by a leak in his ceiling that was causing damage to his apartment that had originated from the toilet in the apartment above his. The building's management repaired damage caused by that leak, but, plaintiff contended, the damage had not been repaired properly and, thus, he had to spend an additional $4,650 to fix it.
**Pursuant to Multiple Dwelling Law § 78, the owner of a multiple dwelling owes a nondelegable "duty to persons on its premises to maintain them in a reasonably safe condition" and is liable to anyone injured "even though the responsibility for maintenance has been transferred to another" However, Multiple Dwelling Law § 78 does not entitle a tenant to make repairs which he claims the statute requires the lessor to do, and to [sue] for the value of such work on the theory of breach of contract. Here, the proprietary lease expressly provided that it is the lessee's responsibility to keep the interior walls, floors and ceilings of the apartment in good repair.
**The implied warranty of habitability cannot similarly be waived or modified by contract (*see* Real Property Law § 235–b [2]), and, thus, a tenant may be entitled to be reimbursed by the landlord for repairs the tenant makes to the premises, where the premises' condition leaves it dangerous, hazardous or detrimental to his life, health or safety in violation of the statutory warranty of habitability, notwithstanding a provision in the lease purporting to shift the responsibility of repairs to the tenant. Here, in view of defendant 1802's failure to properly repair the water damage and mold in plaintiff's apartment resulting from the leak, defendant 1802 breached the warranty of habitability. Consequently, plaintiff is entitled to recover from defendant 1802 the expenses he incurred in repairing the conditions.

Lincoln v. Residences at Worldwide Plaza, Civil Court, New York, December 17, 2018, 62 Misc.3d 1203(A), 2018 WL 6729624 (Table). Claimant seeks compensation for the loss of use of his condominium unit's outdoor terrace as a result of Defendant's renovation of the building's exterior. Claimant is entitled to judgment in the amount of $2,345.00. Under the warranty of habitability, the obligation of a tenant to pay rent (or maintenance) is dependent upon a landlord's satisfactory maintenance of the premises in a habitable condition" The warranty is equally applicable to proprietary lessees and lessees of rental premises. The By-Laws provide that "[a]ll normal maintenance, repairs and replacements of any Terrace … shall be made by the Residential Section Unit Owner having access to such Terrace or Storage Room Unit at his own cost and expense, *but any structural or extraordinary repairs or replacements to such Terrace... shall be made by the Residential Board and the cost and expense thereof shall be charged to all Residential Section Unit Owners as a Residential Common Expense*" (§ 6.9-2.2). Plaintiff interprets the "cost and expense" to include the diminution of value of his

Apartment stemming from the inaccessibility of his terrace; in other words, that he should be reimbursed by fellow unit owners for the overcharge. Given that this can fairly be read as ambiguous, and that Defendant drafted the documents, it is reasonable to "construe this ambiguity in the lease against the defendant, the party that drafted the lease" to find that "cost and expense" can encompass the diminution of the value of Claimant's apartment as a result of necessary compliance with Local Law 11. Defendant's closure of Claimant's terrace rather than installation of a shed may be reasonable, but. the fact remains that Claimant paid for a benefit which the Declaration and By-Laws guarantee, which Claimant has paid for, but which Claimant did not receive. Claimant is entitled to recover a full abatement encompassing the fair value of the terrace,

ENFORCEMENT OF CONTRACTS

Sidore v. 334 East 5th Street, 2018 WL 4749524, Supreme Court of New York. September 28, 2018. Plaintiff seeks a declaratory judgment that the number of shares allocated to her apartment is 245 shares and not 300 shares as defendant contends. Plaintiff now moves for partial summary judgment. Plaintiff principally relies on the original offering statement filed by the defendant cooperative when it converted the building to a cooperative in approximately November 1984. According to the offering plan, defendant allocated 245 shares to plaintiff's apartment. Plaintiff's complaint challenging the allocation of shares to her apartment must be dismissed under the equitable principals of estoppel and laches. It is undisputed that under the terms of plaintiff s lease, which was entered in 1997, the apartment was allocated 300 shares. Plaintiff after having accepted, without objection, the lease and its terms for 20 years, now seeks to modify the parties' agreement. "Having acceded to the terms of the bargain for over a decade before seeking judicial intervention," plaintiff is estopped from complaining that it was unfair. Further, defendant would be prejudiced by the loss of evidence in this case as it would need to prove facts that occurred over thirty years ago, when the alleged alteration and re-allocation occurred, a task that in all likelihood is impossible.

STATUTE OF LIMITATIONS

Valyrakis v. 346 West 48th Street HDFC, 161 A.D.3d 404, Appellate Division, First Department, May 1, 2018.
The first cause of action seeks to reduce the number of Georgiou's shares in the corporation from 500 to 250—and hence the number of her votes from two to one. Each apartment, according to the offering plan, was allocated an equal number of shares, regardless of its size. In 1995, defendant Georgiou and her daughter, who held the proprietary lease to apartment 5W (and the 250 shares appurtenant thereto), acquired apartment 5E (and the 250 shares appurtenant thereto) as well. The first cause of action is barred by the statute of limitations. A proceeding challenging an action taken by a cooperative corporation must be commenced within four months after the action is final.
**The third cause of action seeks to set aside the April 2015 election because Georgiou cast two votes and Varela was not allowed to vote. The vindication of Varela's voting rights is an individual claim. However, this cause of action is barred by the four-month statute of limitations applicable to a challenge to a corporate election.

CONTINUING WRONG

Garron v. Bristol House, Inc., 162 A.D.3d 857, Appellate Division, Second Department, New York. June 20, 2018. Plaintiff, alleges that renovations that occurred in 2004 in the unit directly below his unit caused cracks and other structural damage to the walls and floor of his unit, which persist and have not been remedied. Plaintiff commenced this action to recover damages against the cooperative and the managing agent alleging causes of action sounding in breach of contract for failure to keep the building in "good repair" as required by the proprietary lease, and breach of the implied warranty of habitability. Defendants established that the alleged damage occurred when the renovations were performed in 2004, and that the commencement of this action in 2016, was beyond the six-year statute of limitations applicable to causes of action for breach of contract or breach of the implied warranty of habitability.

**The continuing wrong doctrine "is usually employed where there is a series of continuing wrongs, and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act", the doctrine is applied to extend the statute of limitations when the contract imposes a continuing duty on the breaching party. Here, the plaintiff alleged that the damage to his unit persisted and had not been repaired, and that such breach constituted a continuing breach of the defendants' contractual duty to keep the building in good repair and to provide habitable premises. However, where, as here, the sole remedy sought for the alleged continuing contractual breaches is monetary damages, the plaintiff's recovery must be limited to damages incurred within the six years prior to commencement of the action.

EVICTION

ILLEGAL CONDUCT

East Midtown Plaza Housing Co. v. Gamble, 60 Misc.3d 9, Appellate Term, First Department. June 1, 2018. Landlord, a Mitchell–Lama cooperative, established entitlement to summary judgment of possession in this holdover proceeding based upon illegal use of the apartment. The record, including excerpts from the transcript of tenant's criminal trial, wherein he was convicted of promoting prostitution, among other crimes, conclusively established that the apartment premises were used for prostitution on an ongoing basis, that the tenant knew of and acquiesced in this illegal activity, and, indeed, received a portion of the proceeds from such activity. CPLR 215(4) is inapplicable because it is a special limitation provision governing statutorily created penalties and forfeitures given to a common informer. The statute is applied in citizen-taxpayer actions to enforce public rights and is not properly applied to a summary proceeding commenced by landlord in its proprietary capacity. Lower court cases which hold that the CPLR 215(4) one-year statute of limitations applies in an illegal use eviction proceeding should not be followed.

COLLECTION OF MAINTENANCE

PAYMENT OF COMMON CHARGES

The Bd. of Managers of the Woods III in Westchester Condominium II v. Kaur, 2018 WL 2604777, City Court Peekskill,. May 28, 2018. Plaintiff commenced this civil action for the collection of common charges, late fees, assessments, fines and attorney's fees. Defendant failed and/or refused to pay her common charges and assessments based on claims of mistreatment, harassment, bias and/or a delay in addressing the conditions in her unit. Since the Court has found that the Defendant failed to satisfy her burden of demonstrating that the Board acted in bad faith or outside the scope of its legitimate authority, the Court holds that the Defendant is liable for the above referenced amounts. A unit owner simply cannot withhold the payment of common charges and assessments based on unproven claims that the Board acted in bad faith or that it acted outside the scope of its legitimate authority.

Hall v. Windbrooke Home Condominium Association, 60 Misc.3d 140(A), 2018 WL 3911002 (Table), Appellate Term, 2d Department .August 9, 2018. Plaintiff commenced this small claims action to recover $4,945.98 in common charges which plaintiff had paid to defendant condominium. At a nonjury trial, plaintiff testified that his condominium unit had been totally destroyed by a fire in September 2014 through no fault of his own, and that he had continued to pay the common charges after September 1, 2014. He asserted that he was entitled to an abatement of the common charges for the period until defendant's reconstruction of his unit, and that defendant had breached the condominium bylaws when it applied for a variance, which had caused a delay in the reconstruction of his unit. The condominium's bylaws do not allow for a proportionate abatement of common charges to the owners of condominium units which have been rendered wholly unusable as a result of damage resulting from an all-encompassing destruction such as a fire. Plaintiff failed to show that defendant had breached the bylaws by applying for a variance. Decisions made by the board of managers of a residential condominium are reviewed according to the business judgment rule, and courts must defer to a board's good faith decisions. Nothing in the record establishes that the decision to apply for a variance was not done in good faith, and plaintiff did not show

that the board had acted outside the scope of its authority, in a way that did not legitimately further the corporate purpose, or in bad faith, so as to trigger further judicial scrutiny of the board's actions.

ASSESSMENT

The Bd. of Managers of 111 Street Condominium v. 111 Hudson Street, LLC, 2018 WL 2117834, Supreme Court of New York. May 8, 2018. Plaintiff moves for partial summary judgment on its cause of action against the Unit Owner for certain unpaid common charges and assessments. The motion is granted in part. The Board voted to authorize a $25,000 special assessment on all unit owners to be used for legal fees and expenses incurred in connection with the instant litigation, which arose because of various building maintenance issues. The Board also authorized an additional common charge of $227,000, over a twenty-two-month period, for the funding of reserves to pay legal fees and expenses in connection with the instant litigation. The Unit Owners did not vote to approve the $227,000 in additional common charges. The Board argues that no vote was necessary because the additional common charges are funds "for a general operating reserve." The Court finds that the Board failed to submit sufficient evidence of its authority to levy the additional common charges. It is unclear whether the "general operating reserve" was intended to include funds for potential litigation, and the Board failed to tender evidence demonstrating such. The Unit Owner has raised a triable issue as to whether the general operating reserve was intended to include funds for litigation expenses. The Board's motion for partial summary judgment on its claim for additional common charges is denied.

ATTORNEYS FEES

Krodel v. Amalgamated Dwellings Inc., 166 A.D.3d 412, 1st Dep't,. November 8, 2018. Tenant brought action against cooperative landlord for default of the lease agreement for landlord's failure to transfer the shares of tenant's husband's apartment to her. Landlord counterclaimed for attorney fees. The Court granted tenant's motion for summary judgment on the counterclaim. The attorney fees provision in proprietary lease was unconscionable and unenforceable as a penalty. The clause provided: "If the Lessor] shall incur any cost, fee or expense ... including reasonable legal fees ... in connection with any action or proceeding brought by the Lessee against the Lessor ... which is based on an alleged default of the Lessor hereunder... such cost or expense shall be paid by the Lessee to the Lessor, on demand, as additional rent. Parties to a lease may contract for attorneys' fees "provided [they are] reasonable and not in the nature of penalty or forfeiture" A finding of unconscionability requires "some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." An attorneys' fees provision which provides that the tenant must pay attorneys' fees if it commences an action against the landlord based upon the default of the landlord is unconscionable and unenforceable as a penalty. The proprietary lease permits the landlord to recover attorneys' fees when the tenant brings an action against the landlord even when the landlord is in default. To enforce such a provision would produce an unjust result because it would dissuade aggrieved parties from pursuing litigation and preclude tenant-shareholders from making meaningful decisions about how to vindicate their rights in legitimate instances of landlord default.

Hoff v. Osborne Tenants Corp., 2018 WL 4199102, Supreme Court of New York .August 31, 2018. Petitioner commenced this special proceeding pursuant to Article 78 seeking rescission of a $2,500 fee imposed on her by Respondent. The coop conceded that "it appears the Board did not have proper authority under the Osborne's governing documents to impose the $2,500 move-in fee …and that it was a mistake by the Board and its management company to do so." The coop also avers that the Board "has now gone ahead and unilaterally rescinded that fee." Pursuant to Real Property Law § 234, when the imposition of a fee by a cooperative board is successfully challenged as beyond the board's authority, the leaseholder is entitled to reasonable attorney fees under the statute.

Fleetwood Commons, Inc. v. Fredericks, 59 Misc.3d 1057, City Court, Mount Vernon, April 5, 2018. The legal services and disbursements that accrued from May 2012 through to April 2017, while relating to respondent's tenancy under the proprietary lease, were not, in fact, fees and costs that were incurred by petitioner in commencing

and prosecuting the instant action. Although the services provided were to address issues with respondent's tenancy under the proprietary lease that ultimately led to the instant summary proceeding, said actions took place over a five year period, wherein petitioner served four Notices to Cure Defaults without pursuing any further actions based upon said defaults before finally deciding to call a Special Meeting of its Board of Directors in March 2016 to act on petitioner's alleged breach of the proprietary lease. As such, those fees and costs are too tenuous to the instant proceeding to be considered in a calculation of reasonable and appropriate fees and costs for an award of attorney's fees in the instant action.

TRANSFERS AND SUBLETS

CONSENT TO TRANSFER

Kallop v. Board of Directors for Edgewater Park Owners' Co-op Inc. ,155 A.D.3d 491, Appellate Division, First Department, November 21, 2017. Plaintiffs' application to purchase a unit in defendants' cooperative residential complex was approved by defendant Board of Directors, and then rescinded two weeks later, based upon a Board member's erroneous report that plaintiff told her he did not intend to reside in the complex, as required by the purchase contract. Plaintiffs filed a complaint seeking to compel defendants to permit the sale to go forward. An evidentiary hearing was held, at which the reporting Board member's testimony revealed that plaintiff had not, as she claimed, informed her he intended to reside outside the cooperative complex. Defendants' decision to rescind its approval of plaintiffs' purchase application, being without any basis in reason and without regard to the facts, was wholly arbitrary, and thus not entitled to the protections generally provided to cooperative boards by the business judgment rule. Defendants were ordered to permit the sale of the apartment to plaintiffs.

Lusk v. 170 West 81st Owners Corp., 2018 WL 4519626, Supreme Court of New York. September 17, 2018. [Judge Engoron] "New York City denizens must suffer through a variety of afflictions that are almost biblical in nature: buses that crawl; subways that stall; high prices at the mall; cold weather in the fall; a Flushing Team that can't play ball; friends that don't call; neighbors with gall; graffiti in the hall; plumbing expensive to install; buildings too tall; looking out your window at a wall. But seriously, the drawbacks to city living are legendary: high prices; crowded sidewalks; noise pollution; air pollution; bedbugs and cockroaches; prevalent crime; transportation tottering on the brink; vast income inequality; inadequate schools. And then there's that ubiquitous limitation on the quality of life; that thorn-in-the-urbanite's-side: the imperious Co-op building Board of directors."

**This proceeding arises from the Board's attempt to rescind its prior agreement to permit petitioner, conditionally, to purchase an apartment. The managing agent e-mailed Plaintiff that the Board will approve [the Proposed Sale] under two conditions: (1) Plaintiff was required "to add an additional $125,000 (net cash) [into his] savings account, and cash on hand post-closing & renovation"; and (2) Plaintiff was required to deposit one years' maintenance was to be held in escrow. The Board did not reserve any power to modify or change the terms of its approval. By e-mail Plaintiff accepted the conditions. Plaintiff borrowed money from his father's retirement account and deposited the $125,000 into his savings account, thus satisfying the first condition. Plaintiff entered into an escrow agreement for one-year maintenance for the combined apartments and deposited those funds into the co-op's escrow account, thus satisfying the second condition. Subsequently the Board sent Plaintiff an email notifying him of the Board's attempt to rescind its resolution and detailing the Board's new offer, which required Plaintiff to deposit $125,000 in escrow, rather than the previously agreed-to sum of $26,652. The Board alleges that after it consulted with co-op's counsel, she stated that the Board should either reject the Proposed Sale in whole, or require Plaintiff to place $125,000 in escrow for at least one year. **The resolution was a conditional but binding commitment upon which Plaintiff was entitled to rely. The Board's rescission of its decision to approve the Proposed Sale detailed in the resolution was improper and is not protected by the Business Judgment Rule. Respondents' argument that the Board rescinded its offer because it was concerned with Plaintiff's method of financing the additional funds (i.e., borrowing the money from his father) and, hence, his post-closing liquidity, is equally unavailing; the resolution does not (although it easily could have) condition how Plaintiff was to obtain additional funds, or that he was not allowed to borrow them. In other words, the Board is estopped from setting conditions that were not already contained in the original resolution.

Graham v. 420 East 72nd Tenants Corp., 2017 WL 6734085, Supreme Court of New York .December 27, 2017. Plaintiff alleges that the Board expressed an interest in purchasing Unit 1D from her, to transform the unit into a gymnasium for the Building. The Board's President on behalf of the Board mentioned $400,000 as a price. Plaintiff rejected the apparent offer. Plaintiff received an all-cash offer from purchasers for $495,000 which she accepted. The Board denied the sale application and advised Plaintiff' that the Board would only consider approving a sale for at least $535,000. The Plaintiff and the purchasers agreed to amend the contract to meet the $535,000 price and resubmitted their application. While the sale application was pending, Plaintiff was informed that Unit 1D should instead be sold for at least $ 610,000. Plaintiff commenced this action seeking – damages and declaratory relief ordering that the sale be approved at $535,000. The board then sent Plaintiff a letter rejecting the application. Subsequently another potential buyer offered $530,000 all-cash, which Plaintiff accepted but the Board rejected her application as well.
The Defendants now move for summary judgment. The Defendants fail to make a prima facie showing that the complaint should be dismissed on the basis that the business judgment rule eliminates judicial review of their conduct and decision-making. The Board have failed to put forth any evidence that as directors, they acted in good faith, honest judgment, and in furtherance of their corporate purpose for the Court to summarily invoke the business judgment rule and dismiss this action. Plaintiff has raised issues of fact as to whether or not the Board engaged in self-dealing or misconduct when it thrice denied her sale contracts, without giving any reason, and whether it was because their previous interest in purchasing the unit was rebuked by her. Motion denied.

ESTATE

346 West 48th Street HDFC v. Estate of Tapia, 2018 WL 5255248, Supreme Court of New York. October 22, 2018. Following Tapia's death his niece, Varela, became Executor of his Estate and attempted to transfer the unit to her twin sister Alvarez. The Board unanimously rejected her application based, in part, on the ground that she was not a financially responsible candidate. Varela's application was also rejected. The Board determined that the combined incomes of Varela and her husband exceeded the maximum allowable income for a two-person household. Following Varela's rejection, she permitted Alvarez, Yi, as well as other unknown individuals, to live in the apartment without Board consent. Plaintiff has established its entitlement to summary judgment by submitting documents confirm that although paragraph 5.03(a) of the lease allows certain enumerated relatives of the Estate to reside in the apartment, that provision does not include nieces. Neither Varela, Alvarez, nor Yi had a legal right to reside in the apartment.

601 West 136 Street HDFC v. Tsiropoulos, 2018 WL 5584480 (Table), Appellate Term, First Department,. October 29, 2018. The trial evidence supports the court's determination that respondent, the daughter of the deceased shareholders was a financially responsible individual and that petitioner HDFC breached the proprietary lease by unreasonably withholding consent to transfer the shares and lease to respondent. Respondent's income was adequate to meet current and future obligations, including maintenance of $275 per month plus utilities. Respondent's failure to submit tax returns was not a legitimate basis for petitioner to conclude that respondent was not "financially responsible," since none of the governing documents - proprietary lease, corporate bylaws, the application petitioner provided to respondent - required such production and her verified social security income was more than sufficient for her to meet her expected obligations to the cooperative. Nor did respondent's decision, as voluntary administrator of the estates of her parents, to temporarily withhold maintenance, preclude a finding that respondent, individually, is a financially responsible individual, where the nonpayment was grounded in a complaint against the building for promised reimbursement for repairs to the apartment.

SUBLETS

Chiagkouris v. 201 West 16 Owners Corp., 160 A.D.3d 469, First Department, .April 10, 2018. At issue is whether plaintiff violated the proprietary lease by allowing a friend to occupy his apartment in his absence. Article 14 provides: "The Lessee shall not … occupy or use the …apartment for any purpose other than as a private dwelling for the Lessee and Lessee's [family] …and domestic employees ... *The Lessee may also allow one (1) unrelated party, and that party's dependent children to occupy the apartment without the prior written consent of the Lessor.* In addition to the foregoing, the apartment may be occupied from time to time by guests of the Lessee for a period of time not exceeding one month, …but no guests may occupy the apartment unless one or more of the permitted adult residents are then in occupancy." The court previously held that article 14 "permit[s] occupancy by the listed persons other than the lessee only if the lessee maintains a concurrent occupancy" Plaintiff points out that we did not interpret the sentence italicized above and contends that nothing in that sentence indicates that the lessee must be in occupancy with the unrelated party. However, reading Article 14 as a whole, as we must, with no single sentence isolated we find that the interpretation we affirmed is the only reasonable interpretation of the article. Therefore, plaintiff was not permitted to allow the friend to occupy his apartment without maintaining a concurrent occupancy. Defendant's termination of plaintiff's lease was proper.

PERSONAL INJURY AND PROPERTY DAMAGE

HOMICIDE

Cafferata v. Estate of Kett by Kett [Sea Cliff Towers], 60 Misc.3d 1232(A), 2018 WL 4374459 (Table), Civil Court Richmond Co. September 5, 2018. The action arises from the fatal stabbing of plaintiff's decedent. Defendant's decedent was the proprietary lessee for an apartment. Plaintiff's decedent and third-party defendant were friends who regularly interacted with each other in and out of the subject premises. Plaintiff's decedent was visiting the subject apartment. An argument ensued between Plaintiff's decedent and third-party defendant, who was the lessee's son and a resident of the subject apartment, which culminated in the stabbing death of Plaintiff's decedent by third-party defendant.
**A landlord has a common-law duty to take minimal precautions to protect tenants and their guests from foreseeable harm from a criminal attack from third parties. In criminal attacks by a tenant against a third party at the premises, the plaintiff must establish that the landlord had the ability or a reasonable opportunity to control the aggressor (and) it must be established that the harm complained of was foreseeable To establish that a criminal act is foreseeable, it must be demonstrated that the conduct was reasonably predictable based on a prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location.
**Sea Cliff Towers makes out a prima facie showing of entitlement to summary judgment because they did not have a reasonable opportunity or effective means to prevent or remedy third-party defendant's conduct. The incident arose from a purely personal dispute between Plaintiff's decedent and third-party defendant and was not foreseeable At best plaintiff establishes that Sea Cliff Towers had knowledge that third-party defendant's criminal activities involved loitering, drug use and possible drug sales, excessive noise and visitors. Similarly, there can be no reasonable expectation that the board could act on the several known incidents of the preceding several months in time to effectuate an eviction.
In light of the above, Defendant Sea Cliff Towers motion for summary judgment is granted

ASSAULT

Lloyd v. Font [Hilltop Village Cooperative #4, Inc.], 2018 WL 2446235, Supreme Court Queens Co. March 13, 2018. Plaintiff claims that the bathroom ceiling collapsed as a result of Font having allowed his bathtub to overflow on several occasions. Thereafter, Font "began regularly harassing, plaintiffs ... by banging and stomping on all of the floors of Font's apartment and of shouting, cursing and specifically threatening Keith." Keith regularly complained of this behavior to the co-op defendants. One evening Font was banging on his apartment floor,

prompting Keith to call the NYPD. He was advised to cease and desist, but no arrest was made. Hilltop was notified of the incident, but took no action. Early the following morning, Font came to Keith's apartment door and repeatedly banged on same with a hammer, cursing and threatening to kill him in retaliation to Keith having called the NYPD. Keith personally complained to Hilltop about same and was told to contact the NYPD for future occurrences. Despite following that instruction - which included again calling the NYPD, resulting in Font's arrest, charge, guilty plea, and order of protection - the co-op defendants took no official action against Font. Just 13 days after the expiration of the order of protection, Plaintiffs allege that in the lobby Keith was "brutally ambushed, attacked, assaulted and battered" by Font, thereby resulting in, among other injuries, multiple fractures of Keith's right ankle and leg. As a result of the attack, Font pleaded guilty to assault in the third degree, a Class A misdemeanor, and was subject to a five-year order of protection in favor of Keith. Plaintiffs essentially argue that the co-op defendants' failure to follow through emboldened Font to believe that he would not suffer the consequences" of his behavior.
This argument is without merit. The co-op defendants never affirmatively promised protection to plaintiff, nor the eviction of Font (the latter of which plaintiffs' urge the co-op defendants should have done). There is no indication in this record that plaintiffs were "lulled into a false sense of security" based upon any act or inaction of the co-op defendants. Since plaintiffs injuries were sustained as a result of an intentional assault by Font, who was otherwise lawfully on the premises, there is no breach of the warranty of habitability. The motion by the co-op defendants for an order granting them summary judgment dismissing the complaint against them is granted.

CONVERSION

Sklar v. 650 Park Ave. Corp., 2018 WL 2020819, Supreme Court of New York. May 1, 2018. Plaintiffs allege that the cooperative's resident manager disposed of plaintiffs' property following the sale of the estate's apartment. Plaintiffs allege that they were storing their property in one of the co-op's storage bins with the express permission of the buyer and the defendants.
**Defendants argue that the plaintiffs' claims should be dismissed based on the lease, which provides that the use of the storage bin by any person during or after the term of the lease "shall be entirely at the risk of such person". Under General Obligations Law § 5-321, an exculpatory provision in a lease is void as against public policy and unenforceable. Accordingly, plaintiffs' causes of action cannot be dismissed on this basis.
**Plaintiffs allege that the manager deliberately disposed of and destroyed the plaintiffs' personal property Plaintiffs allegations of a permanent interference with their property interest constitutes the tort of conversion,
**Defendants also argue that the claims against the individual directors should be dismissed because plaintiffs fail to allege independent tortious conduct by any individual director. However, plaintiffs specifically allege that each of the individual directors, either on their own behalf or on behalf of the defendant co-op or management, instructed the manager to dispose of plaintiffs' property. If plaintiffs are able to prove these allegations, the directors may be liable for the corporations' conversion of plaintiffs' property and thus these claims cannot be dismissed.

ELECTIONS

Green v. Cristancho [67-69 St. Nicholas Avenue HDFC], 60 Misc.3d 1219(A), 2018 WL 3717231 (Table), Supreme Court, New York Co., August 1, 2018. Proceeding pursuant to BCL § 619 by the former members of the board against new members of the board. Petitioners seek to overturn both their removal from the board and respondents' election to the board because the meeting/election violated the bylaws. Assuming that petitioners could establish that the meeting was not in conformance with the bylaws, the petition would nonetheless be denied in the exercise of discretion and the interests of justice. A majority of the shareholders exercised their judgment and voted petitioners out and respondents on to the board. Their will should not be freely disregarded by this court. On this record, a hearing would not lead to a different result.

Respondents have demonstrated a diligent effort to ensure that the bylaws were followed. Petitioners have not demonstrated that they made any efforts to assist respondents at the meeting to ensure that the procedures complied with the bylaws (i.e., providing a copy of the current rent roll). Otherwise, petitioners' claims largely amount to form over substance, insofar as they seek to hide behind bylaws provisions in an effort to retain their positions at the HDFC in contravention to the will of the shareholders. The court notes that the petition is not supported by an affidavit from any of the shareholders of the HDFC aside from the named petitioners themselves.

ATTORNEY CLIENT PRIVILEGE

Jarmuth v. Leonard, 2018 WL 4220608, Supreme Court of New York. September 5, 2018. For a communication to be protected by the attorney-client privilege, the party asserting the privilege must show: (a) the communication occurred between an attorney and a client to obtain legal advice (b) the communication was of a confidential nature, in that the client intended to speak in confidence and expected that the communication would remain confidential (c) the communication related to the matter for which the attorney-client relationship was sought), and (d) no one outside the confidential relationship was present when the communication was made. Generally, communications made before third parties, whose presence is known to the client, are not privileged because they are not deemed confidential.

Gendell v. 42 W. 17th Street Housing Corp., 2018 WL 3145926, Supreme Court of New York. June 27, 2018. Plaintiffs assert that the emails withheld by defendants are not privileged and should be produced because they are communications sent to third-parties that do not contain any legal advice. Plaintiffs maintain that a majority of the withheld emails are not directed to an attorney but merely include an attorney as a copied recipient. The attorney-client privilege shields confidential communications between an attorney and his or her client during the course of a professional relationship for the purpose of facilitating the rendition of legal services. The communication itself must be primarily or predominantly of legal character. Generally, communications disclosed to or made by a third-party are not privileged. An exception exists for statements made by a client to the attorney's employees because clients have a reasonable expectation that such statements will be used solely for their benefit and remain confidential. Likewise, communications made to counsel through one serving as an agent of either attorney or client to facilitate communication generally will be privileged. Importantly, it is well settled that the attorney-client privilege can be extended to the client's employees or legal representatives under the agency doctrine.

LEGAL ISSUES INVOLVING THE SPONSOR

JENNIFER REALTY

FLORA GILLESPIE v. ST. REGIS RESIDENCE CLUB, NEW YORK INC., 2018 WL 4681617, United States District Court, S.D. New York .September 28, 2018. Plaintiffs allege that the Sponsor breached the terms of the Purchase Agreement and Club Offering Plan by abandoning sales efforts and renting out Club Units to the general public. Plaintiffs allege that the Purchase Agreement and Plan include both an "express *and/or implied*" promise by the Sponsor "to timely sell all of the Club Interests ... or at least a sufficient number of Club Interests to make this fractional offering viable." Although Plaintiffs fail to allege that an express covenant to sell Club Interests was breached—or even that such a covenant existed—Plaintiffs sufficiently allege that the implied covenant of good faith and fair dealing was breached. However, the Court declines to adopt Defendants' suggestion that the holding in *Jennifer* not apply here because the Club Units are expensive and available only to the well-heeled, unlike the formerly rent-stabilized tenants in *Jennifer*. The ultimate basis for the Court of Appeals' conclusion was a reaffirmation of the fundamental principle of New York law that all contracts contain an implied covenant of good faith and fair dealing. That obligation applies to real estate purchases by the rich as well as by the poor. The ultimate question whether the Sponsor's failure to sell 20% of the Club Interests actually undermined the "viability" of the offering is not before the Court at this time—the only question is whether Plaintiffs have

adequately pleaded that the Sponsor had an implied duty to sell sufficient units to make the offering viable—they have.

LEGAL ISSUES INVOLVING COMMERCIAL TENANTS

Fitzgerald Edibles, Inc. v. Osborne Tenants Corp., 2018 WL 2163585, Supreme Court of New York. May 10, 2018. Plaintiff and Osborne use the common vestibule as a pass through between the alley behind the building and other areas of the basement. Within the common vestibule there are three distinct "niche" areas. Plaintiff began keeping some of its equipment, including an ice maker, compressors and refrigeration units, in these niches. Osborne sent plaintiff a letter seeking that they remove all of their equipment from the common vestibule in order to relocate the waste line under the floor. Prior to starting the work, the coop directed its contractors to remove all of plaintiff's equipment located in the vestibule; and the equipment was removed. After the equipment was moved, the floor was excavated. The coop then authorized the contractor to perform the additional work of installing locking metal cage doors enclosing the niches in the vestibule, thereby preventing plaintiff from returning its equipment to the niches.
**At trial, the jury returned a verdict in favor of plaintiff finding both defendants liable for wrongful eviction, trespass to chattel and conversion. The jury found defendants not liable for trespass to land. If a person is ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is kept out by unlawful means, he is entitled to recover treble damages. The deliberate resort to self-help, unlawful eviction, removal, damage and destruction of plaintiff's property from the side niches in the common vestibule, and the installation of cages to prevent reentry was the cause of the delayed reopening of plaintiff's store, and some ensuing loss of profits. A showing of physical force or violence is not necessary to sustain an award of treble damages. Under these circumstances, an award of treble damages is appropriate.

RIGHTS AGAINST AND LIABILITIES TO THIRD PARTIES

EMPLOYEES

Holguin v. Barton [Gotham Condominium], 160 A.D.3d 819, Appellate Division, Second Department, April 18, 2018. Plaintiff was an employee of a cleaning services company which was hired to clean a **condominium** apartment following a renovation. The plaintiff was directed by her supervisor to clean certain floor-to-ceiling cabinets and was given a stepladder and a cloth for this purpose. The complaint alleges that the plaintiff was standing on the stepladder dusting the inside of the cabinets when she fell, sustaining injuries. The moving defendants demonstrated, prima facie, that the plaintiff was not engaged in "cleaning" within the meaning of Labor Law § 240(1), as her work did not require specialized equipment, and was unrelated to any ongoing construction or renovation of the apartment. The plaintiff's submissions in opposition were insufficient to create a triable issue of fact. Accordingly, the Supreme Court properly denied the plaintiff's motion for summary judgment on the issue of liability on the Labor Law § 240(1) cause of action.

HARASSMENT

Lation v. Fetner Properties, Inc. [1212 Fifth Avenue Condominium]**,** 2017 WL 6550691, United States District Court, S.D. New York .December 22, 2017. This action arises out of Defendant Chiu's alleged harassing and discriminatory conduct against Plaintiff, who works as a concierge in the condominium in which Chiu is a resident-owner. Lation filed suit against Chiu; the condo association; and the management company. But Chiu—the source of the problem—has failed to answer the Complaint. The parties agree that the dispute between Lation and 1212 Fifth Avenue/Fetner should be resolved in arbitration. Lation moves for a default judgment against Chiu. The Complaint details a variety of disturbing incidents in which Chiu harassed Lation while on duty. Chiu directed racist and homophobic comments and other profanities at Lation. Chiu is an owner of one unit in the building—

nothing more. Chiu does not supervise or direct Lation's work, nor does he possess the power to hire or fire Lation, nor does he control Lation's benefits or compensation. Chiu is not Lation's employer. The Court cannot grant Lation default judgment as to any of his employment discrimination claims. The Complaint pleads a claim for intentional infliction of emotional distress against Chiu. The Court concludes that Lation has sufficiently alleged that Chiu's extended campaign of harassment and bullying went far "beyond the bounds of decent behavior" and was "sufficiently outrageous to warrant the imposition of liability." Plaintiff's motion for default judgment against Defendant Chiu is granted.

INSURANCE

1070 Park Avenue Corporation v. Fireman's Fund Insurance Company, 313 F.Supp.3d 528, United States District Court, S.D. New York. June 19, 2018. The gas line running to a line of apartments ruptured shortly after a recycling bin was brought into the basement by the company that runs the e-cycle (electronics recycling) program. As a result, the gas had to be turned off throughout the building. The Administrative Code requires that a building's gas system pass an integrity test before gas can be turned back on. The contractor who was hired to conduct the test ascertained that, in order to pass the test—which is conducted at a considerably higher pressure than the system operates at under normal use—a number of pipes and valves had to be replaced, which necessitated opening walls in the residents' kitchens. The building incurred costs in excess of a half million dollars.
The building demanded reimbursement for the costs it incurred in connection with the restoration of gas service under the "all risks" policy that insured the building. Its insurer disclaimed coverage, on the ground that the policy did not cover damage attributable to the testing of gas lines that was mandated by local ordinance. The building protested that there was an exception to the exclusion if the damage to the gas system was caused by a "vehicle." It argued that the recycling bin—essentially an oversized garbage bin mounted on four wheels—qualified as a "vehicle." I conclude that the term "vehicle"—which appears in the policy's Gas Systems Endorsement as part of the phrase "Aircraft or Vehicles"—does not encompass what is, in essence, a mobile trash can. Therefore, I grant Defendant's motion for summary judgment and direct that Plaintiffs case be dismissed.

SLIP AND FALL

Parasco v. Douglaston Realty Management Corp. [38 Astoria Owners Corp], 2018 WL 339252, Supreme Court Queens Co, June 20, 2018. This is an action to recover damages for personal injuries allegedly sustained by plaintiff on June 1, 2015 when she slipped and fell. Defendants now seek summary judgment on the grounds that slip and fall incidents involving surfaces made slippery from rain are not actionable as a matter of law. The subject steps were replaced, approximately two months after the incident, as part of the buildings' capital improvement project to improve the aesthetics of the building and to foster sales of the remaining unsold cooperative apartment units. Movants met their prima facie burden of establishing their entitlement to judgment as a matter of law by offering evidence that they neither created nor had actual or constructive notice of any alleged dangerous condition on the stairway.

TRIP AND FALL

Cavaretta v. Michigan Cooperative Corp., 2018 WL 3392475, Supreme Court Queens Co. June 11, 2018. Plaintiff allegedly sustained injuries as a result of tripping and falling on a broken curb. The Administrative Code §§ 19-152 and 7-210 place the duty to repair sidewalks upon the abutting property owners. However the defective area upon which plaintiff allegedly tripped was not the sidewalk but the curb. Section 7-201 (c) of the Administrative Code states, in relevant portion, "The term 'street' shall include the curbstone." Conversely, "sidewalk" is defined in § 19-101 as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians." Thus, it is clear that neither § 19-152 nor § 7-210 imposes upon a property owner a duty to repair and maintain curbs. Plaintiff has failed to show any evidence that movants created the condition or made a special use of the curb. The motion by Michigan for summary judgment dismissing the complaint is granted.

Vullo v. Hillman Housing Corp., 2018 WL 1226048, Supreme Court of New York. March 8, 2018. This is an action for personal injuries allegedly sustained by plaintiff when she tripped and fell over the metal stump of a "No Parking" sign in the sidewalk. Plaintiff claims that the paving work done by Hillman, in response to a violation issued by the DOT, resulted in the negligent placement of cement in the area where the remnant of the metal stump was located, which made the defect more difficult to see. Hillman fails to make a prima facie showing that, as a matter of law, the alleged defective condition was merely a non-actionable trivial defect. Here, the alleged defect was not transient, temporary or moveable in nature, such that Hillman may claim that it did not have constructive notice thereof. Hillman's motion for summary judgment dismissing the complaint and all cross claims against it is denied.

QUESTIONS AND DISCUSSION

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