City Bar CLE
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42 West 44th Street, New York, New York 10036

Hot Topics Affecting Cooperatives & Condominiums 2023

Tuesday, April 4, 2023| 12:00 pm – 2:15 pm

Sponsoring Association Committee
Cooperative & Condominium Law | Christopher M. Tumulty, Chair

Hot Topics Affecting Cooperatives & Condominiums 2023

Tuesday, April 4, 2023| 12:00 pm – 2:15 pm

Program Chair:

Leni Morrison Cummins
Cozen O'Connor

Faculty:

Paul Korngold
Korngold Powers LLP

Ingrid C. Manevitz
Seyfarth Shaw LLP

Geoffrey R. Mazel
Hankin & Mazel PLLC

Scott Pashman
Cozen O'Connor

Hot Topics Affecting Cooperatives & Condominiums 2023

Tuesday, April 4, 2023| 12:00 pm – 2:15 pm

Agenda

12:00 – 12:05pm	**Introductions & Program Overview** *Leni Morrison Cummins*
12:05 – 12:30pm	**Nuisances: Noise and Smoke** *Ingrid C. Manevitz*
12:30-12:35pm	**Question/Answer Session**
12:35 – 1:00pm	**Current Updates on Tax Classes; Valuation; 421-a; ICAP & Coop Abatement Benefits** *Paul Korngold*
1:00 – 1:05pm	**Question/Answer Session**
1:05 – 1:30pm	**Legislative Update** *Geoffrey R. Mazel*
1:30 – 1:35	**Question/Answer Session**
1:35 – 2:00pm	**Case Law Update** *Scott Pashman*
2:00 – 2:05pm	**Question/Answer Session**
2:05-2:15pm	**Program Wrap-up** *Panel*

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NJ: 2.7 general
CA: 2.5 general
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Hot Topics Affecting Cooperatives & Condominiums 2023
Tuesday, April 4, 2023
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Mandatory CLE Information I

Notes on Faculty

Leni Morrison Cummins has extensive experience representing both the sponsor-developers of condominiums (condos) and cooperatives (co-ops), as well as condo, co-op, and community association boards. Her work on behalf of sponsor-developers deeply informs her work on behalf of boards — and vice versa. She routinely advises clients on plans for new construction and condominium conversions and has extensive experience negotiating issues pertaining to construction, development, and statutory compliance. She is well known for her ability to resolve contentious disputes between sponsor- developers and boards, and frequently mediates fraud claims under the Martin Act before the New York State Office of the Attorney General. More specifically, Leni represents sponsor-developers at every stage of the new construction or conversion process. She focuses on preventing liability before the first shovel enters the ground and often leads discussions with boards on behalf of sponsor-developers to resolve issues before they escalate. Leni represents condo and co-op boards with respect to construction defects, underfunding, fraud, compliance, and governance. She also provides ongoing general counsel to boards in their day- to-day management of condo and co-op properties. She has experience with crisis management, mediation, negotiation, litigation, and general legal counseling, and her goal is to achieve practical solutions quickly and efficiently. Leni is a regular contributor to the "Q & A" column of The New York Times Real Estate Section. She has also written articles published in the New York Law Journal, the New York State Bar Association Real Property Law Journal, Real Estate Weekly, Habitat Magazine, The Cooperator, and The Mann Report. Leni has been recognized by The New York Times Magazine as one of the "Top Women Attorneys" in the New York Metro Area, by Crain's New York Business as a 2021 Notable Woman in Law, and by the National Law Journal as a Real Estate & Construction Trailblazer. Leni's honors also include being named a Women Leader in The Law by ALM Media and a 2020 "On the Rise--Top 40 Lawyer" by the American Bar Association's Young Lawyers Division. She has been selected as a Super Lawyer, ranking in the top 2.5 percent of attorneys under 40 in the New York Metro Area, and has been ranked "AV Preeminent" by Martindale-Hubbell®. Leni serves on the Cooperative & Condominium Law Committee of the New York City Bar. Leni earned her B.A., with honors, from the University of Michigan and her J.D., cum laude, from New York Law School. She is admitted to practice law in the states of New York, New Jersey, and Connecticut.

Paul Korngold has extensive experience in real estate tax review matters as well as in ICIP/ICAP, 421-a and J-51 tax exemption/ tax abatement applications, and has filed applications for correction of the tax assessments and tax exemptions/tax abatements on these properties. He has been practicing in this area of law since his admission to practice law in 1977. Additionally, he is the past chairman of the Law Committee of the Associated Builders and Owners of Greater New York, a former director of both the New York State Builders Association and the Associated Builders and Owners of Greater New York, a past member of the Tax Certiorari and Condemnation Committee of the Bar Association of the City of New York, and is a director and former President of the Real Estate Tax Review Bar Association, a specialized Bar dealing with real estate tax assessment matters. Paul's articles on real estate tax abatements and tax exemptions have appeared in the New York Law Journal and he has frequently been quoted as an authority on real estate tax matters in various publications. He has lectured on real estate tax certiorari, tax exemption and transactional matters before many organizations including the Rent Stabilization Association, the New York Association of Realty Managers, the Council of New York Cooperatives, the Federation

of Housing Cooperatives, the Bar Association of the City of New York, the Real Estate Tax Review Bar Association, the Community Housing Improvement Program and the Associated Builders and Owners of Greater New York.

Ingrid C. Manevitz has extensive real estate-related litigation experience. Her practice includes disputes involving boards of condominiums and cooperatives, individual unit owners and shareholders, sponsors, building owners, architects, engineers, and sales and marketing agents. She also litigates general commercial, construction and corporate law matters. In addition to her litigation experience, Ingrid provides general counseling to boards and property managers of condominiums and cooperatives, and litigation avoidance counseling to sponsors of new construction and conversion projects. She serves as an arbitrator for New York County Civil Court, and has served on the Judicial Screening Panel for the First District, which considers applicants seeking to become judges in New York County Civil Court.

Geoffrey R. Mazel is a founding partner of Hankin & Mazel, PLLC, located in midtown Manhattan and Great Neck. His practice has been devoted to real estate law, with extensive experience in cooperative and condominium law, litigation, and sales and acquisitions. Mr. Mazel counsels numerous Cooperative and Condominium Boards of Directors/Managers, which encompasses over 20,000 units of Coop/Condo housing, including many of the largest Coop/Condo Boards in the City of New York and the metropolitan area. Additionally, Mr. Mazel has counseled and represents Coop/Condo Boards on all issues that come before them; including Corporate governance; contract negotiations; transfer; and all aspects of litigation. Mr. Mazel lectures frequently before the Bar and Coop/Condo groups on real estate and Coop/Condo issues. He has authored numerous articles in various periodicals on topics of importance to members of the Cooperative and Condominium community. He has chaired and instructed many Continuing Legal Education Seminars for the Bar Association of the City of New York; and the Queens County Bar Association. Mr. Mazel serves as legal adviser to the President's Council for Coop & Condos, an organization representing over 100,000 units of Cooperative and Condominium housing. He is a member of the Committee on Cooperative and Condominium Law of the Association of the Bar of the City of New York and was the Chairperson of the Queens Bar Association Cooperative/Condominium Committee.

Scott J. Pashman is a member of the Real Estate group of Cozen O'Connor, where he concentrates on condominium and cooperative matters, both as a litigator and as a transactional attorney. Scott counsels condominium boards of managers and cooperative boards of directors, as well as sponsors and developers, on board governance, construction and contract issues, alterations, license agreements, quality of life issues, and fiduciary obligations of board members. Scott also handles real estate litigation matters involving breach of contract, breach of fiduciary duty, fraud, adverse possession, easements, nuisance, lien and mortgage foreclosures, rent stabilization, commercial landlord-tenant disputes, rights of first refusal, transient occupancy, eminent domain, license agreements pursuant to Section 881 of the Real Property Actions and Proceedings Law, fraudulent conveyances, the Americans with Disabilities Act, and title insurance defense. Scott regularly handles cases in New York State and federal courts and proceedings involving the New York State Attorney General's Office, and New York City agencies such as the Department of Buildings, Environmental Control Board, and Landmarks Preservation Commission. Scott is a contributor to Habitat's condominium and cooperative law case tracker.

Navigating Nuisance Complaints: Noise & Noxious Smoke/Odors

Ingrid C. Manevitz

Tuesday, April 4, 2023

Seyfarth Shaw LLP

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Agenda

01 Overview

02 Investigate & Document Complaints

03 Review Governing Documents

04 Address Violations

05 Update/Amend Building Documents

06 Recent Cases

07 Q & A

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Overview

- **From Perspective of Co-op/Condo Boards**
  - The Board's Role and Obligations
  - Stuck in the Middle of He Said, She Said
- **Increase in Complaints from Residents**
  - More Residents Working from Home
- **Different Types of Complaints**
  - Marijuana Smoke/Odors
  - Washers and Dryers

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Investigate & Document Complaints

Protocol for Registering Complaints

- *To Whom Should Residents Complain?*
- *How Should Complaints be Registered?*
- *How is the Protocol Communicated to Residents?*

Investigating Noise & Noxious Smoke/Odors

- *Who is Tasked with Investigating Complaints?*
- *Is an Architect, Engineer or Other Professional Needed? If so, Who Pays?*
- *How Exactly are Complaints Investigated?*

Documenting Complaints

- *Who is Tasked with Documenting Complaints?*
- *Where are Records Kept? Who Has Access to Records? Are They Discoverable?*

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Review Governing Documents (Co-op)

· Co-op: Proprietary Lease and House Rules

Proprietary Lease Provision: The Lessee shall not permit unreasonable cooking or other odors to escape into the building. The Lessee shall not permit or suffer any unreasonable noise or anything which will interfere with the rights of other lessees or unreasonably annoy them.

House Rule: No Lessee shall make or permit any disturbing noises in the building or do or permit anything to be done therein which will interfere with the rights, comfort or convenience of other Lessees. No Lessee shall play upon or suffer to be played upon any musical instrument or permit to be operated a radio or television loudspeaker or other sound producing device(s) in such Lessee's apartment between the hours of 11 pm and the following 8 am if the same shall disturb or annoy other occupants of the building. No construction or repair work or other installation involving noise shall be conducted in any apartment and/or passenger elevator landing except on weekdays (not including legal holidays) and only between the hours of 8:30 am and 5 pm.

House Rule: The floors of each apartment must be covered with rugs or carpeting, each with padding beneath that is reasonably effective in reducing noise, or other equally effective noise-reducing material in lieu of such rugs, carpeting and padding, to the extent of at least 80% of the floor area of each room excepting only kitchens, maids' rooms adjacent to kitchens, pantries, closets and foyers.

House Rule: No Lessee, and no member of Lessee's family, or any occupant, guest, subtenant or employee of Lessee or workers or invitees shall cause, or permit, anything to be done that causes, any smoke (including, without limitation, any smoke or vapor from e-cigarettes) to exit Lessee's apartment or to otherwise permeate any common areas or other apartments in the building. Permitting second-hand smoke to permeate beyond Lessee's apartment shall be deemed objectionable conduct under the proprietary lease.

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Review Governing Documents (Condo)

· Condo: By-Laws and Rules and Regulations

By-Law Provision: No nuisance shall be allowed in the Residential Section, nor shall any use or practice be allowed in the Residential Section that either is a source of annoyance to the residents, tenants or other occupants of the Property or that interferes with the peaceful possession or proper use of the Property by its residents, tenants or other occupants.

Rule and Regulation: No Unit Owner shall make or permit any disturbing or objectionable noises, odors or activity in the Building, or do or permit anything to be done therein, which will interfere with the rights, comforts or conveniences of other Unit Owners or the tenants or occupants. No Unit Owner shall play upon or suffer to played upon any musical instrument, or operate or permit to be operated a phonograph, stereo system, or radio or television set or other loudspeaker in such Unit Owner's Unit between 10 pm and the following 9 am, if the same shall disturb or annoy other occupants of the Building. No construction or repair work or other installation involving noise shall be conducted in any Unit except on weekdays (no including legal holidays) and only between the hours of 8 am and 4 pm, unless such construction or repair work is necessitated by an emergency or is being performed by or on behalf of the owner of any Unsold Units, by Sponsor or its designee.

Rule and Regulation: Unless expressly authorized by the Board in each case, at least eighty percent (80%) of the floor area of each Unit (excepting only kitchens, pantries, bathrooms, closets and foyers) must be covered with rugs, carpeting or equally effective noise-reducing material.

Rule and Regulation: Residential Unit Owners, their guests, servants, employees, agents, visitors, tenants, sublessees or licensees shall not cause or permit any unusual or objectionable noise or odors to be produced upon or to emanate from their Units.

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Address Violations

What *may* a Co-op/Condo Board do to address violations?

What *should* a Co-op/Condo Board do to address violations?

Is there a difference between the two?

Does the Board have the authority to impose monetary fines?

What other remedies are available to the Board?

Who is responsible for paying the Co-op's/Condo's attorney's fees?

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Update/Amend Building Documents

- **House Rules and Rules and Regulations**
- **Proprietary Lease and By-Laws**
- **Other Building Documents**
  - Alteration Agreement
  - Smoking Policy

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Recent Cases

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Q&A

Thank You

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Real Estate Taxes for NYC for coops-condos

Tax Class 1

1.- 1-3 units bldg.
2. Most be predominantly residential
3. Capped increase 6%-20.
4. Historically unequal and will stay unequal

II. Tax Class 2A, 2B, 2 C
1.2A 4-6 Units
2. 2B. 7–10 Units
3. Capped increases at 8-30%
4. Beware of changing class because of transition AV disappear
5.AV increases only 1/3 of larger buildings

III. Tax Class 2.

1. 11 Residential units or more
2. Law says residential, DOF counts units but not storage and parking
3. 581 of RPTL -COOPS/CONDOS ARE ASSESSED AS RENTAL BUILDINGS
4,. Cap rate; based
5. Sale prices ignored
6.How to do a cap rate analysis

IV. Taxation of Condos/Coops
1. Condos are separate tax lot, Coops are one tax lot
2. Individual assessments are dependent on character of property except 10 or under is one assessed value
3. Beware of changes because tax rate is:
class 1 = 20.09%
class 2 (and 2A,2 b 2C) are 12.267%. Change to class 1 from class 2 may not bring reduction in taxes due to rate change.

V. RPIE
1. Residential cooperative apartment buildings with no more than 2,500 square feet of commercial space (not including garage space). To claim this exclusion you must still complete the RPIE-2022 (Parts I and IV). An RPIE is required for unsold sponsor-owned units if 10% or more of the units remain unsold. The board's responsibility but there is a way out.

Individual residential units in a condominium building/development. For a residential condominium that has commercial space, professional space, and/or has 10% or more unsold sponsor-owned units, an RPIE must be filed for the commercial space, professional space or the

unsold sponsor-owned units. An RPIE must also be filed for residential units that are rentals and not intended to be individually owned.

Who files?

VI. Exemptions/abatements

1.J51/421-a. Historical- New buildings or gut renovations are not subject to RS or RC unless 421-a or J-51 gut.

2.Coop-Condo Abatement as of January 5:
a. Must be e a resident of NYC
b. Must reside in the apartment.

c. Prevailing wage affidavit file for :

d. Bldgs. with 30 or more apt and an average AV of more than $60,000

or

e .less than 30 apts. and an average AV of more than $100,000.

MCI rent increases:

Must be 35% or more regulated. .If board refuses to file, sponsor is out of luck.

SECTION 1802

Classification of real property in a special assessing unit

Real Property Tax (RPT) CHAPTER 50-A, ARTICLE 18

§ 1802. Classification of real property in a special assessing unit.

1. All real property, for the purposes of this article, in a special

assessing unit shall be classified as follows:

Class one: (a) all one, two and three family residential real property, including such dwellings used in part for nonresidential purposes but which are used primarily for residential purposes, except such property held in cooperative or condominium forms of ownership other than (i) property defined in subparagraphs (b) and (c) of this paragraph and (ii) property which contains no more than three dwelling units held in condominium form of ownership and which was classified within this class on a previous assessment roll; and provided that, notwithstanding the provisions of paragraph (g) of subdivision twelve of section one hundred two of this chapter, a mobile home or a trailer shall not be classified within this class unless it is owner-occupied and separately assessed; and (b) residential real property not more than three stories in height held in condominium form of ownership, provided that no dwelling unit therein previously was on an assessment roll as a dwelling unit

in other than condominium form of ownership; and (c) residential real property consisting of one family house structures owned by the occupant, situated on land held in cooperative ownership by owner occupiers, provided that; (i) such house structures and land constituted bungalow colonies in existence prior to nineteen hundred forty; and (ii) the land is held in cooperative ownership for the sole purpose of maintaining one family residences for members own use; and (d) all vacant land located within a special assessing unit which is a city (i) other than such land in the borough of Manhattan, provided that any such vacant land which is not zoned residential must be situated immediately adjacent to property improved with a residential structure as defined in subparagraphs (a) and (b) of this paragraph, be owned by the same owner as such immediately adjacent residential property immediately prior to and since January 1, 1989, and have a total area not exceeding 10,000 square feet; and (ii) located in the borough of Manhattan north

of or adjacent to the north side of 110th street provided such vacant land was classified within this class on the assessment roll with a taxable status date of January 5, 2008 and the owner of such land has entered into a recorded agreement with a governmental entity on or before December 31, 2008 requiring construction of housing affordable to persons or families of low income in accordance with the provisions of the private housing finance law. Notwithstanding the foregoing, such vacant land shall be classified according to its use on the assessment roll with a taxable status date immediately following commencement of construction, provided further, that construction pursuant to an approved plan for affordable housing shall commence no later than December 31, 2010; and (e) all vacant land located within a special assessing unit which is not a city, provided that such vacant land which is not zoned residential must be situated immediately adjacent to real property defined in subparagraph (a), (b) or (c) of this paragraph and be owned by the same

person or persons who own the real property defined in such

subparagraph immediately prior to and since January 1, 2003;

Class two: all other residential real property which is not designated

as class one, except hotels and motels and other similar

commercial property;

Class three: utility real property and property subject to former

section four hundred seventy of this chapter;

Class four: all other real property which is not designated as class

one, class two, or class three.

2. In addition to any other requirements of law or rule of the commissioner, the assessment roll shall contain a separate column for the entry of the class designation required by this section. The assessor shall enter the appropriate class designation in this column for each parcel listed on the assessment roll.

3. The determination of inclusion within a class pursuant to this section shall be subject to administrative and judicial review as provided by law for the review of assessments.

SECTION 1805

Limitation on increases of assessed value of individual parcels

Real Property Tax (RPT) CHAPTER 50-A, ARTICLE 18

§ 1805. Limitation on increases of assessed value of individual parcels. 1. The assessor of any special assessing unit shall not

increase the assessment of any individual parcel classified in class one in any one year, as measured from the assessment on the previous year's assessment roll, by more than six percent and shall not increase such assessment by more than twenty percent in any five-year period. The first such five-year period shall be measured from the individual assessment appearing on the assessment roll completed in nineteen hundred eighty; provided that if such parcel would not have been subject to the provisions of this subdivision in nineteen hundred eighty had this subdivision then been in effect, the first such five-year period shall be measured from the first year after nineteen hundred eighty in which this subdivision applied to such parcel or would have applied to such parcel had this subdivision been in effect in such year.

If, in respect to any individual parcel classified in class one on the assessment roll completed and applicable for the year nineteen hundred eighty-two, the assessment for the year nineteen hundred eighty-one exceeds by more than twenty percent the assessment for the year nineteen hundred eighty, such assessor shall compute the actual assessments to be entered on assessment rolls applicable to the years nineteen hundred eighty-two through nineteen hundred ninety as follows:

(a) compute the maximum permissible assessments for the years nineteen hundred eighty-one through nineteen hundred eighty-five pursuant to the limitations contained hereinabove as if the provisions of this subdivision were in effect and applicable for assessment rolls prepared in the year nineteen hundred eighty-one;

(b) subtract the maximum permissible assessment for the year nineteen hundred eighty-one as computed in paragraph (a) hereof from the actual assessment entered on the assessment roll completed and applicable for the year nineteen hundred eighty-one and divide such result by four;

(c) the assessment for the year nineteen hundred eighty-two shall be the maximum permissible assessment for such year as computed pursuant to

such paragraph (a) minus the quotient determined pursuant to paragraph (b) hereinabove;

(d) the assessment for the year nineteen hundred eighty-three shall be the maximum permissible assessment for such year as computed pursuant to such paragraph (a) minus the quotient determined pursuant to paragraph (b) hereinabove;

(e) the assessment for the year nineteen hundred eighty-four shall be the maximum permissible assessment for such year as computed pursuant to such paragraph (a) minus the quotient determined pursuant to paragraph (b) hereinabove;

(f) the assessment for the year nineteen hundred eighty-five shall be the maximum permissible assessment for such year as computed pursuant to such paragraph (a) minus the quotient determined pursuant to paragraph (b) hereinabove;

(g) commencing and applicable in the years nineteen hundred eighty-six through nineteen hundred ninety, the limitations contained hereinabove shall be computed as measured against the maximum permissible assessments for the years nineteen hundred eighty-one through nineteen hundred eighty-five as computed in paragraph (a) hereinabove and as measured against the actual assessments for the years occurring after nineteen hundred eighty-five.

2. The assessment roll of a special assessing unit wholly contained within a city shall identify those parcels classified in class two which have fewer than eleven residential units. The assessor of any such special assessing unit shall not increase the assessment of any parcel so identified in any one year, as measured from the actual assessment on the previous year's assessment roll, by more than eight percent and shall not increase such assessment by more than thirty percent in any five-year period. The first such five-year period shall be measured from

the individual assessment appearing on the assessment roll completed in nineteen hundred eighty-one provided that, if such parcel would not have been subject to the provisions of this subdivision in nineteen hundred eighty-one had this subdivision then been in effect, the first such five-year period shall be measured from the first year after nineteen hundred eighty-one in which this subdivision applied to such parcel or would have applied to such parcel had this subdivision been in effect in such year.

If, in respect to any parcel so identified on the assessment roll completed and applicable for the year nineteen hundred eighty-four, the actual assessment for the year nineteen hundred eighty-three exceeds by more than thirty percent the assessment for the year nineteen hundred eighty-one, such assessor shall compute the actual assessments to be entered on assessment rolls applicable to the years nineteen hundred eighty-four through nineteen hundred ninety-two as follows:

(a) compute the maximum permissible assessments for the years nineteen hundred eighty-two through nineteen hundred eighty-seven pursuant to the limitations contained hereinabove as if the provisions of this subdivision were in effect and applicable for assessment rolls prepared in the year nineteen hundred eighty-two;

(b) subtract the maximum permissible assessment for the year nineteen hundred eighty-two as computed in paragraph (a) hereof from the lesser of the actual or transition assessment entered on the assessment roll completed and applicable for the year nineteen hundred eighty-two;

(c) subtract the maximum permissible assessment for the year nineteen hundred eighty-three as computed in such paragraph (a) from the lesser of the actual or transition assessment entered on the assessment roll completed and applicable for the year nineteen hundred eighty-three;

(d) add[21] such results of the computations prescribed by paragraphs (b)

and (c) hereof as are greater than zero and divide such sum by four;

(e) the assessment for the year nineteen hundred eighty-four shall be the maximum permissible assessment for such year as computed pursuant to such paragraph (a) minus the quotient determined pursuant to paragraph (d) hereinabove;

(f) the assessment for the year nineteen hundred eighty-five shall be the maximum permissible assessment for such year as computed pursuant to such paragraph (a) minus the quotient determined pursuant to paragraph (d) hereinabove;

(g) the assessment for the year nineteen hundred eighty-six shall be the maximum permissible assessment for such year as computed pursuant to such paragraph (a) minus the quotient determined pursuant to paragraph (d) hereinabove;

(h) the assessment for the year nineteen hundred eighty-seven shall be the maximum permissible assessment for such year as computed pursuant to such paragraph (a) minus the quotient determined pursuant to paragraph (d) hereinabove;

(i) commencing and applicable in the years nineteen hundred eighty-eight through nineteen hundred ninety-two, the limitations contained hereinabove shall be computed as measured against the maximum permissible assessments for the years nineteen hundred eighty-three through nineteen hundred eighty-seven as computed in paragraph (a) hereinabove and as measured against the actual assessments for the years occurring after nineteen hundred eighty-seven.

3. If the assessment appearing on an assessment roll completed on or after January first, nineteen hundred eighty-two for any parcel not subject to the provisions of subdivision one or two of this section, other than a parcel classified in class three, is greater than the

assessment appearing on the previous year's assessment roll the assessor shall determine a transition assessment for such parcel for the first assessment roll on which such greater assessment appears and for each of the succeeding four assessment rolls by computing the difference between such greater assessment and the assessment appearing on such previous year's assessment roll and adding the following percentages of such difference to the assessment appearing on such previous year's assessment roll: in the first year, twenty percent; in the second year, forty percent; in the third year, sixty percent; in the fourth year, eighty percent; and in the fifth year, one hundred percent. If the assessment of a parcel is increased during a period for which transition assessments have been established because of any prior assessment increases, such new increase shall be phased-in over a five-year period as set forth in this subdivision, and such phased-in increases shall be added to the transitional assessments previously established for the prior increase; provided, however, that if in any year any such transition assessment exceeds the actual assessment for such year, taxes imposed on such parcel for such year shall be based on such lesser actual assessment. Notwithstanding the foregoing, during the period of any such transition, the assessment roll shall contain an entry of the full amount of such greater assessment which shall be used by the commissioner in its determination of class ratios pursuant to paragraph (b) of subdivision one of section twelve hundred two of this chapter. In establishing state equalization rates, class equalization rates, special state equalization rates and special state equalization ratios under article twelve, article twelve-A and article twelve-B of this chapter, the commissioner shall use the transition assessments as provided for in this subdivision in its determinations, or where the actual assessment is the lesser, such actual assessment shall be so used.

4. Notwithstanding the provisions of subdivision three of this section no transition assessment shall be computed for any individual parcel for a year in which subdivision one or two of this section were applicable to such parcel, nor for any real property owned by the state and which

is subject to taxation pursuant to title two of article five of this chapter, nor for any real property for which a statute provides that a state equalization rate or special equalization rate shall be employed to determine the assessed value or the taxable assessed value.

5. Nothing in this section shall prevent placing on the assessment roll new property, additions to or improvements of existing property or formerly exempt property or the full or partial removal from the roll of property by reason of fire, demolition, destruction or new exemption and such increase or decrease in value shall not be included in the computation of the limitations prescribed by this section. Any parcel which would be assessed at a greater amount but for the provisions of subdivision one or two of this section shall be excluded from any survey or computation made by any body or officer for the purpose of determining a level of assessment to be used in the administrative or judicial review of assessments including, but not limited to, class ratios computed pursuant to paragraph (b) of subdivision one of section twelve hundred two of this chapter, ratios computed by selection of parcels or from actual sales of real property under the provisions of subdivision three of section seven hundred twenty of this chapter, and residential assessment ratios computed pursuant to section seven hundred thirty-eight of this chapter, but not including state equalization rates or class equalization rates. In the event that a parcel appearing on the assessment roll completed in nineteen hundred eighty or any subsequent roll is subdivided or consolidated with another, such assessor shall make an appropriate allocation of the assessed value of such parcel in the determination of the limitations prescribed in this section.

6. Notwithstanding any provision of law to the contrary, in any special assessing unit wholly contained within a city, beginning with the assessment roll completed in two thousand five and for each subsequent assessment roll, the assessor shall not increase the assessment of any existing property classified in class two that has fewer than eleven residential units, with respect to any increase in

value attributable to additions to or improvements of such property that were not reflected on the assessment roll for a previous year, by more than one-third of the amount that such assessment would increase, in the absence of this subdivision, with respect to any increase in value attributable to additions to or improvements of such property that were not reflected on the assessment roll for a previous year.
Notwithstanding the provisions of subdivision five of this section, the remainder of the increase in value attributable to such additions or improvements that were not reflected on the assessment roll for a previous year shall be subject to the limitations on increases provided in subdivision two of this section. This subdivision shall not apply to the construction of a new building or structure. This subdivision shall not apply where, as a result of such additions to or improvements of the existing property, there are more than ten residential units in such property.

Tax Rates

	1			2, 2A, 2B, 2C			3			4		
Year	1st Half	2st Half	Average	1st Half	2st Half	Average	1st Half	2st Half	Average	1st Half	2st Half	Average
2022/23	19.9630	20.6550	20.3090	12.2350	12.2990	12.2670	12.2890	13.2210	12.7550	10.7550	10.5370	10.6460
2021/22	21.0450	18.8810	19.9630	12.2670	12.2030	12.2350	12.8260	11.7520	12.2890	10.6940	10.8160	10.7550
2020/21	21.1670	20.9230	21.0450	12.4730	12.0610	12.2670	12.5360	13.1160	12.8260	10.5370	10.8510	10.6940
2019/20	20.9190	21.4150	21.1670	12.6120	12.3340	12.4730	12.0930	12.9790	12.5360	10.5140	10.5600	10.5370
2018/19	20.3850	21.4530	20.9190	12.7190	12.5050	12.6120	11.8910	12.2950	12.0930	10.5140	10.5140	10.5140
2017/18	19.9910	20.7790	20.3850	12.8920	12.5460	12.7190	10.9340	12.8480	11.8910	10.5740	10.4540	10.5140
2016/17	19.5540	20.4280	19.9910	12.8830	12.9010	12.8920	10.8130	11.0550	10.9340	10.6560	10.4920	10.5740
2015/16	19.1570	19.9510	19.5540	12.8550	12.9110	12.8830	11.1250	10.5010	10.8130	10.6840	10.6280	10.6560
2014/15	19.1910	19.1230	19.1570	13.1450	12.5650	12.8550	11.9020	10.3480	11.1250	10.3230	11.0450	10.6840
2013/14	18.5690	19.8130	19.1910	13.1810	13.1090	13.1450	12.4770	11.3270	11.9020	10.2880	10.3580	10.3230
2012/13	18.2050	18.9330	18.5690	13.4330	12.9290	13.1810	12.4730	12.4810	12.4770	10.1520	10.4240	10.2880
2011/12	17.3640	19.0460	18.2050	13.3530	13.5130	13.4330	12.6310	12.3150	12.4730	10.3120	9.9920	10.1520
2010/11	17.0880	17.6400	17.3640	13.2410	13.4650	13.3530	12.7430	12.5190	12.6310	10.4260	10.1980	10.3120
2009/10	16.7870	17.3890	17.0880	13.0530	13.4290	13.2410	12.5770	12.9090	12.7430	10.6120	10.2400	10.4260
2008/09	15.6050	16.7870	16.1960	12.1390	13.0530	12.5960	11.6980	12.5770	12.1375	9.8700	10.6120	10.2410
2007/08	0.0000	0.0000	15.4340	0.0000	0.0000	11.9280	0.0000	0.0000	11.5770	0.0000	0.0000	10.0590
2006/07	15.7460	16.4900	16.1180	12.3960	13.0780	12.7370	12.3090	11.7050	12.0070	11.3060	10.6880	10.9970
2005/06	15.0940	16.3980	15.7460	12.2160	12.5760	12.3960	12.5530	12.0650	12.3090	11.5580	11.0540	11.3060
2004/05	14.5500	15.6380	15.0940	12.6200	11.8120	12.2160	12.4180	12.6880	12.5530	11.4310	11.6850	11.5580
2003/04	14.1600	14.9400	14.5500	12.5170	12.7230	12.6200	12.5650	12.2710	12.4180	11.5800	11.2820	11.4310

PDF.js viewer

SECTION D - RPIE EXCLUSIONS

I am not required to file a RPIE for this year because my property:

a. ☐ has an **Actual Assessed Value of $40,000 or less.**

b. ☐ is **exclusively residential** with 10 or fewer apartments.

c. ☐ is **primarily residential** with 6 or fewer apartments and no more than one commercial unit, and is in Tax Class 1 or Tax Class 2.

d. ☐ is a **residential cooperative** apartment building with less than 2,500 square feet of commercial space (not including garage space).

e. ☐ is an **individual residential condominium unit** that was sold and is not owned by the sponsor.

f. ☐ is rented exclusively to a **related person or entity.**

g. ☐ is **occupied exclusively by the owner** but is not a: department store with 10,000 or more gross square feet; hotel or motel; parking garage or lot; power plant; or theater.

h. ☐ is owned and used exclusively by a fully exempt **not-for-profit organization or government entity** and generates no rental income.

i. ☐ is **vacant or uninhabitable** and non-income-producing for the entire year.

j. ☐ is **vacant, non-income-producing** land.

k. ☐ The owner has not operated the property and is without knowledge of the income and expenses for the entire calendar or fiscal year of the reporting period

IF YOU CLAIMED AN EXCLUSION ABOVE, YOU MAY SKIP TO PART IV: RPIE CERTIFICATION.

SECTION SF - SHORT FORM (Optional form for non-hotel properties with an assessed value of $250,000 or less)

PROPERTY USE, VACANCY & INCOME INFORMATION

	Total Number of Units	Owner/Owner-related Occupancy %	Vacancy % as of Jan 5, 2023	Income ($ per year)
1. Commercial Income		%	%	$
2. Residential Income		%	%	$
3. Cell Site Income				$
4. Signage/Billboard Income				$
5. Total Income from Real Estate				$

PROPERTY OPERATING EXPENSES

	Expenses ($ per year)
1. Utilities	
2. Other	
3. **Total Expenses**	
*Real Estate Taxes	
*Bad Debt	
*Depreciation	
*Mortgage Interest	

***NOTE:** Real estate taxes, bad debt, depreciation and mortgage interest should not be included when tallying Total Expenses. These expenses are not eligible for valuing real estate for NYC property tax purposes.

SECTION E - PROPERTY USE AND VACANCY INFORMATION

1. Description:

a. Total # of Units: _____ b. # of Residential Units: _____ c. # of Commercial Units: _____

d. # of Buildings: _____ e. # of Floors: _____ f. Year of Purchase: _____

For each use type, indicate the percentage of total square feet that was vacant (unoccupied, unleased or generating no income) as of January 5, 2023. Square feet occupied for any portion of January 5, 2022 may not be included.

	Percentage Vacant
2. Residential:	
3. Office:	
4. Retail Tenants:	
5. Loft:	
6. Factory:	
7. Warehouse:	
8. Storage:	
9. Garage/Parking:	
10. Other:	
11. Other:	
12. Other:	
13. Other:	

SUBMISSION

SECTION F - TO BE COMPLETED ONLY IF THE PROPERTY IS A COOPERATIVE OR CONDOMINIUM

	A. # of Units	B. Annual Income ($)
1. Unsold Occupied Units:		
a. Regulated Apartments		
b. Unregulated Apartments		
2. Unsold Commercial Units that are Leased:		
3. Commercial Units Owned and Occupied by the Cooperative/Condominium Owner:		

❑ Despite our due diligence in seeking rent roll information for sponsor-owned units, we have been unable to obtain such information from the sponsor.

Menu

Department of Finance

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Cooperative and Condominium Tax Abatement

Prevailing Wage Affidavits

Certain properties must submit a prevailing wage affidavit prior to the upcoming tax year to qualify for the Cooperative and Condominium Property Tax Abatement.

The filing period for the upcoming tax year ends on **February 15.**

To submit your prevailing wage affidavit:

1. Look for your developments on the list of developments that must file the affidavit.
2. Download the prevailing wage affidavit and complete it.
3. Submit your completed affidavit via the Cooperative/Condominium Abatement Portal.

If you are required to file a prevailing wage affidavit but your developments no longer wish to receive the co-op/condo abatement, you should complete the Co-op/Condo Tax Abatement Benefit Opt-Out form.

Click here to read more about the prevailing wage affidavit requirement.

Notice of Adopted/Final Rule

The New York City Department of Finance has adopted a rule amendment relating to the Real Property Tax Abatement for Cooperative or Condominium Dwelling Units. For more information click here.

Owners of cooperative units and condominiums who meet the eligibility requirements for the Cooperative and Condominium Property Tax Abatement can have their property taxes reduced. The amount of the abatement is based on the average assessed value of the residential units in the development.

Abatement percentages are as follows:

Average Assessed Value	Benefit Amount Per Year
$50,000 or less	28.1%
$50,001 - $55,000	25.2%
$55,001 - $60,000	22.5%
$60,001 and above	17.5%

Requirements

- Co-op and condo boards and managing agents must notify the Department of Finance of changes in ownership or eligibility for the Cooperative and Condominium Property Tax Abatement by February 15, or the following business day if February 15 falls on a weekend or holiday.
- New condominium owners must have filed a real property transfer tax (RPTT) form or deed with the Division of Land Records at www.nyc.gov/acris. For more information, visit the Real Property Transfer Tax page.
- The co-op or condo unit must be the owner's primary residence. Co-op shareholders and condo unit owners: Please tell your board or managing agent if the unit is your primary residence so that you can receive the abatement.
- You must have purchased the unit on or before January 5 to qualify for the abatement for the upcoming tax year. If the unit was purchased after January 5, you can apply for the next tax year.
- Co-op or condo owners cannot own more than three residential units in any one development and one of the units must be the owner's primary residence.
- The property must be classified as a tax class 2 property.
- Properties that are part of the Urban Development Action Area Program (UDAAP) cannot receive the abatement.
- Prevailing wage affidavits must be filed for properties that have 30 or more dwelling units and an average assessed unit value of more than $60,000, or that have less than 30 dwelling units and an average assessed unit value of more than $100,000. Click here for a list of developments that are required to file the prevailing wage affidavit. This list is preliminary and will be updated after the release of the tentative property tax roll for tax year 2022-23 in January 2022.
- Co-op or condo owners cannot be receiving any of the following exemptions or abatements:
  - J-51 exemption
  - 420c, 421a, 421b, or 421g
  - The clergy property tax exemption

  The co-op or condo property cannot be any of the following:
  - a Housing Development Fund Corporation (HDFC)
  - a Limited Dividend Housing Company, Redevelopment Company
  - a Mitchell-Lama Building or
  - in the Division of Alternative Management Programs (DAMP).
- Units owned by a business (LLC) are not eligible.
- Units held by sponsors or their successors in interest are not eligible.

- Units owned by a trust are eligible only if the unit is the primary residence of all of the beneficiaries of the trust, trustee, or life estate holder.

Note: If the development's commercial exemption (such as a 421a or J51 exemption) is due to expire at the end of the tax year on June 30, you can apply for the co-op/condo abatement. We will determine your eligibility to receive the abatement upon review of your application.

How to Apply for and Renew Your Abatement

Managing agents and boards of directors must apply for and renew the cooperative and condominium property tax abatement on behalf of their entire development.

The fastest and simplest way to apply for abatements or submit information changes is via the Cooperative/Condominium Abatement Portal (CCAP) or you may mail a paper form.

Cooperative/Condominium Abatement Portal (CCAP) Training Video

A training video is available to help you use the Cooperative/Condominium Abatement Portal. The training includes instructions for establishing and providing access to company administrators, which is essential for portfolio management.

Developments Applying for the Abatement for the First Time

Cooperative developments that are filing for the abatement for the first time can:

- File using the online Cooperative/Condominium Abatement Portal (CCAP) or
- Complete the paper Cooperative Property Tax Abatement Initial Application. To make it easier to report unit information, you may use the Cooperative Initial Application Unit Information Spreadsheet to complete sections B and C of the application.
  - If you use the spreadsheet, please be sure to submit it along with the completed sections A and D of the application.
  - If you do not use the spreadsheet, please complete all sections A through D of the application.

Condominium developments that are filing for the abatement for the first time can:

- File using the online Cooperative/Condominium Abatement Portal (CCAP) or
- Complete the Condominium Property Tax Abatement Initial Application. To make it easier to report unit information, you may use the Condominium Initial Application Unit Information Spreadsheet to complet section B of the application.
  - If you use the spreadsheet, please be sure to submit it along with the completed sections A and of the application.
  - If you do not use the spreadsheet, please complete all sections A, B, and C of the application.

New Shareholders or Unit Owners in Developments That Have the Abatement

- **For Renewals and Changes**
  For quicker processing, we strongly encourage you to file online using the Cooperative/Condominium Abatement Portal (CCAP). You may use the CCAP portal for submissions during the filing period. For more information and instructions, download the Cooperative Condominium Abatement Portal (CCAP) User Guide.
- **Tax Benefits Letter**
  The Department of Finance mails tax benefits letters to boards and managing agents outlining each unit's tax savings in December of each year.
  - Co-op benefit letters outline personal exemptions; the co-op property tax abatement boards and managing agents use this information to distribute benefits to each unit.
  - Condo benefits letters outline each unit's tax savings for condo property tax abatements in December of each year. Boards and managing agents use this information to identify changes and eligibility for unit owners.
- **Renewals and Changes - Developments without Managing Agents:**
  Note: Shareholders and owners of cooperative units and condominiums who do not have a managing agent or board of directors should contact us or call 311 for more information on how to apply. If you are a cooperative shareholder or condominium owner with a managing agent, please contact your managing agent to apply.

  Please note that if you are a co-op shareholder or condo unit owner, you must inform your managing agent or board that your unit is your primary residence so that you can receive the abatement.

The deadline to file your Cooperative/Condominium Property Tax Abatement Renewal and Change Form was February 15, 2022.

New Requirement Update

Need Help? Email Us.

NYC
Department of Finance

Affidavit of Certification Regarding Prevailing Wage Requirements

How to Submit the Affidavit

Online: www.nyc.gov/ccrenewal
Mail: NYC Department of Finance, Co-op/Condo Abatement,
P.O. Box 311, Maplewood, NJ 07040-0311

Deadline:

February 15 (or the next day if this falls on a weekend or holiday)

Instructions:

The prevailing wage affidavit must be filed for properties that have 30 or more dwelling units and an average assessed unit value of more than $60,000, or that have less than 30 dwelling units and an average assessed unit value of more than $100,000.

How and When to File the Affidavit:

You can submit your completed and notarized prevailing wage affidavit when you file your initial or renewal application at www.nyc.gov/ccrenewal.

In order to complete the affidavit, you will need to provide the cooperative number or condominium number for which you are applying. This number is available on the Tax Benefit Letter or can be looked up at www.nyc.gov/ccabatement.

The prevailing wage affidavit must be submitted on an annual basis along with the renewal or change form.

If there are no building service employees as described in the definition below, check the box on the affidavit to confirm this.

Definitions:

"Prevailing wage" means the rate of wages and supplemental benefits paid in the locality to building service workers in the same trade or occupation and annually determined by the New York City Comptroller's office in accordance with the provisions of section two hundred thirty-four of the labor law.

"Building service employee" means any person who is regularly employed at a building who performs work in connection with the care or maintenance of such building. "Building service employee" includes, but is not limited to, watchman, guard, doorman, building cleaner, porter, handyman, janitor, gardener, groundskeeper, elevator operator and starter, and window cleaner, but shall not include persons regularly scheduled to work fewer than eight hours per week in the building.

How to Get Help:

If have questions or need assistance, please contact us at www.nyc.gov/contactdof or call 311.

AFFIDAVIT OF CERTIFICATION REGARDING PREVAILING WAGE REQUIREMENTS FOR TAX YEAR ENDING 2024

Re:

_____ (Name of Development)

Please select development type (select one): ☐ Condominium ☐ Cooperative

STATE OF NEW YORK)
) ss.:
COUNTY OF)

_____, being duly sworn, under penalty of perjury, deposes and says:

1. I am _____ (name and title), and am duly authorized to make this affidavit on behalf of the _____ (Board of Managers or Board of Directors) of the _____ (condominium / cooperative name) _____ (condominium / cooperative number) for property located in the borough of _____.
2. I make this affidavit in order to comply with the provisions of section 467-a of the Real Property Tax Law.
3. I have read and understood the requirements for the Cooperative/Condominium Abatement pursuant to section 467-a of the Real Property Tax Law.
4. As required pursuant to Section 467-a of the Real Property Tax Law, I certify that all building service employees employed or to be employed at the above-referenced property shall receive the applicable prevailing wage for the duration of the tax abatement benefit.

☐ Check this box if the above-referenced property does not employ building service employees.

_____
Signature of Officer or Authorized Agent

_____
Title of Officer or Authorized Agent

_____
Date

Sworn to me this ___ day of _____,
20____

_____
Notary Public

Tax Rates

	1			2, 2A, 2B, 2C			3			4		
Year	1st Half	2st Half	Average	1st Half	2st Half	Average	1st Half	2st Half	Average	1st Half	2st Half	Average
2022/23	19.9630	20.6550	20.3090	12.2350	12.2990	12.2670	12.2890	13.2210	12.7550	10.7550	10.5370	10.6460
2021/22	21.0450	18.8810	19.9630	12.2670	12.2030	12.2350	12.8260	11.7520	12.2890	10.6940	10.8160	10.7550
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2018/19	20.3850	21.4530	20.9190	12.7190	12.5050	12.6120	11.8910	12.2950	12.0930	10.5140	10.5140	10.5140
2017/18	19.9910	20.7790	20.3850	12.8920	12.5460	12.7190	10.9340	12.8480	11.8910	10.5740	10.4540	10.5140
2016/17	19.5540	20.4280	19.9910	12.8830	12.9010	12.8920	10.8130	11.0550	10.9340	10.6560	10.4920	10.5740
2015/16	19.1570	19.9510	19.5540	12.8550	12.9110	12.8830	11.1250	10.5010	10.8130	10.6840	10.6280	10.6560
2014/15	19.1910	19.1230	19.1570	13.1450	12.5650	12.8550	11.9020	10.3480	11.1250	10.3230	11.0450	10.6840
2013/14	18.5690	19.8130	19.1910	13.1810	13.1090	13.1450	12.4770	11.3270	11.9020	10.2880	10.3580	10.3230
2012/13	18.2050	18.9330	18.5690	13.4330	12.9290	13.1810	12.4730	12.4810	12.4770	10.1520	10.4240	10.2880
2011/12	17.3640	19.0460	18.2050	13.3530	13.5130	13.4330	12.6310	12.3150	12.4730	10.3120	9.9920	10.1520
2010/11	17.0880	17.6400	17.3640	13.2410	13.4650	13.3530	12.7430	12.5190	12.6310	10.4260	10.1980	10.3120
2009/10	16.7870	17.3890	17.0880	13.0530	13.4290	13.2410	12.5770	12.9090	12.7430	10.6120	10.2400	10.4260
2008/09	15.6050	16.7870	16.1960	12.1390	13.0530	12.5960	11.6980	12.5770	12.1375	9.8700	10.6120	10.2410
2007/08	0.0000	0.0000	15.4340	0.0000	0.0000	11.9280	0.0000	0.0000	11.5770	0.0000	0.0000	10.0590
2006/07	15.7460	16.4900	16.1180	12.3960	13.0780	12.7370	12.3090	11.7050	12.0070	11.3060	10.6880	10.9970
2005/06	15.0940	16.3980	15.7460	12.2160	12.5760	12.3960	12.5530	12.0650	12.3090	11.5580	11.0540	11.3060
2004/05	14.5500	15.6380	15.0940	12.6200	11.8120	12.2160	12.4180	12.6880	12.5530	11.4310	11.6850	11.5580
2003/04	14.1600	14.9400	14.5500	12.5170	12.7230	12.6200	12.5650	12.2710	12.4180	11.5800	11.2820	11.4310

Department of Finance

NOTICE OF PROPERTY VALUE
Tax Year 2023-24
(This is not a bill.)

#6795856230109O1#

[redacted]

January 15, 2023

Owner

[redacted]

Property Address

[redacted]

Borough: [redacted] Block: [redacted] Lot: 139

Tax Class: 1 Building Class: B3 Units: 2 Residential

YOUR NOTICE OF PROPERTY VALUE (NOPV) AT A GLANCE

2023-24 Market Value: $7,239,000

2023-24 Assessed Value: $258,785

Your property tax exemptions: None

See below for an estimate of your 2023-24 property tax.

WHAT IS THIS NOTICE?

This is your annual notice of property value, or NOPV. **It is not a bill, and no payment is required**. This notice will:

- Inform you of the assessed value of your property for tax year 2023-24, and tell you how to challenge it if you believe there is a mistake.
- Explain how property taxes are calculated.
- Provide an estimate of your property tax for tax year 2023-24.

Please keep a copy of this notice with your records. You may also view your NOPV and property tax bills online at www.nyc.gov/nopv.

ESTIMATED 2023-24 PROPERTY TAX

We cannot calculate your 2023-24 property tax until the new tax rate is established by the city council. Until then, you will pay the 2022-23 rate. Many factors influence the amount you will owe, including the value of any exemptions you receive. See page two for details about how property tax is calculated.

The table below estimates the amount you will owe by multiplying the taxable value of your property by the current tax rate of 20.309%. This table is provided for informational purposes only; the actual amount you owe may differ, depending on the 2023-24 tax rate and the value of your exemptions and abatements. See page two for information about the importance of your property's "effective market value" in determining your property taxes.

Year	Taxable Value		Tax Rate		Estimated Property Tax
2023-24	$258,785	x	0.20309	=	$52,556.65

KEY DATES

March 15, 2023

Last day to request review of your market value.
(*See page 2.*)

Last day to challenge your assessed value.
(*See page 2.*)

Last day to apply for a tax exemption.
(*See page 3.*)

July 1, 2023

2023-24 tax year begins.

To learn more, visit www.nyc.gov/nopv

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ABOUT YOUR PROPERTY TAXES

Property taxes are determined using a complex formula that takes into account many different amounts and calculations. Visit www.nyc.gov/nopv for more information about property valuation and taxation.

First, we estimate the **MARKET VALUE** of your property.	**$7,239,000**
We start by looking at the selling prices of properties in your neighborhood with characteristics similar to those in the description of your property that appears on page three of this notice. We then use statistical analysis to determine your market value.	
Next, we determine the **ASSESSED VALUE** of your property.	**$258,785**
We multiply your market value by an assessment ratio to determine the assessed value of your property. The assessment ratio for properties in tax class 1 is 6% for 2023-24; this is the maximum percentage of market value at which your assessed value can be set. However, there are caps on how much your property's assessed value can increase. Under state law, your assessed value cannot increase more than 6% per year or 20% over five years, regardless of increases to your property's market value, unless the increases are due to construction or renovations.	
From there we are able to determine your **EFFECTIVE MARKET VALUE**.	**$4,313,083**
After applying the legal caps on your assessed value, we are able to determine your effective market value, which is the market value you are "effectively" paying taxes on. The effective market value is computed by dividing your assessed value by 6%. This number will be important should you choose to challenge our determination of your market value, as your property tax will not go down unless you can prove that your market value should be lower than the effective market value.	
Next we subtract the value of any **EXEMPTIONS** you receive.	**$0**
If you receive any exemptions, we subtract their value - your exemption value - from your property's assessed value. Your exemption value is used to calculate your taxable value (see below); it is not the dollar amount that you will save on your property taxes.	
The result is your **TAXABLE VALUE**.	**$258,785**
After subtracting the value of any exemptions you receive, we arrive at your property's taxable value. The amount you owe in property taxes is determined by applying the city's property tax rate, which is currently 20.309%, to your taxable value. Any abatements that you receive are then applied to reduce your tax bill.	

How You Will Be Billed:

Property tax bills are mailed quarterly for properties with an assessed value of $250,000 or less and semiannually for properties assessed at more than $250,000. If you pay your property taxes through a bank, mortgage servicing company, or co-op board, you will not receive a bill from the Department of Finance unless you are responsible for other charges, such as sidewalk or emergency repair charges.

WHAT TO DO IF YOU DISAGREE WITH THESE VALUES

Challenge Your Market Value with the Department of Finance	**Challenge Your Assessed Value** with the New York City Tax Commission
If you believe the Department of Finance has made an error in determining your market value, you may submit a "Request for Review" form. The form is available at www.nyc.gov/nopv, or by calling 311. Many property owners consider requesting review of their market value in hopes of reducing their property tax. However, your property tax will not go down unless you can prove that the market value should be lower than the effective market value. **Deadline: March 15, 2023**	You have the right to challenge your assessed value by appealing to the New York City Tax Commission, an independent agency that is separate from the Department of Finance. The Tax Commission has the authority to reduce your property's assessed value, change its tax class, and adjust your tax exemptions. The Tax Commission cannot change your market value, property description, or building class. Your application must be received by the filing deadline. To access Tax Commission appeal forms, visit www.nyc.gov/taxcommission. You may also visit a Department of Finance business center (locations at www.nyc.gov/nopv). For more information, call 311. **Deadline: March 15, 2023**

PLEASE REVIEW: YOUR PROPERTY DETAILS

The Department of Finance has the following information on record for your property. Please review this information and inform us of any errors by filing a "Request to Update" form, available at www.nyc.gov/nopv or by calling 311.

Owner(s): [redacted] **Building Class:** B3 (Two-family dwelling)

Borough: [redacted] (Manhattan)

Block: [redacted]

Lot: [redacted]

Primary Zoning	R8B	**Lot Frontage**	18.17 ft	**Lot Depth**	100.00 ft
Lot square feet	1,817	**Lot Shape**	Regular	**Lot Type**	Inside
Proximity	2-Side Abutted	**Building Frontage**	18.17 ft	**Building Depth**	48.00 ft
Number of Buildings	1	**Style**	Town House	**Year Built**	1901
Exterior Condition	High-Average	**Finished Sq. Ft.**	3,456	**Unfinished Sq. Ft.**	864
Commercial Units	0	**Commercial Sq. Ft.**	0	**Residential Units**	2
Garage Type	N/A	**Garage Sq. Ft.**	0	**Basement Grade**	Below Grade
Basement Sq. Ft.	0	**Basement Type**	Full	**Construction Type**	Brick
Exterior Wall	Expensive Mas	**Number of Stories**	4.00		

WHAT'S CHANGED: COMPARING TAX YEARS 2022-23 AND 2023-24

	Current Year (2022-23)	Next Year (2023-24)	Change
Market Value	$7,678,000	$7,239,000	-$439,000
Assessment Percentage	6%	6%	--
Assessed Value	$256,843	$258,785	+$1,942
Effective Market Value	$4,280,716	$4,313,083	+$32,367
Exemption Value	$0	$0	+$0
Taxable Value	$256,843	$258,785	+$1,942

- **Market value** is the Department of Finance's estimated value for your property.
- **Assessment percentage** is a fixed percentage of market value. For class 1 properties, it is 6%.
- **Assessed value** is calculated by multiplying your market value by the assessment percentage. Your assessed value is subject to caps which limit how much it can increase each year.
- **Effective market value** is calculated by dividing the assessed value by the assessment percentage.
- **Exemption value** is the amount of the reduction in your assessed value as a result of any property tax exemptions you receive.
- **Taxable value** is the assessed value minus the exemption value.

HOMEOWNER TAX EXEMPTIONS

New York City offers tax breaks known as exemptions to seniors, veterans, clergy members, people with disabilities, and others. In addition to reducing your taxes, many exemptions can keep you out of the lien sale. See the enclosed sheet for more information about the lien sale.

The deadline to apply for homeowner exemptions is March 15, 2023. For more information, visit www.nyc.gov/nopv or call 311.

New York State offers a STAR benefit that covers many homeowners and an Enhanced STAR benefit for seniors. If you applied with the state for the STAR or Enhanced STAR credit after March 15, 2015, the credit will not appear on this notice. Visit www.tax.ny.gov/star for more information.

CO-OP/CONDO TAX ABATEMENT

Owners of cooperative and condominium units can receive an abatement that will help them save money on their property taxes.

The unit(s) must be in an eligible building and must be the owner's primary residence.

More information about the abatement—including the application, the primary residency verification requirement, and the renewal process—is available at www.nyc.gov/nopv.

If you have questions or need additional information, contact the Department of Finance at www.nyc.gov/contactcoopabat, or call 311.

NYC
Department of Finance

NOTICE OF PROPERTY VALUE
Tax Year 2023-24
(This is not a bill.)

#6775346230109O1#

January 15, 2023

Owner

Property Address

Borough: Block: Lot:

Tax Class: 2 Building Class: D6 Units: 84 Residential - 1 Non-Residential

YOUR NOTICE OF PROPERTY VALUE (NOPV) AT A GLANCE

2023-24 Market Value:	$17,088,000
2023-24 Assessed Value:	$7,689,600
Your property tax exemptions:	None

See below for an estimate of your 2023-24 property tax.

WHAT IS THIS NOTICE?

This is your annual notice of property value, or NOPV. **It is not a bill, and no payment is required**. This notice will:

- Inform you of the assessed value of your property for tax year 2023-24, and tell you how to challenge it if you believe there is a mistake.
- Explain how property taxes are calculated.
- Provide an estimate of your property tax for tax year 2023-24.

Please keep a copy of this notice with your records. You may also view your NOPV and property tax bills online at www.nyc.gov/nopv.

KEY DATES

March 1, 2023

Last day to challenge your assessed value.
(*See page 2.*)

March 15, 2023

Last day to apply for a tax exemption.
(*See page 3.*)

April 3, 2023

Last day to request review of your market value.
(*See page 2.*)

July 1, 2023

Tax year begins.

ESTIMATED 2023-24 PROPERTY TAX

We cannot calculate your 2023-24 property tax until the new tax rate is established by the city council. Until then, you will pay the 2022-23 rate. The table below estimates the amount you will owe by multiplying the taxable value of your property by the current tax rate of 12.267%. This table is provided for informational purposes only; the actual amount you owe may differ.

Please note that property tax abatements, including the co-op/condo abatement, are not included in this estimate. If you receive any abatements, they will be subtracted from your property taxes. Check your July tax bill for the value of any abatements you receive.

Year	Taxable Value		Tax Rate		Estimated Property Tax
2023-24	$6,868,450	x	0.12267	=	$842,552.76

To learn more, visit www.nyc.gov/nopv

ABOUT YOUR PROPERTY TAXES

Property taxes are determined using a complex formula that takes into account many different amounts and calculations. Visit www.nyc.gov/nopv for more information about property valuation and taxation.

The Department of Finance estimates that as of January 5, 2023, the market value for this property is $17,088,000.

We estimate your property's market value using the income approach. Market value is determined by dividing the net operating income by the overall capitalization rate.

The following factors are used by the Department of Finance to determine market value:

Estimated Building Gross Square Footage: 100,986
Estimated Gross Income: $3,843,152
Estimated Expenses: $1,729,418

Net Operating Income: We subtract estimated expenses from estimated gross income, resulting in a net operating income of $2,113,734.

Base capitalization rate: We used a capitalization rate of 6.85% which is the Department of Finance's estimate of the rate of return that an ordinary investor would expect on their investment in this type of property.

Overall capitalization rate: We add an effective tax rate of 5.52% to account for taxes due. Added together your overall capitalization rate is 12.37%.

Visit www.nyc.gov/nopv for more information.

If you own income-producing property, you must file a Real Property Income and Expense (RPIE) statement or a claim of exclusion unless you are exempt by law. You must also file information about any ground or second floor commercial units on the premises, even if you are exempt from filing an RPIE statement. The deadline to file is June 1, 2023. Failure to file will result in penalties and interest, which will become a lien on your property if they go unpaid. Visit www.nyc.gov/rpie for more information.

RPIE filers with a tentative actual assessed value of $750,000 or greater will be required to file an addendum containing rent roll information for the tax year during which filing of the income and expense statement is required.

How You Will Be Billed:

Property tax bills are mailed quarterly for properties with an assessed value of $250,000 or less and semiannually for properties assessed at more than $250,000. If you pay your property taxes through a bank, mortgage servicing company, or co-op board, you will not receive a bill from the Department of Finance unless you are responsible for other charges, such as sidewalk or emergency repair charges.

WHAT TO DO IF YOU DISAGREE WITH THESE VALUES

Challenge Your Market Value with the Department of Finance	**Challenge Your Assessed Value** with the New York City Tax Commission
If you believe the Department of Finance has made an error in determining your market value, you may submit a "Request for Review" form. The form is available at www.nyc.gov/nopv, or by calling 311. **Deadline: April 3, 2023**	You have the right to challenge your assessed value by appealing to the New York City Tax Commission, an independent agency that is separate from the Department of Finance. The Tax Commission has the authority to reduce your property's assessed value, change its tax class, and adjust your tax exemptions. The Tax Commission cannot change your market value, property description, or building class. Your application must be received by the filing deadline. To access Tax Commission appeal forms, visit www.nyc.gov/taxcommission. You may also visit a Department of Finance business center (locations at www.nyc.gov/nopv). For more information, call 311. **Deadline: March 1, 2023**

PLEASE REVIEW: YOUR PROPERTY DETAILS

The Department of Finance has the following information on record for your property. Please review this information and inform us of any errors by filing a "Request to Update" form, available at www.nyc.gov/nopv or by calling 311.

Owner(s): **Building Class:** D6 (Elevator apartments)

Borough: 1 (Manhattan) **Building Category:** RU32

Block: **Building Sub-Category:** 1

Lot:

Number of Buildings:	1	**Gross Square Footage:**	100,986
Number of Stories:	9.00	**Number of Residential Units:**	84
Structure Type:	Highrise Apt	**Gross Residential Square Footage:**	83,166
Grade:	B- Grade	**Number of Commercial Units:**	1
Construction Type:	Fireproof Unsp	**Gross Commercial Square Footage:**	17,820
Primary Zoning:	R10A	**Year Built:**	1905

WHAT'S CHANGED: COMPARING TAX YEARS 2022-23 AND 2023-24

	Current Year (2022-23)	Next Year (2023-24)	Change
Market Value	$14,978,000	$17,088,000	+$2,110,000
Assessment Percentage	45%	45%	--
Actual Assessed Value	$6,740,100	$7,689,600	+$949,500
Transitional Assessed Value	$6,648,413	$6,868,450	+$220,037
Exemption Value	$0	$0	+$0
Taxable Value	$6,648,413	$6,868,450	+$220,037

- **Market value** is the Department of Finance's estimated value for your property.
- **Assessment percentage** is a fixed percentage of market value. For class 2 properties, it is 45%.
- **Actual assessed value** is calculated by multiplying your market value by the assessment percentage.
- **Transitional assessed value** represents the changes being phased in for the coming tax year. Changes to your assessed value are phased in over a five-year period.
- **Exemption value** is the amount of the reduction in your assessed value as a result of any property tax exemptions you receive. The value shown above is your actual exemption value, but a transitional exemption value may be used to calculate your taxable value.
- **Taxable value** is the lower of the actual or transitional assessed value, minus the actual or transitional exemption value.

HOMEOWNER TAX EXEMPTIONS

New York City offers tax breaks known as exemptions to seniors, veterans, clergy members, people with disabilities, and others. In addition to reducing your taxes, many exemptions can keep you out of the lien sale. See the enclosed sheet for more information about the lien sale.

The deadline to apply for homeowner exemptions is March 15, 2023. For more information, visit www.nyc.gov/nopv or call 311.

New York State offers a STAR benefit that covers many homeowners and an Enhanced STAR benefit for seniors. If you applied with the state for the STAR or Enhanced STAR credit after March 15, 2015, the credit will not appear on this notice. Visit www.tax.ny.gov/star for more information.

CO-OP/CONDO TAX ABATEMENT

Owners of cooperative and condominium units can receive an abatement that will help them save money on their property taxes.

The unit(s) must be in an eligible building and must be the owner's primary residence.

More information about the abatement—including the application, the primary residency verification requirement, and the renewal process—is available at www.nyc.gov/nopv.

If you have questions or need additional information, contact the Department of Finance at www.nyc.gov/contactcoopabat, or call 311.

Int. No. 913

By Council Members Paladino, Lee, Holden, Vernikov, Borelli, Ariola and Kagan

A Local Law to amend the city charter and the administrative code of the city of New York, in relation to delaying the greenhouse gas emission reduction requirements outlined in Local Law 97 by 7 years

Be it enacted by the Council as follows:

Section 1. Paragraph 3 of subdivision a of section 651 of chapter 26 of the New York city charter, as amended by local law number 97 for the year 2019, is amended to read as follows:

3. Monitoring buildings' energy use and emissions, and reviewing building emissions assessment methodologies, building emissions limits, goals and timeframes to further the goal of 2 achieving a 40 percent reduction in aggregate greenhouse gas emissions from covered buildings by calendar year [2030] 2037, relative to such emissions for the calendar year 2005;

§ 2. Paragraph 1 of subdivision a of section 24-803 of the administrative code of the city of New York, as amended by local law number 97 for the year 2019, is amended to read as follows:

(1) Reduction of emissions citywide. There shall be, at minimum, a 40 percent reduction in citywide emissions by calendar year [2030] 2037, and an 80 percent reduction in citywide emissions by calendar year [2050] 2057, relative to such emissions for the base year for citywide emissions.

§ 3. Paragraph 1 of subdivision b of section 24-803 of the administrative code of the city of New York, as amended by local law number 147 for the year 2019, is amended to read as follows:

(1) Reduction of emissions from city government operations. There shall be, at minimum, a 40 percent reduction in city government emissions by fiscal year [2025] 2032, and a 50 percent

reduction in city government emissions by calendar year [2030] 2037, relative to such emissions for the base year for city government emissions.

§ 4. Paragraph 3 of subdivision b of section 24-803 of the administrative code of the city of New York, as amended by local law 101 for the year 2021, is amended to read as follows:

(3) Reduction of emissions by the New York city housing authority. The New York city housing authority shall make efforts to reduce greenhouse gas emissions by 40 percent by the year [2030] 2037 and 80 percent by the year [2050] 2057, relative to such emissions for calendar year 2005, for the portfolio of buildings owned or operated by the New York city housing authority. If the office determines that such emissions reduction is not feasible despite the best efforts of city government operations, such office shall report such findings and make recommendations with respect to policies, programs and actions that may be undertaken to achieve such reductions.

§ 5. Section 28-320.3 of the administrative code of the city of New York, as amended by local law 126 for the year 2021, is amended to read as follows:

§ 28-320.3 Building emissions limits. Except as otherwise provided in this article, or otherwise provided by rule, on and after January 1, [2024] 2031 a covered building shall not have annual building emissions higher than the annual building emissions limit for such building as determined in accordance with this section based on the occupancy group of the building.

§ 6. The lead title and opening paragraph of section 28-320.3.1 of the administrative code of the city of New York, as amended by local law 126 for the year 2021, is amended to read as follows:

§ 28-320.3.1 Annual building emissions limits [2024-2029] 2031 through 2036. For calendar years [2024] 2031 through [2029] 2036 the annual building emissions limits for covered buildings shall be calculated pursuant to items 1 through 10 of this section. For the purposes of such calculation the department shall provide a method for converting categories of uses under the United States environmental protection agency Portfolio Manager tool to the equivalent uses and occupancy groups set forth in this section. For a covered building with spaces classified in more than one occupancy group, the annual building emissions limit shall be the sum of the calculated values from items 1 through 10 of this paragraph, as applicable for each space.

§ 7. The lead title and opening paragraph of section 28-320.3.1.1 of the administrative code of the city of New York, as amended by local law 126 for the year 2021, is amended to read as follows:

§ 28-320.3.1.1 Greenhouse gas coefficient of energy consumption for calendar years [2024] 2031 through [2029] 2036. The annual building emissions of a covered building in accordance with this section, greenhouse gas emissions shall be calculated as follows for calendar years [2024] 2031 through [2029] 2036:

§ 8. The lead title and opening paragraph of section 28-320.3.2 of the administrative code of the city of New York, as amended by local law 126 for the year 2021, is amended to read as follows:

§ 28-320.3.2 Building emissions limits for calendar years [2030] 2037 through [2034] 2041. For calendar years [2030] 2037 through [2034] 2041 the annual building emissions limits for covered buildings shall be calculated pursuant to items 1 through 10 of this section. For the purposes of such calculation the department shall provide a method for converting categories of uses under the United States environmental protection agency Portfolio Manager tool to the equivalent uses and occupancy groups set forth in this section. For a covered building with spaces classified in more than one occupancy group, the annual building emissions limit shall be the sum of the calculated values from items 1 through 10 of this paragraph, as applicable for each space. The department may establish different limits, set forth in the rules of the department, where the department determines that different limits are feasible and in the public interest. Where such limits are set by rule, the average emission limits for all covered buildings shall not be less restrictive than the average emissions impact of the building emissions limits outlined in items 1 through 10 of this section. The advisory board and the office of long term planning and sustainability shall provide advice and recommendation regarding such limits.

§ 9. The lead title of section 28-320.3.2.1 of the administrative code of the city of New York, as amended by local law 126 for the year 2021, is amended to read as follows:

§ 28-320.3.2.1 Greenhouse gas coefficients of energy consumption for calendar years [2030] 2037 through [2034] 2041.

§ 10. The lead title and opening paragraph of section 28-320.3.4 of the administrative code of the city of New York, as amended by local law 126 for the year 2021, is amended to read as follows:

§ 28-320.3.4 Building emissions limits for calendar years [2035] 2042 through [2050] 2057. No later than January 1, 2023, the commissioner shall establish by rule annual building emissions

limits and building emissions intensity limits applicable for calendar years [2035] 2042 through [2039] 2046 and building emissions limits and building emissions intensity limits applicable for calendar years [2040] 2047 through [2049] 2056. Such limits shall be set to achieve an average building emissions intensity for all covered buildings of no more than 0.0014 tCO2e/sf/yr by [2050] 2057.

§ 11. The lead title and opening paragraph of section 28-320.3.5 of the administrative code of the city of New York, as amended by local law 126 for the year 2021, is amended to read as follows:

§ 28-320.3.5 Building emissions limits on and after calendar year [2050] 2057. No later than January 1, [2023] 2030 the commissioner shall establish by rule annual building emissions limits and building emissions intensity limits applicable for calendar years commencing on and after January 1, [2050] 2057. Such limits shall achieve an average building emissions intensity for all covered buildings of no more than 0.0014 tCO2e/sf/yr.

§ 12. Section 28-320.3.6.2 of the administrative code of the city of New York, as amended by local law 126 for the year 2021, is amended to read as follows:

§ 28-320.3.6.2 Deductions from reported annual building emissions for purchased greenhouse gas offsets. For calendar years [2024] 2031 through [2029] 2036, a deduction shall be authorized for up to 10 percent of the annual building emissions limit. Such a deduction shall be authorized only where within the reporting calendar year, greenhouse gas offsets equivalent to the size of the deduction as measured in metric tons of carbon dioxide equivalent and generated within the reporting calendar year have been (i) purchased by or on behalf of the owner in accordance with an offset standard referenced by rules of the department, (ii) publicly registered in accordance with such offset standard, and (iii) retired or designated to the department for retirement. Such greenhouse gas offsets must exhibit environmental integrity principles, including additionality, in accordance with rules promulgated by the department in consultation with the office of long term planning and sustainability. For the purposes of this section, additionality means a requirement that an offset project is not already required by local, national or international regulations. Prior to the department promulgation of rules, the department shall consult the advisory board on environmental justice as established in local law 64 of 2017.

§ 13. The opening paragraph of section 28-320.3.6.3 of the administrative code of the city of New York, as amended by local law 126 for the year 2021, is amended to read as follows:

For calendar years [2024] 2031 through [2029] 2036, a deduction from the reported annual building emissions shall be authorized based upon the calculated output of a clean distributed energy resource located at, on, in, or directly connected to the building subject to the report. The department shall promulgate rules to set forth how such deduction shall be calculated, in accordance with the following:

§ 14. Section 28-320.3.7 of the administrative code of the city of New York, as amended by local law 126 for the year 2021, is amended to read as follows:

§ 28-320.3.7 Reports. By May 1, [2025] 2032, and by May 1 of every year thereafter, the owner of a covered building shall file with the department a report, certified by a registered design professional, prepared in a form and manner and containing such information as specified in rules of the department, that for the previous calendar year such building is either:

1. In compliance with the applicable building emissions limit established pursuant to section 28-320.3; or

2. Not in compliance with such applicable building emissions limit, along with the amount by which such building exceeds such limit.

For a report filed on or after May 1, [2026] 2033, where a report required to be submitted by May 1 in the prior year indicated that the covered building was not in compliance with the applicable building emissions limit established pursuant to section 28-320.3 in the calendar year covered by such report, but such building is in compliance for the calendar year covered by the report required to be submitted by May 1 in the current year, such report shall describe the methods used to achieve compliance.

§ 15. Section 28-320.8 of the administrative code of the city of New York, as amended by local law 126 for the year 2021, is amended to read as follows:

§ 28-320.8 Adjustment to applicable annual building emissions limit for calendar years [2024-2029] 2031-2036. The department may grant an adjustment of the annual building emissions limit for calendar years [2024] 2031 through [2029] 2036 applicable to a covered building in existence on the effective date of this article where such covered building emissions in calendar year 2018 exceeds the building emissions limit as prescribed by section 28-320.3.1 by more than 40 percent, as reported to the department by a registered design professional. The adjustment shall result in a required building emissions limit that is 70 percent of the calendar year 2018 building emissions for the covered building. Such adjustment may be granted where:

1. The owner of a covered building demonstrates that the building emissions in excess of the building emissions limit is attributable to special circumstances related to the use of the building, including but not limited to 24 hour operations, operations critical to human health and safety, high density occupancy, energy intensive communications technologies or operations, and energy-intensive industrial processes;

2. The owner of a covered building demonstrates that the energy performance of the covered building is equivalent to a building in compliance with the New York city energy conservation code in effect on January 1, 2015; and

3. The owner of the covered building has submitted a plan to the department setting forth a schedule of alterations to the covered building or changes to the operations and management

of the covered building sufficient to ensure that the covered building will be in compliance with the annual building emissions limits for calendar years [2030] 2037 through [2034] 2041, as required by section 28-320.3.2.

§ 16. Section 28-320.8.1 of the administrative code of the city of New York, as amended by local law 126 for the year 2021, is amended to read as follows:

§ 28-320.8.1 Effective period. An adjustment granted pursuant to section 28-320.8 may be effective for the reporting years [2025] 2032 through [2030] 2037, as prescribed by section 28-320.3.7, provided that the certificate of occupancy has not been amended after December 31, 2018.

§ 17. Section 28-320.8.1.1 of the administrative code of the city of New York, as amended by local law 126 for the year 2021, is amended to read as follows:

§ 28-320.8.1.1 Extension of effective period. The commissioner may also grant an extension of the effective period of the adjustment to applicable annual building emissions limit for calendar years [2030-2035] 2037-2042, as prescribed by section 28-320.3.8. Such extension may be granted upon submission of a schedule of alterations to the covered building or changes to the operations and management of the covered building in accordance with section 28-320.8 sufficient to ensure that by [2035] 2042 the covered building will comply with a required building emissions limit that is 50 percent of the reported 2018 building emissions for the covered building.

§ 18. Section 28-320.9 of the administrative code of the city of New York, as amended by local law 126 for the year 2021, is amended to read as follows:

§ 28-320.9 Adjustment to applicable annual building emissions limit for not-for-profit hospitals and healthcare facilities. The department shall grant an adjustment of the annual building emissions limits for calendar years [2024-2029] 2031-2036 and [2030-34] 2037-2041 where:

1. The building is classified as a not-for-profit hospital, not-for-profit health center, or not-for-profit HIP center, in existence on the effective date of this article; and

2. By no later than July 21, 2021, the owner of the covered building submits an application to the department for such adjustment in a form and manner prescribed by the department.

For calendar years [2024] 2031 through [2029] 2036, the adjustment shall result in the covered building being subject to an emissions limit that is 85 percent of the calendar 2018 building emissions for such covered building. For calendar years [2030] 2037 through [2034] 2041, the adjustment shall result in the covered building being subject to an emissions limit that is 70 percent of the calendar 2018 building emissions for such covered building.

§ 19. Section 28-321.2.1 of the administrative code of the city of New York, as amended by local law 126 for the year 2021, is amended to read as follows:

§ 28-321.2.1 Energy compliant buildings. The owner of a covered building shall demonstrate that, for calendar year [2024] 2031, the annual building emissions of such covered building did not exceed what the applicable annual building emissions limit would be pursuant to section 28-320.3.2 if such building were a covered building as defined in article 320 of this chapter.

§ 20. The lead title of section 28-321.2.2 of the administrative code of the city of New York, as amended by local law 126 for the year 2021, is amended to read as follows:

§ 28-321.2.2 Prescriptive energy conservation measures. By December 31, [2024] 2031, the owner of a covered building shall ensure that the following energy conservation measures have been implemented where applicable:

§ 21. Item 10 of section 28-321.2.2 of the administrative code of the city of New York, as amended by local law 126 for the year 2021, is amended to read as follows:

10. Upgrading lighting to comply with the standards for new systems set forth in section 805 of the New York city energy conservation code and/or applicable standards referenced in such energy code on or prior to December 31, [2024] 2031. This provision is subject to exception 1 in section 28-310.3, provided that July 1, 2010 is replaced by January 1, 2020 for the purposes of this section;

§ 22. Section 28-321.3 of the administrative code of the city of New York, as amended by local law 126 for the year 2021, is amended to read as follows:

§ 28-321.3 Reports. By May 1, [2025] 2032, an owner of a covered building shall submit a report to the department to demonstrate compliance with this section in accordance with section 28-321.3.1 or section 28-321.3.2.

§ 23. Section 28-321.3.1 of the administrative code of the city of New York, as amended by local law 126 for the year 2021, is amended to read as follows:

§ 28-321.3.1 Energy compliant buildings reports. The owner of a covered building shall file with the department a report, certified by a registered design professional, prepared in a form and manner and containing such information as specified in rules of the department, that for calendar year [2024] 2031 such building was in compliance with the applicable building emissions limit established pursuant to section 28-320.3.2.

§ 24. This local law shall take effect immediately.

APM
LS #9868
11/28/22

Int. No. 914

By the Public Advocate (Mr. Williams) and Council Members Sanchez, Cabán, Restler, Abreu and Richardson Jordan

A Local Law to amend the administrative code of the city of New York, in relation to the timing of decisions for sales of cooperative apartments

Be it enacted by the Council as follows:

Section 1. Title 8 of the administrative code of the city of New York is amended by adding a new chapter 9 to read as follows:

CHAPTER 9

COOPERATIVE CORPORATIONS: TIMING OF DECISIONS

§ 8-901 Definitions.
§ 8-902 Requirements for determination.
§ 8-903 Acknowledgment of receipt of materials.
§ 8-904 Time for decision.
§ 8-905 Extensions of time.
§ 8-906 Remedies.
§ 8-907 Powers of the commission.
§ 8-908 Construction.

§ 8-901 Definitions. When used in this chapter:

Application. The term "application" means the set of documents utilized by a cooperative corporation to facilitate a prospective purchaser's acquisition of certificates of stock, a proprietary lease, or other evidence of an ownership interest in such cooperative corporation.

Commission. The term "commission" means the New York city commission on human rights.

Cooperative corporation. The term "cooperative corporation" means any corporation governed by the requirements of the state cooperative corporation law or general business law that, among other things, grants persons the right to reside in a cooperative apartment, that right existing

by such person's ownership of certificates of stock, proprietary lease, or other evidence of ownership of an interest in such entity but shall not include either a cooperative corporation organized pursuant to the private housing finance law for which a purchase is subject to review and approval by a state or city agency or to a cooperative corporation containing less than 10 dwelling units.

Proprietary lease. The term "proprietary lease" means the lease or occupancy agreement by which a cooperative corporation permits a person to occupy an apartment in the premises owned by the cooperative corporation.

Prospective purchaser. The term "prospective purchaser" means a person who has entered into a contract of sale to purchase the proprietary lease and the ownership interest in a cooperative corporation from a prospective seller.

Prospective seller. The term "prospective seller" means a person who has a proprietary lease and an ownership interest in a cooperative corporation and who has entered into a contract of sale to sell the person's proprietary lease and ownership interest in a cooperative corporation to a prospective purchaser.

Sale. The term "sale" means the transfer of a person's ownership interest in a cooperative corporation and that person's proprietary lease to another person.

§ 8-902 Requirements for determination. a. The board of directors or managing agent of each cooperative corporation shall maintain a standardized application and list of requirements for all cooperative apartments subject to the by-laws or proprietary lease of such corporation.

b. The board of directors or managing agent of any cooperative corporation shall provide the corporation's standardized application and list of requirements to any prospective purchasers and prospective sellers, promptly upon request, and shall include instructions as to where and how

to submit the required materials.

§ 8-903 Acknowledgement of receipt of materials. a. Within ten days of receiving materials from a prospective purchaser, a cooperative corporation shall provide to a prospective purchaser a written acknowledgement of materials received. The requirements of this paragraph apply both to a prospective purchaser's initial submission and to any subsequent submissions the prospective purchaser may make.

b. An acknowledgement shall not be construed to represent any determination that the materials submitted satisfy the requirements set forth in the written list that a cooperative corporation must maintain pursuant to paragraph a of section 8-902 of this chapter, or that a subsequent submission has met the requirements set forth in any notice described in section 8-905 of this section.

§ 8-904 Time for determination. a. Within 45 days after the cooperative corporation first receives any of the information or documents contained in the list required to be maintained and provided pursuant to section 8-902 of this chapter, a cooperative corporation shall inform a prospective purchaser whether its consent to a sale is granted unconditionally, whether its consent to a sale is granted conditionally, or whether its consent to a sale is denied.

b. Such time for determination may be extended at any time after a completed application is submitted with the consent of the prospective purchaser, provided that such extension shall not exceed 14 days.

c. Where the cooperative corporation board of directors has placed in its bylaws a statement that such board does not ordinarily meet in the months of July and August, such board of directors or managing agent shall be entitled to an extension not to exceed 14 days, provided that such board of directors notifies a prospective purchaser of such statement with the acknowledgment of receipt

of an application.

d. In addition to any other remedies provided by this chapter, a prospective purchaser may treat a failure to comply with paragraph a of this section as a denial of consent by the cooperative corporation.

§ 8-905 Tolling of time. a. The time period set forth in paragraph a of section 8-904 shall be tolled as follows, provided that such time period may not be tolled more than three times:

1. Beginning when a prospective purchaser receives written notice from a cooperative corporation that sets out with specificity the ways in which the prospective purchaser's initial submission of materials did not comply with the list of requirements maintained and provided by the cooperative corporation pursuant to section 8-902 of this chapter, and concluding when the cooperative corporation receives additional materials from the prospective purchaser;

2. Beginning when a prospective purchaser receives written notice from a cooperative corporation that a submission of the prospective purchaser in response to a notice sent pursuant to paragraph 1 of this section is considered by the cooperative corporation to be incomplete, and concluding when the cooperative corporation receives additional materials from the prospective purchaser.

b. Any period described by paragraph 1 or 2 of subdivision a of this section shall not be deemed to commence unless the notice from a cooperative corporation sets forth with specificity the way or ways previously submitted materials failed to comply with either the cooperative corporation's list of requirements maintained and provided by the cooperative corporation pursuant to section 8-902 of this chapter, or failed to comply with a previous notice sent pursuant to paragraphs 2 or 3 of subdivision a of this section.

c. Nothing in this section shall be construed to prohibit a cooperative corporation from

lawfully denying its consent to a sale at any time.

§ 8-906 Remedies. a. A prospective purchaser or a prospective seller claiming to be aggrieved by a violation of this chapter may commence an action in a court of competent jurisdiction to determine whether a violation has occurred.

b. For each violation of a provision of this chapter the court shall assess statutory damages as follows:

1. $1000 in the event of a violation of subdivision b of section 8-902 of this chapter or a violation of subdivision a of section 8-903 of this chapter;

2. $5000 in the event of a violation of subdivision a of section 8-902 of this chapter; and

3. $10,000 in the event of a violation of subdivision a of section 8-904 of this chapter.

c. Where a cooperative corporation has been found to have violated a provision of this chapter, the court shall award compensatory damages and attorney's fees to the prospective purchaser, and may order appropriate equitable relief; provided, however, that such equitable relief shall not be permitted to include an order deeming the cooperative corporation to have consented to the sale.

§ 8-907 Powers of the commission. The commission may initiate investigations in connection with a violation of this chapter. In the event that the commission determines that a violation occurred, it may award civil penalties in an amount no less than $1000 and no more than $25,000.

§ 8-908 Construction. Nothing in this chapter shall be construed or interpreted to limit or restrict the rights and remedies granted by any other chapter of this title or by any other civil rights or human rights law.

§ 2. This local law takes effect 120 days after it becomes law.

Session 12
EB
LS #115
5/9/22 3:05 PM

Session 11
JW/MPC/CCF
LS 418
Int. #0822-2018

Int. No. 915

By the Public Advocate (Mr. Williams) and Council Members Sanchez, Cabán, Restler, Hudson, Krishnan, Abreu, Avilés, Ossé, Nurse, Feliz, Richardson Jordan, Stevens, Ayala and Narcisse

A Local Law to amend the administrative code of the city of New York, in relation to sales of cooperative apartments

Be it enacted by the Council as follows:

Section 1. Title 8 of the administrative code of the city of New York is amended by adding a new chapter 9 to read as follows:

CHAPTER 9

FAIR RESIDENTIAL COOPERATIVE DISCLOSURE LAW

§ 8-901 Definitions.
§ 8-902 Mandatory statement.
§ 8-903 Amended, supplemental and untimely statements.
§ 8-904 Liability for failure to provide statement.
§ 8-905 Procedure for asserting violation.
§ 8-906 Preclusive effect of statement.
§ 8-907 No estoppel or res judicata.
§ 8-908 Powers of the commission.
§ 8-909 Construction.

§ 8-901 Definitions. As used in this chapter, the following terms have the following meanings:

Application. The term "application" means both the request of a prospective seller or a prospective purchaser to a cooperative corporation for that cooperative corporation to provide its unconditional consent to a sale of certificates of stock, a proprietary lease or other evidence of an ownership interest in such cooperative corporation, and the information and documents acquired by the cooperative corporation in connection with its determination as to whether or not to grant unconditional consent to the sale of certificates of stock, a proprietary lease or other evidence of an ownership interest in such cooperative corporation.

Commission. The term "commission" means the New York city commission on human rights.

Cooperative corporation. The term "cooperative corporation" means any corporation that grants persons the right to reside in a cooperative apartment, that right existing by such person's ownership of certificates of stock, proprietary lease or other evidence of ownership of an interest in such entity, but shall not include a cooperative corporation containing less than 10 dwelling units.

Prospective purchaser. The term "prospective purchaser" means a person who has entered into a contract of sale to purchase the proprietary lease and the ownership interest in a cooperative corporation from a prospective seller.

Prospective seller. The term "prospective seller" means a person who has a proprietary lease and an ownership interest in a cooperative corporation and who has entered into a contract of sale to sell the person's proprietary lease and ownership interest in a cooperative corporation to a prospective purchaser.

Sale. The term "sale" means the transfer of a person's ownership interest in a cooperative corporation and that person's proprietary lease to another person.

§ 8-902 Mandatory statement. a. If a prospective purchaser is disapproved, the cooperative corporation shall provide the prospective purchaser with a written statement of each and all of its reasons for withholding consent no later than five business days after it has made its decision to withhold consent.

b. The statement required by this section must set forth each reason for withholding consent with specificity. This requirement includes identifying each element of the prospective purchaser's application which was found by the cooperative corporation to be deficient; any specific ways that

the application failed to meet any specific policies, standards or requirements of the cooperative corporation; and the source of any negative information relied upon by the cooperative corporation in connection with any of its reasons for withholding consent to the proposed purchase. The statement must convey sufficient information to enable a prospective purchaser to take specific steps to remedy any specific deficiencies in that application.

c. The statement required by this section must set forth the number of applications that have been received by the cooperative corporation in the period commencing three years prior to the date of the submission of the application that is the subject of the statement and continuing through and including the date of the statement. The statement must also set forth for the same period of time the number of applications for which the cooperative corporation withheld consent and the number of applications for which the cooperative corporation did not make a decision on such applications.

d. The statement required by this section shall include a certification by an officer of the cooperative corporation, sworn or affirmed under penalties of perjury, that the statement is a true, complete and specific recitation of each and all of the cooperative corporation's reasons for withholding consent; that each person who participated in the decision to withhold consent has stated to the certifying officer that such person had no reasons for withholding consent other than those set forth in the statement; and that the statement is a true and complete recitation of total applications, applications for which consent was withheld and applications in which no decision was made, as required by this chapter.

§ 8-903 Amended, supplemental and untimely statements. a. Amendments or supplements to timely statements required by section 8-902 of this chapter shall also be considered timely if such amendments or supplements are provided to a prospective purchaser within 10 business days

after the cooperative corporation has disapproved a prospective purchaser.

b. If a cooperative corporation seeks to provide a prospective purchaser with an untimely statement, amendment or supplement, the untimely statement, amendment or supplement must be accompanied by a statement of reasons for untimeliness.

§ 8-904 Liability for failure to provide statement. In addition to any other penalties or sanctions which may be imposed pursuant to this chapter or any other applicable provision of law, any cooperative corporation that is determined to have failed to timely comply with any of the requirements of sections 8-902 of this chapter shall be liable for statutory damages to each prospective purchaser or prospective seller who commences or joins in an action alleging a failure to have timely complied with such requirements in an amount no less than $1,000 and no more than $25,000, in addition to liability as provided by section 8-906 of this chapter. In determining the appropriate statutory damages to be imposed pursuant to this section, a finder of fact shall take into account both the scope of non-compliance and the resources of the cooperative corporation.

§ 8-905 Procedure for asserting violation. Any prospective purchaser or prospective seller may commence an action in any court of competent jurisdiction alleging a failure to comply with the requirements of this chapter. Such action must be commenced within six months of the time when compliance was required. The prevailing party in such an action may be awarded costs and reasonable attorneys' fees. The court shall also order an appropriate equitable remedy, provided that such remedy shall not include a grant of property or an order directing the cooperative corporation to reconsider an application or to grant its consent to a sale. In the event that the finder of fact determines that non-compliance was willful, the finder of fact shall award punitive damages, but such damages shall not exceed twice the amount awarded under section 8-904 of this chapter.

§ 8-906 Preclusive effect of statement. a. In any action or proceeding commenced against a cooperative corporation pursuant to any chapter of this title, neither the cooperative corporation nor any of its directors, officers, employees, or agents shall be permitted to introduce any evidence concerning reasons for having withheld consent that were not set forth in a statement fully compliant with the requirements of this chapter.

b. A person commencing an action or proceeding as described in paragraph a of this section is under no obligation to commence an action under section 8-905 of this chapter in order for such person to gain preclusion of non-compliant statements. The court before which the allegation of an unlawful discriminatory practice is pending shall determine which statements, if any, fully complied with the requirements of section 8-902 of this chapter, unless such a judgment has already been rendered pursuant to an action commenced pursuant to section 8-905 of this chapter.

§ 8-907 No estoppel or res judicata. No action commenced pursuant to this chapter shall determine or purport to determine either the genuineness of the reasons provided in the statement required by section 8-902 of this chapter or any question of whether any person has committed an unlawful discriminatory practice as defined by chapter 1 of this title. If a judgment rendered pursuant to an action commenced pursuant to this chapter purports to do so, a person shall nevertheless retain all rights to commence an action or proceeding alleging that an unlawful discriminatory act has been committed, and insofar as any judgment rendered pursuant to this chapter purports to make findings regarding either genuineness or whether an unlawful discriminatory practice has been committed, such purported findings shall not be given any force or effect in any other action or proceeding.

§ 8-908 Powers of the commission. The commission may initiate investigations in connection with a failure to have timely complied with the requirements of section 8-902 of this

chapter. In the event that the commission determines that a violation occurred, it may award civil penalties in an amount no less than $1,000 and no more than $25,000.

§ 8-909 Construction. a. The provisions of this chapter shall be construed in a manner to make certain that a prospective purchaser has been provided with sufficient information to learn why a cooperative corporation has withheld consent to such purchase, and to deter attempts to evade or delay compliance with the provisions of this chapter.

b. No provision of this chapter shall be construed or interpreted to restrict or expand the reasons for which a cooperative corporation may lawfully withhold consent.

§ 2. This local law takes effect 120 days after it becomes law.

Session 12
JJ
LS #7796
09/08/2022 10:32 a.m.

Session 11
JW/MPC/CCF
LS #371
Int. #0761-2018

Int. No. 917

By Council Member Sanchez, the Public Advocate (Mr. Williams) and Council Members Cabán, Restler, Hudson and Richardson Jordan

A Local Law to amend the administrative code of the city of New York, in relation to requiring cooperative corporations to provide financial information to prospective purchasers of cooperative apartments

Be it enacted by the Council as follows:

Section 1. Title 26 of the administrative code of the city of New York is amended by adding a new chapter 35 to read as follows:

CHAPTER 35

SALES OF COOPERATIVE APARTMENTS

§ 26-3501 Definitions. As used in this chapter, the following terms have the following meanings:

Cooperative corporation. The term "cooperative corporation" means any corporation that grants persons the right to reside in a cooperative apartment, that right existing by such person's ownership of certificates of stock, proprietary lease, or other evidence of ownership of an interest in such entity.

Prospective purchaser. The term "prospective purchaser" means a person who has made an offer to purchase the proprietary lease and the ownership interest in a cooperative corporation from a prospective seller.

Prospective seller. The term "prospective seller" means a person who has a proprietary lease and an ownership interest in a cooperative corporation and who is offering to sell such proprietary lease and ownership interest.

§ 26-3502 Financial disclosure by a cooperative corporation. a. After an offer to purchase a proprietary lease and an ownership interest in a cooperative corporation from a prospective seller

by a prospective purchaser has been accepted by the prospective seller, the cooperative corporation must provide disclosure of its finances to the prospective purchaser within 14 days of a request for such information by the prospective purchaser or an agent of the prospective purchaser. Such financial disclosure must include, at a minimum:

1. The assets and liabilities of the cooperative corporation, including current cash flow, debt and operating expenses;

2. Any capital improvements underway or planned, and the cost of such improvements;

3. The amount in the reserve fund, if any; and

4. The most recent budget, or a statement that the cooperative corporation does not prepare a budget.

b. Any cooperative corporation that fails to provide financial disclosure to a prospective purchaser in accordance with subdivision a of this section shall be liable for a civil penalty in the amount of $500. The civil penalty established by this section may be recovered in a proceeding before the office of administrative trials and hearings.

§ 2. This local law takes effect 60 days after it becomes law.

NAB
LS #8956
06/15/22 11:05AM

HOT TOPICS FOR COOPERATIVES AND CONDOMINIUMS

LEGISLATIVE UPDATE: BY: GEOFFREY MAZEL, ESQ.

NEW YORK CITY COUNCIL:

Intro 632- Criminal Background Ban
This bill would ban property owners from performing criminal background checks on prospective tenants.

Intro 913-Delay of Local Law 97
This bill aims to delay the implementation and penalties of Local Law 97 for a period of seven years from the current deadlines.

Intro 914- Decision Timeliness
This bill aims to standardize the application process by establishing a specific timeframe by which a board must act on a prospective purchaser's application to buy shares in the cooperative corporation. Under the proposal, a board would generally need to approve or deny the application of a potential purchaser within 45 days. The legislation creates a private right of action when violations are alleged to occur with penalties reaching as much as $10,000.

Intro 915-Explanation of Decision
This bill would require boards to provide buyers with a written statement of its reasons for denying a sale within five business days of the decision. The proposal also enumerates additional information that a board must provide to a denied applicant. The legislation establishes a private right of action for denied applicants and establishes a process by which such cases must be considered.

Intro 917-Financial Status of Building
This bill would require a cooperative to disclose certain financial information to a prospective buyer whose offer has been accepted, within 14 days of the buyer's request for the information. This information must include all assets and liabilities, planned capital improvements and their costs, current capital improvements and their costs, the amount of money in reserve, and the most recent budget. Failure to comply could result in a $500 fine.

§ 26-3102 Short-term rental registration-
Passed into law January 2023. It shall be unlawful for a person who owns, manages, occupies or otherwise controls a dwelling unit to offer, manage or administer the short-term rental of such dwelling unit unless such dwelling unit is registered in accordance with this chapter, such dwelling unit has been issued a unique short-term rental registration number, and such registration is currently valid.

NEW YORK STATE SENATE:

Senate Bill S305-Good Cause Eviction Bill
This bill would require Landlords to have "good cause" to evict a tenant if they have an expired lease. As written Co-ops are included in this legislation.

Senate Bill- S2964 Fairness in Coop Act
A "timing" bill for Coops to respond to applications. Requires a standardized application.

Senate Bill S3252—Tax Abatement Extension
Extends certain provisions relating to a partial tax abatement for residential real property held in the cooperative or condominium form

Senate Bill S9603 -Creates Local Law 97 Project Tax Abatements.
Creates a new abatement and tax exemption to cover 50% - 95% of a co-ops LL97 related costs that reduce greenhouse gas emissions.

STATE OF NEW YORK

305

2023-2024 Regular Sessions

IN SENATE

(Prefiled)

January 4, 2023

Introduced by Sens. SALAZAR, BRISPORT, STAVISKY, BAILEY, BRESLIN, BROUK, CLEARE, GIANARIS, GONZALEZ, HARCKHAM, JACKSON, KAVANAGH, KRUEGER, LIU, MAY, MAYER, MYRIE, RAMOS, RIVERA, SEPULVEDA, SERRANO -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

AN ACT to amend the real property law, in relation to prohibiting eviction without good cause

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The real property law is amended by adding a new article 6-A to read as follows:

ARTICLE 6-A

PROHIBITION OF EVICTION WITHOUT GOOD CAUSE

Section 210. Short title.
211. Definitions.
212. Applicability.
213. Necessity for good cause.
214. Grounds for removal of tenants.
215. Preservation of existing requirements of law.
216. Waiver of rights void.

§ 210. Short title. This article shall be cited as the "Prohibition of eviction without good cause law".

§ 211. Definitions. 1. The term "housing accommodation", as used in this article shall mean any residential premises, including a mobile home or land in a mobile home park.

2. The term "landlord" as used in this article shall mean any owner, lessor, sublessor, assignor, or other person receiving or entitled to receive rent for the occupancy of any housing accommodation or an agent of any of the foregoing.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD00464-01-3

3. The term "tenant" as used in this article shall mean a tenant, sub-tenant, lessee, sublessee, assignee, manufactured home tenant as defined in paragraph one of subdivision a of section two hundred thirty-three of this chapter, an occupant of a rooming house or hotel as defined in section seven hundred eleven of the real property actions and proceedings law or any other person entitled to the possession, use or occupancy of any housing accommodation.

4. The term "rent" as used in this article shall mean any consideration, including any bonus, benefit or gratuity demanded or received for or in connection with the possession, use or occupancy of housing accommodations or the execution or transfer of a lease for such housing accommodations.

5. The term "disabled person" as used in this article shall mean a person who has an impairment which results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling, or any controlled substance, which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which are expected to be permanent and which substantially limit one or more of such person's major life activities.

§ 212. Applicability. This article shall apply to all housing accommodations except:

1. owner-occupied premises with less than four units;

2. premises sublet pursuant to section two hundred twenty-six-b of this chapter, or otherwise, where the sublessor seeks in good faith to recover possession of such housing accommodation for his or her own personal use and occupancy;

3. premises the possession, use or occupancy of which is solely incident to employment and such employment is being lawfully terminated; and

4. premises otherwise subject to regulation of rents or evictions pursuant to state or federal law to the extent that such state or federal law requires "good cause" for termination or non-renewal of such tenancies.

§ 213. Necessity for good cause. No landlord shall, by action to evict or to recover possession, by exclusion from possession, by failure to renew any lease, or otherwise, remove any tenant from housing accommodations covered by section two hundred twelve of this article except for good cause as defined in section two hundred fourteen of this article.

§ 214. Grounds for removal of tenants. 1. No landlord shall remove a tenant from any housing accommodation, or attempt such removal or exclusion from possession, notwithstanding that the tenant has no written lease or that the lease or other rental agreement has expired or otherwise terminated, except upon order of a court of competent jurisdiction entered in an appropriate judicial action or proceeding in which the petitioner or plaintiff has established one of the following grounds as good cause for removal or eviction:

(a) The tenant has failed to pay rent due and owing, provided however that the rent due and owing, or any part thereof, did not result from a rent increase which is unreasonable or imposed for the purpose of circumventing the intent of this article. In determining whether all or part of the rent due and owing is the result of an unreasonable rent increase, it shall be a rebuttable presumption that the rent for a dwelling not protected by rent regulation is unreasonable if said rent has been increased in any calendar year by a percentage exceeding either three percent or one and one-half times the annual percentage change in the Consumer Price Index for the region in which the housing accommo-

dation is located, as established the August preceding the calendar year in question, whichever is greater;

(b) The tenant is violating a substantial obligation of his or her tenancy, other than the obligation to surrender possession, and has failed to cure such violation after written notice that the violation cease within ten days of receipt of such written notice, provided however, that the obligation of tenancy for which violation is claimed was not imposed for the purpose of circumventing the intent of this article;

(c) The tenant is committing or permitting a nuisance in such housing accommodation, or is maliciously or by reason of negligence damaging the housing accommodation; or the tenant's conduct is such as to interfere with the comfort of the landlord or other tenants or occupants of the same or adjacent buildings or structures;

(d) Occupancy of the housing accommodation by the tenant is in violation of or causes a violation of law and the landlord is subject to civil or criminal penalties therefore; provided however that an agency of the state or municipality having jurisdiction has issued an order requiring the tenant to vacate the housing accommodation. No tenant shall be removed from possession of a housing accommodation on such ground unless the court finds that the cure of the violation of law requires the removal of the tenant and that the landlord did not through neglect or deliberate action or failure to act create the condition necessitating the vacate order. In instances where the landlord does not undertake to cure conditions of the housing accommodation causing such violation of the law, the tenant shall have the right to pay or secure payment in a manner satisfactory to the court, to cure such violation provided that any tenant expenditures shall be applied against rent to which the landlord is entitled. In instances where removal of a tenant is absolutely essential to his or her health and safety, the removal of the tenant shall be without prejudice to any leasehold interest or other right of occupancy the tenant may have and the tenant shall be entitled to resume possession at such time as the dangerous conditions have been removed. Nothing herein shall abrogate or otherwise limit the right of a tenant to bring an action for monetary damages against the landlord to compel compliance by the landlord with all applicable state or municipal laws or housing codes;

(e) The tenant is using or permitting the housing accommodation to be used for an illegal purpose;

(f) The tenant has unreasonably refused the landlord access to the housing accommodation for the purpose of making necessary repairs or improvements required by law or for the purpose of showing the housing accommodation to a prospective purchaser, mortgagee or other person having a legitimate interest therein;

(g) The landlord seeks in good faith to recover possession of a housing accommodation located in a building containing fewer than twelve units because of immediate and compelling necessity for his or her own personal use and occupancy as his or her principal residence, or the personal use and occupancy as principal residence of his or her spouse, parent, child, stepchild, father-in-law or mother-in-law, when no other suitable housing accommodation in such building is available. This paragraph shall permit recovery of only one housing accommodation and shall not apply to a housing accommodation occupied by a tenant who is sixty-two years of age or older or who is a disabled person;

(h) The landlord seeks in good faith to recover possession of any or all housing accommodations located in a building with less than five

units to personally occupy such housing accommodations as his or her principal residence.

2. A tenant required to surrender a housing accommodation by virtue of the operation of paragraph (g) or (h) of subdivision one of this section shall have a cause of action in any court of competent jurisdiction for damages, declaratory, and injunctive relief against a landlord or purchaser of the premises who makes a fraudulent statement regarding a proposed use of the housing accommodation. In any action or proceeding brought pursuant to this provision a prevailing tenant shall be entitled to recovery of actual damages, and reasonable attorneys' fees.

3. Nothing in this section shall abrogate or limit the tenant's right pursuant to section seven hundred fifty-one of the real property actions and proceedings law to permanently stay the issuance or execution of a warrant or eviction in a summary proceeding, whether characterized as a nonpayment, objectionable tenancy, or holdover proceeding, the underlying basis of which is the nonpayment of rent, so long as the tenant complies with the procedural requirements of section seven hundred fifty-one of the real property actions and proceedings law.

§ 215. Preservation of existing requirements of law. No action shall be maintainable and no judgment of possession shall be entered for housing accommodations pursuant to section two hundred fourteen of this article, unless the landlord has complied with any and all applicable laws governing such action or proceeding and has complied with any and all applicable laws governing notice to tenants, including without limitation the manner and the time of service of such notice and the contents of such notice.

§ 216. Waiver of rights void. Any agreement by a tenant heretofore or hereinafter entered into in a written lease or other rental agreement waiving or modifying his or her rights as set forth in this article shall be void as contrary to public policy.

§ 2. Severability. If any provision of this act, or any application of any provision of this act, is held to be invalid, that shall not affect the validity or effectiveness of any other provision of this act, or of any other application of any provision of this act, which can be given effect without that provision or application; and to that end, the provisions and applications of this act are severable.

§ 3. This act shall take effect immediately and shall apply to actions and proceedings commenced on or after such effective date.

Int. No. 632

By Council Member Powers, the Public Advocate (Mr. Williams), Council Members Rivera, Ayala, Williams, Sanchez, Hudson, Krishnan, Abreu, Brewer, Joseph, De La Rosa, Hanif, Restler, Gutiérrez, Riley, Bottcher, Cabán, Feliz, Stevens, Marte, Avilés, Narcisse, Richardson Jordan, Ossé, Nurse, Farías, Mealy, Barron, Louis and Won (in conjunction with the Manhattan Borough President, Brooklyn Borough President, Bronx Borough President and Queens Borough President)

A Local Law to amend the administrative code of the city of New York, in relation to prohibiting housing discrimination on the basis of arrest record or criminal history.

Be it enacted by the Council as follows:

Section 1. Section 8-107 of title 8 of the administrative code of the city of New York is amended by adding a new subdivision 5-a to read as follows:

5-a. *Protections based on arrest record and criminal history; housing.* a. For purposes of this subdivision, the term "criminal history" includes records of an individual's

(1) Currently pending criminal cases;

(2) Convictions, including unsealed violations, or any conviction that resulted in a sentence involving fines, incarceration or other penalties arising from a verdict or plea of guilty or nolo contendere, a suspended sentence, a sentence of probation, or a sentence of unconditional discharge, and convictions that have been expunged, the subject of an executive pardon, the subject of a certificate of relief from disabilities, or otherwise legally nullified or vacated;

(3) Adjudications of juvenile delinquency or youthful offender adjudications; and

(4) Any records that have been sealed.

b. It shall be an unlawful discriminatory practice for the owner, lessor, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation, constructed or to be constructed, or an interest therein, or any agent or employee thereof, or any real estate broker or agent or employee thereof

to:

(1) Refuse to sell, rent, lease, approve the sale, rental or lease or otherwise deny to or withhold from any person such a housing accommodation or an interest therein because of such person's arrest record or criminal history;

(2) Discriminate against any person in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or an interest therein or in the furnishing of facilities or services in connection therewith, because of such person's arrest record or criminal history;

(3) Represent to any person that, because of such person's arrest record or criminal history, any housing accommodation or an interest therein is not available for inspection, sale, rental or lease when in fact it is available to such person;

(4) Declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such a housing accommodation or an interest therein which expresses, directly or indirectly, any limitation, specification or discrimination in housing based on a person's arrest record or criminal history; or

(5) Make any inquiry or statement related to arrest record or criminal history in connection with the prospective or continued purchase, rental, or lease of a housing accommodation. Prohibited inquiries include any question communicated to an individual in writing or otherwise, directly or indirectly, searches of publicly available records, criminal background checks, or any other conduct that gathers arrest record or criminal history information. If a covered entity uses consumer credit reports to screen applicants, it shall not take any adverse action based on arrest record or criminal history information contained in such report.

c. Nothing in paragraph b shall restrict a covered entity from taking any lawful adverse

action against a current occupant for reasons other than a person's arrest record or criminal history, including the person's acts of physical violence against persons or property on the premises and other acts that would adversely affect the health, safety, or welfare of other residents, or excuse a covered entity from complying with applicable laws relating to victims of domestic violence, sex offenses or stalking.

d. Paragraph b shall not apply to the following:

(1) Actions taken by a covered entity to exclude a person from a housing accommodation based on the person's arrest record or criminal history where such exclusion is required pursuant to any federal, state, or local law or rule or regulation, provided that the covered entity shall provide the person a citation to the law, rule or regulation that requires such action.

(2) Actions taken by a covered entity pursuant to any federal, state or local law or rule or regulation that requires criminal background checks for housing eligibility, provided that prior to taking any adverse action that is not required by such law, the covered entity shall comply with paragraphs e and f; and

(3) Inquiries into the New York sex offense registry maintained by the state division of criminal justice services pursuant to section 168-b of the correction law, or adverse actions taken by a covered entity against a person listed publicly on such registry, provided that prior to taking any adverse action that is not required by such law, the covered entity shall comply with paragraphs e and subparagraphs (1) and (2) of paragraph f.

e. *Notice of inquiry*. Except where providing notice would conflict with a requirement of federal or state law, rule or regulation, prior to any inquiry into, gathering of, or use of criminal history information a covered entity must:

(1) Notify an individual in writing of the inquiry; and

(2) Provide the individual a reasonable amount of time to withdraw their application for housing, not to exceed three days.

f. *Fair housing process.* Except where following this process would conflict with a requirement of federal or state law, rule or regulation, after providing notice, and prior to any adverse action based on arrest record or criminal history, the covered entity shall provide:

(1) A written copy of the inquiry on which the intended adverse action is based and allow the person a reasonable amount of time of at least five business days, during which the covered entity must hold the housing unit open, to dispute the accuracy of the inquiry and respond with rebutting or mitigating information prior to the denial of the person's housing application.

(2) A copy of supporting documents that were reviewed, and a statement of the legitimate, non-discriminatory interest of the covered entity in protecting property and the safety and welfare of others;

(3) A copy of the analysis and the covered entity's reasons for intending to take adverse action against such person in a manner to be determined by the commission, identifying which of the following fair housing factors were taken into account:

(A) The time that has elapsed since the date of the offense;

(B) The age of the individual at the time of the offense;

(C) Evidence of good tenant history;

(D) Any additional information produced by an individual or on their behalf, in regards to their rehabilitation or good conduct, including but not limited to history of conduct in the community;

(E) The seriousness of the person's offense; and

(F) The legitimate interest of the owner in protecting property, and the safety and welfare

of specific individuals.

g. The requirements of paragraphs e and f shall be satisfied where a covered entity follows a substantially similar process under federal, state or local law, regulations or rules that provides notice and an opportunity for the person to submit rebutting information before the actual denial of a housing accommodation.

h. Paragraph b shall not apply to the sale or rental of:

(1) A housing accommodation, other than a publicly-assisted housing accommodation, in a building that contains housing accommodations for not more than two families living independently of each other, if the owner or members of the owner's family reside in one of such housing accommodations; or

(2) A room or rooms in a housing accommodation, other than a publicly-assisted housing accommodation, if such rental is by the occupant of the housing accommodation or by the owner of the housing accommodation and the owner or members of the owner's family reside in such housing accommodation.

i. To the extent permitted by law, a covered entity's compliance with this subdivision shall not constitute a basis for liability under other laws.

§ 2. This local law shall take effect 200 days after it becomes law, except that the commission may take such actions as are necessary to implement this local law, including the promulgation of rules, before such date.

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Chapter 31: Registration Requirements for Short-Term Rentals

§ 26-3101 Definitions.

As used in this chapter:

Administering agency. The term “administering agency” means the office of special enforcement, as established under executive order number 96 for the year 2006, or such other agency as the mayor may designate by executive order.

Booking service. The term “booking service” has the meaning ascribed to such term by section 26-2101, as added by local law number 146 for the year 2018.

Class A multiple dwelling. The term “class A multiple dwelling” has the meaning ascribed to such term by the housing maintenance code, except that for the purposes of this chapter the term class A multiple dwelling shall also be deemed to include an “interim multiple dwelling” as defined in section 281 of the multiple dwelling law.

Class B multiple dwelling. The term “class B multiple dwelling” has the meaning ascribed to such term by subchapter 1 of the housing maintenance code.

Dwelling unit. The term “dwelling unit” has the meaning ascribed to such term by subchapter 1 of the housing maintenance code.

Listing. The term “listing” means an advertisement on a booking service that offers a short-term rental.

Registered host or host. The term “registered host” or "host" means a natural person who is a permanent occupant of a dwelling unit registered in accordance with this chapter.

Private dwelling. The term “private dwelling” has the meaning ascribed to such term by subchapter 1 of the housing maintenance code.

Rooming unit. The term “rooming unit” has the meaning ascribed to such term by subchapter 1 of the housing maintenance code.

Short-term rental. The term "short-term rental" means a rental for fewer than 30 consecutive days of a dwelling unit within a private dwelling or class A multiple dwelling, or in the case of a mixed use building, a rental of a class A dwelling unit therein for fewer than 30 consecutive days.

(L.L. 2022/018, 1/9/2022, eff. 1/9/2023)

§ 26-3102 Short-term rental registration.

a. It shall be unlawful for a person who owns, manages, occupies or otherwise controls a dwelling unit to offer, manage or administer the short-term rental of such dwelling unit unless such dwelling unit is registered in accordance with this chapter, such dwelling unit has been issued a unique short-term rental registration number, and such registration is currently valid. It shall be unlawful for a person who owns, manages, occupies or otherwise controls a dwelling unit to falsely represent or falsely advertise a dwelling unit as registered for short-term rental pursuant to this chapter when such dwelling unit is not so registered. This chapter does not apply to the short-term rental of class B multiple dwellings or class B dwelling units within mixed use buildings.

b. The form and manner of applying for a short-term rental registration or renewal thereof shall be established by rules of the administering agency.

c. No short-term rental registration shall be issued unless:

1. The applicant is a natural person who is a permanent occupant of the dwelling unit and is either: (i) the owner of such dwelling unit, or (ii) a tenant of such dwelling unit who certifies in a form and manner to be specified by the administering agency that they are not prohibited by the terms of a lease or other agreement from applying for a short-term rental registration for such dwelling unit and from subsequently acting as a host for short-term rentals within such dwelling unit;

2. The applicant has described, in a form acceptable to the administering agency, any parts of the premises containing such unit or accommodation that a person occupying a short-term rental at such unit or accommodation will be allowed to occupy or use;

3. The applicant certifies in a form and manner to be specified by the administering agency that they understand and agree to comply with provisions of the zoning resolution, multiple dwelling law, housing maintenance code and New York city construction codes relating to the short-term rental of dwelling units in private dwellings and class A multiple dwellings, or in class A dwelling units within mixed use buildings;

4. The administering agency has determined that, in accordance with the records of the department of buildings, the department of housing preservation and development and the fire department, there are no uncorrected violations of the New York city construction codes, the housing maintenance code or the fire code that would endanger occupants of such dwelling unit;

5. The administering agency has verified the occupancy classification of the building, or with respect to a mixed use building, the occupancy classification of the dwelling unit to be occupied as a short-term rental;

6. The administering agency has verified that the building does not appear on the prohibited buildings list published pursuant to this section;

7. Where the applicant uses a booking service, the applicant has provided the uniform resource locator or listing identifier and the associated booking service name for all existing listings of the dwelling unit and agrees that any listing of such dwelling unit with a booking service shall be reported to the administering agency prior to such listing being used to make an agreement for a short-term rental; and

8. The applicant has paid an application or renewal fee in an amount to be established by rule by the administering agency.

d. No registration shall be issued for the short-term rental of a dwelling unit the rent of which is regulated in accordance with the emergency tenant protection act of 1974, the rent stabilization law of 1969, the local emergency housing rent control act of 1962, sections four hundred twenty-one-a or four hundred eighty-nine of the real property tax law, in a housing development organized pursuant to article two of the private housing finance law and supervised by the department of housing preservation and development, or any other law or rule or an agreement with a governmental entity.

e. No short-term rental registration shall be issued for a dwelling unit in a New York city housing authority development.

f. No short-term rental registration shall be issued for a rooming unit.

g. Issuance of a registration for a dwelling unit pursuant to this chapter shall not be construed as permission for or approval of the use of such dwelling unit for any occupancy that would be in violation of a lease, cooperative bylaws, condominium association rules and regulations, the multiple dwelling law, the zoning resolution, the New York city construction codes, the housing maintenance code or any other applicable rules, regulations, or laws.

h. A short-term rental registration or renewal thereof shall be valid for a period established by the administering agency, but not to exceed the demonstrated right of occupancy by the applicant.

i. A short-term rental registration or renewal thereof is not transferable.

j. If the information provided by an applicant in connection with an application for a short-term rental registration or renewal thereof changes before the expiration of such registration or renewal thereof, such applicant shall submit such changes to the administering agency in a time, form and manner established by the administering agency.

k. Upon receipt of a complete initial application, the administering agency shall notify the owner of record of the dwelling unit and of the building, informing the owners that an application for a short-term rental registration has been received.

l. The administering agency shall create and maintain a prohibited buildings list of all addresses whose owner, including any applicable board of a cooperative or condominium corporation or their managers and agents, has notified the agency in a form and manner to be specified by the administering agency that no short-term rental of any dwelling unit therein is permitted. The administering agency shall adopt rules with respect to applications for inclusion on the prohibited buildings list, including, but not limited to, rules requiring building owners to certify that leases and other occupancy agreements for dwelling units within the building prohibit short-term rentals and rules relating to removing buildings from the prohibited building list. Where all dwelling units in a building are prohibited pursuant to subsection (d) of this section, such buildings shall also be included on the prohibited building list. The administering agency shall publish the prohibited buildings list on the city open data web portal.

m. The administering agency shall as soon as practicable, for each booking service disclosed by the registrant as having a listing for the registered dwelling unit, notify such booking service of any revocation of a short-term rental registration.

(L.L. 2022/018, 1/9/2022, eff. 1/9/2023)

§ 26-3103 Posting and advertising requirements.

a. A registered host of a dwelling unit shall, in a form and manner established by the administering agency, conspicuously post and maintain within such dwelling unit, during each short-term rental thereof: (i) a diagram indicating normal and emergency egress routes from such unit and the building containing such unit, and (ii) a copy of the short-term rental registration certificate for such unit which shall include the registration number along with a number to call in the event of an emergency.

b. A registered host shall include in any advertisement or other offer for the short-term rental of a dwelling unit the short-term registration number for such unit.

c. A registered host shall maintain, for at least seven years after such short-term rental, a record of each such short-term rental in a manner established by the administering agency and containing such information as the administering agency shall prescribe. Such records shall be provided to the administering agency in accordance with the rules of such agency and applicable law.

(L.L. 2022/018, 1/9/2022, eff. 1/9/2023)

§ 26-3104 Penalties and enforcement.

a. Any person who violates subdivision a of section 26-3102 shall be liable for a civil penalty of not more than the lesser of $5,000 or three times the revenue generated by the short-term rental for each such violation.

b. Any registered host who violates the provisions of this chapter or rules of the administering agency promulgated pursuant to this chapter shall be liable for a civil penalty of not more than $5,000 for each such violation.

c. Any person who makes a material false statement or conceals a material fact in connection with the filing of an application or renewal thereof pursuant to this chapter shall be liable for a civil penalty of not more than $1,000 for each such violation, in addition to revocation pursuant to the provisions of this section.

d. The registration of a dwelling unit shall be revoked, after notice and opportunity to be heard, where:

1. Such dwelling unit has been used in violation of restrictions in the zoning resolution, multiple dwelling law, housing maintenance code and New York city construction codes relating to the short-term rental of dwelling units in private dwellings and class A multiple dwellings, or in class A dwelling units within mixed use buildings;

2. The applicant made a material false statement or concealed a material fact in connection with the filing of an application or renewal thereof pursuant to this chapter;

3. The registered host has committed three or more violations of this chapter or rules of the administering agency within a period of 24 months;

4. The dwelling unit was added to the prohibited building list after the registration had been approved; or

5. The administering agency, subsequent to issuing the registration, discovers information that would have precluded the administering agency from granting the registration had it been known at the time.

e. Civil penalties for violations of this chapter and rules of the administering agency promulgated pursuant to this chapter may be recovered in proceedings before an administrative tribunal within the jurisdiction of the office of administrative trials and hearings in accordance with the rules of such tribunal or in an action in a court of competent jurisdiction. Notices of violation, administrative summonses and appearance tickets for violations may be issued by officers and employees of the administering agency or other city agencies designated by such administering agency.

f. The administering agency shall be authorized to conduct investigations, to issue subpoenas, to receive evidence, to hear complaints regarding activities subject to this section, to hold public hearings, to take testimony and to promulgate, amend and modify procedures and practices governing such proceedings.

(L.L. 2022/018, 1/9/2022, eff. 5/9/2023)

§ 26-3105 Reporting.

a. The administering agency shall make the following information on each short-term rental registration available on the city open data web portal in as close to real time as practicable:

1. registration number;

2. uniform resource locators associated with such registration;

3. address and unit number of the dwelling unit, including latitude and longitude;

4. status of the registration, including active or revoked; and

5. expiration date of registration.

b. No later than September 1 of each year, the administering agency shall submit a report to the mayor and to the speaker of the city council and post on the administering agency's website, a report including, but not limited to, the following information for the twelve-month period ending the preceding June 30, disaggregated by council district:

1. the number of active registrations;

2. the number of short-term registration applications and renewals: applied for, granted, refused, revoked and pending;

3. the average time to process registration applications and renewals;

4. a summary of the reasons for applications or renewals to be refused or revoked;

5. total number and reasons for summonses issued;

6. total penalties imposed and collected.

c. The administering agency shall provide a website page where members of the public may submit a registration number or uniform resource locator that will return associated information provided in paragraph (a) and instructions on how to file a complaint related to unregistered activity.

(L.L. 2022/018, 1/9/2022, eff. 1/9/2023)

STATE OF NEW YORK

9603

IN SENATE

November 23, 2022

Introduced by Sen. PARKER -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the real property tax law, in relation to establishing an abatement and exemption from real property taxes for capital improvements to reduce carbon emissions; and to repeal such provisions upon the expiration thereof

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative intent. New York's nation leading climate law, the climate leadership and community protection act of 2019 (CLCPA), requires the state to reduce its greenhouse gas emissions to 40 percent below 1990 levels by 2030, and 85 percent below 1990 levels by 2050, among other goals. At the same time, New York city's local law number 97 for the year 2019 requires buildings over 25,000 square feet to reduce their carbon emissions to comply with increasingly stringent emissions limits. While New York's building stock accounts for more than 25 percent of statewide greenhouse gas emissions and transportation is a top emitter, in New York city that ratio is reversed, with buildings accounting for approximately 70 percent of greenhouse gas emissions. As such, reaching the state and city's climate goals will require significant investment to decarbonize buildings including through electrification, energy efficiency, and the use of new technologies and energy sources. The use of this targeted abatement, which would be available to support all property owners that are meaningfully engaged in reducing carbon emissions will ensure the success of the CLCPA and local law 97. This legislation will benefit all New Yorkers by ensuring that our buildings can play a vital role in decarbonization.

§ 2. The real property tax law is amended by adding a new section 488-b to read as follows:

§ 488-b. Abatement and exemption from real property taxes for capital improvements to reduce carbon emissions. 1. For the purposes of this section, the following terms shall have the meaning specified in this subdivision:

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD16565-01-2

a. "Eligible real property" shall mean a property located within a city of one million or more that is:

(i) any class B multiple dwelling as defined in the multiple dwelling law;

(ii) any class A multiple dwelling as defined in the multiple dwelling law;

Notwithstanding the foregoing, eligible real property shall not include college and school dormitories, club houses, or residences whose occupancy is restricted to an institutional use such as housing intended for use primarily or exclusively by the employees of a single company or institution. A building is an eligible real property only if it qualifies as such after completion of the eligible improvements, but need not have been an eligible real property prior to the eligible improvements;

(iii) any non-residential, commercial property used primarily for the buying, selling or otherwise providing of goods or services inclusive of manufacturing and office space;

(iv) any single family private dwelling; or

(v) any two-family private dwelling.

b. "Eligible improvements" shall be limited to categories of work that result in a reduction of greenhouse gas emissions for the building, provided further that such work shall be in conformity with all applicable laws. Eligible improvements shall include, but not be limited to, any of the following types of improvements:

(i) design, permitting, and technical analysis work required to identify, measure, and complete eligible work including the development of carbon emissions reduction strategies and plans;

(ii) cleaning, resurfacing or repair of adjacent surfaces, inclusive of the replacement or installation of windows, walls, ceilings, floors, doors or trim where necessary;

(iii) pointing, waterproofing and repair of building envelope, including cleaning of entire building exterior surface to prepare for such work, in the course of the replacement, installation or upgrading of eligible systems or equipment;

(iv) replacement, repair or installation of new systems for heating or cooling, including domestic hot water;

(v) installation of solar, green roofs or other mechanisms to offset use of energy from the electricity grid;

(vi) replacement, or installation of insulation in walls, roofs, flooring, eaves, and around pipes;

(vii) replacement or installation of thermostats to control temperature and building management systems;

(viii) installation of energy efficient appliances, fixtures, or lighting;

(ix) repair, replacement and modification of electrical systems, and/or wiring associated therewith;

(x) appurtenant labor, equipment and supplies; and

(xi) any other categories of work established by the board in regulations that results in a net reduction in greenhouse gas emissions for the building.

c. "Board" shall mean the energy efficiency improvement board established by this section.

d. "Department of buildings" shall mean the department of buildings in the city of New York.

2. Eligible property reconstructed, altered or improved subsequent to the effective date of this section shall be exempt from taxation and special ad valorem levies to the extent provided in this section. Any

exemption or abatement permitted pursuant to this section shall take effect no sooner than July first next succeeding the effective date of this section.

3. There is hereby established an energy efficiency improvement board within the office of real property services, which shall consist of four members appointed by the governor, one of whom shall be the commissioner of taxation and finance, ex-officio, one of whom shall be the president of the New York state energy research and development authority, ex-officio, one of whom shall be the commissioner of homes and community renewal, ex-officio, and a fourth member who shall have experience in the construction of multiple dwellings. The board shall additionally have two, non-voting members appointed by the mayor of the city of New York. The board shall be responsible for administering the benefits conferred by this section. The board shall appoint staff, within amounts appropriated therefor, to assist it in the execution of its duties. The board members shall be entitled to reimbursement of their actual and necessary expenses in the discharge of their duties, but shall not otherwise be entitled to any compensation for their service. The board shall promulgate a regulation to establish a methodology to determine the greenhouse gas emissions of a building, and by regulation establish a formula that applicants can utilize to determine the reduction in emissions created by any improvements permitted by this section. The improvements described in subparagraphs (i), (ii) and (x) of paragraph b of subdivision one of this section which do not inherently reduce emissions, may only be approved if they are part of an application which includes other projects which have the net effect of reducing the net greenhouse gas emissions of the building if the building is characterized as an eligible real property pursuant to subparagraph (i), (ii) or (iii) of paragraph a of subdivision one of this section. For an eligible real property defined in subparagraph (iv) or (v) of paragraph a of subdivision one of this section, the benefits of subparagraph (i) of paragraph b of subdivision one of this section may be claimed independently at a reduced benefit of fifty percent of actual costs as provided further in this section. The board shall promulgate an application for benefits afforded to owners under this section, and shall establish a process to review applications for the benefits under this section. The board may promulgate regulations to allow for additional classes or categories of work that should entitle an individual to an exemption and abatement under this section, upon a finding that such work has a beneficial impact on greenhouse gas emissions. The board shall approve reasonable costs associated with the work proposed and may use as a guide the typical costs of such improvements, and update such information annually. Any application for benefits shall be approved or denied within one year of submission, or if an affirmative approval or denial has not been given, then such application shall be deemed approved. The board shall establish a process to communicate with the department of finance in the city of New York as to their determinations, such that it may promptly update the tax rolls.

4. Any increase in assessed valuation of eligible real property resulting from eligible improvements shall be exempt from taxation for local purposes for a period of twenty years, provided that:

a. the eligible improvements are commenced after December thirty-first, two thousand twenty-one, and are completed within sixty months of the issuance of a permit by the department of buildings;

b. the eligible improvements are approved by the board with respect to their costs and their qualifications for the benefits of this section;

c. the exemption may commence no sooner than the July first following the filing with the local agency responsible for real property tax assessment an application for such assessment, provided that if the board has not established the amount of such assessment prior to such filing, that no such increase in assessment shall be permitted until such time as the board determines that the cost or work is otherwise not qualified for such exemption; provided, however, that no abatement of existing taxes shall be permitted until such time as an application is approved, or deemed approved as applicable. If the rehabilitation is carried out with substantial government assistance as part of a program for affordable housing, the exemption may commence no sooner than the July first following the commencement of construction of eligible improvements;

d. there shall be no outstanding real estate taxes, water and sewer charges, payments in lieu of taxes or other municipal charges due and owing as of the tax quarter prior to commencement of tax exemption to this section;

e. no person who lives in the eligible real property shall be required by the owner to permanently vacate the eligible real property in order to perform the eligible improvements or any related work;

f. notwithstanding the provisions of any state or local law, rule or regulation to the contrary, the exemption shall be available notwithstanding the receipt of any other benefit under state, local or federal law.

5. Eligible real property which qualifies for exemption from taxation for local purposes for eligible improvements shall also be eligible for an abatement of real property taxes not to exceed the cost of eligible improvements certified by the board, which abatement may commence on the first day of the first tax quarter following the filing with the local agency responsible for real property tax assessment of a certification of eligibility issued by the board for such abatement; provided, however that if the rehabilitation is carried out with substantial government assistance as part of a program for affordable housing the abatement may commence no sooner than the first day of the first tax quarter following the commencement of construction of eligible improvements, provided that:

a. the annual abatement shall not exceed the amount of taxes otherwise payable in the corresponding tax year;

b. the period during which such abatement is effective shall not exceed the following amounts, which shall be determined by regulations which establish a methodology to determine such amounts, which shall establish a base year for calculating the percentage on the building's prior calendar year building emissions report as required by article three hundred twenty of chapter three of title twenty-eight of the administrative code of the city of New York, or if not required to file a building emissions report, then a benchmarking report required by article three hundred nine of chapter three of title twenty-eight of the administrative code of the city of New York:

(i) two years for a greenhouse gas emission reduction of between two to five percent;

(ii) five years for a greenhouse gas emission reduction of between five to ten percent;

(iii) six years for a greenhouse gas emission reduction of between ten to twelve percent;

(iv) seven years for a greenhouse gas emission reduction of between twelve to fifteen percent;

(v) eight years for a greenhouse gas emission reduction of between fifteen to seventeen percent;

(vi) nine years for a greenhouse gas emission reduction of between seventeen to twenty percent;

(vii) ten years for a greenhouse gas emission reduction of between twenty to twenty-five percent;

(viii) fifteen years for a greenhouse gas emission reduction of between twenty-five to thirty percent; and

(ix) twenty years for a greenhouse gas emission reduction of in excess of thirty percent;

c. the abatement shall be available for consecutive years from the date such abatement first becomes effective;

d. the total abatement shall be the lesser of two hundred percent of the certified reasonable costs of eligible improvements or the actual costs as determined by the board pursuant to its rules and regulations; and

e. notwithstanding the provisions of any state or local law, rule or regulation to the contrary, the abatement shall be available notwithstanding the receipt of any other benefit under state, local or federal law.

6. During the period of tax exemption or abatement pursuant to this section, the owner shall submit an annual certification to the board. Failure to submit such certification may result in revocation of benefits. Such certification shall include the following:

a. the annual greenhouse gas emissions and usage of energy for the building;

b. a statement that the property currently complies with all building and housing codes and that no tax required to be paid is in arrears; and

c. all such other information required by the board.

7. During the period of tax exemption or abatement pursuant to this section, the exemption and abatement may be revoked upon a violation of applicable oversight laws, where an agency with jurisdiction to enforce such laws has requested a suspension of abatement or exemption based upon violations of the multiple dwelling law, the local building code and the local housing maintenance code, or other applicable law or regulation.

8. The benefits of this section may be revoked or reduced upon a finding by the board that:

a. the application for benefits hereunder or the annual certification required hereunder contains a false statement or false information as to a material matter or omits a material matter;

b. real estate taxes, water and sewer charges, payments in lieu of taxes or other municipal charges are due and owing for more than one year; or

c. the eligible real property fails to provide the annual certification required by this section; and

d. after receiving notice of such a failure, that such owner has failed to cure the deficiency within ninety days.

9. The local agencies of government charged with the administration of this section may promulgate rules and regulations to carry out the provisions of this section.

§ 3. This act shall take effect immediately and shall expire and be deemed repealed December 31, 2030.

STATE OF NEW YORK

2964--A

2023-2024 Regular Sessions

IN SENATE

January 26, 2023

Introduced by Sens. KAVANAGH, ADDABBO, COMRIE, HARCKHAM, HINCHEY, MAYER, PALUMBO, SANDERS, SEPULVEDA, SKOUFIS -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the real property law, in relation to the timing of decisions for the sales of cooperative apartments

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative findings. The legislature hereby finds and declares that residential cooperative purchasers are subject to processes and conditions that do not also apply to the purchases of other single-family residences. The provisions of this act are not intended and do not diminish the duty of cooperative boards to uphold their established fiduciary duties. It is the intent of this act to significantly improve the transparency of the cooperative purchase process to the benefit of all parties involved in the transaction.

§ 2. The real property law is amended by adding a new article 11 to read as follows:

ARTICLE 11

COOPERATIVE CORPORATIONS; TIMING OF DECISIONS

Section 360. Short title.
361. Definitions.
362. Requirements for determination.
363. Acknowledgement of receipt of application.
364. Time for determination.
365. Tolling of time.
366. Construction.

§ 360. Short title. This article shall be known and may be cited as the "fairness in cooperative homeownership act".

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD02825-04-3

§ 361. Definitions. As used in this article, unless the context otherwise requires:

1. "Application" means the set of documents utilized by a cooperative corporation to facilitate a prospective purchaser's acquisition of certificates of stock, a proprietary lease, or other evidence of an ownership interest in such cooperative corporation.

2. "Cooperative corporation" means any corporation governed by the requirements of the state cooperative corporation law or the general business law, which among other things, grants persons the right to reside in a cooperative apartment, that right existing by such person's ownership of certificates of stock, proprietary lease, or other evidence of ownership of an interest in such entity.

3. "Proprietary lease" means the lease or occupancy agreement by which a cooperative corporation permits a person to occupy an apartment in the premises owned by the cooperative corporation.

4. "Prospective purchaser" means a person who has entered into a contract of sale to purchase the proprietary lease and the ownership interest in a cooperative corporation from a prospective seller.

5. "Prospective seller" means a person who has a proprietary lease and an ownership interest in a cooperative corporation and who has entered into a contract of sale to sell the person's proprietary lease and ownership interest in a cooperative corporation to a prospective purchaser.

6. "Sale" means the transfer of a person's ownership interest in a cooperative corporation and that person's proprietary lease to another person.

§ 362. Requirements for determination. 1. The board of directors or managing agent of each cooperative corporation shall maintain a standardized application and list of requirements for all cooperative apartments subject to the by-laws or proprietary lease of such corporation.

2. The board of directors or managing agent of every cooperative corporation shall provide the corporation's standardized application and list of requirements to any prospective purchasers and prospective sellers, or their respective real estate agents, promptly upon request, and shall include instructions as to where and how to submit the required materials including the mailing address and designated email address for the cooperative corporation.

§ 363. Acknowledgement of receipt of application. 1. A prospective purchaser shall submit an application via registered mail, and such application shall include a mailing address and email address. Within ten business days of receiving an application from a prospective purchaser, a cooperative corporation shall provide to a prospective purchaser via electronic mail and registered mail a written acknowledgment of the receipt of such application. Electronic mail delivery shall serve as an additional notice, but shall not replace the requirement for delivery by registered mail. The requirements of this subdivision shall apply both to a prospective purchaser's initial submission and to any subsequent submissions the prospective purchaser may make.

2. An acknowledgement of receipt shall set forth with specificity whether the application submitted fully satisfies the requirements therefor and list of the requirements provided for in section three hundred sixty-two of this article, the way or ways the submitted application failed to comply with the cooperative corporation's list of requirements maintained and provided by the cooperative corporation pursuant to such section, and if additional materials are requested for

clarification of a previously submitted application, what materials are desired.

3. Failure by a cooperative corporation to provide a written acknowledgement pursuant to this section within ten business days from the date of receipt of the submission of an application shall result in the application being deemed to be complete.

§ 364. Time for determination. 1. Following the submission of a completed application containing the information and documents contained in the list required to be maintained and provided pursuant to section three hundred sixty-two of this article and any additional materials requested for clarification, a cooperative corporation shall inform a prospective purchaser whether its consent to a sale is granted or whether its consent to a sale is denied within forty-five days.

2. The time period provided in subdivision one of this section may be extended at any time with the consent of the prospective purchaser. The cooperative corporation shall be entitled to one fourteen day extension without the consent of the purchaser after sending notice to the prospective purchaser via registered mail within forty-five days of receiving a completed application.

3. If after the forty-five day period for determination and any applicable extensions, the cooperative corporation does not act on an application, a prospective purchaser may inform the board of such corporation that if no action is taken within ten days then the failure to act will constitute consent by the cooperative corporation to the sale.

4. If no action is taken following the ten day notice period pursuant to subdivision three of this section, the cooperative corporation shall be deemed to have consented to the sale.

5. Nothing in this section shall be construed to prohibit a cooperative corporation from lawfully denying its consent to a sale at any time prior to the expiration of the forty-five day determination period and ten day notice period, provided that notice is given to the prospective purchaser stating the reason for denial.

§ 365. Tolling of time. If a cooperative corporation's board of directors has placed a memorandum or other writing in its files stating that such board does not ordinarily meet in the months of July and August, then such board of directors or managing agent shall have sixty calendar days or until the tenth of September, whichever is later, after receiving an application to acknowledge receipt thereof and begin the determination process for any application received on or after July first but before September tenth of any calendar year.

§ 366. Construction. Nothing in this article shall be construed or interpreted to limit or restrict the rights and remedies granted by any other provision of law.

§ 3. This act shall take effect on the one hundred twentieth day after it shall have become a law and shall apply to applications submitted and received on or after such date. Effective immediately the state commissioner of human rights is authorized to take any actions necessary prior to such effective date for the implementation of the provisions of this act on its effective date including, but not limited to, establishing guidelines and promulgating rules.

STATE OF NEW YORK

3252

2023-2024 Regular Sessions

IN SENATE

January 30, 2023

Introduced by Sen. LIU -- read twice and ordered printed, and when printed to be committed to the Committee on Cities 1

AN ACT to amend the real property tax law, in relation to extending certain provisions relating to a partial tax abatement for residential real property held in the cooperative or condominium form of ownership in a city having a population of one million or more

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraphs (a) and (b) of subdivision 2 of section 467-a of the real property tax law, as amended by chapter 184 of the laws of 2021, are amended to read as follows:

(a) In a city having a population of one million or more, dwelling units owned by unit owners who, as of the applicable taxable status date, own no more than three dwelling units in any one property held in the condominium form of ownership, shall be eligible to receive a partial abatement of real property taxes, as set forth in paragraphs (c), (d), (d-1), (d-2), (d-3), (d-4), (d-5) and (d-6) of this subdivision; provided, however, that a property held in the condominium form of ownership that is receiving complete or partial real property tax exemption or tax abatement pursuant to any other provision of this chapter or any other state or local law, except as provided in paragraph (f) of this subdivision, shall not be eligible to receive a partial abatement pursuant to this section; and provided, further, that sponsors shall not be eligible to receive a partial abatement pursuant to this section; and provided, further, that in the fiscal years commencing in calendar years two thousand twelve through two thousand [~~twenty-two~~] **twenty-four** no more than a maximum of three dwelling units owned by any unit owner in a single building, one of which must be the primary residence of such unit owner, shall be eligible to receive a partial abatement pursuant to paragraphs (d-1), (d-2), (d-3) and (d-4) of this subdivision.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD08043-01-3

(b) In a city having a population of one million or more, dwelling units owned by tenant-stockholders who, as of the applicable taxable status date, own no more than three dwelling units in any one property held in the cooperative form of ownership, shall be eligible to receive a partial abatement of real property taxes, as set forth in paragraphs (c), (d), (d-1), (d-2), (d-3), (d-4), (d-5) and (d-6) of this subdivision; provided, however, that a property held in the cooperative form of ownership that is receiving complete or partial real property tax exemption or tax abatement pursuant to any other provision of this chapter or any other state or local law, except as provided in paragraph (f) of this subdivision, shall not be eligible to receive a partial abatement pursuant to this section; and provided, further, that sponsors shall not be eligible to receive a partial abatement pursuant to this section; and provided, further, that in the fiscal years commencing in calendar years two thousand twelve through two thousand [~~twenty-two~~] twenty-four no more than a maximum of three dwelling units owned by any tenant-stockholder in a single building, one of which must be the primary residence of such tenant-stockholder, shall be eligible to receive a partial abatement pursuant to paragraphs (d-1), (d-2), (d-3) and (d-4) of this subdivision. For purposes of this section, a tenant-stockholder of a cooperative apartment corporation shall be deemed to own the dwelling unit which is represented by his or her shares of stock in such corporation. Any abatement so granted shall be credited by the appropriate taxing authority against the tax due on the property as a whole. The reduction in real property taxes received thereby shall be credited by the cooperative apartment corporation against the amount of such taxes attributable to eligible dwelling units at the time of receipt.

§ 2. Paragraphs (d-1), (d-2), (d-3) and (d-4) of subdivision 2 of section 467-a of the real property tax law, as amended by chapter 184 of the laws of 2021, are amended to read as follows:

(d-1) In the fiscal years commencing in calendar years two thousand twelve, two thousand thirteen and two thousand fourteen, eligible dwelling units in property whose average unit assessed value is less than or equal to fifty thousand dollars shall receive a partial abatement of the real property taxes attributable to or due on such dwelling units of twenty-five percent, twenty-six and one-half percent and twenty-eight and one-tenth percent respectively. In the fiscal years commencing in calendar years two thousand fifteen through two thousand [~~twenty-two~~] twenty-four eligible dwelling units in property whose average unit assessed value is less than or equal to fifty thousand dollars shall receive a partial abatement of the real property taxes attributable to or due on such dwelling units of twenty-eight and one-tenth percent.

(d-2) In the fiscal years commencing in calendar years two thousand twelve, two thousand thirteen and two thousand fourteen, eligible dwelling units in property whose average unit assessed value is more than fifty thousand dollars, but less than or equal to fifty-five thousand dollars, shall receive a partial abatement of the real property taxes attributable to or due on such dwelling units of twenty-two and one-half percent, twenty-three and eight-tenths percent and twenty-five and two-tenths percent respectively. In the fiscal years commencing in calendar years two thousand fifteen through two thousand [~~twenty-two~~] twenty-four eligible dwelling units in property whose average unit assessed value is more than fifty thousand dollars, but less than or equal to fifty-five thousand dollars, shall receive a partial abatement of the real property taxes attributable to or due on such dwelling units of twenty-five and two-tenths percent.

(d-3) In the fiscal years commencing in calendar years two thousand twelve, two thousand thirteen and two thousand fourteen, eligible dwelling units in property whose average unit assessed value is more than fifty-five thousand dollars, but less than or equal to sixty thousand dollars, shall receive a partial abatement of the real property taxes attributable to or due on such dwelling units of twenty percent, twenty-one and two-tenths percent, and twenty-two and five-tenths percent respectively. In the fiscal years commencing in calendar years two thousand fifteen through two thousand [~~twenty-two~~] twenty-four eligible dwelling units in property whose average unit assessed value is more than fifty-five thousand dollars, but less than or equal to sixty thousand dollars, shall receive a partial abatement of the real property taxes attributable to or due on such dwelling units of twenty-two and five-tenths percent.

(d-4) In the fiscal years commencing in calendar years two thousand twelve through two thousand [~~twenty-two~~] twenty-four, eligible dwelling units in property whose average unit assessed value is more than sixty thousand dollars shall receive a partial abatement of the real property taxes attributable to or due on such dwelling units of seventeen and one-half percent.

§ 3. Paragraph (a) of subdivision 3 of section 467-a of the real property tax law, as amended by chapter 184 of the laws of 2021, is amended to read as follows:

(a) An application for an abatement pursuant to this section for the fiscal year commencing in calendar year nineteen hundred ninety-six shall be made no later than the fifteenth day of September, nineteen hundred ninety-six. An application for an abatement pursuant to this section for the fiscal year commencing in calendar year nineteen hundred ninety-seven shall be made no later than the first day of April, nineteen hundred ninety-seven. An application for an abatement pursuant to this section for the fiscal year commencing in calendar year nineteen hundred ninety-eight shall be made no later than the first day of April, nineteen hundred ninety-eight. An application for an abatement pursuant to this section for the fiscal year commencing in calendar year nineteen hundred ninety-nine shall be made in accordance with this subdivision and subdivision three-a of this section. An application for an abatement pursuant to this section for the fiscal year commencing in calendar year two thousand shall be made no later than the fifteenth day of February, two thousand. An application for an abatement pursuant to this section for the fiscal year commencing in calendar year two thousand one shall be made in accordance with this subdivision and subdivision three-b of this section. An application for an abatement pursuant to this section for the fiscal year commencing in calendar year two thousand two shall be made no later than the fifteenth day of February, two thousand two. An application for an abatement pursuant to this section for the fiscal year commencing in calendar year two thousand three shall be made no later than the fifteenth day of February, two thousand three. An application for an abatement pursuant to this section for the fiscal year commencing in calendar year two thousand four shall be made in accordance with this subdivision and subdivision three-c of this section. An application for an abatement pursuant to this section for the fiscal year commencing in calendar year two thousand five shall be made no later than the fifteenth day of February, two thousand five. An application for an abatement pursuant to this section for the fiscal year commencing in calendar year two thousand six shall be made no later than the fifteenth day of February, two thousand six. An application for an

abatement pursuant to this section for the fiscal year commencing in calendar year two thousand seven shall be made no later than the fifteenth day of February, two thousand seven. An application for abatement pursuant to this section for the fiscal year commencing in calendar year two thousand eight shall be made in accordance with this subdivision and subdivision three-d of this section. An application for an abatement pursuant to this section for the fiscal year commencing in calendar year two thousand nine shall be made no later than the fifteenth day of February, two thousand nine. An application for an abatement pursuant to this section for the fiscal year commencing in calendar year two thousand ten shall be made no later than the fifteenth day of February, two thousand ten. An application for an abatement pursuant to this section for the fiscal year commencing in calendar year two thousand eleven shall be made no later than the fifteenth day of February, two thousand eleven. An application for an abatement pursuant to this section for the fiscal years commencing in calendar years two thousand twelve and two thousand thirteen shall be made in accordance with subdivision three-e of this section. The date or dates by which applications for an abatement pursuant to this section shall be made for the fiscal years beginning in calendar years two thousand fourteen through two thousand [~~twenty-two~~] twenty-four shall be established by the commissioner of finance by rule, provided that such date or dates shall not be later than the fifteenth day of February for such calendar years.

§ 4. This act shall take effect immediately.

CASE LAW UPDATE

HOT TOPICS AFFECTING COOPERATIVES AND CONDOMINIUMS

APRIL 4, 2023

I.

COOPERATIVES

A. Alterations/Breach of Fiduciary Duty

1. *Tahari v. 860 Fifth Avenue Corporation*, 2023 WL 2483687 (1st Dep't March 14, 2023): This years' long dispute arises from the plaintiff's penthouse combination project. Plaintiff alleges that he is the victim of unequal treatment by the cooperative board, which has refused to grant his allegedly routine apartment combination request and by conditioning any eventual grant on plaintiff agreeing to pay "extortionate" sums of money ($15 million security + $2,000 per day penalty for delays in achieving substantial completion) and to abide by allegedly unworkable and one-sided terms. On appeal from Supreme Court's order denying defendants' motion to dismiss plaintiff's amended complaint, the First Department held that plaintiff's cause of action under Business Corporation § 501(c) does not state a claim upon which relief may be granted. That section would be appropriate for claims that the terms of the plaintiff's lease or shares are different than those of the other shareholders, but not for redressing alleged unequal treatment in connection with negotiations for plaintiff's penthouse construction project. The Court also held that (1) the cause of action for breach of fiduciary duty against the cooperative could not be sustained because a corporation owes no fiduciary duty to its shareholders; (2) plaintiff stated a claim for breach of fiduciary duty against two of the individual board member defendants by alleging that they had a bad faith motivation for their refusal to approve plaintiff's project, basing their refusal on the impacts to their own apartment rather than to the cooperative as a whole; and (3) plaintiff stated a cause of action for declaratory and injunctive relief requiring the cooperative to approve plaintiff's construction project on terms similar to those afforded to other shareholders because defendants maintain that they are not subjecting plaintiff to disparate treatment.

2. *Mandracchia v. Renovate-Create Sourcing and Procurement Corp.*, 2023 N.Y. Slip Op. 30483(U) (Sup. Ct. N.Y. Cnty. Feb. 9, 2023). The plaintiff, a shareholder in the cooperative, brought suit for money damages against various parties including the cooperative and its managing agent (the "Co-op Defendants") arising from an allegedly substandard renovation done to her apartment. In this decision, the court granted summary judgment in favor of the Co-op Defendants, holding that (1) in signing her proprietary lease and Alteration Agreement, plaintiff waived whatever statutory duty Multiple Dwelling Law § 78 might have imposed on the Co-op Defendants; (2) any claim for breach of fiduciary duty should have been asserted against the Board of Directors, not the Co-Op Defendants, and in any event the Co-op Defendants never required only licensed general contractors to work in the building, did not have a duty to "warn" plaintiff that her contractor's license had expired in 2015, and did not sign off on the renovation; (3) plaintiff was obligated to indemnify the Co-op Defendants pursuant to the indemnification clause of the Alteration Agreement; and (4) the

Co-op Defendants' cross-claim for attorneys' fees should be scheduled for an inquest.

B. Alterations/Successor Liability/Attorneys' Fees

1. *131 Perry Street Apartment Corporation v. Clauser*, 2022 N.Y. Slip Op. 33018(U) (Sup. Ct. N.Y. Cnty. Sep. 8, 2022): Plaintiff, a cooperative, brought this action concerning responsibility for the repair/maintenance of custom-made French doors located in defendant's apartment. A problem with the doors caused a leak to the apartment below. In 1998, a previous owner of the subject apartment entered into an agreement with the cooperative in which she was permitted to install the doors but was required to provide for their long-term maintenance. That agreement purported to be binding on all future purchasers, but defendant was not required to sign any agreement pertaining to the doors when he purchased the apartment. Defendant complained that the cooperative had charged him over $13,000 in additional rent, threatened his leasehold, and suggested that defendant will be responsible for additional repairs that could exceed $80,000. In this decision, the Supreme Court granted the shareholder's motion to dismiss on the ground that generally only parties in privity of contract may enforce the terms of the contract. The cooperative did not make defendant sign the agreement when he took ownership of the shares for the subject unit, and the cooperative did not bring this action under any provision of the proprietary lease. However, because the proprietary lease has a provision requiring that a lessee pay legal fees, defendant is also entitled to legal fees to be sought by a separate motion.

C. Business Judgment Rule/Transfers

1. *Young v. 101 Old Mamaroneck Road Owners Corp.*, 211 A.D.3d 771 (2d Dep't Dec. 7, 2022): In 1993, the plaintiff and her father closed on the purchase shares in the defendant cooperative appurtenant to a cooperative unit in White Plains. Plaintiff and her father allegedly desired to take title as joint tenants with rights of survivorship, but the stock certificate issued by the Board of Directors contained no language indicating that they were joint tenants with rights of survivorship. In 2004, several years after her father's death, and after plaintiff supplied proof that her siblings waived any interest they may have had in the apartment, the Board issued a stock certificate naming plaintiff as the sole owner of the shares. In 2017, plaintiff entered into a contract with a third party for the sale of the shares. The Board first approved the sale, but reversed itself less than a week later saying it viewed the 1993 certificate as conveying a tenancy in common, the 2004 certificate as a nullity, and that it would not consent to a sale unless a court-appointed representative of plaintiff's father's estate authorized the transfer of the estate's interest in the shares represented by the 1993 certificate. Plaintiff initiated a Surrogate's Court proceeding but later dropped it when she discovered a Medicaid recovery lien that might encumber the estate and because plaintiff was unable to locate proof that her father and stepmother had divorced prior to 1993.

   In 2019, plaintiff commenced this action against various defendants including the Board, the cooperative, the cooperative's former counsel and transfer agent. The complaint sought declaratory and injunctive relief and damages for conversion, estoppel, breach of fiduciary duty, tortious interference with contract, and negligence. Affirming the Order of Supreme Court, the Second Department held that the court correctly granted the motion of the former counsel and transfer

agent to dismiss because absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties not in privity, or near-privity, for harm caused by professional negligence. The allegations of the complaint were not sufficient. The Second Department further held that the Supreme Court correctly granted the motion to dismiss by the Board and the cooperative because the complaint failed to allege that the co-op defendants breached any duty sufficient to overcome the business judgment rule. In the context of cooperative dwellings, the business judgment rule provides that a court should defer to a cooperative board's determination so long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith.

D. Harassment/Pullman Action

1. *Rivercross Tenants' Corp. v. Kovach*, 212 A.D.3d 540 (1st Dep't Jan. 24, 2023): The First Department affirmed the Supreme Court's order which granted plaintiff's motion for summary judgment on its cause of action for ejectment and to dismiss defendants' affirmative defenses. Plaintiff's decision to terminate defendant's proprietary lease for her objectionable conduct of constantly harassing her neighbors was protected by the business judgment rule. There was no indication that plaintiff acted outside the scope of its authority or other than for purposes of the cooperative, and its determination was made in compliance with the required procedure set forth in the lease. Defendant shareholder's affidavit in opposition to the motion made only speculative statements that the termination was in retaliation for her own complaints against her neighbors and her requests for a disability accommodation, and did not include evidentiary support sufficient to raise a triable issue of fact.

E. Noise Nuisance

1. *Gross v. 133 East 80th Street Corporation*, 2023 N.Y. Slip Op. 30375(U) (Sup. Ct. N.Y. Cnty. Feb. 7, 2023): In this decision, plaintiff, the owner of shares in a cooperative appurtenant to Apartment 2A, obtained a preliminary injunction against the cooperative and its retail tenant, Joe & The Juice New York LLC, from creating or allowing noise into plaintiff's apartment in excess of what is permitted under the New York City Noise Code. Plaintiff's expert's report established violations of the Noise Code, and plaintiff established all elements to obtain injunctive relief. Defendant's argument that there is no private right of action to enforce the Noise Code is unavailing because the code violations are merely offered to show likelihood of success on the common law nuisance claim.

F. Repairs/Statute of Limitations

1. *Whealon v. Gramercy Park Residence Corp.*, 2023 N.Y. Slip Op. 01155 (1st Dep't March 2, 2023): Plaintiff purchased shares for a penthouse apartment in a cooperative residential apartment owned by defendant Gramercy Park Residence Corporation. As early as 2012, Plaintiff noticed black soot staining his walls, ceilings, and several other places. Apartment renovations including installation of new windows, ducted central A/C, and a ducted HVAC return did not solve the problem. An environmental engineer opined that the source was the building's inadequately vented boiler room. In 2018, plaintiff sued the Co-op and others for breach of proprietary lease, breach of warranty of habitability, and breach of fiduciary duty. Defendants moved to dismiss the action as untimely. Affirming

the order of Supreme Court, the First Department held that plaintiff's claims seeking to recover damages to his apartment were timely as governed by the six-year statute of limitations for breach of contract because the claimed damages arise from a proprietary lease and the asserted liability had its genesis in the contractual relationship between the parties based upon that lease agreement. Plaintiff's gross negligence cause of action and claims for personal injury damages were correctly dismissed as untimely.

G. Sales/Transfers of Shares

1. *McCabe v. 511 West 232nd Owners Corp.*, 2023 N.Y. Slip Op. 01592 (1st Dep't March 23, 2023): The petitioner brought a proceeding pursuant to CPLR Article 78 to annul the determination of respondent cooperative board which declined to transfer the shares and proprietary lease for the subject cooperative unit to petitioner. Affirming Supreme Court's denial of the petition, the First Department held that the cooperative board's decision was made in furtherance of a legitimate corporate purpose, was not arbitrary and capricious or an abuse of discretion. The cooperative legitimately applied the terms of paragraph 16 of the proprietary lease to find that petitioner was not the decedent's spouse and therefore required approval by the board prior to transfer of the proprietary lease and shares of the subject unit. Based on petitioner's tax returns and financial information provided on her application to transfer such shares, the cooperative offered a legitimate, nondiscriminatory reason for denying its approval. Absent bad faith or discrimination, the board's decision is protected by the business judgment rule.

2. *Rivera v. 98-100 Avenue C Housing Development Fund Corporation*, 209 A.D.3d 616 (1st Dep't Oct. 27, 2022): Reversing the lower court's denial of summary judgment in favor of the HDFC and declaring that there was no valid *inter vivos* gift of the shares and proprietary lease for the apartment from decedent brother/cooperative shareholder to plaintiff because (1) the statute of frauds applies to the sale of stock in a housing cooperative and there was no writing to effect the transfer and (2) plaintiff's brother, the decedent, failed to follow the transfer provisions of the proprietary lease which required a written assignment of shares signed by the shareholder and the approval of defendant's board of directors to make a valid transfer of the shares to the apartment within the decedent's lifetime.

H. Shares/Statute of Frauds/Proprietary Lease/Punitive Damages

1. *Levinson v. 77 Perry Realty Corp.*, 212 A.D.3d 464 (Jan. 12, 2023): Plaintiffs, the owners of three units in a cooperative, brought action against the cooperative asserting claims for breach of contract and specific performance, alleging that cooperative owner refused to complete the sale of an area of the building's roof located directly over two of their three units. The plaintiffs also alleged that the cooperative violated Business Corporation Law § 501(c) by adopting amendments to the proprietary lease and bylaws that affected only plaintiffs by precluded them from combining all three of their units. Plaintiffs sought to amend their complaint to add a claim for punitive damages. Affirming the order of Supreme Court which granted summary judgment to defendant on plaintiffs' claims for breach of contract and specific performance, the First Department held that emails exchanged between plaintiff Levinson and defendant's managing agent did not contain all material terms of a contract of sale to satisfy the statute of frauds. Even though the email relied on by plaintiffs accepted an offer from plaintiffs to buy the roof at a specified price with a specific number of shares being issued to

plaintiffs, it said nothing about financing, terms of payment, or a closing date. Moreover, communications that followed indicated that the parties were negotiating additional terms such as additional maintenance fees, responsibility for maintaining the roof, and other issues regarding the roof structure. Further, the parties' communications showed that the parties intended to enter into a formal contract and that the board would not make a final decision until the annual shareholders' meeting. In sum, the early emails relied on by plaintiffs did not constitute a binding contract. The Court also affirmed the portion of Supreme Court's order denying plaintiffs' motion for leave to amend the complaint to add a claim for punitive damages because (1) the requirement to allege conduct directed at the public generally only applies in connection breach of contract claims; (2) plaintiffs did not plead a tort claim and the cooperative corporation does not owe a fiduciary duty to its shareholders; and (3) defendant's alleged violation of Business Corporation Law § 501(c) by adopting new by-laws and amending the proprietary lease does not meet the "very high threshold of moral culpability" necessary to award punitive damages, such as "a wanton or reckless disregard of plaintiff's rights." Accordingly, the proposed complaint amendment was "palpably insufficient or clearly devoid of merit."

I. Stock/Shares

1. *Oliver 889 LLC v. 889 Realty Inc.*, 212 A.D.3d 531 (1st Dep't Jan. 24, 2023): Plaintiff is the owner of the retail space in defendant cooperative. When plaintiff acquired full ownership of the retail space, the deal was structured as a purchase of additional cooperative shares in order to enable plaintiff to acquire the retail space at a lower up-front purchase price while agreeing to pay higher monthly maintenance. In order to avoid giving plaintiff majority voting control, the parties entered into a voting agreement that indefinitely linked together the votes allocated to 2,630 of plaintiff's shares with the votes cast by all other shareholders. Plaintiff subsequently went into arrears and commenced this action for a declaratory judgment to declare the voting agreement null and void. On appeal from Supreme Court's order on motions for summary judgment, the First Department held that Supreme Court properly determined that Business Corporation Law § 501(c) applied to defendant, a cooperative corporation that owns a mixed-use building, and that the parties' voting agreement violated the parity requirement set forth in that statute. Because the voting agreement violated the Business Corporation Law, it could not be saved by the business judgment rule. The voting agreement could not be enforced in its entirety pursuant to Business Corporation Law § 609 (Proxies) because, pursuant to Cooperative Corporations Law § 5(1)(b), Business Corporation Law § 609 does not apply to cooperatives. Assuming without deciding that Business Corporation Law § 620(a) (Agreements as to voting) does authorize cooperative corporation shareholder voting agreements, the parties' voting agreement is still not enforceable because it runs afoul of Business Corporation Law § 501(c) in that it effectively and impermissibly creates a permanent class of 2,630 nonvoting shares. However, because the voting agreement contained an unambiguous severability provision, the Supreme Court should not have determined the entire voting agreement to be void, but rather, should have voided only paragraph 1(b), the provision that effectively strips voting rights from a portion of plaintiff's shares.

J. Sweetheart Lease/Statute of Limitations/Attorneys' Fees

1. *Meadow Apartments Corp. v. S and H LLC*, 211 A.D.3d 537 (1st Dep't Dec. 15, 2022): This is an action by a residential cooperative corporation to terminate a 49-year old sweetheart lease with its sponsor for valuable parking facilities pursuant to the federal Condominium and Cooperative Abuse Relief Act, 15 U.S.C. § 3601, *et seq*. (the "Abuse Act"). Defendant successfully moved to dismiss the action as time-barred. On appeal, the First Department modified the order to deny the motion, holding that the parties' factual dispute over the assertion of defendant's principal that he sent a letter dated December 8, 1992, to plaintiff's shareholders on that date, and issues as whether the letter, even if so served, provided notice of a loss of "special developer control" pursuant to the Abuse Act, as required by the offering plan, meant that the letter did not utterly refute plaintiff's allegations or conclusively establish the statute of limitations defense. The Court also held that the Supreme Court properly denied defendant's request for attorneys' fees pursuant to the federal statute, which may be recovered by a defendant if the court determines that the cause of action filed by the plaintiff is frivolous, malicious, or lacking in substantial merit.

II.

CONDOMINIUMS

A. Bylaws

1. *Board of Managers of Van Wyck Glen Condominium v. Van Wyck at Merritt Park Homeowners Association, Inc.*, 211 A.D.3d 786 (2d Dep't Dec. 14, 2022): Plaintiff condominium boards in related condominium communities, having come under the control of the unit owners, brought suit against the sponsor-controlled homeowners association and two of its board members for declaratory relief and damages arising from the HOA's alleged failure to perform adequate maintenance of the condominiums' common elements. After settlement negotiations, the condominium homeowners held meetings at which they voted to approve an amendment to the condominiums' bylaws to remove language appointing the HOA as the "Irrevocable Managing Agent" and providing that the boards of managers would consult with the HOA for the purpose of providing uniform services and appearance within the community of related condominiums. In affirming the Supreme Court's order granting summary judgment to plaintiffs dismissing defendant's counterclaim for declaratory judgment declaring the meaning of "Irrevocable Managing Agent," the Second Department held that plaintiffs established, prima facie, that the amendments to their respective bylaws were procedurally proper, approved by 66 and 2/3% of homeowners and 51% of first mortgage holders, with the requisite filings made with the Dutchess County Clerk. The amendment of the bylaws rendered defendants' request for declaratory judgment with respect to the deleted portion of the bylaws academic, and was properly dismissed as moot. The Court also held that Supreme Court properly denied the individual defendants' motion to dismiss or for summary judgment with respect to plaintiffs' cause of action for breach of fiduciary duty arising from the HOA's alleged failure to perform maintenance and misuse of funds. The complaint alleged with sufficient particularity (1) the existence of a fiduciary relationship; (2) misconduct by the individual defendants; and (3) damages directly caused by the misconduct. Plaintiffs' allegations and defendants' denial thereof raised triable issues of fact.

B. Bylaws/Arbitration

1. *300 W 110th 19B LLC v. Argo Real Estate LLC*, 2023 N.Y. Slip Op. 30409(U) (Sup. Ct. N.Y. Cnty. Jan. 31, 2023): Plaintiff, a unit owner in the condominium, brought suit on behalf of a class of unit owners against defendants Argo Real Estate and the Board of Managers of the condominium for breach of contract and breach of fiduciary duty, claiming that defendants are leasing the condominium's parking spaces at below-market rates. Defendants moved pursuant to the condominium's bylaws to compel arbitration of plaintiff's individual claim and to dismiss the action. The court granted the motion to compel arbitration and dismissing the action without prejudice, holding that pursuant to AAA's Commercial Rules and Supplementary Rules for Class Actions, that the arbitrator has the power to rule on the scope of the arbitrator's jurisdiction to hear the claim and whether the arbitration clause permits the arbitration to proceed on behalf of or against a class.

C. Construction Defects/Managing Agent Liability

1. *The Board of Managers of 325 Fifth Avenue Condominium v. Continental Residential Holdings, LLC*, 2022 N.Y. Slip Op. 34432(U) (Sup. Ct. N.Y. Cnty. Dec. 23, 2022): This is an action by the board of managers for construction defects including failing balcony glass, railings, and concrete slabs. The Board brought breach of contract claims against defendants FirstService Project Management, LLC and FirstService Residential New York, Inc. (together, ("FSR"). The board alleged that FSR failed to timely disclose the contents of a report prepared by Howard L. Zimmerman Architects, acted in the interests of the condominium sponsor rather than building residents, and failed to properly advise the board as to construction defects that needed to be addressed. In this order, the Supreme Court granted summary judgment to FSR, finding that (1) FSR did not breach any express provision of the Management Agreement; (2) with limited exceptions not applicable to investigating or recommending repairs to original structural defects, FSR only acted at the direction of the condominium; (3) the parties intended to be bound by a separate Owner's Representative Agreement; (4) the plaintiffs did not articulate any breach of an express provision of the Owner's Representative Agreement; and (5) plaintiffs' damages stem from original construction defects, which were the responsibility of the sponsor.

D. Insurance/Defamation

1. *Salvo v. Greater New York Mutual Insurance Company*, 213 A.D.3d 587 (1st Dep't Feb. 21, 2023): A member of a condominium's board of managers was sued for defamation by another board member. In this action for declaratory judgment, the First Department, affirming the order of Supreme Court, held that plaintiff was entitled to summary judgment declaring that defendant insurance company was obligated to defend and indemnify plaintiff in the underlying defamation action notwithstanding plaintiff's four-year delay in notifying defendant of the claim. Plaintiff could not claim that her lack of knowledge was justifiable absent a showing that she made reasonably diligent efforts to ascertain the existence of alternative or additional coverage, particularly given that another carrier that had previously assumed her defense had given notice that it was disclaiming coverage but providing a defense under a reservation of rights. Nevertheless, the untimely notice did not invalidate coverage because there is no showing in the record that the delay prejudiced defendant. Defendant was deprived of the opportunity to participate in the initial investigation and litigation

of the claim, however, defendant did not explain how the prior carrier's defense of the matter materially prejudiced it. Moreover, the delay did not affect defendant's access to relevant evidence because discovery was still open at the time defendant received notice of the claim.

E. Purchases/Noise Nuisance

1. *Montgomery v. 215 Chrystie LLC*, 209 A.D.3d 587 (1st Dep't Oct. 25, 2022): affirming order which denied plaintiff's motion for a preliminary injunction to enjoin the condominium's hotel from operating its entertainment spaces at what plaintiff alleged to be unreasonable noise levels because (1) the harm to plaintiff in maintaining the status quo while awaiting trial on her claims is compensable by measurable money damages and therefore not irreparable and (2) plaintiff has not shown that the equities balance in her favor in that she purchased a unit in a condominium where one of the other units was a hotel, operating directly below her and where she was aware from the offering plan that entertainment spaces would be present in the hotel.

Scott J. Pashman, Esq.
Cozen O'Connor

2023 WL 2483687
Only the Westlaw citation is currently available.
Supreme Court, Appellate Division,
First Department, New York.

Elie **TAHARI**, Plaintiff–Respondent,

v.

860 FIFTH AVENUE CORPORATION,
et al., Defendants–Appellants.

17495
|
Index No. 654702/18
|
Case No. 2022–00578
|
Entered March 14, 2023

Attorneys and Law Firms

Cozen O'Connor, New York (Menachem J. Kastner of counsel), for appellants.

Morrison Cohen, LLP, New York (Y. David Scharf of counsel), for respondent.

Webber, J.P., Oing, Scarpulla, Mendez, Rodriguez, JJ.

Opinion

***1** Order, Supreme Court, New York County (Arthur F. Engoron, J.) entered on or about January 21, 2022, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the causes of action for violation of Business Corporation Law § 501 (first cause of action), breach of fiduciary duty against defendant 860 Fifth Avenue Corporation (the cooperative) and the board member defendants (second cause of action), fraudulent misrepresentation (third cause of action), negligent misrepresentation (fourth cause of action), declaratory judgment (sixth cause of action), and breach of fiduciary duty against defendants Jennifer Chin Dussich and Joseph Dussich (seventh cause of action), unanimously modified, on the law, to the extent of dismissing the first, second, third, and fourth causes of action, and otherwise affirmed, without costs.

The arbitration proceeding arising under the 2005 agreement does not preclude litigation of plaintiff's claims here, as plaintiff's penthouse combination project is not governed by the parties' earlier agreement containing the arbitration clause (*see Pursuit Inv. Mgt., LLC v. Alpha Beta Capital Partners, L.P.,* 127 A.D.3d 565, 565–566, 8 N.Y.S.3d 96 [1st Dept. 2015]). In any event, defendants have waived arbitration, having opted to litigate this action since 2018 (*see Poole v. West 111th St. Rehab Assoc.,* 82 A.D.3d 647, 647, 919 N.Y.S.2d 335 [1st Dept. 2011]).

As to the merits, the cause of action for violation of Business Corporation Law § 501(c) does not state a claim upon which relief may be granted, as that section is not the appropriate vehicle for redressing the kind of disparate treatment alleged in the amended complaint (*see Moltisanti v. East Riv. Hous. Corp.,* 149 A.D.3d 530, 532, 52 N.Y.S.3d 333 [1st Dept. 2017]). Plaintiff does not assert that "the terms of their lease or shares are any different from those of the other shareholders" (*id.*). Rather, the allegations here concern the negotiations regarding plaintiff's penthouse construction project, which has nothing to do with the treatment of plaintiff's shares.

Similarly, the second cause of action for breach of fiduciary duty as against the cooperative and the board member defendants also does not state a claim upon which relief may be granted. The cause of action cannot be sustained as against the cooperative "because a corporation owes no fiduciary duty to its shareholders" (*Hersh v. One Fifth Ave. Apt. Corp.,* 163 A.D.3d 500, 501, 83 N.Y.S.3d 4 [1st Dept. 2018]). Furthermore, even assuming that the cause of action was addressed to the actions taken by the individual board member defendants, it "does not allege any individual wrongdoing by the members of the board separate and apart from their collective actions" taken in their capacity as board members (*Pine St. Homeowners Assn. v. 20 Pine St. LLC,* 109 A.D.3d 733, 735–736, 971 N.Y.S.2d 289 [1st Dept. 2013]).

By contrast, plaintiff stated a claim for breach of fiduciary duty against defendants Jennifer Chin Dussich and Joseph Dussich by pleading that those defendants had a bad faith motivation for their refusal to approve plaintiff's project, basing their refusal on the impacts to their own apartment rather than on any benefit to the cooperative as a whole (*see Lorne v. 50 Madison Ave. LLC,* 65 A.D.3d 879, 880, 886 N.Y.S.2d 1 [1st Dept. 2009], *lv dismissed* 15 N.Y.3d 732, 905 N.Y.S.2d 798, 931 N.E.2d 1054 [2010]). At the pleading stage, these allegations are sufficient to overcome the business judgment rule, as plaintiff has alleged that defendants' actions were not "taken in good faith and in the exercise of honest judgment in the lawful and

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legitimate furtherance of corporate purposes" (*Matter of Levandusky v. One Fifth Ave. Apt. Corp.,* 75 N.Y.2d 530, 538, 554 N.Y.S.2d 807, 553 N.E.2d 1317 [1990] [internal quotation marks omitted]). For the same reason, plaintiff stated a cause of action for declaratory and injunctive relief requiring the cooperative to approve plaintiff's construction project on terms similar to those afforded other shareholders, particularly because defendants maintain that they are not subjecting plaintiff to disparate treatment.

***2** The causes of action for fraudulent and negligent misrepresentation are barred by CPLR 4547, which prohibits the admission of "[e]vidence of any conduct or statement made during compromise negotiations" (*see e.g. Keitel v. E*TRADE Fin. Corp.,* 153 A.D.3d 1181, 1182, 61 N.Y.S.3d 218 [1st Dept. 2017], *lv denied* 31 N.Y.3d 903, 2018 WL 1597546 [2018]). In any event, plaintiff failed to establish the element of justifiable reliance for either claim, as "opinions of ... future expectations" do not constitute statements of material fact (*Sheth v. New York Life Ins. Co.,* 273 A.D.2d 72, 74, 709 N.Y.S.2d 74 [1st Dept. 2000]).

We have considered defendants' remaining contentions and find them unavailing.

All Citations

--- N.Y.S.3d ----, 2023 WL 2483687

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2023 WL 2020051 (N.Y.Sup.), 2023 N.Y. Slip Op. 30483(U) (Trial Order)
Supreme Court of New York.
New York County

1 Martine **MANDRACCHIA, Plaintiff,

v.

RENOVATE-CREATE SOURCING AND PROCUREMENT CORP., Alan Friedberg, Imagen Architecture LLC, Cutsogeorge Tooman & Allen Architects PC, Douglas Elliman Realty LLC, Doug Elliman Property Management, 405/63 Owners' Corp, John and Jane Does 1-10, Defendants.

No. 653953/2019.
February 9, 2023.

*1 Part 37
Motion Date 08/10/2022, 08/29/2022, 09/06/2022
Motion Seq. No. 007 008 009

Decision + Order on Motion

Present: Hon. Arthur F. Engoron, Justice.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 187, 188, 191, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 300, 303, 306, 312 were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 189, 192, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 298, 301, 304, 307, 309 were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 190, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 299, 302, 305, 308, 310, 311, 313 were read on this motion for SUMMARY JUDGMENT.

To paraphrase Leo Tolstoy: all successful apartment renovations are alike; each unsuccessful apartment renovation is unsuccessful in its own way. The instant action arises from the latter sort of apartment renovation.

Background

In 2013 plaintiff, Martine **Mandracchia**, decided she wanted to “gut renovate” her apartment, Penthouse E (the “Apartment”) in the building located at 405 E. 63rd Street, New York, New York, a cooperative apartment corporation (the “Co-op”). NYSCEF Doc. No. 15. In pursuit of **2 her goal, on June 25, 2013, plaintiff signed proposal P00140 (the “Imagen Contract”) with defendant Imagen Architecture, LLC (“Imagen”) to develop renovation plans. NYSCEF Doc. No. 164.

The Imagen Contract states the intention of Imagen and its principal, non-party architect Raul G. Mederos ("Mederos"), to "work closely with [plaintiff] towards achieving [her] project objectives" including consultations, developing schematic designs, creating bidding and construction documents, and, notably, during the "construction phase," the "observation of construction in the field, the monitoring of the project construction schedule ... [this] phase shall include three field visits." NYSCEF Doc. No. 164. However, inter alia, the Imagen Contract also states that the architect "will not be required to make *exhaustive* or *continuous* on-site inspections to check quality or quantity of the work." Id. (emphasis added).

On August 4, 2013, plaintiff submitted an Alteration Agreement (the "Alteration Agreement") to the Co-op and its property manager, defendants 405/63 Owners Corp. ("405/63") and Doug Elliman Property Management ("DEPM"), seeking their approval for the plan Imagen had developed. NYSCEF Doc. No. 147. DEPM and defendant Douglas Elliman Realty LLC ("Douglas Elliman Realty") are affiliates of non-party Douglas Elliman, Inc.

***2** The Alteration Agreement describes the procedure for construction work within the Apartment and required that plaintiff submit, inter alia, a scope of the work to be done, proof of insurance, licenses for any plumbers and electricians, and an escrow deposit. Id. It also includes an acknowledgment "that by granting consent to work, [the Co-op] do[es] not profess to express any opinion as to design, feasibility or evidence of the work" and includes an indemnification clause as well as an annexed page titled "Indemnification" which indemnifies 405/63 and DEPM "from any damages or liabilities arising from the alterations in Apartment PHE." Id.

As part of its approval process, DEPM gave Imagen's plans to 405/63's architect, defendant Cutsogeorge Tooman & Allen Architects, P.C. ("CTA"), for a feasibility review in the context of the integrity of the Co-op's building structure and envelope. NYSCEF Doc. Nos. 184, 185. In a letter dated August 23, 2013, CTA provided numerous comments on Imagen's plan and ultimately did not recommend that 405/63's Board of Directors allow plaintiff to proceed. NYSCEF Doc. No. 28.

In a letter dated January 30, 2015, and after revisions by Imagen, CTA recommended that 405/63 approve plaintiff's plans. NYSCEF Doc. No. 28. CTA also approved two further revised plans in letters dated May 1, 2015, and July 16, 2016. Id.

Meanwhile, plaintiff searched for a general contractor and, in or about November 2015, hired defendant Renovate-Create Sourcing and Procurement Corp. ("Renovate-Create") and its principal, defendant Alan Friedberg ("Friedberg," collectively with Renovate-Create, "Contractor Defendants"). NYSCEF Doc. No. 15 ¶ 26. Plaintiff alleges she hired the Contractor Defendants based on the recommendation of a Co-op board member, non-party Michael Weinberg. NYSCEF Doc. No. 15 ¶ 14, 25. In an affidavit, Mr. Weinberg says any claim he recommended Friedberg is "an outright falsehood." NYSCEF Doc. No. 142.

****3** On or about January 11, 2016, a TR-1: Technical Report Statement of Responsibility ("TR-1") was filed with the New York City Department of Buildings (the "DOB") in which, inter alia, Imagen's Mederos "enlisted" himself to perform a self-certified final inspection pursuant to Directive 14 of 1975 by initialing and dating the relevant check box. NYSCEF Doc. Nos. 166, 208. In the same document Mederos affirmed that he would:

> make final inspection of the construction work, including those inspections during its progress necessary to my certification upon final inspection that all work substantially conforms to approved construction documents ... Upon completion of the work and within 30 days of my final inspection, I will file a certification attesting to the fact that all work was performed and completed in accordance with the approved construction documents, laws and rules ...

NYSCEF Doc. No. 208.

On November 15, 2017, Mederos visited the Apartment to perform a final inspection pursuant to Directive 14, which he videotaped. NYSCEF Doc. No. 166; Greener Affirmation, Exhibit 9. Mederos does not recall another inspection of the Apartment. NYSCEF Doc. No. 166.

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On or about XX/XX/2018, a new TR-1 was filed with the DOB in which Mederos asserted the final Directive 14 inspection was complete. NYSCEF Doc. No. 225. The same day PW7: Certificate of Occupancy / Letter of Completion Folder Review Request forms were filed with the DOB for the Apartment by Mederos and non-party R Consulting. NYSCEF Doc. No. 228.

In a letter generated on XX/XX/2018, the DOB informed Mederos that the work related to the Apartment was completed and signed off in the DOB's Building Information System specifically "[b]ecause this job was filed as Directive 14 ... a registered professional engineer or registered architect, who certified that he/she inspected the work approved on this application and that it complies with the applicable laws, rules and regulations." NYSCEF Doc. No. 55.

Procedural History

***3** On July 10, 2019, plaintiff commenced the instant action, seeking to recover monetary damages as a result of the allegedly substandard renovation done to the Apartment. NYSCEF Doc. No. 1. On October 17, 2019, plaintiff filed an Amended Complaint, alleging causes of action for: (1) breach of contract as against Friedberg and Renovate-Create; (2) breach of the implied covenant of good faith and fair dealing as against Friedberg and Renovate-Create; (3) negligence as against Friedberg and Renovate-Create; (4) violation of Multiple Dwelling Law ("MDL") § 78 as against DEPM, 405/63, and CTA; (5) negligence as against CTA; (6) breach of fiduciary duty as against DEPM, 405/63, and CTA; (7) breach of contract as against Imagen; and (8) negligence as against Imagen. NYSCEF Doc. No. 15.

In a Decision and Order dated June 26, 2020, pursuant to CPLR 3211, this Court dismissed the fourth and sixth causes of action as against CTA. NYSCEF Doc. No. 50.

****4** In a Decision and Order dated February 9, 2021, pursuant to CPLR 3211, this Court dismissed the complaint as against Imagen in its entirety. NYSCEF Doc. No. 71.

In a Decision and Order dated May 18, 2021, this Court, upon reargument, restored plaintiff's eighth cause of action, for negligence, as against Imagen. NYSCEF Doc. No. 95.

On August 2, 2022, DEPM, Douglas Elliman Reality, and 405/63 moved, pursuant to CPLR 3212, for summary judgment: dismissing the fourth and sixth causes of action; granting 405/63's second counterclaim and dismissing plaintiff's affirmative defenses to the same; and dismissing the complaint in its entirely as to Douglas Elliman Reality. NYSCEF Doc. No. 140. They also moved the Court to schedule a hearing for attorneys' fees, costs and disbursements. Id.

On August 11, 2022, Imagen moved, pursuant to CPLR 3212, for summary judgment dismissing all claims and crossclaims against it. NYSCEF Doc. No. 156.

Also on August 11, 2022, CTA moved, pursuant to CPLR 3212, for summary judgment dismissing the remaining cause of action against it, for professional negligence. NYSCEF Doc. No. 172.

On October 20, 2022, plaintiff cross-moved, pursuant to CPLR 3212, for summary judgment against Imagen. NYSCEF Doc. No. 194.

Discussion

In order to obtain summary judgment, the "movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law. The party opposing the motion, on the other hand, must produce evidentiary

proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests. '[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' for this purpose." Gilbert Frank Corp. v Fed. Ins. Co., 70 NY2d 966, 967 (1988) (internal citations omitted).

Douglas Elliman Realty

Defendant Douglas Elliman Realty moves to have the complaint dismissed against it in the entirety as it has no involvement with the operation or management of the Co-op, is a distinct entity from DEPM, and because the Amended Complaint fails to state any cause of action against it. NYSCEF Doc. Nos. 142 and 143.

Thus, as no causes of action are alleged against it, and without opposition, the complaint should be dismissed against Douglas Elliman Realty in its entirety.

Multiple Dwelling Law § 78

DEPM and 405/63 (collectively, the "Co-op Defendants") move for summary judgment dismissing plaintiff's fourth cause of action, for violation of MDL § 78.

****5** Pursuant to MDL § 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." See Mas v Two Bridges Assoc., 75 NY2d 680, 687-688 (1990). However, "[e]ven if the statutory duty could be said to have been imposed for the benefit of one in [plaintiff's] position, [plaintiff] might waive same." Emigrant Indus. Sav. Bank v One Hundred Eight W. Forty Ninth St. Corp., 255 AD 570, 576 (1st Dept 1938), aff'd, 280 NY 791 (1939).

***4** Here, plaintiff alleges that the Co-op Defendants were "in violation of their non delegable duty under MDL § 78" by taking "no steps to correct or amend the defects nor to direct the contractor Friedberg to correct the violations to bring the unit into conformance with the code," and are therefore liable for the cost of repairs.

Co-op Defendants argue that: none of its representatives inspected the work on Apartment "before, during, or after the Project;" MDL § 78 imports joint liability on them only if HPD had issued any violations due to conditions in the Apartment, which it did not; plaintiff's proprietary lease (the "Lease," NYSCEF Doc. No. 145) is clear that it is her duty to keep the interior of the Apartment in "good repair;" and, further, that nothing in the Lease, nor any other document, imports responsibility for plaintiff's renovation on the Co-op Defendants.

In reply plaintiff argues that the Co-op Defendants were: in control of the unit as their approval was required for the renovation; implicated by the lease because of an exception for work done on "windows, windowpanes, window frames, sashes, sills, entrance and terrace doors, frames and saddles" because part of the renovation included turning a kitchen window into a terrace door; had notice of the conditions in the apartment because a CTA representative inspected the new door on multiple occasions; and were ultimately negligent in allowing unsafe conditions in the apartment to persist and taking no steps to correct them.

The Co-op Defendants are correct, however, that in signing the Lease and Alteration Agreement plaintiff waived whatever statutory duty MDL § 78 might have imposed on the Co-op Defendants, particularly as no related violations arising from the work were issued. Maintaining the interior of the Apartment in "good repair" is the duty of plaintiff, and all of the issues in the instant action arise out of the work plaintiff's contractors did or did not do to the interior.

Thus, plaintiff's fourth cause of action, for breach of MDL § 78 as against the Co-op Defendants, should be dismissed.

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Fiduciary Duty

The Co-op Defendants move for summary judgment dismissing plaintiff's sixth cause of action, for breach of fiduciary duty.

Plaintiff alleges that the Co-op Defendants have a fiduciary duty to its shareholders "to maintain the safety of the building, and the health and safety of the tenants living there," and breached that duty to plaintiff, as a cooperative shareholder, by failing to notify her that Friedberg and ****6** Renovate-Create were not licensed contractors in New York and, also, by "approv[ing] and sign[ing] off on the job for the DOB."

The Co-op Defendants argue in response that: plaintiff has sued the wrong party by suing 405/63 rather than its Board; even if the right entity had been sued it was plaintiff's responsibility to research the contractor she hired to work on her apartment; the Co-op has a long-standing policy of not requiring general contractors working in the building to be duly licensed (only requiring that of plumbers and electricians); neither DEPM or 405/63 ever assumed any responsibility to ensure the work done by plaintiff's contractors; and that any final "signing off on the job" was done by plaintiff's architect, Imagen.

The Co-Op Defendants are correct, plaintiff's allegations of breach of fiduciary duty should have been directed at 405/63's Board of Directors and thus should be dismissed. Hyman v New York Stock Exch., Inc., 46 AD3d 335, 337 (1st Dept 2007) ("[I]t is well settled that a corporation does not owe fiduciary duties to its members or shareholders."), citing Kavanaugh v Kavanaugh Knitting Co., 226 NY 185, 194 (1919). The cause of action against DEPM should also be dismissed, as it owes no fiduciary duty to any of 405/63's individual shareholders.

***5** However, even if plaintiff *had* sued the 405/63 Board of Directors, the same result would have been reached, as nothing on the record shows the Co-op Defendants ever required that only licensed general contractors work in the building, had any duty to "warn" plaintiff that Friedberg's license had expired in 2015, or that it "signed off" on the renovation with the DOB.

Thus, plaintiff's sixth cause of action, for breach of fiduciary duty as against the Co-op Defendants, should be dismissed.

Indemnification and Attorneys' Fees

The Co-op Defendants two counterclaims seek (1) attorneys' fees and (2) indemnification from any damages or liabilities arising from the Apartment renovation.

In support of their second counterclaim the Co-op Defendants cite the indemnification clause in the Alteration Agreement (promising "to reimburse ... for any expenses [including, without limitation, attorneys' fees and disbursements] incurred as a result of such work.") and the separate, annexed, indemnification agreement (indemnifying 405/63 and DEPM "from any damages or liabilities arising from the alterations in Apartment PHE").

Plaintiff argues in reply that: the Alteration Agreement and its indemnification clause were not signed by defendants and is therefore unenforceable; the separate indemnification agreement, which only required plaintiff's signature, was a part of the Alteration Agreement and therefore is not valid; and, in any event, the indemnification agreements only cover third-party negligence and not the Co-op Defendant's own negligence, which is what plaintiff alleges in her fourth and sixth causes of action.

Here, as the Co-op Defendants are not liable for breach of either MDL § 78 or fiduciary duty to plaintiff, *supra*, and as plaintiff signed the "indemnification" page annex to the Alteration ****7** Agreement that did not have a space for another party's signature, the Co-op Defendant's second counterclaim for indemnification should be granted.

Further, as no causes of action remain against the Co-op Defendants, and as they are indemnified by plaintiff, their first crossclaim, for attorneys' fees, should be scheduled for an inquest.

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CTA Negligence

CTA moves for summary judgment dismissing plaintiff's fifth cause of action, for negligence.

Plaintiff alleges that because she could not renovate her apartment without CTA approval to the 405/63 Board, and because CTA was "intimately involved in reviewing" those plans, and because CTA was obligated to (and did) inspect the work to ensure compliance, and because it "signed off on the job as being finished," CTA acted negligently.

In opposition, CTA argues that it does not owe plaintiff any duty, as there is no privity between them, nor is there the functional equivalent of privity, as there is no contract between CTA and any of the parties responsible for plaintiff's renovation.

Plaintiff in response argues that nothing has changed since this Court found, in its Decision and Order dated June 26, 2020, that a lack of privity here does not preclude a negligence claim against CTA, as there are still triable issues of fact as to CTA's level of control of the renovation. Plaintiff also argues that CTA negligently failed to use due care in ensuring that the renovation plans submitted by Imagen for its approval were code complaint, and cites the affidavit of Lazar Kesic, a registered architect in New York, who asserts that CTA "should not have allowed the building plans to be filed as numerous issues in the plans were not complian with DOB Codes." NYSCEF Doc. No. 34

***6** In reply CTA reiterates that it owned no duty to CTA and, further, that because plaintiff is seeking damages for economic loss only, and is *not* claiming property damage, this cause of action sounding in tort should be dismissed. To show a lack of privity, CTA compares plaintiff's relationship with Imagen, and points to plaintiff's own admissions that CTA was 405/63's architect for compliance review as it related to the architectural integrity of the building only, that CTA only billed 405/63 for its work, and that plaintiff never spoke with CTA about the project. NYSCEF Doc. No. 183, 184.

Here, because there was no privity between plaintiff and CTA, as plaintiff was clearly not the intended beneficiary of CTA's relationship with 405/63, and because CTA's reviews of Imagen's plans were for the purpose of ensuring the integrity of the Co-op only (while code compliance was the purview of the Architect of Record, Mederos of Imagen), and because CTA's inspections of the Apartment were directly related to, and only involved, the replacement of a window with a door (entirely in its purview of monitoring the integrity of the Co-op's envelope and waterproofing), CTA's motion for summary judgment dismissing plaintiff's fifth cause of action should be granted. Further, even if the foregoing were not true, plaintiff's cause of action for negligence seeking only economic loss would necessarily require dismissal. 7 World Trade Co. v Westinghouse Elec. Corp., 256 AD2d 263, 264 (1st Dept 1998) ("Because ****8** plaintiffs allege losses of only an economic nature ... plaintiffs were not entitled to maintain an action for negligence and strict liability in the absence of allegations of bodily injury or damage to property.")

Therefore, plaintiff's fifth cause of action, for negligence, should be dismissed.

Imagen Negligence

Imagen moves for summary judgment dismissing plaintiff's eighth cause of action, for negligence.

Plaintiff alleges that Imagen and Mederos had a duty of care, which they breached, to her both as professional architects and as the self-designated Directive 14 architect responsible for self-certifying after a final inspection.

Imagen now argues for dismissal because: the damages to the Apartment alleged in the complaint were caused by the Contractor Defendants and not Imagen; the Imagen Contract says Imagen was not hired to perform contractor supervision; and because an affidavit of registered architect Anthony DiProperzio (NYSCEF Doc. No. 169) "establishes that the damages allegedly incurred to the Apartment are a result of workmanship-related issues."

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In reply, plaintiff argues that: Imagen has failed to show there are no material triable issues of facts in the case; Imagen and Mederos, as the Architect of Record and the Directive 14 signatory, had a statutory obligation to inspect the Apartment; Imagen and Mederos not only failed to live up to their statutory obligations, but also misled the Court about them; and because the affidavit of registered architect Lazar Kesic states that Imagen's failure to inspect was a proximate cause of plaintiff's damages.

As the parties' voluminous papering and dueling architect affidavits make clear, material triable issues of fact remain as to Imagen and Mederos' obligations, pursuant to both the Imagen Contract and the TR-1, to inspect the Apartment, and whether they were a proximate cause of plaintiff's alleged damages.

Therefore, the motion of Imagen and the cross-motion of plaintiff for summary judgment on the eighth cause of action, for negligence, should be denied.

The Court has considered the parties' other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

***7** Therefore, it is hereby ordered that: the motion of defendants Doug Elliman Property Management, Douglas Elliman Realty, LLC, and 405/63 Owners Corp. for summary judgment is granted; the motion of defendant Cutsogeorge Tooman & Allen Architects, P.C., for summary judgment is granted; and the motion of defendant Imagen Architecture, LLC, and cross-motion of plaintiff Martine **Mandracchia** for summary judgment is denied. Accordingly, the Clerk is ****9** hereby ordered to enter judgment: dismissing the complaint in its entirety as against Douglas Elliman Realty, LLC; dismissing the fourth and sixth causes of action against Doug Elliman Property Management and 405/63 Owners Corp.; and dismissing the fifth cause of action against Cutsogeorge Tooman & Allen Architects, P.C..

It is further ordered that 405/63 Owners Corp.'s first counterclaim, for attorneys' fees, is hereby severed, and it may obtain an inquest into said fees by presenting the Clerk with a Note of Issue with Notice of Inquest, a copy of this Decision and Order, and any necessary fees. Defendant must file such Note of Issue within 30 days from the date of this Decision and Order, and failure to do so timely shall result in automatic disposal of this action. Defendant is further directed, within 15 days of filing the Note of Issue, to contact the Part 37 Clerk at 646-386-3222 to schedule the inquest date.

2/9/2023

DATE

<<signature>>

ARTHUR F. ENGORON, J.S.C.

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2022 WL 4110209 (N.Y.Sup.), 2022 N.Y. Slip Op. 33018(U) (Trial Order)
Supreme Court of New York.
New York County

**1 131 PERRY STREET APARTMENT CORPORATION, Plaintiff,

v.

Robert CLAUSER, Defendant.

No. 155397/2022.
September 8, 2022.

*1 Part 14
Motion Date 08/31/2022
Motion Seq. No. 001

Decision + Order on Motion

Present: Hon. Arlene P. Bluth, Justice.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 were read on this motion to/for DISMISS.

The motion by defendant to dismiss is granted.

Background

Plaintiff, a co-op, brings this case concerning responsibility for the repair/maintenance of custom-made French doors located in defendant's apartment. The problem with the doors caused a leak to the apartment below.

In 1998, a previous owner of the subject apartment (Kim Dempster) entered into an agreement with plaintiff in which she was permitted to install the doors ("Atrium Doors") but was required to provide for their long-term maintenance.

The agreement provided that "your acceptance of responsibility for this alteration is binding on all future purchasers of the shares allocated to your apartment. No transfer or cancellation of your proprietary lease shall be permitted unless you are in full compliance with this consent" (NYSCEF Doc. No. 9, ¶ 7).

**2 Plaintiff contends that defendant purchased the shares of stock and entered into the relevant proprietary lease for this apartment in 2003. It argues that he assumed all responsibility for the long-term maintenance and integrity of the Atrium Doors under the terms of the agreement with Ms. Dempster. Plaintiff maintains that in September 2021, heavy rainfall penetrated the Atrium Doors and caused substantial flooding in the building, including the unit directly below defendant's apartment.

Plaintiff contends that its architect looked at the Atrium Doors and found that they needed extensive repairs in order to prevent future flooding issues. It claims that defendant has refused to perform the required maintenance and repairs and is therefore violating the terms of the agreement signed by Ms. Dempster.

Defendant moves to dismiss and asserts that the Atrium Doors were installed by a previous unit owner and he did not sign any agreement with plaintiff that requires him to fix the doors. He complains that plaintiff has charged him over $13,000 in

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additional rent and threatened his leasehold. Defendant argues that plaintiff has suggested defendant will be responsible for additional repairs that could exceed $80,000.

Defendant insists that he never signed the agreement to maintain the Atrium Doors and that his proprietary lease requires plaintiff to maintain the windows. He questions how he can assume liability pursuant to an agreement to which he did not sign.

In opposition, plaintiff claims that defendant was aware of the agreement with Dempster as far back as 2004 and purportedly acknowledged his obligation under the agreement. It claims that defendant only recently started claiming that he did not have to fix the problem. Plaintiff argues that the proprietary lease does not require plaintiff to fix equipment or fixtures installed by the lessee or a predecessor and that plaintiff must only fix *standard* windows and doors. ****3** Plaintiff maintains that the $13,000 it charged to defendant was for hiring a contractor to install an exterior tarp over the doors after defendant refused to fix the issue.

***2** In reply, defendant admits that there were certain window repairs done in 2004 and that he asked plaintiff to do the repairs and plaintiff refused. He insists that he just paid for it because it was only a few hundred dollars. Defendant emphasizes that he does not recall receiving the agreement between Dempster and plaintiff in 2004.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the [pleading] as true, accord [the proponent of the pleading] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994] [citations omitted]). "At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141, 75 NE3d 1159 [2017] [citation and internal quotations omitted]).

On a "motion to dismiss on the ground that the action is barred by documentary evidence, such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law"(*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

Plaintiff brings four causes of action: for declaratory relief that the terms of the agreement between Dempster and plaintiff are binding on defendant, injunctive relief that defendant take all actions to maintain the doors in the future, breach of contract under the terms of the Dempster agreement, and legal fees under the terms of the proprietary lease.

****4** The Court dismisses this action. "[G]enerally only parties in privity of contract may enforce terms of the contract" (*Freeford Ltd. v Pendleton*, 53 AD3d 32, 38, 857 NYS2d 62 [1st Dept 2008] [citation omitted]). There is no dispute that defendant never signed the agreement between Dempster and plaintiff. Plaintiff's claim, that somehow a party who did not sign an agreement containing express maintenance obligations is bound by such an agreement indefinitely is without merit.

The Court questions why plaintiff did not make defendant sign the agreement when he took ownership of the shares for the subject unit (If plaintiff did, then no proof whatsoever was submitted to the Court). Clearly, plaintiff thought the agreement was necessary; that is why it made Dempster enter into the agreement and it should have made sure that defendant acknowledged the obligations that plaintiff now seeks to make defendant follow. In fact, the Dempster agreement notes that she could not transfer or cancel the proprietary lease "unless you are in compliance with this consent" (NYSCEF Doc. No. 9, ¶ 7). That suggests that plaintiff could have stopped transfer of the apartment until a purchaser acknowledged that he or she was responsible for maintaining the Atrium Doors.

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Plaintiff's reliance on casual references to the agreement is not enough, in this Court's view, to bind defendant to a substantial financial obligation. That defendant apparently received the agreement (although he does not recall) in 2004 makes no difference because plaintiff, once again, did not make defendant sign this agreement. And under the terms of the proprietary lease, plaintiff is responsible to repair and maintain "windows, window panes, window frames, sashes, sills, entrance and terrace doors, frames and saddles" (NYSCEF Doc. No. 6, ¶ 18). The Atrium Doors in question clearly fall under that definition, as something that plaintiff has to repair.

***3** ****5** Plaintiff's reliance on paragraphs four and twenty-one of the proprietary lease does not change the Court's conclusion because it misses the point. Paragraph four deals with damage to the apartment while paragraph twenty-one concerns alterations and removal of fixtures. The Court recognizes that paragraph four does assert that plaintiff is not responsible to repair any fixtures installed by a lessee or any of the lessee's predecessors. The issue for this Court is that the instant complaint alleges causes of action solely based on the Dempster agreement- this complaint does not seek relief under paragraph four of the proprietary lease. The complaint wants a declaration that defendant is bound by the Dempster agreement, injunctive relief going forward based on the Dempster agreement and breach of that Dempster agreement. The only reference to the proprietary lease is plaintiff's claim for legal fees. And this Court is unable to find that plaintiff is bound by an agreement he never signed.

Defendant's decision to just pay for some window repairs in 2004 does not foreclose his ability to assert here that plaintiff must cover these expenses. A single event does not modify the proprietary lease or bind him to the Dempster agreement.

Summary

The central issue in this case, as framed by the instant complaint, is whether defendant is bound to follow the obligations of an agreement he did not sign. While the Dempster agreement clearly tried to impose obligations on subsequent purchasers of the apartment, this Court cannot enforce an agreement on someone who is not a party to it. As stated above, plaintiff should have clearly made defendant sign the agreement when he acquired the shares or include a provision in all proprietary leases that purchasers are bound by all agreements signed by previous owners. That would, at the very least, encourage both plaintiff and buyers to investigate these types of ****6** agreements. Instead, plaintiff is attempting to make defendant expend significant resources to repair the issue based on an agreement he was not aware of when he acquired the apartment.

The implications of binding a non-party, such as plaintiff, are obvious. What if the agreement required defendant to make substantial payments to plaintiff? How could the Court bind plaintiff to such a bargain where he didn't sign the agreement? That is exactly what is happening here. Plaintiff is attempting to pass the costs of repairs onto defendant based on an agreement he never signed.

Typically, non-signatories to contracts attempt to enforce agreements as third-party beneficiaries (*see e.g., Marino v Dwyer-Berry Const. Corp.*, 193 AD2d 654, 597 NYS2d 466 [2d Dept 1993]). In such instances, the plaintiff is the non-signatory and seeks relief under a contract signed by the defendant. Here, the situation is different. Plaintiff, a signatory, tries to bind defendant to an agreement he never signed and make him pay for the associated repair costs. That situation cannot withstand principles of contract. Plaintiff cannot breach or be bound by a contract he never signed, had knowledge of, benefitted from or ratified.

Because the proprietary lease has a provision requiring that a lessee pay legal fees, defendant is also entitled to legal fees under the Real Property Law. Defendant shall make a separate motion for legal fees on or before September 23, 2022.

Nothing in this decision precludes plaintiff from bringing another action based on the proprietary lease; this decision granting the motion to dismiss is based on the instant complaint which limits itself to the agreement with Dempster. Plaintiff did not cross-move to amend the complaint to include a claim under the applicable provision of the proprietary lease.

Accordingly, it is hereby

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**7 ORDERED that the motion by defendant to dismiss the instant complaint is granted, the complaint is dismissed and the Clerk is directed to enter judgment in favor of defendant and against plaintiff along with costs and disbursements upon presentation of proper papers therefor; and it is further

*4 ORDERED that defendant is entitled to reasonable legal fees and that issue is severed and defendant must make a motion for legal fees on or before September 23, 2022.

9/8/2022

DATE

<<signature>>

ARLENE P. BLUTH, J.S.C.

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211 A.D.3d 771
Supreme Court, Appellate Division,
Second Department, New York.

Joan A. Moo YOUNG, appellant,
v.
101 OLD MAMARONECK ROAD OWNERS CORP., et al., respondents, et al., defendants.

2020–01298
|
(Index No. 57263/19)
|
Argued—September 29, 2022
|
December 7, 2022

Synopsis

Background: Owner of cooperative apartment unit brought declaratory and injunctive relief action against cooperative, its board of directions, and their former counsel and transfer agent, alleging conversion, estoppel, breach of fiduciary duty, and tortious interference with contract, and negligence. The Supreme Court, Westchester County, Charles D. Wood, J., granted cooperative, board of directors, former counsel, and transfer agent's motion to dismiss for failure to state a claim. Owner appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] owner failed to state a claim of negligence against former counsel and transfer agent, and

[2] owner failed to adequately allege that cooperative or its board of directors breached any duty owed to owner, as required to overcome business judgment rule.

Affirmed as modified.

Procedural Posture(s): On Appeal; Motion for Declaratory Judgment; Motion to Dismiss for Failure to State a Claim.

West Headnotes (5)

[1] Pretrial Procedure Insufficiency in general

On motion to dismiss for failure to state cause of action, standard is whether pleading states cause of action. N.Y. CPLR § 3211(a)(7).

[2] Attorneys and Legal Services Adverse parties and counsel

Common Interest Communities Purchase Contract, Assignment of Proprietary Lease, and Other Transfers

Owner of cooperative apartment unit failed to state a claim for negligence against former counsel and transfer agent in assisting owner in transferring shares in the apartment unit to owner's name from her deceased father's name, where owner's complaint did not allege or evince facts that would have established former counsel or transfer agent's relationship of privity or near-privity with owner arising from their actions on behalf of cooperative board of directors, and her complaint did not contain any specific allegations that would have placed her within an exception to privity requirement.

[3] Attorneys and Legal Services Privity in general

Absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties not in privity, or near-privity, for harm caused by professional negligence.

[4] Common Interest Communities Governing board; members, directors, and officers; committees

In context of cooperative dwellings, business judgment rule provides that court should defer to cooperative board's determination so long as board acts for purposes of cooperative, within scope of its authority and in good faith.

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[5] Common Interest Communities Governing board; members, directors, and officers; committees

Owner of cooperative apartment unit failed to adequately allege that cooperative and its board of directors breached any duty owed to her, as required to overcome business judgment rule, and thus, owner failed to state a cause of action for conversion, estoppel, breach of fiduciary duty, tortious interference with contract, and negligence against cooperative and its board of directors, where owner did not allege or evince any facts that would have supported a finding that cooperative or its board of directors acted without authority or in bad faith.

Attorneys and Law Firms

Joan A. Moo Young, White Plains, NY, appellant pro se.

Marin Goodman, LLP, Harrison, NY (Russell S. Jamison of counsel), for respondents **101 Old Mamaroneck** Road Owners Corp. and **101 Old Mamaroneck** Road Owners Corp.'s Board of Directors, Officers & Agents (Unnamed Defendants).

Bleakley Platt & Schmidt, LLP, White Plains, NY (Adam Rodriguez and Susan E. Galvão of counsel), respondent pro se and for respondent James W. Glatthaar.

ANGELA G. IANNACCI, J.P., REINALDO E. RIVERA, JOSEPH A. ZAYAS, JANICE A. TAYLOR, JJ.

****225** DECISION & ORDER

***772** In an action, inter alia, for declaratory and injunctive relief, the plaintiff appeals from an order of the Supreme Court, Westchester County (Charles D. Wood, J.), dated January 2, 2020. The order granted the motion of the defendants Bleakley Platt & Schmidt, LLP, and James W. Glatthaar pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against them and, in effect, granted that branch of the motion of the defendants **101 Old Mamaroneck** Road Owners Corp. and **101 Old Mamaroneck** Road Owners Corp.'s Board of Directors, Officers & Agents (Unnamed Defendants) which was pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against them.

ORDERED that the order is modified, on the law, by deleting the provision thereof, in effect, granting that branch of the motion of the defendants **101 Old Mamaroneck** Road Owners Corp. and **101 Old Mamaroneck** Road Owners Corp.'s Board of Directors, Officers & Agents (Unnamed Defendants) which was pursuant to CPLR 3211(a) to dismiss so much of the complaint as sought declaratory relief against them, and adding thereto a provision deeming that branch of the motion to be for a declaratory judgment in favor of those defendants, and thereupon granting that branch of the motion; as so modified, the order is affirmed, with one bill of costs to the respondents, and the matter is remitted to the Supreme Court, Westchester County, for the entry of a judgment in accordance herewith.

In late 1992, the plaintiff and her father entered into a contract for the purchase of shares in the defendant **101 Old Mamaroneck** Road Owners Corp. referable to a cooperative apartment unit in White Plains. The plaintiff is an attorney, and she represented herself and her father during the transaction. At the closing in 1993, the plaintiff and her father allegedly stated that they intended to take title as joint tenants with rights of survivorship, and they indicated as much in the appropriate field of their mortgage application. The defendant **101 Old Mamaroneck** Road Owners Corp.'s Board of Directors, Officers & Agents (Unnamed Defendants) (hereinafter the Board) issued a stock certificate (hereinafter the 1993 certificate) to the plaintiff and her father, but it contained no language indicating that they were joint tenants with rights of survivorship.

The plaintiff's father died in 1997, survived by the plaintiff, his other three children, and the plaintiff's stepmother, from whom the father was either estranged or divorced. The plaintiff thereafter requested that the Board reissue the subject shares in her name alone, allegedly on the ground that she was the ***773** "surviving joint tenant," to enable her to obtain a second mortgage. On September 16, 2004, the Board issued a replacement stock certificate naming the plaintiff as the sole owner of the shares (hereinafter the 2004 certificate), ****226** but only after the plaintiff supplied proof that her siblings waived any interest they may have had in the apartment.

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In early 2017, the plaintiff entered into a contract with a third party for the sale of the shares referable to her apartment. The Board approved the sale on May 3, 2017, but reversed itself less than a week later, allegedly explaining, among other things, that it viewed the 1993 certificate as conveying a tenancy in common, it considered the 2004 certificate to be invalid, and it would not consent to a sale unless a court-appointed representative of the plaintiff's father's estate authorized the transfer of the estate's interest in the shares represented by the 1993 certificate. The plaintiff sought to obtain such authorization by commencing a proceeding in the Surrogate's Court, but she then discovered a Medicaid recovery lien against her stepmother's estate that might encumber her father's estate's interest in the subject shares. Unable to locate proof that her father and stepmother had divorced prior to 1993, the plaintiff discontinued the Surrogate's Court proceeding.

In May 2019, the plaintiff commenced this action in the Supreme Court against, among others, the Board and **101 Old Mamaroneck** Road Owners Corp. (hereinafter together the co-op defendants), as well as the co-op defendants' former counsel and transfer agent, Bleakly Platt & Schmidt, LLP (hereinafter BPS), and James W. Glatthaar, who served in various capacities on the Board and as an employee of BPS. The complaint purported to assert causes of action against the co-op defendants sounding in conversion, estoppel, breach of fiduciary duty, and tortious interference with contract, and a cause of action against all defendants sounding in negligence. The complaint sought, inter alia, compensatory damages against all defendants and declaratory and injunctive relief against the co-op defendants that would, in effect, require them to recognize the validity of the 2004 certificate.

BPS and Glatthaar moved pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against them. They argued, among other things, that the complaint failed to state a cause of action against them sounding in negligence because it did not allege any duty owed by them to the plaintiff. The co-op defendants separately moved, inter alia, pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted ***774** against them. They argued, among other things, that the business judgment rule precluded liability for any of their allegedly wrongful actions underlying the causes of action identified in the complaint. In an order dated January 2, 2020, the Supreme Court granted the motion of BPS and Glatthaar and, in effect, granted that branch of the motion of the co-op defendants which was pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against them, concluding that the complaint should be dismissed pursuant to CPLR 3211(a)(7) for failure to state a cause of action. The plaintiff appeals.

[1] "On a motion to dismiss pursuant to CPLR 3211(a)(7), 'the standard is whether the pleading states a cause of action' " (*Houtenbos v. Fordune Assn., Inc.,* 200 A.D.3d 662, 663, 160 N.Y.S.3d 57, quoting *Sokol v. Leader,* 74 A.D.3d 1180, 1180–1181, 904 N.Y.S.2d 153). In considering such a motion, "the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Phillips v. Taco Bell Corp.,* 152 A.D.3d 806, 807, 60 N.Y.S.3d 67; *see* ***227** *Leon v. Martinez,* 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Houtenbos v. Fordune Assn., Inc.,* 200 A.D.3d at 663, 160 N.Y.S.3d 57; *Sokol v. Leader,* 74 A.D.3d at 1181, 904 N.Y.S.2d 153). Nonetheless, "conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss" (*Godfrey v. Spano,* 13 N.Y.3d 358, 373, 892 N.Y.S.2d 272, 920 N.E.2d 328; *see* *Matter of Kenneth Cole Prods., Inc., Shareholder Litig.,* 27 N.Y.3d 268, 278, 32 N.Y.S.3d 551, 52 N.E.3d 214).

[2] **[3]** The Supreme Court properly granted the motion of BPS and Glatthaar pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against them. "Absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties not in privity, or near-privity, for harm caused by professional negligence" (*Hinnant v. Carrington Mtge. Servs., LLC,* 172 A.D.3d 827, 829, 100 N.Y.S.3d 69; *see* *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.,* 5 N.Y.3d 582, 595, 808 N.Y.S.2d 573, 842 N.E.2d 471). Here, the complaint and the supporting documentation attached thereto did not allege or evince any facts that would establish a relationship of privity or near-privity with the plaintiff arising from the actions of BPS and Glatthaar as transfer agent on behalf of the Board, or any involvement by those defendants whatsoever in the Board's treatment of the plaintiff's shares in 2017. Furthermore, the complaint does not contain specific allegations that would place the plaintiff within an exception to the privity

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requirement (*see AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.,* 5 N.Y.3d at 595, 808 N.Y.S.2d 573, 842 N.E.2d 471).

***775** **[4]** **[5]** The Supreme Court also properly granted that branch of the co-op defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against them to the extent that it sought damages and injunctive relief. "In the context of cooperative dwellings, the business judgment rule provides that a court should defer to a cooperative board's determination so long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith" (*40 W. 67th St. v. Pullman,* 100 N.Y.2d 147, 153, 760 N.Y.S.2d 745, 790 N.E.2d 1174 [internal quotation marks omitted]; *see Matter of Levandusky v. One Fifth Ave. Apt. Corp.,* 75 N.Y.2d 530, 538, 554 N.Y.S.2d 807, 553 N.E.2d 1317; *Matter of Cohan v. Board of Directors of 700 Shore Rd. Waters Edge, Inc.,* 108 A.D.3d 697, 699, 969 N.Y.S.2d 547). Here, the complaint and the supporting documentation attached thereto did not allege or evince any facts that would support a finding that the co-op defendants acted without authority or in bad faith. Instead, at most, the complaint made only conclusory allegations in that regard (*see Patel v. Gardens at Forest Hills Owners Corp.,* 181 A.D.3d 611, 613, 120 N.Y.S.3d 354; *Cohen v. Kings Point Tenant Corp.,* 126 A.D.3d 843, 845, 6 N.Y.S.3d 93). Accordingly, the complaint failed to adequately allege that the co-op defendants breached any duty, as adjusted by the business judgment rule (*see 40 W. 67th St. v. Pullman,* 100 N.Y.2d at 154–155, 760 N.Y.S.2d 745, 790 N.E.2d 1174), that was owed to the plaintiff, and thus failed to state a cause of action sounding in conversion, estoppel, breach of fiduciary duty, tortious interference with contract, or negligence. Furthermore, since her allegations were not sufficient to overcome the business judgment rule, the plaintiff was not entitled to the declaratory relief sought in the complaint.

The parties' remaining contentions either need not be reached in light of our determination or are without merit.

****228** Since this is, in part, a declaratory judgment action, we remit the matter to the Supreme Court, Westchester County, for the entry of a judgment, inter alia, making appropriate declarations in favor of the co-op defendants (*see Lanza v. Wagner,* 11 N.Y.2d 317, 334, 229 N.Y.S.2d 380, 183 N.E.2d 670; *Park Slope Auto Ctr., Inc. v. Papa,* 190 A.D.3d 754, 757, 139 N.Y.S.3d 641; *North Oyster Bay Baymen's Assn. v. Town of Oyster Bay,* 130 A.D.3d 885, 889–890, 16 N.Y.S.3d 555).

IANNACCI, J.P., RIVERA, ZAYAS and TAYLOR, JJ., concur.

All Citations

211 A.D.3d 771, 180 N.Y.S.3d 224, 2022 N.Y. Slip Op. 06955

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212 A.D.3d 540
Supreme Court, Appellate Division,
First Department, New York.

RIVERCROSS TENANTS'
CORP., Plaintiff–Respondent,
v.
Kathleen KOVACH, Defendant–Appellant.

17173
|
Index No. 161789/19
|
Case No. 2022–01313
|
Entered January 24, 2023

Attorneys and Law Firms

Grimble & LoGuidice, LLP, New York (Robert Grimble of counsel), for appellant.

Warshaw Burstein, LLP, New York (Bruce H. Wiener of counsel), for respondent.

Kapnick, J.P., González, Mendez, Shulman, Higgitt, JJ.

Opinion

***540** Order, Supreme Court, New York County (James D'Auguste, J.), entered October 14, 2021, which granted plaintiff's motion for summary judgment on its cause of action for ejectment and to dismiss defendant's affirmative defenses, unanimously affirmed, without costs.

***541** The court correctly granted plaintiff summary judgment on its ejectment cause of action, as plaintiff's decision to terminate defendant's proprietary lease for her objectionable conduct of constantly harassing her neighbors was protected by the business judgment rule (*see 40 West 67th Street Corp. v. Pullman,* 100 N.Y.2d 147, 153–154, 760 N.Y.S.2d 745, 790 N.E.2d 1174 [2003]; *1050 Tenants Corp. v. Lapidus,* 39 A.D.3d 379, 382–383, 835 N.Y.S.2d 68 [1st Dept. 2007], *lv denied* 9 N.Y.3d 807, 843 N.Y.S.2d 536, 875 N.E.2d 29 [2007]). There is no indication that plaintiff acted outside the scope of its authority or other than for the purposes of the cooperative, and its determination was made in compliance with the required procedure set forth in the lease (*see Trump Plaza Owners, Inc. v. Weitzner,* 61 A.D.3d 480, 480, 877 N.Y.S.2d 271 [1st Dept. 2009]). While defendant contends that the termination of her tenancy was in retaliation for her own complaints against her neighbors and her requests for a disability accommodation, she offers no evidentiary support for this claim aside from speculative statements in her affidavit in opposition to plaintiff's motion. Thus, there is no indication of bad faith warranting closer review of plaintiff's determination. Nor did defendant refute any of the allegations of objectionable conduct such that a triable issue of fact is raised.

Defendant's affirmative defenses were correctly dismissed in the absence of any evidence submitted by defendant to demonstrate their merits (CPLR 3211[b]).

All Citations

212 A.D.3d 540, 180 N.Y.S.3d 532 (Mem), 2023 N.Y. Slip Op. 00285

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2023 WL 1800981 (N.Y.Sup.), 2023 N.Y. Slip Op. 30375(U) (Trial Order)
Supreme Court of New York.
New York County

****1** Grecia GROSS, Plaintiff,

v.

133 EAST 80TH STREET CORPORATION, Joe & The Juice New York LLC, Defendants.

No. 155888/2022.
February 7, 2023.

***1** Part 47
Motion Date N/A
Motion Seq. No. 001

Decision + Order on Motion

Present: Hon. Paul A. Goetz, Justice.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 28, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 84, 85, 87, 88, 89, 90, 91, 92 were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

In this residential real estate action, plaintiff Grecia Gross moves for a preliminary injunction enjoining defendants 133 East 80th Street Corporation (the building) and Joe & The Juice New York LLC (Joe & The Juice or store) from creating or allowing noise into plaintiff's apartment in excess of what is permitted under the New York City Noise Code. By order dated July 21, 2021, this court granted plaintiff's request for a temporary restraining order, which sought the same relief as the underlying motion (NYSCEF Doc No 22).

BACKGROUND

Plaintiff owns shares of stock in the building corporation appurtenant to cooperative apartment 2A (the apartment) and is also the lessee under a proprietary lease (Gross Aff at ¶ 1, NYSCEF Doc No 3). The building is located on the corner of Lexington Avenue and is directly above the 4/5/6 subway line (Schmidt Aff at ¶¶ 13-14, NYSCEF Doc No 65). The apartment is located directly above a ground floor commercial space leased to defendant Joe & The Juice since February 2018 (NYSCEF Doc No 3 at ¶ 2; NYSCEF Doc No 65 at ¶ 6). Joe & The Juice is ****2** a coffee shop / juice bar, which utilizes blenders and coffee grinders as necessary components of their business (NYSCEF Doc No 3 at ¶¶ 3-5).

Since October 2018, plaintiff asserts that her apartment has been "plagued with excessive, disruptive noise from" Joe & The Juice consisting of "incredibly loud bass music, excessive banging, and extremely loud whining machine noises . . . *nearly every single morning*" from approximately 7:00 a.m. until after 9:00 p.m. (NYSCEF Doc No 3 at ¶ 5 [emphasis in original]). Plaintiff alleges the noise prevents her from being able to sleep or rest, make telephone calls, and causes her headaches, undue stress, and anxiety (*id*.). Plaintiff sought to address the issue by speaking with the store's employees, requesting remedial efforts by the board of the corporation, and hiring an acoustical consulting service company, Acoustilog Inc. (Acoustilog), to perform sound testing and acoustical recordings from April 1, 2022 through April 11, 2022 (Fierstein Aff, at ¶¶ 11-15, NYSCEF Doc No 13).

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Acoustilog's findings, submitted by affidavit of Alan Fierstein, Acoustilog's president, confirmed that the excessive noise plaintiff alleged hearing came from the store below and was "likely caused by a lack of sufficient soundproofing in the [b]uilding's commercial space" (NYSCEF Doc No 3 at ¶ 38). It additionally found that the noise is sporadic and unpredictable which can cause a "startle effect" that is more than just a matter of annoyance (*id*. at ¶ 39). Since the Acoustilog report came out, Joe & The Juice claims it has taken measures to reduce the noise coming from its store (*see* NYSCEF Doc No 65 at ¶ 29). Nevertheless, the noise continues to emanate from Joe & The Juice and Acoustilog outlines a series of additional steps that should be considered by defendants to ensure the issue is resolved (Fierstein Reply Aff at ¶ 58, NYSCEF Doc No 87).

***2** ****3** Plaintiff argues that all of the elements for a preliminary injunction are met: (1) she has demonstrated a likelihood of success on the merits for all three causes of action (nuisance, breach of contract, and breach of the warranty of habitability); (2) she will suffer irreparable harm if the preliminary injunction is not granted; and (3) the balance of equities tips in her favor. Defendants argue that plaintiff does not have standing to demand the relief sought because there is no private right to adjudicate Noise Code violations and she cannot demonstrate the necessary elements for the issuance of a preliminary injunction.

DISCUSSION

It is well-established that a preliminary injunction will only be issued if plaintiff demonstrates, with convincing evidentiary support, a likelihood of success on the merits, irreparable injury absent granting of a preliminary injunction, and that a balancing of equities favors its position (CPLR § 6301; *Nobu Next Door, LLC v. Fina Arts Housing, Inc.*, 4 N.Y.3d 839, 840 [2005]; *LAIG v. Medanito S.A.*, 130 A.D.3d 466 [1st Dept 2015]). Here, plaintiff has met all of these elements. *Likelihood of Success on the Merits*

To establish a likelihood of success on the merits, "a prima facie showing of a reasonable probability of success is sufficient; actual proof of the petitioners' claims should be left to a full hearing on the merits" (*Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d 430, 431 [1st Dept 2016] [internal quotations omitted]). "A likelihood of success on the merits may be sufficiently established even where the facts are in dispute and the evidence need not be conclusive (*id*.; *see also* CPLR 6312 § [c] [an issue of fact "shall not in itself be grounds for denial of the motion"]). Here, plaintiff brings three claims: private nuisance, as against defendants, and breach of contract and breach of the warranty of habitability, as against the building.

****4** To prevail on her nuisance claim, plaintiff must prove that defendants are substantially and unreasonably interfering with plaintiff's use and enjoyment of her home (*Domen Holding Co. v Aranovich*, 1 NY3d 117, 123 [2003]). "Noise of such character as to produce actual physical discomfort and annoyance to a person of ordinary sensibilities is a nuisance, even though it is caused by conducting a trade or business in a city" (*Dillon v Cortland Baking Co.*, 224 AD 303, 305 [3d Dept 1928]). Plaintiff has demonstrated that the noise emanating from Joe & The Juice is unreasonably loud and substantially interferes with her use and enjoyment of her apartment. The affidavits submitted by plaintiff and her son detail years-long disturbances of loud music, banging, and mechanical noises that have harmed her life in a variety of essential ways (*i.e.*, sleep issues, stress and anxiety, and social interruptions). Additionally, the two reports submitted by Acoustilog demonstrate that Joe & The Juice is violating New York City's Noise Code. Fierstein states that

> "[t]he recording picked up *hundreds* of banging and machine sounds, as well as other incidents of disturbing noise over the course of the 10 days . . . [T]hese banging and machine sounds are caused by employees and machinery (such as coffee grinders, blenders, and smoothie machines) in the [s]tore. Not only does the character of the sounds clearly show that the noise disturbance came from the first floor, but as further confirmation, the accelerometer data from the vibration on the [a]partment's floor clearly correlates with the bangs and machine noise"

(NYSCEF Doc No 13 at ¶ 15) He elaborates that

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> "[t]he impulsive sounds and the continuous machine sounds are easy to distinguish from traffic and miscellaneous sounds, both visually and aurally. These noises are substantially louder than the background level, or 'ambient,' which is shown just before and after the noisy events. The impulsive sounds are typically at least 16-17 dBA . . . higher than the background level, 'or ambient, which is shown just before and after the noisy events, while the continuous machine sounds are at least 12-13 decibels higher than ambient noise"

***3** ****5** (*id*. at ¶ 18). The findings of 16-17 dBA impulsive sounds violate Noise Code 24-218 [b] [3] because they are greater than the 15-dBA increase threshold for impulsive noise and "the continuous machine sounds were recorded at as high as 24 dB above the ambient level at various frequencies, which violates Noise Code 24-218 [b] [2], since it is greater than the 10-decibel increase threshold for daytime noise" (*id*. at ¶¶ 21, 23). Noise issues persisted when Fierstein conducted additional acoustic tests on August 30, 2022 (*see generally* NYSCEF Doc No 87).

Defendants' assertion that the relief sought by plaintiff is inappropriate because there is no private right to enforce the Nuisance Code is unavailing because plaintiff is only seeking to use the Nuisance Code violations to support her common law nuisance claim. Defendants also argue that there are multiple issues of fact regarding the Acoustilog report such as the methodology being skewed and the findings being out of date, yet the reporting occurred twice, with the first report taking place over a period of ten days, and the second occurring as recently as August 2022. Additionally, the affidavit of plaintiff's expert wherein he establishes the noise complained of was significantly above the legal limit under the Noise Code is unrebutted by competent proof.

Since plaintiff has demonstrated a likelihood of success on the merits of her nuisance claim, it is not necessary to consider the remaining claims on this motion (*see Sylmark Holdings Ltd. v Silicone Zone Intl. Ltd.*, 5 Misc 3d 285, 295 [Sup Ct, NY County 2004]).

Irreparable Injury

An irreparable injury for purposes of granting a preliminary injunction is an "injury for which money damages are insufficient" (*Bashian & Farber, LLP v Syms*, 147 AD3d 714, 717 [2d Dept 2017]; *see also U.S. Re Cos. v Scheerer*, 41 AD3d 152, 155 [1st Dept 2007]). Plaintiff's affidavit details the harm the noise has caused her (NYSCEF Doc No 3 at ¶ 5 [the noise ****6** "prevents [plaintiff] from being able to sleep or rest, or to make or stay on telephone calls, and causes [her] headaches, undue stress, and anxiety. In short, it makes it almost impossible for [plaintiff] to live in [her] home."]). Therefore, plaintiff has established irreparable harm for which money damages are insufficient if the preliminary injunction is not granted.

Balance of Equities

Courts must weigh the irreparable harm that would be suffered by the movant in the absence of an injunction against the burden or harm to the opposing party through the imposition of an injunction (*McLaughlin, Piven, Vogel v Nolan & Co.*, 114 AD2d 165 [2d Dept 1996]). Here, defendants' burden of stopping or lowering the store's music, instructing employees not to bang equipment or slam doors, and finding some temporary sound-proofing solutions until a more long-term solution can be agreed upon does not outweigh the harm caused to plaintiff by the continued disturbances to her quality of life at home.

Additionally, defendants cannot claim prejudice or inequity from being required to comply with their contractual or statutory obligations (*see Stellar Sutton LLC v Dushey*, 82 AD3d 485, 487 [1st Dept 2011] [equities favored injunction under which non-moving party "would be required merely to abide by the terms of its purchase of the building"]; *see also Doe v Dinkins*, 192 AD2d 270, 276 [1st Dept 1993] [equities favored injunction requiring defendant to comply with legal obligations]).

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Lastly, the case proffered by defendants, *McGuire v Bloomingdale*, 8 Misc 478 [NY Com Pl 1894], is easily distinguishable from the present matter considering the plaintiff in *McGuire* was seeking to enjoin defendants from running essential machines and equipment for their business. Here, plaintiff is not asking for Joe & The Juice to completely stop operating their business, she is only asking for defendants to take additional measures to lower or eliminate the ****7** noise disturbances. None of Fierstein's remedial suggestions include closing shop. Therefore, the third element is satisfied. Accordingly, it is hereby

***4** ORDERED that plaintiff's motion for a preliminary injunction enjoining and restraining defendants from creating or allowing noise from defendant Joe & The Juice New York, LLC into plaintiff's apartment in excess of what is allowed under the New York City Noise Code is granted; and it is further

ORDERED that pursuant to CPLR § 6312 (b) the preliminary injunction is conditioned on plaintiff posting a bond in the amount of $5,000.

2/7/2023

DATE

<<signature>>

PAUL A. GOETZ, J.S.C.

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2023 WL 2316144
Supreme Court, Appellate Division, First Department, New York.

Timothy WHEALON, Plaintiff-Respondent,
v.
GRAMERCY PARK RESIDENCE CORP., et al., Defendants-Appellants.

17425
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Index No. 651595/19
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Case No. 2021–04562
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Entered March 2, 2023

Synopsis

Background: Purchaser of shares for penthouse apartment in cooperative residential apartment building brought action against building owner and others, seeking to recover damages allegedly caused by accumulation of black soot in apartment. The Supreme Court, New York County, Melissa Crane, J., 2020 WL 7405647, among other things, denied defendants' motion to dismiss plaintiff's claims for breach of proprietary lease, breach of warranty of habitability, and breach of fiduciary duty as untimely. Appeal was taken.

[Holding:] The Supreme Court, Appellate Division, held that six-year statute of limitations for breach of contract actions applied to action.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (1)

[1] Limitation of Actions

Six-year statute of limitations for breach of contract actions applied to action brought by purchaser of shares for penthouse apartment in cooperative residential apartment building against building owner and others, which sought to recover damages allegedly caused by accumulation of black soot in apartment, inasmuch as claimed damages arose from proprietary lease and asserted liability had its genesis in contractual relationship of parties based upon that lease agreement.

Attorneys and Law Firms

Lewis Brisbois Bisgaard & Smith LLP, New York (Daniel J. Fox of counsel), for appellants.

Feuerstein Kulick, LLP, New York (Richard Trotter of counsel), for respondent.

Renwick, J.P., Friedman, Gesmer, Singh, Higgitt, JJ.

Opinion

***1** Order, Supreme Court, New York County (Melissa Crane, J.), entered on or about December 17, 2020, which, to the extent appealed from, denied defendants' motion to dismiss plaintiff's claims for breach of proprietary lease, breach of warranty of habitability, and breach of fiduciary duty as untimely, unanimously affirmed, with costs.

Plaintiff purchased shares for a penthouse apartment in a cooperative residential apartment building owned by defendant Gramercy Park Residence Corporation. Plaintiff alleges that soon after taking took possession of the apartment, he noticed “a black, soot-like dust” staining his walls, ceilings, and several other places. In 2012 and 2013, plaintiff, with defendants' permission, renovated the apartment, installing new windows, doors, ceilings, and a ducted central air conditioning unit. The accumulation of black soot worsened. Plaintiff hired a series of architects, engineers, and other experts to determine the source of the soot. At the suggestion of one of the professionals, plaintiff installed a ducted HVAC return. When black soot continued to accumulate, plaintiff hired an environmental engineer who opined that the source of the problem was the building's inadequately ventilated boiler room. In March 2018, plaintiff

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commenced this action to recover damages caused by the black soot.

The motion court correctly held that plaintiff's claims seeking to recover damages to his apartment were timely as governed by the six-year statute of limitations for breach of contract. Inasmuch as the claimed damages here arise from a proprietary lease and the asserted liability had its genesis in the contractual relationship of the parties based upon that lease agreement, we find that the six-year statute of limitations was properly applied (*see* *Sears, Roebuck & Co. v. Enco Assoc., Inc.*, 43 N.Y.2d 389, 396, 401 N.Y.S.2d 767, 372 N.E.2d 555 [1977]; *see also* *Matter of Paver & Wildfoerster [Catholic High School Assn.]*, 38 N.Y.2d 669, 676, 382 N.Y.S.2d 22, 345 N.E.2d 565 [1976]; *Novita LLC v. 307 W. Rest. Corp.*, 35 A.D.3d 234, 828 N.Y.S.2d 5 [1st Dept. 2006]). The court, while properly dismissing plaintiff's gross negligence cause of action and its attendant personal injury damages as untimely, correctly found that plaintiff's damages should be limited to those allowable under the law of damages for contract liability and he may not offer proof of damages allowable in tort (*see* *Sears, Roebuck v. Enco Assoc.*, 43 N.Y.2d at 396, 401 N.Y.S.2d 767, 372 N.E.2d 555).

All Citations

--- N.Y.S.3d ----, 2023 WL 2316144, 2023 N.Y. Slip Op. 01155

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2023 WL 2603161
Supreme Court, Appellate Division,
First Department, New York.

In the Matter of Maryann **MCCABE**
et al., Petitioners–Appellants,
v.
511 WEST 232ND OWNERS
CORP., Respondent–Respondent.

17574
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Index No. 802172/22E
|
Case No. 2022–05809
|
Entered March 23, 2023

Attorneys and Law Firms

Vernon & Ginsburg, LLP, New York (Yoram Silagy of counsel), for appellants.

Gallet Dreyer & Berkey, LLP, New York (Michelle P. Quinn of counsel), for respondent.

Renwick, A.P.J., Friedman, Scarpulla, Mendez, Rodriguez, JJ.

Opinion

***1** Judgment (denominated an order), Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about June 13, 2022, denying the petition to annul the determination of respondent cooperative board, dated October 27, 2021, which declined to transfer the shares and proprietary lease for the subject cooperative unit to petitioner, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The cooperative board's decision was made in furtherance of a legitimate corporate purpose, and was not "arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]; *see* *Matter of Levandusky v. One Fifth Ave. Apt. Corp.,* 75 N.Y.2d 530, 542, 554 N.Y.S.2d 807, 553 N.E.2d 1317 [1990]). The cooperative legitimately applied the terms of paragraph 16 of the proprietary lease to find that petitioner was not the decedent's spouse and therefore required approval by the board prior to transfer of the proprietary lease and shares of the subject unit (*see* *Hudson View Props. v. Weiss,* 59 N.Y.2d 733, 735, 463 N.Y.S.2d 428, 450 N.E.2d 234 [1983]; *see also Matter of Cadalzo v. Russ,* 195 A.D.3d 463, 465, 144 N.Y.S.3d 861 [1st Dept. 2021]). Furthermore, based on petitioner's tax returns and financial information provided on her application to transfer such shares, the cooperative offered a legitimate, nondiscriminatory reason for denying its approval (*see Hirschmann v. Hassapoyannes,* 52 A.D.3d 221, 222, 859 N.Y.S.2d 150 [1st Dept. 2008]). Absent bad faith or discrimination, the board's decision is protected by the business judgment rule (*see Matter of Levandusky,* 75 N.Y.2d at 538, 554 N.Y.S.2d 807, 553 N.E.2d 1317).

All Citations

--- N.Y.S.3d ----, 2023 WL 2603161 (Mem), 2023 N.Y. Slip Op. 01592

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209 A.D.3d 616
Supreme Court, Appellate Division,
First Department, New York.

Pablo RIVERA, Plaintiff–Respondent,
v.
98–100 AVENUE C HOUSING DEVELOPMENT FUND CORPORATION, Defendant–Appellant.

16554-, 16554A
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Index No. 152490/21
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Case Nos. 2022-00686, 2022-01685
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Entered October 27, 2022

Synopsis

Background: After death of sole proprietary lessee of cooperative apartment, lessee's brother brought action against lessor, alleging that lessee made inter vivos gift to brother of the shares and proprietary lease for the apartment. The Supreme Court, New York County, Paul Allan Goetz, J., entered a first order, 2021 WL 4236516, denying lessor's motion for summary judgment and a second order, 2022 WL 173782, denying brother's motion for summary judgment. Lessor appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] purported transfer of the apartment was not valid absent a writing to effect the transfer, as required under statute of frauds;

[2] brother's possession of share certificate and lease did not render transfer a completed gift to which statute of frauds did not apply;

[3] lessee also failed to follow lease's transfer provisions and thus failed to effect valid transfer; and

[4] brother failed to establish lessee's donative intent and thus could not establish valid inter vivos gift.

First order reversed; second order dismissed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (7)

[1] **Frauds, Statute of** Interests created by leases

Frauds, Statute of Nature of property

Purported transfer as an inter vivos gift of shares and proprietary lease for cooperative apartment by apartment's sole proprietary lessee to his brother before lessee's death was not valid absent a writing to effect the transfer, as required under statute of frauds. N.Y. General Obligations Law § 5-703(2).

[2] **Frauds, Statute of** Nature of property

Statute of frauds applies to the sale of stock in a housing cooperative. N.Y. General Obligations Law § 5-703(2).

[3] **Frauds, Statute of** Interests created by leases

Frauds, Statute of Nature of property

Possession of share certificate and proprietary lease for cooperative apartment by brother of apartment's proprietary lessee, who had allegedly transferred apartment to brother as an inter vivos gift prior to lessee's death, did not render the transfer a completed gift to which requirement under statute of frauds that sale of stock in a housing cooperative be in writing did not apply, absent showing of the applicability of one of the exceptions enumerated in the statute of frauds. N.Y. General Obligations Law § 5-703(2).

[4] **Common Interest Communities** Requisites and validity in general

Sole proprietary lessee of cooperative apartment failed to follow transfer provisions of proprietary lease when making inter vivos gift of apartment to brother before lessee's death and thus failed

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to effect valid transfer of the apartment; lease required written assignment of shares signed by shareholder and approval of lessor's board of directors to make valid transfer of shares to the apartment within lessee's lifetime, and lessee did not comply with these requirements.

[5] **Gifts** Gift of land in general

Brother of sole proprietary lessee of cooperative apartment failed to establish lessee's donative intent with respect to alleged transfer of apartment to brother, and thus brother could not establish that lessee's alleged inter vivos gift of the apartment to brother before lessee's death was valid; no writing was made with respect to the transfer, lessee did not follow the procedures in the proprietary lease for transferring the apartment, delivery of the share certificate and proprietary lease for the apartment were not made by lessee, and it was unclear whether lessee's girlfriend was acting as lessee's agent for that purpose.

[6] **Gifts** Intent

Donative intent is necessary element of valid inter vivos gift.

[7] **Gifts** Gifts of corporate stock

Symbolic delivery of a share certificate, for purposes of effectuating an inter vivos gift, becomes effective only when there is a transfer or record on the stock books of the company.

Attorneys and Law Firms

****552** Andrea Shapiro, PLLC, New York (Andrea Shapiro of counsel), for appellant.

Canzoneri & Canzoneri, LLP, Malverne (Patricia M. Canzoneri of counsel), for respondent.

Kapnick, J.P., Mazzarelli, Friedman, Shulman, Rodriguez, JJ.

Opinion

*****1** ***616** ****553** Order, Supreme Court, New York County (Paul A. Goetz, J.), entered August 30, 2021, which, to the extent appealed from as limited by the briefs, denied defendant's cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the cross motion granted, and it is declared that there was no valid inter vivos gift of the shares and proprietary lease for the apartment to plaintiff. Order, same court and Justice, entered January 14, 2022, which denied plaintiff's motion for summary judgment, unanimously dismissed, without costs, as academic. The Clerk is directed to enter judgment accordingly.

[1] **[2]** **[3]** According to plaintiff, his deceased brother, who was the sole proprietary lessee of a cooperative apartment in the defendant 98–100 Avenue C Housing Development Fund Corporation (HDFC), made an inter vivos gift of the apartment to plaintiff. ***617** Defendant established that there was no valid inter vivos gift to plaintiff of the shares and proprietary lease for the apartment, as the statute of frauds applies to the sale of stock in a housing cooperative and there was no writing to effect the transfer (*see Rosner v. 80 CPW Apartments Corp.,* 73 A.D.2d 39, 41, 424 N.Y.S.2d 723 [1st Dept. 1980]). Plaintiff's assertion that a writing was not required because he already possessed the share certificate and proprietary lease and the transfer was therefore a "completed gift" is unavailing, because he has not identified any applicable exception to the statute of frauds (General Obligations Law § 5–703[2]; *Pollard v. Meyer,* 61 A.D.2d 766, 767, 402 N.Y.S.2d 15 [1st Dept. 1978]).

[4] Plaintiff's claim further fails as a matter of law, as the decedent – his brother – failed to follow the transfer provisions of the proprietary lease, which required, among other things, a written assignment of shares signed by the shareholder and the approval of defendant's board of directors to make a valid transfer of the shares to the apartment within the decedent's lifetime (*see LI Equity Network, LLC v. Village in the Woods Owners Corp.,* 79 A.D.3d 26, 28, 910 N.Y.S.2d 97 [2d Dept. 2010]).

[5] **[6]** **[7]** Moreover, even if the decedent had not been required to abide by the terms of the proprietary lease to make a valid inter vivos gift of the apartment, the lack of a writing also militates against establishing the decedent's donative intent, which is a necessary element of a valid inter vivos gift (*see Gruen v. Gruen,* 68 N.Y.2d 48, 53, 505 N.Y.S.2d 849,

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496 N.E.2d 869 [1986]). Not only does the decedent's failure to follow the procedures in the proprietary lease contradict any donative intent, but plaintiff also acknowledges that the delivery of the share certificate and proprietary lease were not made by the decedent himself, and the conflicting affidavits of the decedent's girlfriend fail to establish that she was acting as decedent's agent for that purpose. In any event, with respect to symbolic delivery of a share certificate, such a delivery becomes effective only when there is a transfer or record on the stock books of the company, since before that time, the donor can change his mind and direct his agent not to effect the transfer (*In re Szabo's Estate,* 10 N.Y.2d 94, 98, 217 N.Y.S.2d 593, 176 N.E.2d 395 [1961]).

*****2** ****554** We have considered the remaining contentions and find them unavailing.

All Citations

209 A.D.3d 616, 177 N.Y.S.3d 551, 2022 WL 14955516, 2022 N.Y. Slip Op. 06074

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212 A.D.3d 464
Supreme Court, Appellate Division,
First Department, New York.

Janet LEVINSON et al., Plaintiffs–Appellants,
v.
77 PERRY REALTY CORP., Defendant–Respondent.

17089
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Index No. 158948/15
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Case No. 2021–04257
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Entered January 12, 2023

Synopsis

Background: Owners of three units in cooperative brought action against cooperative owner, asserting claims for breach of contract and specific performance, alleging that cooperative owner breached agreement to sell them area of roof located directly over two of their units, and that cooperative owner adopted amendments to proprietary lease and bylaws that precluded them from combining all three units. The Supreme Court, New York County, James E. d'Auguste, J., 2021 WL 4523602, granted summary judgment in favor of cooperative owner, and denied unit owners' motion to amend their complaint to add claim for punitive damages. Unit owners appealed.

Holdings: The Supreme Court, Appellate Division, Kern, J., held that:

[1] email which purportedly constituted valid contract did not contain all material terms of contract, and thus did not satisfy statute of frauds, and

[2] unit owners' proposed amendment to add claim for punitive damages was without merit.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment; Motion to Amend the Complaint.

West Headnotes (3)

[1] Appeal and Error Necessity of presentation in general

Appellate court would decline to address question, on appeal of trial court's grant of summary judgment in favor of cooperative owner in breach of contract action, of whether cooperative owner's managing agent had prior written authorization to sign emails on behalf of cooperative owner, for purposes of determining whether emails between managing agent and owner of unit in cooperative constituted valid contract between cooperative owner, unit owner, and owners of two other units, for sale of area of roof located directly over two of subject units, where cooperative owner did not dispute managing agent's authority before trial court, but rather trial court raised issue sua sponte, and thus denied unit owners fair opportunity to submit evidence on that point.

[2] Frauds, Statute of Sufficiency

Email between cooperative owner's managing agent and owner of unit in cooperative, which purportedly constituted valid contract for unit owner and owners of two other unit owners to buy area of roof located directly over two of subject units, did not contain all material terms of contract, and thus did not satisfy statute of frauds; although email specified price and specific number of shares to be issued to unit owners, email said nothing about financing, terms of payment, or closing date, later communications indicated that parties were negotiating additional material terms, and communications showed that parties anticipated entering into formal contract and that cooperative's board of directors would not make final decision on sale until annual shareholders' meeting. N.Y. General Obligations Law § 5-703(2).

[3] Pleading As to relief prayed

Pleading Sufficiency of amendment

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Proposed amendment by owners of three units in cooperative, to add claim for recovery of punitive damages from cooperative arising from claim that cooperative's board of directors improperly adopted amendments to proprietary lease and bylaws that precluded unit owners from combining all three units and that amendments only affected them, was palpably insufficient or clearly devoid of merit, where unit owners did not plead breach of fiduciary duty claim, cooperative did not owe fiduciary duty to its shareholders, and board's alleged wrongdoing did not meet high threshold of moral culpability necessary to award punitive damages, such as wanton or reckless disregard of plaintiff's rights. N.Y. Business Corporation Law § 501(c).

Attorneys and Law Firms

****14** Schwartz Sladkus Reich Greenberg Atlas LLP, New York (Eric M. Sable of counsel), for appellants.

Abrams Garfinkel Margolis Bergson, LLP, New York (Alexander Rabinowitz of counsel), for respondent.

Kern, J.P., Oing, Scarpulla, Pitt–Burke, Higgitt, JJ.

Opinion

***464** Order, Supreme Court, New York County (James E. D'Auguste, J.), entered on or about October 4, 2021, which, to the extent appealed from as limited by the briefs, denied ***465** plaintiffs' motion for summary judgment on their breach of contract and specific performance claims and for leave to amend the complaint to add a demand for punitive damages in connection with their claim for violation of Business Corporation Law § 501(c), and granted defendant's motion for summary judgment dismissing the breach of contract and specific performance claims, unanimously affirmed, without costs.

Plaintiffs, owners of three units in defendant's cooperative, allege that defendant's board of directors entered into a binding contract to sell them the area of the roof located directly over two of their apartments, and that defendant subsequently refused to complete the sale. They also allege that defendant adopted amendments to the proprietary lease and bylaws that precluded them from combining all three units, and that because the amendments only affected them, the amendments violated Business Corporation Law § 501(c).

[1] **[2]** Plaintiffs' breach of contract claim rests on emails exchanged between plaintiff Janet Levinson and defendant's managing agent, which, they contend, constitute an offer and acceptance containing all material terms of the agreement and satisfying the statute of frauds (*see* General Obligations Law § 5–703[2]; *Lebowitz v. Mingus,* 100 A.D.2d 816, 817, 474 N.Y.S.2d 748 [1st Dept. 1984], *appeal dismissed* 63 N.Y.2d 675, —— N.Y.S.2d ——, —— N.E.2d —— [1984]). While the motion court found that plaintiffs did not show that the agent who signed the email on behalf of defendant had prior written authorization, we do not reach that issue because the agent's authority was not disputed by defendant, and the issue was sua sponte raised by the motion court, so that plaintiffs did not have a fair opportunity to submit evidence on that point (*see Martin v. Grenadier Realty Corp.,* 260 A.D.2d 276, 277, 688 N.Y.S.2d 558 [1st Dept. 1999]).

However, we affirm on the ground that the email did not contain all material terms of the contract to satisfy the statute of frauds (*see Argent Acquisitions, LLC v. First Church of Religious Science,* 118 A.D.3d 441, 444–445, 990 N.Y.S.2d 1 [1st Dept. 2014]). The email relied upon by plaintiffs accepted an offer from them to buy the roof at a specified price, with a specific number of shares being issued to plaintiffs, but it says nothing about financing, terms of payment, or a closing date. Moreover, communications that followed indicated that the parties were negotiating additional material terms concerning the sale of the roof space, including additional maintenance fees, responsibility for maintaining the roof deck, and other issues ****15** surrounding aspects of the roof structure. Further, the parties' communications show that they anticipated entering into a formal contract and that the board would not make a final decision on ***466** the sale until the annual shareholders' meeting. The totality of the parties' communications thus show that the early emails relied upon by plaintiff did not constitute a binding contract (*see id.*).

[3] We also affirm the portion of the order denying plaintiffs' motion for leave to amend the complaint to add a demand for punitive damages. The motion court denied the motion because defendant's alleged conduct was not "directed at the public generally," but that requirement applies only to breach of contract claims (*see* *New York Univ. v. Continental Ins. Co.,* 87 N.Y.2d 308, 315–316, 639 N.Y.S.2d 283, 662 N.E.2d 763 [1995]; *Sherry Assoc. v. Sherry–Netherland,*

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Inc., 273 A.D.2d 14, 15, 708 N.Y.S.2d 105 [1st Dept. 2000]), and plaintiffs did not seek punitive damages in connection with their breach of contract claim. Nevertheless, plaintiffs' motion was properly denied because their allegations would not support an award of punitive damages.

Plaintiffs' argument that they can recover punitive damages in connection with their statutory claim because it is analogous to a breach of fiduciary duty claim is unpersuasive (*see generally* *Thoreson v. Penthouse Intl.,* 80 N.Y.2d 490, 496, 591 N.Y.S.2d 978, 606 N.E.2d 1369 [1992]). Plaintiffs did not plead a breach of fiduciary duty claim against defendant cooperative corporation, which, in any event, does not owe a fiduciary duty to its shareholders (*see Hersh v. One Fifth Ave. Apt. Corp.,* 163 A.D.3d 500, 501, 83 N.Y.S.3d 4 [1st Dept. 2018]; *Fletcher v. Dakota, Inc.,* 99 A.D.3d 43, 54, 948 N.Y.S.2d 263 [1st Dept. 2012]). Even if a breach of fiduciary duty or tort claim were pleaded, defendant's alleged wrongdoing in connection with adopting new by-laws and amending the proprietary lease does not meet "the very high threshold of moral culpability" necessary to award punitive damages, such as "a wanton or reckless disregard of plaintiff's rights" (*Zuckerman v. Goldstein,* 71 A.D.3d 407, 894 N.Y.S.2d 748 [1st Dept. 2010] [internal quotation marks omitted]; *see Fe Bland v. Two Trees Mgt. Co.,* 125 Misc.2d 111, 117, 479 N.Y.S.2d 123 [Sup. Ct., N.Y. County 1984], *affd* 109 A.D.2d 1110, 487 N.Y.S.2d 453 [1st Dept. 1985], *affd* 66 N.Y.2d 556, 498 N.Y.S.2d 336, 489 N.E.2d 223 [1985]). Accordingly, the proposed amendment was "palpably insufficient or clearly devoid of merit" (*Tribeca Space Mgrs., Inc. v. Tribeca Mews Ltd.*, 200 A.D.3d 626, 628, 161 N.Y.S.3d 38 [1st Dept. 2021]).

All Citations

212 A.D.3d 464, 183 N.Y.S.3d 13, 2023 N.Y. Slip Op. 00160

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212 A.D.3d 531
Supreme Court, Appellate Division,
First Department, New York.

OLIVER 889 LLC, Plaintiff–Respondent,
v.
889 REALTY INC., Defendant–Appellant,
Fish eddy, LLC et al., Counterclaim Defendants.

17162
|
Index No. 652814/20
|
Case No. 2022-03559
|
Entered January 24, 2023

Synopsis

Background: Shareholder brought declaratory judgment action against cooperative corporation, seeking declaration that cooperative corporation's voting agreement was null and void. Cooperative corporation counterclaimed, seeking declaration that its voting agreement was authorized and fully enforceable. The Supreme Court, New York County, Gerald Lebovits, J., granted summary judgment in favor of shareholder. Cooperative corporation appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] voting agreement was not protected by business judgment rule;

[2] voting agreement was not enforceable under statute authorizing voting proxies and statute governing voting agreements; but

[3] severing of unenforceable provision of voting agreement was warranted.

Affirmed as modified.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (4)

[1] Common Interest Communities Governing board; members, directors, and officers; committees

Common Interest Communities Member meetings

Voting agreement between shareholder and cooperative corporation that owned and operated mixed-use building violated statute governing parity requirements, and thus, voting agreement was not protected by the business judgment rule. N.Y. Coop. Corp. Law § 5; N.Y. Business Corporation Law § 501(c).

[2] Declaratory Judgment Scope and extent of review in general

Cooperative corporation could raise for first time on appeal its argument that voting agreement between shareholder and cooperative corporation could be enforced under statute authorizing shareholder proxies and statute authorizing voting agreements, in shareholder's declaratory-judgment action asserting that voting agreement was null and void, where arguments were purely legal questions that could be determined on the record. N.Y. Business Corporation Law §§ 609, 620.

[3] Common Interest Communities Member meetings

Voting agreement between shareholder and cooperative corporation that owed and operated mixed-use building could not be enforced under statute authorizing shareholder proxies and statute authorizing voting agreements, where statute authorizing shareholder proxies did not apply to cooperative corporations, and voting agreement was not permissible under Business Corporation Law because it indefinitely linked together votes allocated from shareholder's shares and votes cast by other shareholders, and in linking the two, agreement effectively created a permanent class of nonvoting shares.

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N.Y. Coop. Corp. Law § 5(1)(b); N.Y. Business Corporation Law §§ 609, 620.

[4] **Common Interest Communities** Member meetings

Severing voting agreement's unenforceable provision that effectively stripped voting rights from a portion of shareholder's shares in cooperative corporation that owed and operated mixed-use building from remainder of agreement, not declaring entire agreement to be void, was warranted in shareholder's declaratory-judgment action against corporation, where agreement contained unambiguous severability provision. N.Y. Coop. Corp. Law § 5; N.Y. Business Corporation Law § 501(c).

Attorneys and Law Firms

Warshaw Burstein, LLP, New York (Maxwell Breed of counsel), for appellant.

Holland & Knight LLP, New York (Robert S. Bernstein of counsel), for respondent.

Kapnick, J.P., González, Mendez, Shulman, Higgitt, JJ.

Opinion

***531** Order (denominated an order and judgment), Supreme Court, New York County (Gerald Lebovits, J.), entered on or about August 9, 2022, which, to the extent appealed from, granted plaintiff shareholder's motion for summary judgment on its cause of action for a declaration that the parties' voting agreement violated Business Corporation Law § 501(c) and was therefore null and void, and denied defendant's motion for summary judgment dismissing that cause of action and for summary judgment on its counterclaim for a declaration that ***532** the voting agreement was authorized and fully enforceable, unanimously modified, on the law, to provide that only paragraph 1(b) of the voting agreement is null and void, and otherwise affirmed, without costs.

[1] Supreme Court properly determined that Business Corporation Law § 501(c) applied to defendant, a cooperative corporation that owns and operates a mixed-use building, and that the parties' voting agreement violated the parity requirement set forth in that statute (*see* Cooperative Corporations Law § 5). Because the voting agreement violated the Business Corporation Law, it cannot be saved by the business judgment rule (*see* *Razzano v. Woodstock Owners Corp.,* 111 A.D.3d 522, 523, 975 N.Y.S.2d 38 [1st Dept. 2013]).

[2] Although defendant's arguments regarding Business Corporation Law §§ 609 and 620 and the severability provision of the voting agreement are raised for the first time on appeal, we nevertheless will consider those arguments, as they raise purely legal issues that can be determined on this record (*see Vanship Holdings Ltd. v. Energy Infrastructure Acquisition Corp.,* 65 A.D.3d 405, 408, 884 N.Y.S.2d 24 [1st Dept. 2009]).

[3] Contrary to defendant's contentions, the voting agreement cannot be enforced in its entirety under Business Corporation Law §§ 609 or 620. Under the Cooperative Corporations Law, Business Corporation Law § 609, which authorizes shareholder proxies, does not apply to cooperative corporations (Cooperative Corporations Law § 5[1][b]). Moreover, assuming without deciding that Business Corporation Law § 620(a) does authorize cooperative corporation shareholder voting agreements, the parties' voting agreement is still not permissible under that section of the statute. The agreement runs afoul of the Business Corporation Law because it indefinitely links together the votes allocated to 2,630 of plaintiff's shares and the votes cast by all other shareholders. In linking the two, the voting agreement effectively (and impermissibly) creates a permanent class of 2,630 nonvoting shares (*see* *Matter of Madison v. Striggles,* 228 A.D.2d 170, 170, 644 N.Y.S.2d 6 [1st Dept. 1996]; *see* *Yu v. Linton,* 68 A.D.2d 856, 856–857, 414 N.Y.S.2d 558 [1st Dept. 1979]).

[4] However, because the voting agreement contained an unambiguous severability provision, Supreme Court should not have determined the entire voting agreement to be void, but rather, should have voided only paragraph 1(b) — the provision that effectively strips voting rights from a portion of plaintiff's shares.

Supreme Court correctly declined to address defendant's reformation counterclaim in the order for review (*see* ***533** CPLR 2214[a]) and we also will not consider that issue because there is currently a motion pending before Supreme

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Court by defendant for summary judgment on this very counterclaim.

We have considered defendant's remaining arguments and find them unavailing.

All Citations

212 A.D.3d 531, 183 N.Y.S.3d 352, 2023 N.Y. Slip Op. 00271

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211 A.D.3d 537
Supreme Court, Appellate Division,
First Department, New York.

MEADOW APARTMENTS CORP.,
Plaintiff–Appellant–Respondent,
v.
S AND H LLC, Defendant–Respondent–Appellant.

16893
|
Index No. 653913/20
|
Case No. 2021–03720
|
Entered December 15, 2022

Attorneys and Law Firms

Boddoohi & Friedlander LLP, New York (Milad Boddoohi of counsel), for appellant-respondent.

Gartner + Bloom, P.C., New York (Michael Hemway of counsel), for respondent-appellant.

Webber, J.P., Friedman, González, Mendez, JJ.

Opinion

Order, Supreme Court, New York County (Andrew Borrok, J.), entered on or about September 15, 2021, which granted defendant's motion to dismiss plaintiff's first, second, and third causes of action, and denied defendant's request for attorneys' fees pursuant to 15 USC § 3611(d), unanimously modified, on the law, to deny the motion to dismiss, and otherwise affirmed, without costs.

Defendant moved to dismiss plaintiff's first, second, and third causes of action pursuant to CPLR 3211(a)(1) and (5), contending that documentary evidence established that those claims were time-barred. The court should have denied the motion. In light of the parties' factual dispute over the assertion of defendant's principal that he sent a letter dated December 8, 1992 to plaintiff's shareholders on that date, and issues as to whether the letter, even if so served, provided notice of a loss of special developer control pursuant to the federal Condominium and Cooperative Abuse Relief Act as required by the offering plan, the letter did not "utterly refute[ ] plaintiff's factual allegations, conclusively establishing" the statute of limitations defense as a matter of law (*Goshen v. Mutual Life Ins. Co. of N.Y.,* 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190 [2002]; *see VXI Lux Holdco S.A.R.L. v. SIC Holdings, LLC,* 171 A.D.3d 189, 193, 98 N.Y.S.3d 1 [2019]).

In light of the foregoing, the court properly denied defendant's request for attorneys' fees pursuant to the federal statute, which provides that "[a] defendant may recover reasonable attorneys' fees if the court determines that the cause of action filed by the plaintiff is frivolous, malicious, or lacking in substantial merit" (15 USC § 3611[d]).

All Citations

211 A.D.3d 537, 178 N.Y.S.3d 436 (Mem), 2022 N.Y. Slip Op. 07158

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211 A.D.3d 786
Supreme Court, Appellate Division,
Second Department, New York.

BOARD OF MANAGERS OF VAN WYCK GLEN CONDOMINIUM, et al., respondents,
v.
VAN WYCK AT MERRITT PARK HOMEOWNERS ASSOCIATION, INC., et al., appellants (and a third-Party action).

2021–00411
|
(Index No. 50017/17)
|
Argued—November 1, 2022
|
December 14, 2022

Synopsis

Background: Members of condominiums' managing boards brought action against defendants, homeowners' association (HOA) and two of HOA's board members, seeking a declaratory judgment with respect to the parties' rights, under condominiums' bylaws, to maintain and repair common elements of condominiums and seeking damages for breach of fiduciary duty. Defendants counterclaimed for, among other things, a declaratory judgment with respect to the meaning of the condominiums' bylaws. After the condominiums' bylaws were amended by stipulation of the parties, the Supreme Court, Dutchess County, Christi J. Acker, J., dismissed breach-of-fiduciary-duty claim as to HOA but denied defendants' motion to dismiss or for summary judgment as to that claim against HOA's board members, granted summary judgment to plaintiffs dismissing defendants' declaratory-judgment counterclaim, and awarded damages to plaintiffs for rental revenue wrongly retained by defendants. Defendants appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] defendants could not prevail on declaratory-judgment counterclaim, which was addressed to language that had been removed from condominiums' bylaws when they were amended, and

[2] plaintiffs pleaded their breach-of-fiduciary duty claim against HOA's board members with sufficient particularity.

Affirmed.

Procedural Posture(s): On Appeal; Complaint Seeking Declaratory Judgment; Motion for Summary Judgment; Motion to Dismiss for Failure to State a Claim.

West Headnotes (4)

[1] Declaratory Judgment Covenants and restrictions

Homeowners association (HOA) and two board members, defendants in action by members of two condominium boards, could not prevail on their declaratory-judgment counterclaim for a declaration of the meaning of certain language in condominiums' bylaws, where the language at issue was no longer operative because the bylaws, by stipulation of the parties, had been amended to remove the disputed language, which stated that the condominium boards would be "deemed to have irrevocably appointed" the HOA to provide certain services, and to replace it with a provision by which each condominium's board of managers would consult with the HOA, among others, for the purpose of providing uniform services and appearance within the community of related condominiums.

[2] Action Moot, hypothetical or abstract questions

The power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal.

[3] Action Moot, hypothetical or abstract questions

Courts are generally precluded from considering questions which, although once live, have become moot by passage of time or change in circumstances.

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[4] **Pleading** Certainty, definiteness, and particularity

Condominium board members pleaded claim for breach of fiduciary duty with sufficient particularity against defendants, board members of homeowners' association (HOA), where condominium board members' complaint alleged the existence of a fiduciary relationship, misconduct by the HOA's board members, and damages directly caused by their misconduct. N.Y. CPLR § 3016(b).

Attorneys and Law Firms

****115** Braverman Greenspun, P.C., New York, NY (Jon Kolbrener and Kelly Ringston of counsel), for appellants.

Handel & Carlini, LLP, Poughkeepsie, NY (Anthony C. Carlini, Jr., of counsel), for respondents.

VALERIE BRATHWAITE NELSON, J.P., ANGELA G. IANNACCI, LINDA CHRISTOPHER, BARRY E. WARHIT, JJ.

DECISION & ORDER

***787** In an action, inter alia, for declaratory relief, the defendants appeal from an order of the Supreme Court, Dutchess County (Christi J. Acker, J.), dated January 8, 2021. The order, insofar as appealed from, denied those branches of the defendants' motion which were pursuant to CPLR 3211(a) or, in the alternative, for summary judgment dismissing the first cause of action and the second cause of action insofar as asserted against the defendants Anthony Costa and Dick Hack, and granted those branches of the plaintiffs' motion which were for summary judgment awarding the plaintiffs the sum of $40,696.32 against the defendant Van Wyck at Merritt Park Homeowners Association, Inc., and dismissing so much of the first counterclaim as sought a judgment declaring the meaning of a certain provision in the plaintiffs' respective by-laws.

ORDERED that the order is affirmed insofar as appealed from, with costs.

This action concerns related condominium communities in Fishkill, which include the Van Wyck Glen Condominium (hereinafter the Glen) and Van Wyck Meadows Condominium (hereinafter the Meadows) (hereinafter together the condominiums). The condominiums were developed by the same sponsor and each of their governing documents appoint the defendant Van Wyck at Merritt Park Homeowners Association, Inc. (hereinafter the HOA), to provide certain services in connection with the maintenance, repair, and replacement of the common elements of the condominiums, and authorized the HOA to collect assessments from the unit owners for such ****116** purposes. As relevant to this appeal, Article III, Section 11 of each condominium's bylaws, titled "Appointment of Board of Directors of Association as Irrevocable Managing Agent," provided that its board of managers "shall be deemed to have irrevocably appointed" the HOA to provide certain services in connection with the common elements. Shortly after the sponsor relinquished control of the condominiums to their respective boards of managers, issues arose with the HOA, and the condominiums sought to take control of some of the services that the HOA had been providing.

The plaintiffs, the board of managers of the Glen and the board of managers of the Meadows, commenced this action ***788** against the HOA and two of its board members, the defendants Anthony Costa and Dick Hack. The first cause of action sought a judgment declaring the parties' respective rights to maintain and repair the common elements of the condominiums. The second cause of action sought damages for breach of fiduciary duty. In their answer, the defendants asserted several counterclaims, the first of which sought a judgment declaring, among other things, the meaning of "Irrevocable Managing Agent" as used in Article III, Section 11 of the plaintiffs' respective bylaws.

Settlement negotiations ensued, and by order dated September 26, 2018, made upon the stipulation of the parties, the Supreme Court, inter alia, directed both plaintiffs to hold a meeting to amend their respective bylaws. Each of the plaintiffs subsequently held meetings at which the homeowners voted to approve an amendment to the condominium's bylaws deleting the existing language in Article III, Section 11, and replacing it with a provision by which the board of managers would consult with the HOA, among others, for the purpose of providing uniform

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services and appearance within the community of related condominiums.

Thereafter, the defendants moved pursuant to CPLR 3211(a), or, in the alternative, for summary judgment dismissing the complaint. The plaintiffs moved, among other things, for summary judgment dismissing so much of the first counterclaim as sought a judgment declaring the meaning of "Irrevocable Managing Agent" as used in Article III, Section 11 of the plaintiffs' respective by-laws, and awarding the plaintiffs the sum of $40,696.32 for rental revenue wrongfully retained by the defendants. In an order dated January 8, 2021, the Supreme Court, inter alia, granted those branches of the plaintiffs' motion, and granted that branch of the defendants' motion which was to dismiss the second cause of action insofar as asserted against the HOA, but otherwise denied their motion. The defendants appeal.

[1] The Supreme Court properly granted that branch of the plaintiffs' motion which was for summary judgment dismissing so much of the first counterclaim as sought a judgment declaring the meaning of "Irrevocable Managing Agent" as used in Article III, Section 11 of the plaintiffs' respective bylaws. Contrary to the defendants' contention, the plaintiffs established, prima facie, that the amendments to their respective bylaws were procedurally proper. Article X of each of the bylaws provide for their amendment upon the approval of $66\,^{2}/_{3}\%$ of homeowners and 51% of first mortgage holders. The plaintiffs ***789** submitted affidavits and documents demonstrating that they complied with this amendment procedure (*see Viviane Etienne Med. Care, P.C. v. County–Wide Ins. Co.,* 25 N.Y.3d 498, 508, 35 N.E.3d 451), and made the requisite filings with the Dutchess County Clerk. In opposition, the HOA failed to raise a triable issue of fact as to the propriety of these procedures. Accordingly, the plaintiffs established, ****117** prima facie, that the language in Article III, Section 11 of their respective bylaws about which the defendants sought a declaration no longer exists.

[2] **[3]** "It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal" (*Matter of Hearst Corp. v. Clyne,* 50 N.Y.2d 707, 713, 431 N.Y.S.2d 400, 409 N.E.2d 876; *see Coleman v. Daines,* 19 N.Y.3d 1087, 1090, 955 N.Y.S.2d 831, 979 N.E.2d 1158). Courts are generally precluded "from considering questions which, although once live, have become moot by passage of time or change in circumstances" (*Matter of Hearst Corp. v. Clyne,* 50 N.Y.2d at 714, 431 N.Y.S.2d 400, 409 N.E.2d 876; *see City of New York v. Maul,* 14 N.Y.3d 499, 507, 903 N.Y.S.2d 304, 929 N.E.2d 366). Here, the plaintiffs established a change in circumstances, namely the amendment to their respective bylaws, which rendered the defendants' request for declaratory relief with respect to that provision of the bylaws academic. Accordingly, the Supreme Court properly granted that branch of the plaintiffs' motion which was for summary judgment dismissing so much of the first counterclaim as sought a judgment declaring the meaning of "Irrevocable Managing Agent" as used in Article III, Section 11 of the plaintiffs' respective bylaws.

[4] Contrary to the defendants' contention, the second cause of action in the complaint alleges with sufficient particularity (1) the existence of a fiduciary relationship, (2) misconduct by Costa and Hack, and (3) damages directly caused by that misconduct (*see* CPLR 3016[b]; *Mann v. Sasson,* 186 A.D.3d 823, 824, 127 N.Y.S.3d 791), and, therefore, states a cause of action to recover damages for breach of fiduciary duty insofar as asserted against Costa and Hack. Furthermore, in response to the assertions of those defendants in their respective affidavits that they engaged in no wrongdoing and acted within the scope of their authority as Board members (*see generally Graham v. 420 E. 72nd Tenants Corp.,* 168 A.D.3d 568, 90 N.Y.S.3d 524; *Tucciarone v. Hamlet on Olde Oyster Bay Homeowners Assn., Inc., Inc.,* 154 A.D.3d 898, 901, 62 N.Y.S.3d 492), the plaintiffs raised triable issues of fact (*see Bowery 263 Condominium Inc. v. D.N.P. 336 Covenant Ave. LLC,* 169 A.D.3d 541, 542, 95 N.Y.S.3d 35; ***790** *Gochberg v. Sovereign Apts., Inc.,* 119 A.D.3d 431, 432, 988 N.Y.S.2d 489). Accordingly, the Supreme Court properly denied that branch of the defendants' motion which was pursuant to CPLR 3211(a)(7), or, in the alternative, for summary judgment dismissing the second cause of action insofar as asserted against Costa and Hack.

The parties' remaining contentions are without merit.

BRATHWAITE NELSON, J.P., IANNACCI, CHRISTOPHER and WARHIT, JJ., concur.

All Citations

211 A.D.3d 786, 181 N.Y.S.3d 114, 2022 N.Y. Slip Op. 07044

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2023 WL 1795733 (N.Y.Sup.), 2023 N.Y. Slip Op. 30409(U) (Trial Order)
Supreme Court of New York.
New York County

**1 300 W 110TH 19B LLC, Plaintiff,

v.

ARGO REAL ESTATE LLC, Board of Managers of Towers on the Park, and John Does 1-10, Defendants.

No. 657036/2022.
January 31, 2023.

*1 Part 41

Decision and Order

Lucy Billings, J.S.C.

Plaintiff is a unit owner in nonparty Towers on the Park Condominium and sues defendants Argo Real Estate LLC and Board of Managers of Towers on the Park on behalf of a class of unit owners for breach of a contract and breach of fiduciary duty, claiming defendants are leasing the condominium's parking spaces at below-market rates. Defendants move to compel arbitration of plaintiff's individual claims and to dismiss this action based on the condominium's bylaws. C.P.L.R. §§ 3211(a)(1), 7503(a). The court grants defendants' motion as follows.

The bylaws include an arbitration provision:

> ARTICLE XIV. ARBITRATION
>
> Section 1. General Procedure. Any matter required or permitted to be determined by arbitration pursuant to the terms of the Condominium Documents shall be submitted for resolution before a single arbitrator in a proceeding held in New York City, New York in accordance with the then existing rules of the American Arbitration Association or **2 any successor organization thereto.

Aff. of Greta Pryror Ex. A. Defendants contend that plaintiff's claims must be arbitrated because they arise from defendants' alleged violation of the bylaws. Plaintiff maintains that its claims are not presumptively arbitrable, because the bylaws contemplate judicial resolution of disputes as well as arbitration and do not expressly designate that the type of claims plaintiff alleges are to be arbitrated. Id.

Both parties overlook, however, whether the court maintains authority to determine the arbitrability of plaintiff's claims. Although arbitrability is typically a question for the court, the bylaws' arbitration provision shows a "clear and unmistakable" intent that an arbitrator is to determine the arbitrability of this action. ALP, Inc. v. Moskowitz, 204 A.D.3d 454, 456 (1st Dep't 2022); Teshabaeva v. Family Home Care Servs. of Brooklyn & Queens, Inc., 198 A.D.3d 500, 501 (1st Dep't 2021). The bylaws direct that "any matter required or permitted to arbitration shall be submitted for resolution . . . in accordance with the then existing rules of the American Arbitration Association." Pryror Aff. Ex. A ¶ XIV § 1. This broad provision expressly incorporates all the American Arbitration Association's rules, including Commercial Arbitration Rule 7(a), that "an arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or **3 validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." (emphasis added) Consequently, even though plaintiff insists that the bylaws' arbitration provision is not applicable to plaintiff's claims, this question is for the

arbitrator to decide, pursuant to the parties' written agreement embodied in the bylaws. Strbngbow Consulting Group LLC v. PricewaterhouseCoopers LLP, 195 A.D.3d 532, 532 (1st Dep't 2021); Anima Group, LLC v. Emerald Expositions, LLC, 191 A.D.3d 572, 572 (1st Dep't 2021); WN Partner, LLC v Baltimore Orioles L.P., 179 A.D.3d 14, 16 (1st Dep't 2019).

***2** Finally, while the complaint alleges classwide claims, the parties further fail to address whether this action may proceed as a class arbitration. Yet another set of American Arbitration Association rules resolves this question. Under Rule 3 of the Supplementary Rules for Class Arbitrations, "the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." Thus an arbitrator likewise shall determine the availability of class arbitration in the first instance.

For the reasons explained above, the court grants defendants' motion to compel arbitration of plaintiff's claims in ****4** this action and dismisses plaintiff's complaint without prejudice. C.P.L.R. §§ 3211(a)(1), 7503(a).

DATED: January 31, 2023

<<signature>>

LUCY BILLINGS, J.S.C.

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2022 WL 18098136 (N.Y.Sup.), 2022 N.Y. Slip Op. 34432(U) (Trial Order)
Supreme Court of New York.
New York County

**1 THE BOARD OF MANAGERS OF 325 FIFTH AVENUE CONDOMINIUM on its own behalf and on behalf of individual unit owners, and 325 Fifth Avenue Condominium, Plaintiffs,

v.

CONTINENTAL RESIDENTIAL HOLDINGS, LLC, Douglaston Development, LLC, 325 Fifth Avenue, LLC, 325 Fifth Avenue Commercial, LLC, 325 Fifth Avenue Investors, LLC, Continental Properties, Clinton Management, LLC, JELB 5th Avenue, LLC, Mark Fisch, Steven Fisch, Steven R. Charno, Jeffrey E. Levine, J.B. Levine Builder Inc. d/b/a Levine Builders, The Stephen B. Jacobs Group, P.C., Stephen B. Jacobs, Faia, Howard I. Shapiro & Associates Consulting Engineers, P.C., Jay P. Shapiro, P.E., Lawrence Kent Shapiro, P.E., Cantor Seinuk Group, P.C., Wsp Cantor Seinuk, I.M. Robbins, P.C., Marc Robbins, Cantor & Pecorella, Inc., S&S Manufacturing, Skyline Steel Corp., K&M Architectural Window Products, Inc., Efco Corporation, Cross Country Construction, LLC, Cross Country Concrete, LLC, Silvian Marcus, Wolf Haldenstein Adler Freeman & Herz Llp, Fs Project Management, LLC, First Service Residential New York, LLC, Canido Basonas Construction Corp., Defendants.

No. 154764/2012.
December 23, 2022.

*1 Part 31M
Motion Date 12/17/2021
Motion Seq. No. 008

Decision + Order on Motion

Present: Hon. Kelly O'Neill Levy, Justice.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432 were read on this motion for SUMMARY JUDGMENT.

Plaintiffs The Board of Managers of 325 Fifth Avenue Condominium and 325 Fifth Avenue Condominium (plaintiffs) bring this action to recover damages for alleged construction **2 defects in the building located at 325 Fifth Avenue, New York, New York (the building), including the building's balconies.

Defendants FS Project Management LLC n/k/a FirstService Project Management, LLC (FSPM) and FirstService Residential New York, Inc. i/s/h/a First Service Residential New York, LLC (FSR) (together, FS defendants) move, pursuant to CPLR 3212, for summary judgment dismissing all claims against them.

BACKGROUND

FSR was retained as the managing agent of the building, pursuant to an agreement dated August 3, 2006 (the Management Agreement) (NY St Cts Elec Filing [NYSCEF] Doc No. 377 ¶ 1). Article FOURTH of FSR's Management Agreement provides as follows:

"The Agent shall perform the following services with due diligence and care:

> (a) Cause to be hired, paid and supervised, all persons necessary to be employed in order to properly maintain and operate the Building . . .
>
> (b) Cause the Building to be maintained in such condition as may be deemed advisable by the Owner, including interior and exterior cleaning, and cause repairs and alterations of the building to be made, including, but not limited to, electrical, plumbing, steamfitting, carpentry, masonry, elevator, decorating, and such other incidental alterations or changes therein as may be proper, subject only to the limitations contained in this agreement or in the **Condominium** Declaration or By-Laws. . .
>
> (c) Recommend and, with the approval of the Owner, cause all such acts and things to be done in or about the Building as shall be necessary or desirable to comply with any orders or violations affecting the Building, as a result of any action by any federal, state, or municipal authority having jurisdiction thereover. . . except that if failure to promptly comply with any such order or violation would or might expose the Owner of the Agent to criminal liability, the Agent may cause such order or violation to be complied with after consultation, if feasible, with the president, vice-president or treasurer of the Owner (in the order given). . .

* * *

(v) Generally, do all things deemed necessary or advisable by the Board of Managers of the Owner for the proper management of the Building. However, in the event any such things are not within the services enumerated in ****3** paragraphs FOURTH (a) through FOURTH (u) above (e.g. without limitation compliance with a new administrative or filing requirement), Agent shall be entitled to additional compensation from Owner therefore as owner and Agent mutually agree"

***2** (NYSCEF Doc No. 378).

FSR's property manager primarily communicated with the Board president about operations, but communicated with the entire Board regarding urgent and important matters (NYSCEF Doc No. 377 ¶ 3; NYSCEF Doc No. 374, Kirschenbaum tr at 75, 77-78).

The former Senior Property Manager at Cooper Square Realty (which became FirstService Residential), Gustavo Rusconi (Rusconi) testified that, in July 2007, "a couple of the glass panels cracked and fell onto the public space behind the building" (NYSCEF Doc No. 368, Rusconi tr at 50). In response, the New York City Department of Buildings (DOB) issued violations to the building (*id*. at 52, 59).

On August 2, 2007, FSR's senior properly manager retained Howard L. Zimmerman Associates, P.C. (HLZA) on behalf of the building to investigate the cause of the incident, including "inspect[ing] all the balconies (approximately 180 balconies) and associated attachment mechanisms . . ." (NYSCEF Doc No. 393 at 2).

At the time, the Board was controlled by the Sponsor (NYSCEF Doc No. 364, Moy tr at 22).

On November 15, 2007, HLZA issued a nine-page initial report to FSR, detailing the findings of its investigation into the cause of the balcony glass breakage (NYSCEF Doc No. 380, Zimmerman aff, ¶ 6). HLZA's principal, Howard L. Zimmerman, FAIA

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(Zimmerman), avers that the report recommended further testing, remedial action and preventative maintenance in connection with the balcony glass panels and railings (*id.*, ¶ 7). The report noted that certain balconies exhibited settlement cracks in the cantilevered concrete slabs of the balconies, which ****4** was expected and should be monitored over time, and categorized this as a "low priority" issue (NYSCEF Doc No. 380 at 15).

The Board's president, Monica Tadros (Tadros), testified that the non-Sponsor affiliated members never received a copy of this report (NYSCEF Doc No. 365, Tadros tr at 118-120). However, Tadros later admitted that she probably received the November 15, 2007 report, but did not read it because she could not open attachments on her phone (*id*. at 141-148).

Plaintiffs allege that the Sponsor Board members directed FSR to give HLZA "instructions" to narrow this report (NYSCEF Doc No. 399 at 2).

On December 10, 2007, HLZA issued a revised report (NYSCEF Doc No. 380, Zimmerman aff, ¶ 8). Zimmerman avers that this report recommended laboratory and site testing, including a mock-up of the balcony glass panel and railing system, to determine the cause of the glass failure and/or the guardrail system as a whole, as well as a thorough examination of relevant industry standards and codes to determine compliance *(id.)*. The testing only pertained to the balcony glass panel and railing systems, but did not pertain in any manner to the cantilevered concrete slabs of the balconies at the building *(id.)*.

In December 2007, Steven Charno (Charno), one of the Sponsor's directors, wrote an email to Rusconi, Marc Kotler (Rusconi's supervisor), Tom Epstein, and Adam Mann, stating that "[HLZA] has issued a revised report, which unfortunately, despite our instructions to the contrary, still goes beyond the scope of addressing why the glass may have broken" (NYSCEF Doc No. 399 at 2). Charno stated that FSR and the Sponsor's representatives should see if they "can get [HLZA] to delete sections that do not relate to possible causes as to why the glass may have broken" *(id.)*.

***3** ****5** On June 10, 2008, HLZA issued a final report (NYSCEF Doc No. 380, Zimmerman aff, ¶ 9). This report did not determine why the balcony glass panels broke *(id)*. However, HLZA determined that the July 2007 glass breakage incident was "not inconsistent with a falling object breaking the upper panels," and that "based on our inspection, reinforced concrete structure does not appear to have contributed to the breakage" *(id.)*. The report also detailed the necessary steps to repair the balcony glass panel and railing systems, which had been completed at the time the report was issued *(id.)*.

In 2008, repairs were made to slab edge cracks in the building's balconies (NYSCEF Doc No. 365, Tadros tr at 296-297).

On July 1, 2009, a glass panel shattered onto **Fifth Avenue**, causing the Police Department to close the sidewalk and the DOB to issue a vacate order prohibiting access to any of the building's balconies (NYSCEF Doc No. 370, Ostafin tr at 60-64). The Sponsor still controlled the Board at the time (NYSCEF Doc No. 365, Tadros tr at 94, 300).

The Board retained a new engineer, Frank Seta Associates (FSA), to investigate and determine a solution to the glass panel issue (NYSCEF Doc No. 422 at 2). FSA determined that the glass panels of the balconies were breaking because "there were no thermal breaks between the materials", i.e., "the concrete of the balconies, the aluminum railings, and the glass" (NYSCEF Doc No. 373, Foley tr at 22-23, 30-31). The absence of a thermal break did not have an effect on the concrete slab (*id*. at 31).

Plaintiffs further allege that, in July 2009, FSR learned of a structural crack in the balcony of apartment 32E that had been "overlooked" during the Sponsor's prior patchwork repairs (NYSCEF Doc No. 418 at 2). They allege that it was later determined that the entire ****6** concrete slab on that balcony had to be "[d]emolish[ed] and reconstruct[ed]" (NYSCEF Doc No. 419 at 2).

In November 2009, FSR's subsidiary, FSPM, was retained as the owner's representative to replace the glass balconies (NYSCEF Doc No. 374, Kirschenbaum tr at 152-153). FSPM's role was to facilitate the project, i.e., to make sure the work was done efficiently and timely, and that it did not disrupt the building (*id*. at 157, 160). FSPM was "not there to determine that the specs are followed. That's the engineer's responsibility" (*id*. at 160).

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FSPM's Owner's Representative Agreement provides:

> "1. Statement of Purposes and Services
>
> The purpose of this agreement is for Owner to engage Representative as its consultant to provide the professional services as set forth in Exhibit A to this Agreement (the 'Services') in connection with the replacement of the glass partitions on the balconies (the 'Project') at the Property located at and known as **325 Fifth Avenue**, New York, NY (the 'Property'). . ."

(NYSCEF Doc No. 379). Exhibit A required FSPM to provide various services during the pre-construction phase, including selecting engineers, financial planning, and reviewing specifications with engineers (*id*. at 7). During the construction phase of the balcony glass project, FSPM was required to chair weekly meetings and provide controlled inspections *(id.)*.

FSPM's general counsel, who drafted the Owner's Representative Agreement, testified that he never saw an executed copy of the agreement (NYSCEF Doc No. 374, Kirschenbaum tr at 41, 148).

In a November 18, 2009 email, Tal Eyal (Eyal), the president of Cooper Square Project Development, Inc., now known as FSPM, wrote to the Board after "an incident that occurred on Tuesday, November 17, 2009 where a small piece of glass from the south facing façade fell onto the neighboring building" (NYSCEF Doc No. 416 at 2). Eyal stated that that FSPM would ****7** "learn (at an accelerated pace) the history of the balcony railing glass and help the Board come to a decision in order to rectify this situation" *(id.)*. Eyal indicated that FSPM "understood the severity of the situation" and would report to the Board on a regular basis *(id.)*.

***4** Canido Basonas Construction Corp. (Basonas) performed rigging work, removed the existing glass panels, and installed a new railing system, and Walsh Associates installed the new glass panels pursuant to the plans and specifications prepared by FSA (NYSCEF Doc No. 373, Foley tr at 215-216, 219-220).

According to an email dated May 14, 2010, DOB's representative requested "structural drawings of the composition of the balconies," "[t]o completely discount that there are no structural design defects with the existing defects" (NYSCEF Doc No. 423 at 2). Plaintiffs allege that, in response, FSPM delivered a letter to DOB from the engineer, indicating that it had "performed daily controlled inspections for concrete placement and rebar installation," and that "all concrete placement of the exposed balconies was completed in accordance with the structural drawings and specifications" (NYSCEF Doc No. 424 at 2).

When Basonas was drilling holes in the concrete balcony slabs, it "hit a rebar" on a single line of balconies (NYSCEF Doc No. 373, Foley tr at 232, 250-251). FSPM instructed Basonas "to move [the drill] to the side and then adjust it and go to the side of the rebar" and Basonas "adjusted their positioning and they were able to complete" the railing installation (*id*. at 233, 236).

The building paid for the balcony glass panel and railing replacement project with contributions from the Sponsor in exchange for a release, the building's insurance carrier in exchange for a release, and a special assessment imposed on the unit owners (NYSCEF Doc No. 363, Bartow tr at 32, 44-45, 59, 106).

****8** In April 2012, FSPM assisted the Board in retaining a licensed engineer to conduct a Local Law 11 inspection prior its due date in February 2013 (NYSCEF Doc No. 369, Seddio tr at 43-44).

The Board retained Lawless & Mangione Architects and Engineers LLP (L&M) as the engineer to perform the Local Law 11 inspection (*id*. at 63-64, 81-82). During the Local Law 11 inspection, L&M discovered "the concrete issue . . . in the balconies" (NYSCEF Doc No. 373, Foley tr at 129-131).

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Thereafter, the Board retained Whitlock Dalyrmle Poston & Associates, P.C. (WDP) and Thornton Tomasetti to provide second and third opinions (NYSCEF Doc No. 369, Seddio tr at 79-80; NYSCEF Doc No. 363, Bartow tr at 15). WDP's and Thornton Tomassetti's reports identified various original construction defects in the concrete slabs of the building, including excessive congestion of the reinforcing steel rebar at the edges of the slab, lack of ties anchoring the rebar, improper placement of rebar hooks, inadequate spacing of the rebar, use of an improper size of reinforcing steel rebar, and insufficient air content in the poured concrete (NYSCEF Doc No. 363, Bartow tr at 41-42; NYSCEF Doc No. 365, Tadros tr at 109).

Plaintiffs have been unable to obtain a final certificate of occupancy for the building as a result of the ongoing balcony concrete slab reconstruction work (NYSCEF Doc No. 365, Tadros tr at 340-343).

As relevant here, the complaint asserts the following two claims: (1) breach of contract against FSR (count nine); and (2) breach of contract against FSPM (count twelve) (NYSCEF Doc No. 62, complaint ¶¶ 166-171, 184-187). The complaint requests reasonable costs, expenses, and attorney's fees (*id*, wherefore clause). [1]

***5 **9** In their responses to interrogatories, plaintiffs claim damages for costs to inspect and remediate the concrete balcony slabs, including costs to investigate the cause of cracking and spalling, engineer costs, fees paid to Basonas, construction costs, and fees paid to DOB to rescind a stop work order (NYSCEF Doc No. 362 at 12). Additionally, plaintiffs seek damages for costs to inspect and remediate non-balcony defects, including costs concerning the building's mechanical, electrical, plumbing and firestopping systems, defective conditions in the garage, costs relating to fire-stopping and fire-safing, drain piping, a missing valve in the mechanical room, and improper installation of power transformers in the basement electrical room (*id*. at 13).

Plaintiffs' expert, George B. Fink, Jr. P.E. CCM (Fink), an engineer licensed in Virginia, opines, based upon his review of the record, that FSR breached its contractual duties and did not meet the standard of care in its industry by: (1) failing to disclose the defective conditions in the balconies' glass panels; (2) failing to disclose the cracking and spalling in the balconies; (3) improperly putting the Sponsor's interests ahead of the Board's interests; (4) failing to recommend an objective project manager; and (5) failing to fully investigate issues with the quality of the Sponsor's construction (NYSCEF Doc No. 375, Fink report at 17-20). Fink also opines that FSPM breached its contractual duties and did not meet the standard of care in its industry by: (1) ignoring red flags that the balconies suffered from systemic, structural issues; (2) failing to conduct a comprehensive investigation of all possible causes for the balcony glass failures; and (3) failing to keep the Board adequately informed about the balcony repair project (*id*. at 20-22). Fink states that, as a result of these failures, **325 Fifth Avenue Condominium** "did ****10** not discover the extent of systemic construction defects in the balcony slabs and rebar until years after it reasonably should have" (*id*. at 22).

Defendants' expert, Daniel Hogan, RA, AIA, BSFX (Hogan), states that all of the standards referenced in HLZA's November 15, 2007 report apply to balcony guard rail glass assemblies, and not concrete balcony slabs (NYSCEF Doc No. 376, Hogan report at 24-31).

The FS defendants move for summary judgment, arguing that they did not breach their contracts. The FS defendants contend that FSR acted as a typical managing agent and fully complied with its contractual obligations. They argue that plaintiffs seek to impose a contractual duty upon FSR that does not exist under the Management Agreement, and that was not agreed upon through a course of dealing between the parties. With respect to FSPM, the FS defendants contend that FSPM was appointed the owners' representative in connection with the balcony glass panel and replacement project in 2009. According to the FS defendants, FSPM also assisted the Board in retaining necessary architects and engineers to perform a Local Law 11 inspection in 2012. The FS defendants assert that plaintiffs seek to impose a contractual obligation upon FSPM which is contradicted by the Owners' Representative Agreement and the course of dealing of the parties.

In addition, the FS defendants maintain that plaintiffs' expert report is speculative and conclusory. Furthermore, the FS defendants argue that they did not know or have reason to know of any original systemic defects in the concrete balcony slabs. The FS defendants also contend that any alleged breach of contract was not the proximate cause of plaintiffs' damages, as all

of their damages stem from original construction defects. According to the FS defendants, they did not have any involvement in the original construction of the building.

***6** ****11** In opposition, plaintiffs contend that there is an issue of fact as to whether the FS defendants breached their contractual duties to plaintiffs. As argued by plaintiffs, plaintiffs' expert engineer opines that the FS defendants failed to meet their industry standard of care either because: (1) they knew of the building's structural issues with the building's concrete balcony slabs and hid those issues from plaintiffs; or (2) they should have known about these issues, since they failed to properly investigate these problems (NYSCEF Doc No. 375, Fink report at 17-23). Further, plaintiffs assert that the FS defendants proximately caused plaintiffs' damages. Plaintiffs assert that the FS defendants' failure to disclose the HLZA report resulted in plaintiffs spending "hundreds of thousands of dollars on investigatory costs alone, paying five separate companies to investigate issues that HLZA had already raised in its November 2007 report" (NYSCEF Doc No. 386 at 28). Plaintiffs argue that the FS defendants' failure to investigate the structural issues delayed remediation of the defects.

Additionally, plaintiffs maintain that there is an issue of fact as to whether FSPM's duties were modified by Eyal's November 18, 2009 email. Plaintiffs argue that FSPM failed to keep plaintiffs adequately informed about the status of the balcony repair project, as agreed to in that email.

In reply, the FS defendants point out that (1) plaintiffs did not file a counterstatement of material facts, and, therefore, admitted to all of the facts in their statement of material facts; (2) plaintiffs' opposition does not include a certification of the word count of their papers; and (3) plaintiffs' opposition only discusses the balcony-related defects and they have abandoned claims as to interior original construction defects, accounting issues, and attorney's fees. The FS defendants further contend that plaintiffs have failed to identify contractual duties that were allegedly breached. In addition, the FS defendants argue that any alleged breach of contract was ****12** not a proximate cause of plaintiffs' damages, since all of plaintiffs' damages stem from original construction defects, which were the responsibility of the Sponsor.

DISCUSSION

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact' " (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once such a prima facie showing has been made, the burden shifts to the non-moving party "to establish the existence of material issues of fact which require a trial of the action" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). "On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party' " (*id.*, quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise an issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

As a preliminary matter, the court excuses plaintiffs' failure to submit a response to defendants' statement of material facts (*see* 22 NYCRR 202.8-g [b] ["the papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party and, if necessary, additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried"]; [c] ["Each numbered paragraph in the statement of material facts required to be served by the moving party may be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party"]). While it ****13** would have been a better practice for plaintiffs to submit a response to defendants' statement of material facts, the court is not required to blindly adhere to the rule and deem facts admitted (*see Smith v MDA Consulting Engrs. PLLC,* -- AD3d --, 2022 NY Slip Op 06389, *1 [4th Dept 2022]; *Leberman v Instantwhip Foods, Inc.*, 207 AD3d 850, 851 [3d Dept 2022]; *see also Abreu v Barkin & Assoc. Realty, Inc.*, 69 AD3d 420,

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421 [1st Dept 2010]; *Muscato v Spare Time Entertainment*, 74 Misc 3d 1215[A], 2022 NY Slip Op 50127[U], *1-2 [Sup Ct, Schenectady County 2022]). Moreover, even though plaintiffs did not submit a certification of the word count of their opposition papers (*see* 22 NYCRR 202.8-b), the court finds that this is a technical defect that may be overlooked (*see* CPLR 2001; *Sklar v Itria Ventures, LLC*, 2022 NY Slip Op 31800[U], *4 [Sup Ct, NY County 2022]). The court, therefore, turns to the merits.

***7** To prevail on a breach of contract claim, the plaintiff must establish: (1) the existence of a contract; (2) the plaintiff's performance; (3) the defendant's breach of that contract; and (4) resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]; *Morris v 702 E. **Fifth** St. HDFC*, 46 AD3d 478, 479 [1st Dept 2007]; *Furia v Furia*, 116 AD2d 694, 694 [2d Dept 1986]).

The plaintiff may establish a breach of contract by demonstrating a breach of an express term of the contract (*see e.g. Morris*, 46 AD3d at 479).

The plaintiff may also establish a breach of contract by showing a breach of the contract's implied covenant of good faith and fair dealing (*see Parlux Fragrances, LLC v S. Carter Enters., LLC*, 204 AD3d 72, 91-92 [1st Dept 2022] ["Generally, a breach of the covenant of good faith and fair dealing is a breach of the contract itself"]; *accord Gil1er v Oracle USA, Inc.*, 512 Fed Appx 71, 73 [2d Cir 2013], *cert denied* 571 US 1006 [2013]).

****14** "[I]mplicit in every contract is a covenant of good faith and fair dealing . . ., which encompasses any promises that a reasonable promisee would understand to be included" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). The covenant "embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract' " (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995], *lv dismissed* 85 NY2d 964 [1995], quoting *Kirke La Shelle Co. v Armstrong Co.*, 263 NY 79, 87 [1933]; *see also* *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]; *see generally* 23 Williston on Contracts § 63:22 [4th ed 2021] ["a party who evades the spirit of the contract, willfully renders imperfect performance, or interferes with performance by the other party, may be liable for breach of the implied covenant of good faith and fair dealing"]; Restatement [Second] of Contracts § 205, Comment *d* ["A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance"]). "The duty of good faith and fair dealing, however, is not without limits, and no obligation can be implied that would be inconsistent with other terms of the contractual relationship" (*Dalton*, 87 NY2d at 389 [internal quotation marks and citation omitted]).

Plaintiffs argue that the FSR "knew or should have known of structural issues with the Building's concrete balcony slabs, and should have, at a minimum, recommended further investigation of these conditions," but instead, "hid this knowledge from Plaintiffs to protect the Sponsor" (NYSCEF Doc No. 386 at 20). However, plaintiffs have not identified breaches of any express provision of the Management Agreement. Moreover, the court finds that any ****15** determination that FSR breached the covenant of good faith and fair dealing would be inconsistent with other provisions of that agreement and would create additional obligations not contained therein.[2] Pursuant to the Management Agreement, FSR was required to "Cause the Building to be maintained in such condition *as may be deemed advisable by the Owner*, including interior and exterior cleaning, and cause repairs and alterations of the building to be made, including, but not limited to, electrical, plumbing, steamfitting, carpentry, masonry, elevator, decoration, and *such other incidental alterations or changes therein as may be proper* . . ." (NYSCEF Doc No. 378 at 3 [emphasis added]). In addition, FSR was required to "Recommend and, with the approval of the Owner, cause all such acts and things to be done in or about the Building as shall be necessary or desirable to comply with any orders or violations affecting the Building . . . ." *(id.)*. The Management Agreement further provides that FSR shall *"do all things reasonably deemed necessary or desirable by the Board of Managers of the Owner for the proper management of the Building*. However, in the event any such other things are not within the services enumerated in paragraphs FOURTH (a) through FOURTH (u) . . ., [FSR]

shall be entitled to such additional compensation from Owner therefore as owner and Agent mutually agree" (*id* at 7 [emphasis supplied]). Thus, with limited exceptions not applicable to investigating or recommending repairs to original structural defects, FSR only acted at the **16 direction of 325 Fifth Avenue Condominium (*id.; see also* NYSCEF Doc No. 374, Kirschenbaum tr at 128). [3]

*8 Moreover, contrary to plaintiffs' contention, the record reflects that the parties intended to be bound by the Owner's Representative Agreement. "[A]n unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound" (*Flores v Lower E. Side Serv. Ctr.*, 4 NY3d 363, 369 [2005]). "In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look . . . to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds" (*Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 399 [1977]). The Owner's Representative Agreement does not indicate on its face that the parties did not intend to be bound absent formal execution. Additionally, FSR's general counsel testified that, even though he never saw an executed copy of the Owner's Representative Agreement, FSPM began performing services on the glass replacement project in or around November 2009 (NYSCEF Doc No. 374, Kirschenbaum tr at 148). The building paid FSPM as its project manager for the replacement of the glass partitions on the balconies (NYSCEF Doc No. 372, Eyal tr at 219-223). Although plaintiffs argue that the Owner's Representative Agreement was modified by an email dated November 18, 2009, that email was addressed to the individual Board members (NYSCEF Doc No. 416 at 2), and was sent before the Owner's Representative Agreement was sent to plaintiffs on November 25, 2009 (NYSCEF Doc No. 374, Kirschenbaum tr at 147-148). In any **17 event, plaintiffs have not offered any evidence that 325 Fifth Avenue Condominium assented to any modification. Further, the Owner's Representative Agreement states that "[t]his Agreement may not be modified except in a writing signed by Owner and Representative" (NYSCEF Doc No. 379 at 6). Plaintiffs have not offered any such writing.

Furthermore, plaintiffs have not articulated any breach of an express provision of the Owner's Representative Agreement. FSPM's alleged failure to perform a comprehensive investigation to rule out structural problems with the balconies is outside the scope of its work, which was limited to serving as 325 Fifth Avenue Condominium's representative on the glass replacement project. FSPM's role as a project manager was limited to ensuring that the work was done efficiently and timely, and that the contractors did not disrupt the building's operations (NYSCEF Doc No. 374, Kirschenbaum tr at 160). Plaintiffs' argument that FSPM breached the covenant of good faith and fair dealing by failing to conduct an appropriate investigation into the building's original structural defects is contradicted by the terms of the Owner's Representative Agreement and creates additional obligations not contained therein. For example, the Owner's Representative Agreement states that: (1) "[FSPM] shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions or programs in connection with the work of Owner's contractors, their subcontractors or other third party contractors"; (2) "[FSPM] shall not be responsible for the failure of Owner's contractors, their subcontractors or other third party contractors to carry out work in accordance with their contractual obligations"; (3) "[FSPM] shall not have control over or charge of the acts or omissions of Owner's contractors, their subcontractors, or third party contractors or any other persons performing portions of the work for the Project"; (4) "[FSPM] shall have no design responsibilities for the Project"; (5) "[FSPM] shall be entitled to rely upon **18 the adequacy, accuracy and completeness of the services, certifications and approvals performed by Owner's design professionals"; and (6) "[FSPM] *will not make exhaustive or continuous on-site inspections* to check the quality or quantity of the work" (NYSCEF Doc No. 379 at 3 [emphasis supplied]). Essentially, plaintiffs seek to hold FSPM, as the owner's representative, liable for construction defects in the balconies, which is not permitted pursuant to the Owner's Representative Agreement.

Even assuming that the FS defendants breached their contracts, they have established that any breach of their contracts was not a proximate cause of plaintiffs' damages (*see Frydman & Co. v Credit Suisse First Boston Corp.*, 1 AD3d 274, 275 [1st Dept 2003] [summary judgment appropriate where "plaintiffs failed to raise any triable issues of fact with regard to defendants' demonstration that the alleged contractual and tortious breaches were not the proximate cause of plaintiffs' failure to acquire the target corporation"]; *accord Demetriades v Royal Abstract Deferred, LLC*, 159 AD3d 501, 503 [1st Dept 2018], *lv dismissed* 32 NY3d 1191 [2019]). To recover general damages in an action alleging breach of contract, the damages must flow naturally

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and directly from the breach of contract (*see* *Kenford Co. v County of Erie*, 73 NY2d 312, 319 [1989]; *Rose Lee Mfg. v Chemical Bank*, 186 AD2d 548, 551 [2d Dept 1992]). "Whether one violates a contractual obligation or a duty imposed by law, the theory is that compensation shall be made for the injury directly and proximately caused by the breach of contract or duty" (*Rose Lee Mfg.*, 186 AD2d at 551 [citation omitted]). Plaintiffs claim damages for inspection and remediation work on the concrete balcony slabs (NYSCEF Doc No. 362 at ****19** 12).[4] Stated differently, plaintiffs' damages stem from original construction defects, which were the responsibility of the Sponsor.

***9** Plaintiffs have failed to raise an issue of fact as to whether the FS defendants' breaches proximately caused their damages.[5] Plaintiffs argue that the FS defendants' failure to disclose HLZA's November 15, 2007 report forced them to spend "hundreds of thousands of dollars on investigatory costs alone, paying five separate companies to investigate issues that HLZA had already raised in its November 2007 report" (NYSCEF Doc No. 386 at 28). However, Zimmerman states that his reports recommended that certain testing be conducted, but it only pertained to the balcony glass panel and railing systems and had nothing to do with the cantilevered concrete slabs (NYSCEF Doc No. 380, Zimmerman aff, ¶¶ 7, 8, 9, 10). Moreover, plaintiffs' argument that, had the FS defendants properly investigated the balconies for potential structural issues, they would have known that their expected remediation costs would be much higher and would have pursued the full cost of the required repairs from the Sponsor is speculative. So, too, is plaintiffs' contention that they would have avoided significant construction costs from prior inadequate repairs and duplicative engineering fees.

In light of the above, the FS defendants are entitled to summary judgment dismissing plaintiffs' breach of contract claims.

****20** The FS Defendants also request dismissal of plaintiffs' request for attorney's fees. Generally, attorney's fees, as incidents of litigation, are not recoverable unless provided for by the parties' agreement, statute or court rule (*Matter of* *A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]). As argued by the FS defendants, the Management Agreement and Owner's Representative Agreement do not allow for recovery of plaintiffs' attorney's fees (NYSCEF Doc Nos. 378, 379). Plaintiffs have not opposed dismissal of their request for attorney's fees. Accordingly, plaintiffs' request for attorney's fees is dismissed.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 008) of defendants FS Project Management LLC n/k/a FirstService Project Management, LLC and FirstService Residential New York, Inc. i/s/h/a First Service Residential New York, LLC for summary judgment is granted, and the complaint is dismissed with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the court.

12/23/2022

DATE

<<signature>>

KELLY O'NEILL LEVY, J.S.C.

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Footnotes

1 Previously, the FS defendants moved to dismiss certain causes of action against them. However, they did not move to dismiss the breach of contract claims against them (*see* *Board of Mgrs. of 325 Fifth Ave. Condominium v Continental Residential Holdings LLC*, 2016 NY Slip Op 31230[U], **3 [Sup Ct, NY County 2016], *affd as mod* 149 AD3d 472 [1st Dept 2017]). There is no dispute that the sole remaining causes of action against the FS defendants are for breach of contract.

2 Contrary to plaintiffs' contention, the construction of unambiguous contract terms is a judicial function (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). The court finds that the terms of the Management Agreement and Owner's Representative Agreement are clear and unambiguous and that expert testimony is inadmissible to interpret their language. "[U]nless the words or phrases as used in a writing which is the subject of controversy are terms of art, science, or trade, or there is something to show that they were not used in their ordinary and plain meaning, opinion testimony to interpret the language is not admissible" (31A Am Jur2d Expert and Opinion Evidence § 294 [2022]). Neither side argues that the language is ambiguous.

3 The court finds *Commissioners of State Ins. Fund v Photocircuits Corp*. (20 AD3d 173 [1st Dept 2005]), relied upon by plaintiffs, to be distinguishable. There, the First Department held that there were issues of fact as to whether a workers' compensation insurer performed its contractual duties in a commercially reasonable manner where it paid funds to a known impostor; failed to limit or cap liability to claimants based on preexisting injuries; and frequently failed to appear at hearings (*id*. at 178-179, 183). The First Department noted that the insured was "relying on more than mere negligence" and was "asserting what amounts to a conscious disregard by the [insurer] of its basic contractual obligations to perform reasonably" (*id*. at 182).

4 As argued by the FS defendants, plaintiffs appear to have abandoned claims for non-balcony related defects. Indeed, plaintiffs state that "if the FS Defendants had met their contractual obligations and advised a prompt and thorough investigation of the balconies, Plaintiffs' remediation costs would have been substantially lower and Plaintiffs' property values would have been higher" (NYSCEF Doc No. 386 at 6).

5 Plaintiffs cite *Chen v City of New York* (194 AD3d 904 [2d Dept 2021]), which unlike the instant matter was a personal injury action. In that case, the Second Department held that there were issues of fact as to whether defendants' lack of adequate supervision was a proximate cause of the infant plaintiff's injuries (*id*. at 906).

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213 A.D.3d 587
Supreme Court, Appellate Division,
First Department, New York.

Silvina **SALVO**, Plaintiff–Respondent,
v.
GREATER NEW YORK MUTUAL
INSURANCE COMPANY, Defendant–Appellant.

17370-, 17371
|
Index No. 657025/20
|
Case Nos. 2021-03996, 2021-04713
|
Entered February 21, 2023

Synopsis

Background: Member of condominium association's board of managers brought action against insurer that issued commercial general liability (CGL) policy to board, seeking declaration that insurer owed duty to defend and indemnify her in underlying suit for defamation. The Supreme Court, New York County, 2021 WL 4325662, Arlene Bluth, J., granted member's motion for summary judgment and denied insurer's cross-motion for summary judgment. Insurer appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] member's lack of knowledge that coverage was available to her under CGL policy issued board did not excuse her four-year delay in notifying insurer of underlying suit for defamation;

[2] member was entitled to defense and indemnification under CGL policy, despite four-year delay in notice to insurer of claim; and

[3] member was not judicially estopped from asserting that insurer was not prejudiced by four-year delay in notice of underlying claim.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (3)

[1] Insurance

Lack of knowledge by member of condominium association's board of managers that coverage was available to her under commercial general liability (CGL) policy issued board did not excuse her four-year delay in notifying insurer of underlying suit for defamation, as condition precedent to defense and indemnification, absent showing that she made reasonably diligent efforts to ascertain existence of alternative or additional coverage, after other insurance company that had initially assumed defense notified member that it was disclaiming coverage but was proceeding with her defense under reservation of rights.

[2] Insurance

Member of condominium's board of managers was entitled to defense and indemnification in underlying defamation action, under commercial general liability (CGL) policy issued to board, despite four-year delay in notice to insurer of claim, absent showing that insurer was actually prejudiced by delay; although late notice deprived insurer of ability to participate in initial investigation and litigation, other insurance company had provided member with defense under reservation of rights, and insurer provided no explanation as to how it was materially prejudiced by other company's defense of member. N.Y. Insurance Law § 3420(a)(5), (c)(2)(C).

[3] Estoppel

Condominium association board member was not judicially estopped from asserting that insurer that issued commercial general liability (CGL) policy to board was not prejudiced by four-year delay in notice of underlying suit for defamation, and thus that untimely

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notice did not relieve insurer of duty to defend and indemnify her, after order was entered in other suit denying different insurance company's motion for summary judgment for declaratory judgment that it had no duty to defend or indemnify member in defamation suit, where prior order neither addressed nor adopted member's arguments that she was prejudiced by other insurance company's defense.

Attorneys and Law Firms

Milber Makris Plousadis & Seiden, LLP, Purchase (Jason A. Pozner of counsel), for appellant.

Law Offices of Eric Dinnocenzo, New York (Eric Dinnocenzo of counsel), for respondent.

Webber, J.P., Gesmer, Singh, Moulton, Scarpulla, JJ.

Opinion

****1** ***587** Order, Supreme Court, New York County (Arlene Bluth, J.), entered September 23, 2021, which granted plaintiff's motion for summary judgment declaring that defendant is obligated to defend and indemnify plaintiff in the underlying defamation action, and denied defendant's cross motion for summary judgment for a contrary declaration, unanimously affirmed, without costs. Order, same court and Justice, entered November 19, 2021, which, to the extent appealed from, denied defendant's motion to renew its cross motion for summary judgment, unanimously affirmed, without costs.

[1] **[2]** Plaintiff is entitled to a defense and indemnification from defendant, notwithstanding plaintiff's untimely notice of the underlying defamation claim brought against her by another member of her condominium's Board of Managers. Initially, contrary to the court's determination, plaintiff's lack of knowledge that coverage was available to her under the commercial general liability policy issued by defendant to the Board did not excuse her four-year delay in notifying defendant of the claim. Plaintiff cannot claim that her lack of knowledge was justifiable absent a showing that she made reasonably diligent efforts to ascertain the existence of alternative or additional coverage, particularly where the insurer that previously assumed her defense, Wesco Insurance Company, had notified her in October 2016 that it was disclaiming coverage but was proceeding with her defense under a reservation of rights (*see* *Winstead v. Uniondale Union Free School Dist.,* 201 A.D.2d 721, 723, 608 N.Y.S.2d 487 [2d Dept. 1994]).

***588** Nevertheless, the untimely notice does not invalidate coverage because there is no showing in the record that the delay prejudiced defendant (*see* Insurance Law § 3420[a][5]; [c][2][C]; *Slocum v. Progressive Northwestern Ins. Co.,* 137 A.D.3d 1634, 1635, 28 N.Y.S.3d 181 [4th Dept. 2016]). Regardless of whether the insurance policy shifted the burden of proof with respect to the showing of prejudice (*see* Insurance Law 3420[c][2][A]), the record does not support a finding that the delayed notice caused defendant to suffer "actual prejudice" resulting from a "material deprivation of [its] right to control the defense of the [underlying] claim" (*Conergics Corp. v. Dearborn Mid–W. Conveyor Co.,* 144 A.D.3d 516, 527, 43 N.Y.S.3d 6 [1st Dept. 2016]). Although the late notice deprived defendant of the ability to participate in the initial investigation and litigation of the claim, defendant has not explained how Wesco's defense of the matter materially prejudiced it. Moreover, the delay did not affect defendant's access to relevant evidence since discovery was still open at the time defendant received notice of the claim.

****2** **[3]** Defendant's motion to renew its cross motion for summary judgment was correctly denied. The October 2021 order issued in *Wesco Ins. Co. v. **Salvo***, 2021 WL 4706400 (Sup. Ct., N.Y. County, Oct. 8, 2021, index No. 652442/2020) does not foreclose plaintiff from arguing lack of prejudice to defendant under the doctrine of judicial estoppel because the Wesco order neither addressed nor adopted plaintiff's arguments that she was prejudiced by Wesco's defense (*see Kalikow 78/79 Co. v. State of New York*, 174 A.D.2d 7, 11, 577 N.Y.S.2d 624 [1st Dept. 1992], *appeal dismissed* 79 N.Y.2d 1040, 584 N.Y.S.2d 448, 594 N.E.2d 942 [1992]).

All Citations

--- N.Y.S.3d ----, 213 A.D.3d 587, 2023 WL 2124738, 2023 N.Y. Slip Op. 00967

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209 A.D.3d 587
Supreme Court, Appellate Division,
First Department, New York.

Catherine MONTGOMERY, Plaintiff–Appellant,
v.
215 CHRYSTIE LLC, et al., Defendants–Respondents.

16529
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Index No. 158146/20
|
Case No. 2022–02049
|
Entered October 25, 2022

Synopsis

Background: Plaintiff, an owner of a unit in a condominium, brought an action against the hotel that operated in the condominium unit directly below plaintiff. Plaintiff moved to preliminarily enjoin hotel from operating its entertainment spaces at what plaintiff alleged were unreasonable noise levels. The Supreme Court, New York County, David B. Cohen, J., denied preliminary injunction. Plaintiff appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] plaintiff failed to demonstrate risk of irreparable harm in maintaining status quo while awaiting trial on her claims against hotel, and

[2] plaintiff failed to demonstrate that the equities balanced in her favor.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Preliminary Injunction.

West Headnotes (2)

[1] **Injunction** Common interest communities

Plaintiff, an owner of a unit in a condominium, failed to demonstrate risk of irreparable harm in maintaining status quo while awaiting trial on her claims against hotel that operated in the condominium unit directly below plaintiff, and thus preliminary injunction precluding hotel from operating its entertainment spaces at what plaintiff alleged were unreasonable noise levels was not warranted, where harm to plaintiff was compensable by measurable money damages.

[2] **Injunction** Common interest communities

Plaintiff, an owner of a unit in a condominium, in action against hotel that operated in the condominium unit directly below plaintiff failed to demonstrate that the equities balanced in her favor on her motion for a preliminary injunction precluding hotel from operating its entertainment spaces at what plaintiff alleged were unreasonable noise levels, and thus preliminary injunction was not warranted, where plaintiff purchased a unit in a condominium where one of the other units was a hotel, operating directly below her, that she was aware from the offering plan had entertainment spaces.

Attorneys and Law Firms

****228** Lambert & Shackman, PLLC, New York (Thomas C. Lambert of counsel), for appellant.

Meister Seelig & Fein LLP, New York (Remy J. Stocks of counsel), for respondents.

Webber, J.P., Singh, Moulton, González,Pitt, JJ.

Opinion

*****1** ***587** Order, Supreme Court, New York County (David B. Cohen, J.), entered on or about May 13, 2022, which denied plaintiff's motion for a preliminary injunction, unanimously affirmed, without costs.

[1] **[2]** Plaintiff's motion to enjoin the condominium's hotel from operating its entertainment spaces at what she alleges are "unreasonable noise levels" was properly denied. The harm to plaintiff in maintaining the status quo while awaiting trial on her claims is compensable by measurable money damages and therefore not irreparable (*see Louis Lasky Mem. Med. & Dental Ctr. LLC v. 63 W. 38th LLC,* 84 A.D.3d 528,

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924 N.Y.S.2d 324 [1st Dept. 2011]; *see also Montgomery v. 215 Chrystie LLC,* 201 A.D.3d 503, 156 N.Y.S.3d 855 [1st Dept. 2022], *lv dismissed,* 38 N.Y.3d 1125, 172 N.Y.S.3d 679, 192 N.E.3d 1158 [2022]). Nor has plaintiff shown that the equities balance in her favor in that she purchased a unit in a condominium where one of the other units was a hotel, operating directly below her and where she was aware from the offering plan that entertainment spaces would be present in the hotel (*cf.* *61 W. 62 Owners Corp. v. CGM EMP LLC,* 86 A.D.3d 403, 404, 928 N.Y.S.2d 861 [1st Dept. 2011] [finding a preliminary injunction should issue in a case where the club at the center of the noise complaints began operations after the plaintiffs were already owner tenants and its rooftop bar violated plans filed with the Department of Buildings]). Plaintiff's arguments concerning the building's machine room ***588** are not before this Court, as an injunction was not sought on that basis in the motion below. Moreover, the issue was decided in a prior order, subsequently affirmed by this Court (*see Montgomery,* 201 A.D.3d at 503, 156 N.Y.S.3d 855).

All Citations

209 A.D.3d 587, 177 N.Y.S.3d 227, 2022 WL 14160182, 2022 N.Y. Slip Op. 05955

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